

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUNRISE VILLAS IX HOMEOWNERS
ASSOCIATION,

Appellant,

vs.

SIMONE RUSSO,

Respondent.

Case No. 83115 Electronically Filed
Jun 09 2022 08:58 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX
VOLUME 8

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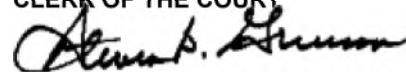
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EXHIBIT 12

Electronically Filed
2/1/2021 10:31 AM
Steven D. Grierson
CLERK OF THE COURT


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**DISTRICT COURT
CLARK COUNTY, NEVADA**

SIMONE RUSSO,)

Plaintiff,)

vs.)

CASE NO: A-17-753606-C

DEPT. NO: XVI

COX COMMUNICATIONS LAS VEGAS,)
INC., D/B/A COX COMMUNICATIONS,)
IES RESIDENTIAL, INC., SUNRISE)
VILLAS IX HOMEOWNERS)
ASSOCIATION, J & G LAWN)
MAINTENANCE, KEVIN BUSHBAKER,)
PWJAMES MANAGEMENT &)
CONSULTING, LLC., J. CHRIS)
SCARCELLI, DOE LANDSCAPER,)
RICHARD DUSLAK, JUSTIN SESMAN,)
AND DOES I-V, and ROE)
CORPORATIONS I-V, inclusive,)

Defendants.)

**PLAINTIFF'S SECOND SUPPLEMENT TO OPPOSITION TO NON-PARTY QBE
INSURANCE CORPORATION'S SECOND MOTION TO INTERVENE AND MOTION
TO "ENFORCE" SETTLEMENT**

COMES NOW, Plaintiff, SIMONE RUSSO, by and through his attorney of record, and again supplements his opposition to the motions filed by non-party QBE Insurance Corporation ("QBE"), to intervene in this matter and "enforce settlement", which were joined by SUNRISE.

This supplement, and the underlying opposition are made and based upon the pleadings and papers filed herein, the attached Points and Authorities, and upon oral argument at the time of hearing.

POINTS AND AUTHORITIES

QBE's motion asserts that "Plaintiff agreed in connection with a settlement reached in this case that he would limit his claims against Richard Duslak and Justin Sesman to liability solely arising from their (sic) as independent contractors". See QBE's motion at P. 1 L. 24-27. In addition to the evidence and arguments set forth in the opposition and initial supplement, SIMONE also directs this Court to the transcript from the November 7, 2019 hearing in this matter wherein it is made clear that 1) it was QBE's insured SUNRISE, through its tripartite counsel, that represented to SIMONE and the Court that DUSLAK and SESMAN were not employees, 2) SIMONE agreed to so stipulate that DUSLAK and SESMAN were independent contractors based on SUNRISE's representations, and 3) SIMONE again specifically reserved all rights to pursue DUSLAK and SESMAN as individuals no matter whether they were employees of contractors.

Attached hereto as Exhibit "1" is the transcript from the November 7, 2019 hearing in this matter. On October 18, 2019 the parties to the settlement had previously placed on the record that the settlement would not affect any of SIMONE's rights against DUSLAK and/or SESMAN. See Exhibit "3" to SIMONE's Opposition to the instant motion. At a subsequent hearing on November 7, 2019 David Sampson, Esq., counsel for SIMONE, reminded the Court of the agreement that had been previously put on the record. Mr. Sampson stated that in confirming the settlement in this matter, "we put on the record -- *we're not waiving, releasing, or otherwise affecting anything against Sesman or Duslak*. I don't think anyone would dispute

that . . . it was a pretty significant point that day.” *See* Exhibit “1” attached hereto at P. 25 L. 6-16 (emphasis added). The Court then asked SUNRISE’s counsel, “Mr. Fink, are we disputing that?” *Id* at P. 25 L. 21-22. Mr. Fink answered, “My best recollection is that *when Mr. Sampson said he was specifically retaining his rights to go against Mr. Sesman and Mr. Doslak, we all agreed to that.*” *Id* at P. 26 L. 2-5 (emphasis added).

It was QBE and SUNRISE, via their tripartite counsel Mr. Fink, who represented to SIMONE and to the Court that DUSLAK and SESMAN were not employees of SUNRISE. In the November 7, 2019 hearing Mr. Fink stated, “There’s never been one bit of evidence in this case that they were employees. It was always that they were independent contractors.” *Id* at P. 16 L. 20-22. Mr. Sampson responded, “I don’t think they are employees either as I sit here right now. But I’ve not had a chance to find any of that stuff out. I have not – I have no confirmation as to any of that.” *Id* at P. 21 L. 23 – P. 22 L. 1.

Mr. Sampson then discussed the very circumstance QBE and SUNRISE currently face, that being that evidence may one day come to light that DUSLAK and SESMAN were in fact SUNRISE employees and that SUNRISE’s representations to SIMONE and to the Court were incorrect. Mr. Sampson discussed the possibility that SUNRISE was incorrect and how under that circumstance DUSLAK and SESMAN would still be liable under the Judgment if “Something goes on and all of a sudden that all -- that they come up W-2s that were not provided before and Mr. Fink's not aware of, and then we've somehow been mislead.” *Id* at P. 29 L. 12-14. Mr. Sampson was adamant that under that circumstance SIMONE would still retain all rights to any judgment the Court may enter against DUSLAK and/or SESMAN. *Id* at P. 40 L. 16-22.

Mr. Sampson ultimately offered, given SUNRISE's representations that DUSLAK and SESMAN were not SUNRISE, employees, to simply stipulate that judgment would be taken against them individuals as SUNRISE asserted they were independent contractors. Mr. Sampson stated, "Could we perhaps enter a stipulation on the record here and now that for purposes of this litigation they're not employees?" *Id* at P. 37 L. 13-15. Mr. Fink then stated he would "like to think about" that suggestion and said, "That may take care of all of this." *Id* at P. 40 L. 4-8.

After suggesting the parties stipulate that DUSLAK and SESMAN were not employees, and Mr. Fink saying he would "like think about" that, Mr. Sampson stated, "I would ask -- I would ask just -- Mr. Fink has made a couple of comments today, and I think the Court also echoed them, along the lines of Sesman and Duslak, *all rights against them*, anybody who insures them, you know, *all of those are preserved. They're not affected. I would like to make sure that is crystal clear in whatever iteration we end up with.*" *Id* at P. 40 L. 16-22 (emphasis added).

As noted in SIMONE's Opposition to the instant motion, the agreement that SUNRISE did make it "crystal clear" that SIMONE was preserving all rights to proceed against DUSLAK and SESMAN, and that neither DUSLAK and/or SESMAN were being released even in the event they were subsequently deemed employees. *Indeed, the settlement agreement specifically excluded SUNRISE employees entirely.* See Supplement to Opposition. On page 4 of the release, the description of the released parties includes all of Defendants' "employees *EXCLUDING RICHARD DUSLAK AND/OR JUSTIN SESMAN . . .*". See Exhibit "4" to SIMONE's opposition to the instant motion at P. 4 (emphasis in original). When referencing the employees of any of the Defendants it was made more than clear that the term "employees"

did not include DUSLAK or SESMAN, and that DUSLAK nor SESMAN were being released, even if they were deemed employees of SUNRISE.

If evidence has now come to light that SUNRISE's representations to SIMONE and to the Court were incorrect, SUNRISE and/or its insured(s) will have to face the consequence for the same. At no time was it ever agreed that SIMONE would lose any rights against DUSLAK and/or SESMAN if it turned out SUNRISE's representations to the Court were incorrect.

CONCLUSION

For the foregoing reasons SIMONE respectfully requests this Court deny QBE's motion to intervene and deny the motion to "enforce" the settlement as well. The Court should further hold that the 2019 settlement of this matter did not affect any rights SIMONE may have against DUSLAK and/or SESMAN as agreed on the record by all active parties on October 18, 2019, and again confirmed on November 7, 2019, and further find that SIMONE retains all rights to pursue any claims against DUSLAK and/or SESMAN as specifically set forth on the record and in the subsequent settlement documents.

DATED this 1st day of February, 2021.

LAW OFFICE OF DAVID SAMPSON, LLC.

BY: /s/ David Sampson

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the LAW OFFICE OF DAVID SAMPSON, LLC., and that on this 1st day of February, 2021, I served a copy of the foregoing **SECOND SUPPLEMENT** on all the remaining parties in this matter via the court's electronic online filing system and as follows:

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/s/ *Amanda Nalder*
An Employee of The LAW OFFICE OF DAVID SAMPSON, LLC.

EXHIBIT “1”

NOVEMBER 7, 2019

RUSSO V. COX COMMUNICATIONS

1

1 CASE NO. A-17-753606-C

2 DOCKET U

3 DEPT. XVI

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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* * * * *

9 SIMONE RUSSO,

10 Plaintiff,

11 vs.

12 COX COMMUNICATIONS LAS VEGAS,

13 Defendant.

14

REPORTER'S TRANSCRIPT
OF
HEARING

15

16

17 BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

18

DISTRICT COURT JUDGE

19

20 DATED THURSDAY, NOVEMBER 7, 2019

21

22

23 REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

24

25

NOVEMBER 7, 2019

RUSSO V. COX COMMUNICATIONS

2

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Pursuant to NRS 239.053, illegal to copy without payment.

NOVEMBER 7, 2019

RUSSO V. COX COMMUNICATIONS

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NOVEMBER 7, 2019

RUSSO V. COX COMMUNICATIONS

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Pursuant to NRS 239.053, illegal to copy without payment.

1 LAS VEGAS, NEVADA; THURSDAY NOVEMBER 7, 2019

2 12:01 P.M.

3 P R O C E E D I N G S

4 * * * * *

5
6 MR. SAMPSON: This is David Sampson.

7 THE COURT: All right. Mr. Sampson, good
8 morning.

9 MR. SAMPSON: Good morning.

10 THE COURT: And...

11 MR. LEMKUL: Good morning, your Honor. Judge,
12 Will Lemkul here.

13 THE COURT: All right. Good morning. And I
14 see we have plaintiff's motion to compel settlement on
15 an order shortening time.

16 MR. SAMPSON: Yes, Judge, thank you. So we
17 were -- the Court is, I'm sure -- well remembers this
18 case. We were in front of your Honor three weeks ago
19 now on Wednesday initially. And we put the settlement
20 on the record and the terms of the settlement on the
21 record. We came back on Friday, found out that the two
22 other -- two other defendants who on Wednesday said
23 they hadn't gotten any confirmation from their client
24 yet because it had just kind of happened and that whole
25 thing. They wanted to check with their clients, call

12:01:56 1 back on Friday, and confirmed their client did agree to
2 do the settlement. And so under those terms -- a
3 couple of the terms, one was that --

4 (Reporter clarification)

12:02:06 5 MR. SAMPSON: Two of the defendants who were
6 named in the case who have never filed answers, who
7 have been defaulted were not affected by the
8 settlement, with the money that was being paid.

9 THE COURT: And...

12:02:17 10 MR. SAMPSON: And my clients rights --

11 THE COURT: And Mr. Sampson, I don't want to
12 cut you off. But please identify the two defaulted
13 defendants again for the record.

14 MR. SAMPSON: Duslak and Sesman are the last
15 names.

16 THE COURT: Thank you, sir. You may continue.

17 MR. SAMPSON: So then Dr. Russo's rights
18 against those two defaulted individuals would not be
19 affected at all. Everyone agreed. And then the
12:02:41 20 comment was made that the provisions of the settlement
21 would be reduced to a writing and released. Then we
22 would sign off on. And the money would be paid to my
23 client within two weeks of the release being signed.

24 So I raised two issues when the release was
12:02:58 25 brought up. I said, number one, we agreed there is

12:03:01 1 going to be nothing in the release that's not agreed to
2 on the record today. There's not going to be any new
3 terms or new anything going on. And it's going to
4 comport with -- the release will comport with what
12:03:11 5 we've agreed to on the record today. Everyone agreed
6 that was the case. No problem. Not an issue.

7 The next thing I say is this idea that the
8 money will be paid within two weeks of release being
9 signed. I then said, well, I don't want the release to
12:03:27 10 take, you know, two weeks to get to me and then two
11 more weeks before you sign it. And so a month out and
12 we still don't have our money.

13 And the comments from the defense were, of
14 course, we'd never do that. Mr. Sampson, don't be
12:03:40 15 ridiculous. Why you got to always assume the worse,
16 that whole thing.

17 Yet here we sit three weeks later now. We're
18 three weeks and a day from Wednesday, and tomorrow is
19 two weeks from the Friday, and I don't have a release
12:03:53 20 that I can have my client sign to get the money. I did
21 get -- which we resolved it on Friday, I want to say
22 the 18th, on Monday, Mr. Fink sent an email over, and
23 he said here is the release that he had typed up. He
24 made no bones about it. Sunrise does not agree and has
12:04:11 25 not authorized this to be a release we can use in the

12:04:14 1 case.

2 And if we stand here today, we still don't
3 have anything from Sunrise that agrees we can use to
4 resolve the case.

12:04:21 5 I sent out some changes to what Mr. Fink
6 provided and asked for comment. I did get word from
7 Mr. Bushbaker's counsel, Mr. Meloro, to have some
8 rather insignificant changes we needed to make that
9 didn't affect any substance. I incorporated those
12:04:38 10 changes. And asked Cox, IES, Sunrise, anybody for
11 Mr. Scarcelli, anybody else have comments. I heard
12 nothing until the following Monday.

13 So on the following Monday I said, all right,
14 it's been a week that Mr. Fink provided this. And I
12:04:54 15 sent back my changes. I've heard nothing from anybody.
16 So I assume what I sent back was going to work and have
17 my client sign it. He expected his money in two weeks.

18 And then all of a sudden within like 15
19 minutes, I heard from Mr. Fink, oh, no, Sunrise hasn't
12:05:09 20 agreed yet. We told you we don't agree. We don't --
21 I'll pass it by to take a look at. Cox sent back word
22 very quickly from Mr. Turtzo, Oh, no, Cox hasn't
23 agreed. And I essentially wrote back and said, Well,
24 then get your clients to agree. I mean, what's he --
12:05:23 25 let me know what changes you have because it's -- I've

12:05:25 1 waited a week very patiently. I don't want this to
2 stall out. Because my client's losing patience. We
3 don't have anything for him to authorize.

4 We need to get this taken care of. I
12:05:36 5 ultimately did get comments from Cox, and we've
6 incorporated the changes they want. My understanding,
7 although Mr. Meloro would have to address this, my
8 understanding from the communications I received from
9 Mr. Meloro because he sent something a week ago Tuesday
12:05:52 10 saying, is this that Mr. Sampson sent out something we
11 can have my client sign and conclude. So I don't think
12 there is any additional issues.

13 I've not heard from Scarcelli's counsel other
14 than it was a side question about renters insurance,
12:06:05 15 and there isn't any. So I think, but I've not heard
16 conclusively, that Mr. Scarcelli is on board with what
17 I sent over.

18 But Sunrise now, between a week ago Tuesday
19 and Thursday, Mr. Fink and I were sending things back
12:06:23 20 and forth. What we're looking at is, again, we want to
21 preserve all rights against the defaulted defendants,
22 just like we said on the record. And the release that
23 was provided defines Sunrise as all employees,
24 independent contractors. It lays out other things that
12:06:40 25 could potentially include Duslak and Sesman.

12:06:44 1 So I included in there that we are not going
2 to include them specifically or anyone affiliated with
3 them. And I think, as I understand it, Sunrise no
4 longer agrees. So as of last Thursday, Halloween, was
12:06:57 5 my last conversation with Mr. Fink until yesterday.
6 And I've been calling every day since then trying to
7 work all this out. I got no response at all.

8 And so I did, when I didn't get it worked out
9 on Halloween, filed this motion. Let's get it in front
12:07:12 10 of the judge. It's been -- it's been silence since
11 then until yesterday. And even yesterday Mr. Fink on
12 the phone as we were talking sounded like maybe we
13 could work something out, but he sent over some
14 proposed language even this morning that, again, says
12:07:27 15 Seslak and Dusman [sic] are to be dismissed if it turns
16 out they're employees, for example, of Sunrise. Which
17 we -- so I sent something over yesterday. And I'll
18 just read it to the Court.

19 My email says: "It appears what I sent
12:07:44 20 earlier --" Well, I sent something over. I'm sorry.
21 I sent something over where I proposed since we haven't
22 got an agreement yet -- the problem was the first one I
23 sent over was red lined. So I said, it was so
24 ridiculously red lined that it looks like the actual
12:07:58 25 language I proposed didn't go through. But here is

12:08:01 1 what I propose our release should say.

2 Settlement release agreement. And it
3 identifies each party by name. Dr. Russo, Sunrise,
4 IES, Cox, PWJames, Kevin Bushbaker, Chris Scarcelli
12:08:16 5 hereby agree to settle the disputes between them and
6 release each other pursuant to the terms set forth on
7 the record on October 16 and October 18, 2019, in case
8 number, and I laid the case number out, pending in the
9 Eighth Judicial District, Clark County, Nevada, which
12:08:34 10 terms are incorporated herein by this reference.

11 And everybody signed it. And says it seems to
12 me to be the best way if, as we agreed, the release
13 isn't -- isn't any different than what was confirmed on
14 the record, all rights are going to be given in the
12:08:49 15 release nor taken away from the release than what was
16 confirmed on the record. This is really the only way
17 to do it.

18 And I have gotten a response I think from Cox
19 that they're not agreeable. I assume given I was given
12:09:02 20 the proposed changes from Mr. Fink perhaps they're not
21 agreeable either. But, you know, we really don't need
22 a release because, as your Honor pointed out a couple
23 times in voir dire, this case is pending a long time.
24 Happened back in October of 2016. And there is no
12:09:20 25 statute of limitations long run at this point in time.

12:09:22 1 So there really is no reason for a release. I
2 have no problem putting one -- or signing off on one as
3 long as it does two things:

4 One, doesn't delay my client getting his money
12:09:34 5 which now, it has;

6 And two, strictly comports with what was
7 placed on the record which the release I've now just
8 read into the record absolutely would do.

9 And if that are not agreeable, then I don't
12:09:46 10 know. I would ask the Court either enforce the
11 settlement and say, you know, since there was radio
12 silence regarding the release, I'm not going to require
13 one anymore. Or I will require one, but it's just
14 going to say what Mr. Sampson pointed out that you're
12:10:00 15 settling the case pursuant to the terms that were
16 placed on the record.

17 I've also given -- suggested a third option
18 that I'll now suggest to the Court that perhaps we just
19 print up the record, both days, and all the parties
12:10:13 20 sign it. And go, so agreed. And we're all released
21 pursuant to what this document says.

22 But what I don't want to do is keep spinning
23 my wheels with the parties with the defendants that's,
24 number one, going to delay my client getting his money.
12:10:27 25 And number two, potentially would add or takeaway from

12:10:31 1 the rights and claims that the parties agreed with not
2 be released or otherwise affected when we put this all
3 on the record.

4 So I'm just reaching out to the Court. I do
12:10:43 5 understand that the check from Sunrise is now in
6 Las Vegas. I understand the Cox one is either here or
7 should be here shortly. So I want to get my client his
8 money as we agreed to three weeks ago. I want to put
9 this thing to bed without waiving any rights other than
12:10:59 10 those that were specifically put on the record. So I
11 would ask for instruction or direction from the Court
12 on how we can best do that, please.

13 THE COURT: Okay. Thank you, sir.

14 MR. CLARK: If it please the Court, David
12:11:13 15 Clark for Chris Scarcelli. Mr. Sampson is right. We
16 did have a side issue on the additional insured
17 provision of the lease agreement.

18 Last week we got communications from
19 Mr. Sampson on that issue. And I can now say that my
12:11:29 20 client is going to go forward and just sign off on a
21 complete release and settlement.

22 THE COURT: Okay.

23 MR. CLARK: And if that's -- so I'm not really
24 involved in the other issues. I don't think my client
12:11:39 25 is going to pay me for this appearance now. But if it

12:11:42 1 please the Court, I have another appearance I need to
2 make. So if I'm not needed, and I don't know if
3 Mr. Sampson still needs me, but Mr. Scarcelli says
4 he'll just sign it when it's in final form.

12:11:56 5 THE COURT: I understand. And we don't need
6 you, sir, I don't think.

7 MR. CLARK: Okay. I'll take my leave now.
8 Thank you all.

9 MR. FINK: Your Honor, Leonard Fink for
12:12:03 10 Sunrise.

11 Mr. Sampson's recitation of what happened
12 since the Friday when we put the settlement on the
13 record is mostly correct. I want to throw in a few
14 things that I think are important here.

12:12:18 15 Number one is that I got everybody the
16 release, the proposed. And we said although we were
17 putting this on the record it was very clear that we
18 were going to be putting together an actual settlement
19 agreement.

12:12:32 20 I don't remember if that part was on the
21 record. I think it was. Mr. Lemkul might remember
22 that differently, but I do.

23 However, I did that Sunday night. And if
24 anybody knows me, the fact that I actually did it that
12:12:43 25 quickly shows that I was trying to be a person of my

12:12:46 1 word and get this done for Mr. Sampson. Especially
2 because I knew that his client -- that he was having
3 issues with that.

4 So I got that done. I sent it out either
12:12:55 5 Sunday night or early Monday morning. I did in the
6 email say my client had not yet agreed to the terms.
7 The reason is that I had a case with then Judge Bayliss
8 where a plaintiff went in to enforce the settlement
9 that was based upon terms that were negotiated between
12:13:09 10 counsel. And the reason the court enforced the
11 settlement, even though my client had not agreed to it,
12 was because counsel had agreed to it and he thought
13 that that was good enough.

14 So since that time, I made sure that unless my
12:13:21 15 client has absolutely signed off on it, every email
16 that goes out when we're talking about settlement
17 agreements, make sure it's clear. My client has not
18 yet agreed to these terms. I didn't think it would be
19 a problem, but I wanted to make sure everybody
12:13:33 20 understood that.

21 So I sent that out again either Sunday night
22 or early Monday morning waiting to hear back from
23 people as to what changes they were going to want, so
24 that we can get a final agreement, so then we can get
12:13:43 25 our respective clients to sign off on it.

12:13:46 1 And I don't recall, and I think Mr. Sampson is
2 probably correct. I think the next thing we probably
3 heard was maybe that next Friday. And then there was
4 some back and forth up until Thursday which was the
12:13:56 5 October 31, which is Halloween.

6 I got sick on Thursday, Friday. Then I had a
7 deposition on Monday which is why I never responded to
8 Mr. Sampson's phone calls. Again, I explained that to
9 him when I talked to him. So I wasn't shining him on
12:14:09 10 or anything like that. I just literally got sick and
11 wasn't do anything.

12 So we resumed trying to get this done. The
13 hold up, and Mr. Sampson I think said it but I'll say
14 it again, I think the real hold up right now is whether
12:14:24 15 or not the release that we negotiated was intended to
16 cover Mr. Sesman and Duslak, D-U-S-L-A-K, I think.
17 Actually, I've got it in front of me. Okay. Duslak,
18 D-U-S-L-A-K, and Sesman, S-E-S-M-A-N, if they were
19 considered employees of Sunrise.

12:14:43 20 There's never been one bit of evidence in this
21 case that they were employees. It was always that they
22 were independent contractors. But as I'm sure the
23 Court has dealt with thousands of settlements, when you
24 settle with an entity, you are settling with the
12:14:57 25 employees too.

12:14:58 1 There's nothing in Mr. Sampson's amended
2 complaint that even suggests or asserts that either one
3 of these gentlemen is an employee. There is nothing in
4 any one of his disclosures that asserts they're
12:15:09 5 employees.

6 So the idea here is that not only is Sunrise
7 getting itself out of the case, but it's also getting
8 out its employees, which also includes board members.
9 Although, we didn't specifically say that on the record
12:15:22 10 either, but also Cox, IES, they're also getting their
11 employees out.

12 In fact, the gentleman Curtis, I think
13 was always the name that came up. But, again, that
14 wasn't specifically on the record. So I think it's an
12:15:34 15 understood term. When you're getting an entity out
16 that includes their employees. If somebody is saying
17 that somebody acted within the course and scope of
18 their employment, unless you're saying they weren't
19 acting within the course and scope of employment,
12:15:45 20 which, again, wasn't an issue in the case because it
21 was never made an issue in the case.

22 So to the extent this is what we were trying
23 to do with the settlement agreement, and Mr. Sampson is
24 right, I did throw in independent contractors in the --
12:15:55 25 in one of the versions of the draft. But as of this

12:15:59 1 morning, I sent out something that I intended to send
2 out before the hearing and realized when I was talking
3 to Mr. Clark when I got here that I didn't press send
4 on my computer. So I think I sent it out maybe 9:15,
12:16:10 5 maybe 9:30 this morning.

6 So I think that the only hang up is whether or
7 not this settlement includes Mr. Duslak and Mr. Sesman
8 if they are found to be employees of Sunrise. And I
9 think that's it.

12:16:23 10 If they're not and they're independent
11 contractors, then the settlement agreement absolutely
12 does not cover them. Would allow Mr. Sampson to do
13 what he needs to do. And even try to go after my
14 client's insurance carriers to see if there is coverage
12:16:38 15 for them as independent contractors. We all agree
16 that -- that was one of the things that was important
17 to him. We aren't seeking to release that.

18 But to the extent they're employees, this
19 should cover it. And I think, I think that's really
12:16:48 20 where we are, Judge. And, of course, I'd certainly
21 leave it up to Mr. Bushbaker's counsel -- I think I
22 always stumble on your name -- sorry, Joe -- and
23 Mr. Lemkul for anything else.

24 THE COURT: Okay. Anything you want to add?

12:17:01 25 MR. MELORO: Joseph Meloro on behalf of Kevin

12:17:04 1 Bushbaker. Your Honor, Mr. Fink did prepare a release
2 agreement that Sunday evening. During that week I made
3 some minor requests for some changes. I've been trying
4 to cooperate through this whole matter.

12:17:19 5 You know, the issues that's going on between
6 Mr. Sampson and Mr. Fink really have nothing to do with
7 my client. I just want to make sure that we're not
8 releasing anyone who wasn't a party to this action that
9 we might have some claims against in the future.

12:17:36 10 But I don't see that in the agreement that was
11 presented, if that's the case at this point. But we're
12 trying to get this along just as much as everyone else,
13 your Honor.

14 THE COURT: I understand.

12:17:48 15 Mr. Lemkul.

16 MR. LEMKUL: Yeah, your Honor, how are you?

17 THE COURT: Good.

18 MR. LEMKUL: Good, good. So the position of
19 Cox and IES, your Honor, is basically we sent back
12:17:59 20 changes to Mr. Sampson that were incorporated into the
21 release that he sent out.

22 I don't have any issue with Monday's changes.
23 I do agree that part and parcel to the Cox and IES
24 release would come, officers, agents, the typical
12:18:18 25 language that we all see in these releases. And that's

12:18:20 1 what we sent out.

2 So I really have nothing else to offer other
3 than to answer questions should the Court have them for
4 me or my clients.

12:18:29 5 THE COURT: Okay. I have no questions, sir,
6 at this point.

7 Okay. Mr. Sampson, have you had a chance to
8 see the revised proposed settlement agreement that's
9 been sent by Mr. Fink in this matter at approximately
12:18:43 10 9:30 this morning?

11 MR. SAMPSON: I didn't see a proposed
12 settlement agreement. I saw, like, a list of here's
13 some items. And the one that I take issue with is the
14 one that seeks to stop my client from being able to
12:18:56 15 proceed against Sesman and Duslak.

16 And yes, I do know and I understand if you
17 release a party, you typically would be releasing their
18 employees, and board of directors, and those types of
19 things unless you clearly indicate otherwise when you
12:19:10 20 put the settlement agreement together.

21 So when we put this on the record, that's why
22 I made it a point to say, none of this settlement
23 involves Sesman or Duslak at all in any of their
24 capacities. And if there was an idea of, well, hold
12:19:25 25 on, Sunrise wants all its employees, and there might be

12:19:29 1 a claim that they're employees, so that should have
2 been brought up when we put the terms on the record.
3 It shouldn't have been dropped on me just like they
4 couldn't come up later and say, we want it
12:19:39 5 confidential. Or, and there is language about
6 indemnification and what not, which we'll agree to even
7 though it wasn't specifically put on the record. But
8 if you wanted those -- when I say -- make it a point to
9 mention, and I'm sure had I said, for example, you
12:19:50 10 know, here's so and so, it's the CEO of Cox, we're not
11 releasing any claims against that person, I'm sure
12 Mr. Lemkul would have piped up and said, oh, no, hold
13 on. We don't agree to that. We were stippling on the
14 record putting the terms together.

12:20:05 15 So I think it's improper for Sunrise to stand
16 there while we're putting the settlement on the record,
17 and I say Sesman and Duslak are not released in any
18 way, shape, or form. They remain parties. We still
19 have all rights to proceed against them, and that's all
12:20:19 20 fine and dandy while we're on the record, and then to
21 come back later in the release and say, except they're
22 not. Because if they're employees they're out.

23 I don't think they're employees either as I
24 sit here right now. But I've not had a chance to find
12:20:32 25 any of that stuff out. I have not -- I have no

12:20:34 1 confirmation as to any of that. So but the bottom line
2 is, you know, what I proposed now is, again, the
3 settlement that says here's all the people. We agree
4 to release each other pursuant to the terms reached on
12:20:48 5 the record on those two days we were there. And then
6 we all sign it.

7 I don't see why anyone would have a problem
8 having that serve as the release given that it does
9 exactly what we agreed to do. The only thing I can
12:21:00 10 envision as to why that would be a problem for someone
11 is: One, they want to continue to delay things, which
12 is an inappropriate reason and shouldn't be permitted;
13 or two, they're looking to change the deal that was
14 reached on the record.

12:21:14 15 Because what I proposed says specifically
16 releasing each other as agreed on the record. No more,
17 no less. I don't think anybody should require that my
18 client do any more or any less for any of that.

19 So given, again, EDCR allows a settlement to
12:21:31 20 be enforceable if it's placed on the record, so we've
21 done that. Mr. Fink kept talking about we're looking
22 at getting people out. Well, they are out. Anybody
23 pursuant to the terms that were set forth on the
24 record, they're out. The agreement is enforceable on
12:21:49 25 the record. Beside the fact that the statute of

12:21:50 1 limitations ran over a year ago at this point.

2 So it's not a question about that. I don't
3 know what else is going on. And my clients should not
4 be -- my client should not be required to waive any
12:22:02 5 right at all that he -- that he specifically --
6 especially when he specifically preserved them on the
7 record when we -- when we resolved this thing and put
8 the settlement on the record.

9 So, again, I appreciate your Honor asking if
12:22:14 10 I've had a chance to review what they sent me. Again,
11 I didn't get an actual release. I just got an email
12 from Mr. Fink that had some terms. And the term that I
13 had an issue with is this idea that if they're
14 employees, then Sesman and Duslak are out. That was
12:22:27 15 not agreed to.

16 But I think what you should perhaps ask is, to
17 the defendants, you know, what about what Mr. Sampson
18 sent you guys Wednesday and Tuesday? Say, we hereby
19 release each other as agreed on the record, and it's
12:22:40 20 incorporated by this reference. And we're done. Why
21 wouldn't that work?

22 And if they're going to balk and somehow say
23 that won't work, then, clearly, they must be either
24 looking to just drag this thing out or trying to get
12:22:52 25 something in the release that wasn't on the record,

12:22:54 1 which I don't think the Court should permit.

2 THE COURT: Do we have a copy of that portion
3 of the record? Have we ordered one or no?

4 MR. SAMPSON: I've not ordered one. I mean,
12:23:06 5 again, that's another proposal is I will order a copy
6 of Wednesday and Friday's transcripts and just have
7 everyone just sign the transcripts so agreed, so
8 released.

9 THE COURT: All right. Anything else?

12:23:22 10 MR. SAMPSON: But whatever is on -- yeah.
11 Whatever is on the transcript from Wednesday and Friday
12 would be incorporated by reference with exactly what I
13 proposed. And it just says release each other as per
14 what was put on the record. And then we all sign off
12:23:36 15 and get my client his money. And then we're done.

16 THE COURT: Well, I don't know if it's -- I
17 wish it was just that simple.

18 The reason why I asked that question regarding
19 a copy of the transcript, I wish I could say with
12:23:51 20 computer-like recollection I can remember every
21 utterance in court regarding the general terms of the
22 settlement and the like, but I can't.

23 And so all I'm saying is this: As to whether
24 anyone is correct as to specifically what was placed on
12:24:06 25 the record, I'd need a copy of the transcript to make

12:24:08 1 that determination. That's what I'm saying.

2 MR. SAMPSON: I don't know that anyone is
3 disputing what I'm talking about. In fact, I think
4 Mr. Fink indicated that my discussion with what was
12:24:19 5 placed on the record was accurate.

6 I mean, my position is -- I'm telling you, we
7 put on the record -- we're not waiving, releasing, or
8 otherwise affecting anything against Sesman or Duslak.
9 I don't think anyone would dispute that.

12:24:34 10 And if they don't dispute it, I mean, we can
11 keep a transcript -- we can get a transcript if we need
12 to, but I don't think it's disputed what I'm telling
13 you as to what we agreed to.

14 THE COURT: Is it --

12:24:44 15 MR. SAMPSON: It was a pretty significant
16 point that day.

17 THE COURT: Is it disputed? Anyone?

18 MR. SAMPSON: Not -- I'm not disputing. I'm
19 not disputing my version of what happened. I tell you
12:24:58 20 that. This is Dave Sampson.

21 THE COURT: Okay. Mr. Fink, are we disputing
22 that?

23 MR. FINK: Well, first I did send this out at
24 9:35 this morning which included, like, I think, six
12:25:10 25 bullet points, five bullet points of things that were

12:25:13 1 kind of core to the agreement.

2 My best recollection is that when Mr. Sampson
3 said he was specifically retaining his rights to go
4 against Mr. Sesman and Mr. Duslak, we all agreed to
12:25:27 5 that. There was no specific discussion as to whether
6 or not they were independent contractors or employees.
7 So I didn't -- I didn't jump and say, well, to the
8 extent they're employees. This wouldn't cover them.
9 So that part is right.

12:25:41 10 But then I didn't know that I had to do that
11 because when you're releasing Sunrise, you're releasing
12 their employees, their board members, all of that. So
13 I don't know that I was thinking that that's something
14 I needed to specifically do.

12:25:53 15 I completely understood that to the extent
16 that Sesman and Duslak were his independent
17 contractors, which we all think they are, that the HOA
18 hired to do the lawn maintenance that it --
19 shouldn't -- it didn't and shouldn't affect
12:26:07 20 Mr. Sampson's rights to go after them. That was the
21 point.

22 But certainly not if it turns out that they
23 were my client's employees, which, again -- and I
24 appreciate Mr. Sampson recognizing that in most cases
12:26:20 25 that's what's included, but that's exactly what I was

12:26:22 1 thinking was excluded here. If they're employees,
2 they're covered.

3 THE COURT: So the impact of the -- what would
4 be considered the material terms of the settlement is
12:26:34 5 an issue.

6 MR. FINK: If -- if the -- I think the only
7 issue, if I'm not mistaken, is whether or not the
8 settlement covers those two gentlemen if it turns out
9 they're employees. That's it.

12:26:46 10 If they're not employees, there's no question
11 the settlement doesn't cover them. And allows
12 Mr. Sampson whatever avenue or avenues he needs to try
13 to recover money from them, including going after
14 Sunrise's insurance carrier if for some reason that
12:27:01 15 that carrier should have defended or indemnified those
16 two gentlemen as independent contractors. And that's
17 language that my carrier agreed to that's in that
18 agreement. Which is fine. And that absolutely was not
19 part of a negotiation to get them out.

12:27:16 20 But the issue really is, is whether or not if
21 it turns out that these two were employees and getting
22 W-2s, which there's been no evidence and no allegation
23 that there they were, that it's our belief that the
24 settlement covers them under that one circumstance.

12:27:34 25 THE COURT: Okay. Mr. Sampson.

12:27:35 1 MR. SAMPSON: Your Honor.

2 THE COURT: Go ahead.

3 MR. SAMPSON: Sure. All I would ask, again,
4 is the Court to consider, well, you know, that should
12:27:42 5 have been brought up on the record. Because I made
6 clear -- and there is no dispute it sounds like. I
7 made it clear we want to preserve all rights against
8 Sesman and Duslak. They've been defaulted. We want to
9 move forward against them. And this release and this
12:27:56 10 money doesn't go to affecting any of my client's rights
11 against them, period.

12 And the response while we were on the record
13 from Mr. Fink and everybody else was that is correct.
14 And we are in agreement.

12:28:08 15 And if they were going to raise some kind of,
16 well, hold on. Is this, then okay. But if not, then
17 that was the time to do it, and they did not do it.
18 And they did it -- they had a chance on Wednesday and
19 again on Friday. So we can't even blame it on, like,
12:28:23 20 spur of the moment. I didn't have time to consider it.
21 It just got tossed out there. It was brought up
22 specifically, and they agreed. And they can't now turn
23 around and unagree, or try to undo it when we said --
24 again, all I want to do is enforce the terms that were
12:28:39 25 placed on the record. And I don't think my client

12:28:41 1 should be forced to agree to terms that weren't placed
2 on the record, which Mr. Fink is now asking to do. I
3 think -- I hope Mr. Fink is correct when he says
4 they're not employees.

12:28:51 5 I'm a little concerned if he is so convinced
6 they're not employees why this is a sticking point.
7 Because it shouldn't be. If he's convinced they're not
8 employees, I don't know how it would turn out, as he
9 used the phrase, if they somehow would magically become
12:29:06 10 employees other than perhaps if the carrier goes to
11 Sunrise, and says, you know, I don't know. Something
12 goes on and all of a sudden that all -- that they come
13 up W-2s that were not provided before and Mr. Fink's
14 not aware of, and then we've somehow been mislead.

12:29:20 15 But the terms of the agreement were reached on
16 the record, and we're just asking no more, no less than
17 what was placed on the record be enforced. And since
18 it's been three weeks now and they can't seem to come
19 up with an agreement, that Sunrise would be on board
12:29:37 20 with that comports with what was on the record, then I
21 think the Court either just find that that's waived at
22 this point, or that they sign what I proposed. Which
23 is we just release each other pursuant to what was
24 placed on the record.

12:29:51 25 THE COURT: Anything else? There is no way

12:29:52 1 this can be worked out.

2 MR. FINK: Never say no way. But your Honor,
3 again --

4 THE COURT: And the reason why I do that, I
12:30:01 5 think everybody understands this, it's always easier.

6 MR. FINK: Right. I mean, it's -- it's
7 problematic. I mean, look, there's nothing in the
8 complaint. So when Mr. Sampson says, Well, then we
9 should have said something. The problem here is that
12:30:12 10 if we are looking at the record, we're looking at the
11 entire record.

12 And the entire record is the amended complaint
13 which makes no allegation, even an allegation, that
14 either one of those two gentlemen were employees of
12:30:23 15 Sunrise, or were working within the course and scope of
16 being employees of Sunrise.

17 So if that's what he has alleged, then that's
18 why I have no problem releasing them as to how he's
19 alleged it. Had he alleged in his amended complaint
12:30:36 20 that they were employees of Sunrise, that would have
21 been a different discussion on the record.

22 Should that have been made more clear from
23 both sides? Probably, which we wouldn't be here. But
24 the fact is it's -- again, it's in the operative
12:30:51 25 complaint. There is no allegations that they are

12:30:53 1 employees, which is why I didn't feel the need that I
2 had to clarify that.

3 And again, nothing in any 16.1 disclosure, up
4 until and including trial, that alleged that either one
12:31:02 5 of them were employees. And I also think and I didn't
6 check this before the hearing, but even when we did the
7 motion for summary judgment, and even the renewed
8 motion for summary judgment -- or I think it was a
9 motion for reconsideration, I don't believe, and I'll
12:31:15 10 apologize if I'm wrong here, I don't believe that even
11 then Mr. Sampson -- Mr. Sampson said they were
12 employees.

13 And then there was a motion in limine related
14 to keeping the gardener's statements out of evidence.
12:31:29 15 And, again, he didn't say they were employees. He said
16 that we argued about whether or not agent in principal
17 whether or not that would --

18 So there has never been an allegation by
19 Mr. Sampson in this case that they're employees. And I
12:31:39 20 think that's true which is what I said all along. I
21 don't think they were. I thought they were independent
22 contractors, two guys on a mower.

23 However, I'm sure the Court can appreciate
24 that even though I'm really, really comfortable with
12:31:53 25 that, I'm also not that comfortable with just leaving

12:31:57 1 it to wind.

2 So, I mean, maybe the best thing to do is to
3 get a copy of the transcripts from those two hearings
4 and try to hash it out. I mean, the good thing is we
12:32:06 5 do have the money, so we're not waiting on that. So if
6 there is no delay here, no one is trying to delay
7 anything. We're just trying to get it right and trying
8 to save our own --

9 THE COURT: Well, here's the issue. I mean,
12:32:18 10 I've been listening patiently. And it appears to be no
11 dispute that hypothetically they're independent
12 contractors and potentially additional insureds under
13 the insurance policy, there would be coverage.

14 MR. FINK: Well, well, no, no. Not a coverage
12:32:33 15 issue, but would allow them to go after my insurance
16 carrier.

17 THE COURT: Right.

18 MR. FINK: Absolutely.

19 THE COURT: I understand. It's not a
12:32:38 20 stipulation.

21 MR. FINK: Right.

22 THE COURT: It's not a stipulation of
23 coverage.

24 MR. FINK: Right.

12:32:41 25 THE COURT: But there's not a -- I get the

12:32:43 1 significance.

2 MR. FINK: Right.

3 MR. MELORO: And your Honor.

4 THE COURT: Yes.

12:32:48 5 MR. MELORO: Joseph Meloro on behalf of
6 Mr. Bushbaker.

7 Mr. Fink did send an email earlier today. And
8 there were some bullet points. One of the bullet
9 points that I want to make clear was that Mr. Bushbaker
12:32:59 10 is not waiving any claims against any insurance
11 carriers.

12 Also I'd like the record to reflect that
13 Mr. Sampson in his motion did state that Mr. Bushbaker
14 is not doing anything to delay this settlement and that
12:33:14 15 we've been cooperative.

16 And so I just want to make that clear that
17 we're not doing anything. This is a dispute. I think
18 it's pretty narrow on whether these are independent
19 contractors or employees. Doesn't really regard my
12:33:29 20 client. But we're trying to help facilitate a
21 settlement here.

22 MR. FINK: We'd like nothing more than to give
23 Mr. Sampson the money.

24 MR. SAMPSON: Your Honor.

12:33:38 25 THE COURT: Yes. Yes, Mr. Sampson.

12:33:39 1 MR. SAMPSON: Well, so given that's the case,
2 I think then why don't we do this. Why doesn't the
3 Court order the money be paid to Dr. Russo, you know,
4 forthwith, or however you want to do it. Within, I
12:33:51 5 don't know, by middle of the next week or something.
6 If it's here in town, it could even be by the end of
7 this week. But order that the funds be paid. And that
8 we set maybe a status check or something. Or where we
9 can look at --

12:34:03 10 I don't know what Mr. Fink -- I've never known
11 him to say something that's not accurate, but I don't
12 know that my complaint doesn't make those allegations.
13 I know I typically have a paragraph in every complaint
14 I've done that involves respondeat superior potentially
12:34:18 15 that says the parties -- that the defendants were all
16 agents, principals, employees, employers, managers and
17 service with one another. Perhaps it's not in there.
18 I don't know. I don't know what was said. Sounds like
19 neither does Mr. Fink with much surety about what was
12:34:33 20 said in relation to motions that were filed.

21 But I think you say, Look, the Court is going
22 to enforce the terms that were reached on the record.
23 So go ahead and pay the money. We'll figure out a way
24 to draft it and get it written up. But we're going to
12:34:45 25 enforce it pursuant to what was placed on the record.

12:34:47 1 And the other issue I've got is if, you know,
2 Mr. Fink is saying, Well, we never had any allegation
3 that he thought they were employees. We never -- it
4 was never anything that would have ever even entered my
12:34:57 5 mind, well then why now? Because I didn't bring it up.

6 Why now when all of a sudden it's the sticking
7 point. Something has gone on, and it sure -- I mean,
8 again, I only see two reasons why we would do anything
9 other than sign something that says the terms reached
12:35:12 10 on the record are incorporated herein and we agree to
11 them. Unless they're trying to delay things or put
12 something in there that wasn't reached on the record.

13 And the Court shouldn't permit either one of
14 those to take place. So, you know, I haven't heard any
12:35:24 15 objection to what I proposed a day or two ago saying
16 let's just sign something saying that we agree to the
17 terms as proposed on the record, or as placed on the
18 record and incorporated by this reference and then pay
19 the money, then we're done.

12:35:38 20 So, again, I would just ask we either do that
21 or the Courts say, look, as Mr. Fink said and I'm sure
22 Mr. Lemkul probably agrees, they'd love nothing more
23 than to give Dr. Russo his money. So go ahead and give
24 it to him. And then we can sit down at some point if
12:35:52 25 we need to have an evidentiary hearing or some other

12:35:54 1 kind of status check where we go over complaints or the
2 transcript from when we put it on the record. Because
3 at some point we'll have a release in place that
4 Dr. Russo will sign that comports to what was placed on
12:36:05 5 the record. No more, no, less.

6 THE COURT: I don't think I can do that, as
7 far as ordering payments of monies without an execution
8 of some sort of closing documents, or release, or
9 something like that.

12:36:22 10 MR. SAMPSON: So then what about the one I
11 proposed that now no one has as of this point had an
12 objection to?

13 THE COURT: Well, here's --

14 MR. SAMPSON: That I've heard.

12:36:31 15 THE COURT: This is the -- I think it's always
16 better for parties to come to some sort of resolution.
17 Because I can anticipate -- and I don't mind saying
18 this, and then I want to go to lunch. I think we all
19 do. But and I don't know this, but I can anticipate
12:36:57 20 potentially without having it all tied up, there could
21 be litigation as to the impact of the release under one
22 remote scenario. Right?

23 And that's the concern I have. And, I mean,
24 it doesn't matter, I mean, from a personal level. But
12:37:16 25 from a judicial perspective, that's why I always want

12:37:20 1 you to try to come to some sort of accord before I make
2 decisions because realistically it could be litigation.
3 I mean, the chances are remote. I get that.

4 Because when you look at it from this
12:37:36 5 perspective if there was truly evidence -- I mean, this
6 makes perfect sense. If there was evidence that they
7 were employees, there would not have been a default
8 judgment entered against them. There would have been
9 motions to set aside, answers, and the like. And
12:37:50 10 that's pretty much the status of the case because I
11 can't -- I can't foresee either Mr. Lemkul or Mr. Fink
12 permitting an employee to be defaulted; right?

13 MR. SAMPSON: Could we perhaps enter a
14 stipulation on the record here and now that for
12:38:06 15 purposes of this litigation they're not employees?

16 THE COURT: Well, I think -- here's the thing,
17 and I don't -- I mean, as far as -- and, I mean, you
18 know, when you look at it, this is so layered. I'd
19 hate to go down this rabbit hole. But there could be
12:38:22 20 arguments made based upon the law of the case; or facts
21 of the case; or how the case has developed; as it has
22 an impact, what does the release cover? And so those
23 are issues. I think -- I don't mind saying this. I
24 think it's almost -- it rises to a level of a
12:38:47 25 significant presumption they're not employees because

12:38:50 1 there would have been an answer filed, you know. But I
2 just want everyone to come to some sort of accord on
3 this.

4 MR. SAMPSON: Well, the problem is it's been
12:38:59 5 three weeks, and we haven't. And I've spent two weeks,
6 Monday the 21st until the following week before I heard
7 anything and Thursday until yesterday where I go with
8 no communication from the -- from Sunrise. Or -- and
9 one of those weeks was including Cox, and then three
12:39:19 10 weeks with Scarcelli. I'm glad to hear he's on board.
11 But I don't want any further -- I mean, I don't want to
12 tell my client, well you don't get your money and you
13 don't get your verdict either. So...

14 THE COURT: I understand.

12:39:30 15 MR. SAMPSON: I mean, I need at this point for
16 the Court to please take action to tell these
17 defendants, do what -- enter into a release that
18 comports no more no less than what was placed on the
19 record and give the doctor his money.

12:39:44 20 MR. MELORO: Your Honor, I take exception to
21 being grouped as defendants by Mr. Sampson. There are
22 separate entities here. I communicated with
23 Mr. Sampson and the other parties in this action, not
24 only that first week after we made this agreement but
12:40:01 25 the following week I did a follow up saying have we

12:40:05 1 come to any agreements. So I just want it clear when
2 Mr. Sampson says "defendants", which defendants he's
3 speaking of, please. Thank you.

4 MR. FINK: Your Honor --

12:40:15 5 MR. SAMPSON: And I thought -- I don't know
6 what comes through on the phone, but I thought I said
7 some of the defendants, specifically Sunrise. I
8 went -- I got the release either Sunday night, Monday
9 morning. Didn't hear anything for a week. And then we
12:40:29 10 talked from Monday to Thursday. I didn't hear anything
11 for another week until yesterday. Cox I didn't hear
12 for the first week, but we did deal with them the
13 following week. We got it all worked out.

14 Scarcelli I hadn't heard from hardly at all,
10:27:58 15 but it sounds today like they're on board.

16 (Reporter clarification)

17 So that's where we are at. And again, I
18 just -- I don't want -- please don't make me go back
19 and tell Dr. Russo you don't get your money; you don't
12:40:49 20 get your trial either. There is some kind of limbo.

21 I'd like to think there is some way the Court
22 can take action under the settlement to say here's what
23 you need to do, and it includes -- and it should
24 include signing the release that comports and provides
12:41:05 25 no more no less than what was placed on the record, and

12:41:08 1 tender the funds pretty quickly. We've already been
2 three weeks into this.

3 THE COURT: Mr. Fink.

4 MR. FINK: Good, your Honor. Mr. Sampson made
12:41:16 5 an interesting suggestion that I'd like to think about
6 and that may work. That if we say for the purposes of
7 this litigation they weren't employees. That may take
8 care of all of this. I would just need to run that by
9 my people. But that may take care of all of our
12:41:31 10 concerns at that point, and then we can -- we can be
11 done.

12 THE COURT: How's that, Mr. Sampson?

13 MR. SAMPSON: It was my suggestion, so I still
14 totally agree with it.

12:41:40 15 THE COURT: Well, you know what --

16 MR. SAMPSON: I would ask -- I would ask
17 just -- Mr. Fink has made a couple of comments today,
18 and I think the Court also echoed them, along the lines
19 of Sesman and Duslak, all rights against them, anybody
12:41:53 20 who insures them, you know, all of those are preserved.
21 They're not affected. I would like to make sure that
22 is crystal clear in whatever iteration we end up with.
23 I put some language in there that Mr. Fink has asked to
24 modify. And I think he and I hopefully can work that
12:42:08 25 out, and say, you know, that sentiment that, I believe,

12:42:11 1 was expressed much more clearly today than in the
2 agreement be set out very, very clearly.

3 THE COURT: And I think he has no problem with
4 that because that was his idea, you know, so regarding
12:42:24 5 the fact that if they're independent contractors,
6 there's no waiver of the right to seek coverage for
7 this case. I mean, I get that based upon the insurance
8 policy. And no big deal there.

9 But, okay. How about this? Because I know
12:42:41 10 your client wants their money. And I've been in that
11 situation before.

12 How long do you think it would take you,
13 Mr. Fink, to run that passed your clients?

14 MR. FINK: Well, I can try to do that now.
12:42:55 15 They're on the east coast, Philly. So I can try to do
16 that now. But I would say for sure -- and they're,
17 obviously, they're hot on this issue. I would say if I
18 can't get that by them today for whatever reason,
19 tomorrow morning. You know, I get up early. I'm
12:43:09 20 usually up east coast time anyway. So I think I can
21 get an answer from them, again, either this afternoon
22 or before everybody generally wakes up in the morning.
23 But I think it's -- I think it's a workable solution
24 from where I'm sitting.

12:43:25 25 And yeah, Mr. Sampson and I, other than this

12:43:28 1 one thing, we're in complete agreement. I don't think
2 we have any issues on that.

3 THE COURT: So how about this then.

4 (Off-the-record scheduling discussion
01:24:06 5 between the court clerk and the Court.)

6 THE COURT: How about a status check,
7 telephonic status check at 9:30?

8 MR. FINK: That would be fine for Sunrise,
9 Judge.

12:43:52 10 THE COURT: Is that fine, Mr. Sampson?

11 MR. SAMPSON: That's fine.

12 THE COURT: Okay.

13 MR. SAMPSON: In the meantime, Mr. Fink can
14 just re-forward to me whatever the final version is
12:44:04 15 he's claiming. Or perhaps what we're talking the
16 stipulation he'd be okay with, the last one I provided.
17 And then I get a chance to look that over, and we can
18 talk it out tomorrow and find out where we're at, but
19 what if anything else we would do from there.

12:44:16 20 THE COURT: Well, I think this -- I think it's
21 actually much simpler than that in this regard.

22 Hypothetically, Mr. Fink hears back from the
23 east coast sometime today. He gives you a phone call
24 or email, says, Look, my client has no problems with
12:44:32 25 the stipulation. You guys move from -- with that, with

12:44:36 1 the stipulation and whatever release language you feel
2 would be appropriate. And everything is covered. I
3 make my phone call tomorrow at 9:30. Say, Look, Judge,
4 we've resolved this issue.

12:44:50 5 MR. SAMPSON: That would be nice too.

6 THE COURT: I mean, I can foresee that
7 happening. And the reason -- and what that does is
8 this, and remember this is important too, that gives
9 finality.

12:45:02 10 MR. SAMPSON: Yeah.

11 THE COURT: That's a big -- and I'm -- and,
12 Mr. Sampson, I understand your plight, and I respect
13 it. And I'm not just kicking the can down the road.
14 I'd rather give you finality now than maybe appeals,
12:45:17 15 those types of things. And we don't need that. We
16 need to just put this case to bed. Because 24 hours
17 could save you a year and a half, right?

18 MR. FINK: Mr. Sampson, did you get a copy of
19 the email I just sent over to you?

12:45:31 20 MR. SAMPSON: I don't know.

21 MR. FINK: Okay.

22 MR. SAMPSON: I'm not in a position to check
23 my emails right now.

24 MR. FINK: All right. Let me know if you
12:45:37 25 didn't get it. I just sent it over again, so I can

12:45:40 1 do --

2 MR. SAMPSON: All right. I'll take a look.

3 THE COURT: So what we'll do, we'll set a

4 9:00 o'clock conference call, and we'll use Court Call.

12:45:46 5 9:30, I'm sorry.

6 MR. FINK: 9:30.

7 THE COURT: 9:30. We'll use Court Call. And

8 we'll -- how do we do that?

9 THE COURT CLERK: Do you all have

12:45:56 10 instructions?

11 MR. LEMKUL: No.

12 MR. FINK: I'm sure my office does somewhere.

13 THE COURT CLERK: No worries.

14 MR. FINK: Those are all beyond my

12:46:03 15 capabilities.

16 THE COURT: And it's just a continuation of

17 today's hearing, Mr. Sampson and Mr. Lemkul. That's

18 all it is.

19 MR. LEMKUL: Sounds good, your Honor.

12:46:14 20 MR. SAMPSON: Sounds good.

21 THE COURT: All right. Everyone enjoy your

22 day.

23 MR. FINK: Thank you.

24 THE COURT: All right.

12:46:16 25 MR. SAMPSON: All right.

12:46:21 1

MR. MELORO: Have a good lunch, your Honor.

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(Proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF NEVADA)

:SS

COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE
PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE
TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
STENOGRAPHY NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
AND UNDER MY DIRECTION AND SUPERVISION AND THE
FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND
ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
NEVADA.

PEGGY ISOM, RMR, CCR 541

Peggy Isom, CCR 541, RMR

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Pursuant to NRS 239.053, illegal to copy without payment.

EXHIBIT 13

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15 **DISTRICT COURT**
16 **CLARK COUNTY, NEVADA**

17 ***

18 SIMONE RUSSO,

) Case No.: A-17-753606-C

) Dept. No.: XVI

19 Plaintiffs,

20 v.

) **DEFENDANT SUNRISE VILLAS IX**
) **HOMEOWNERS ASSOCIATION'S SECOND**
) **SUPPLEMENTAL RESPONSES TO**
) **PLAINTIFF'S FIRST SET OF**
) **INTERROGATORIES**

21 COX COMMUNICATIONS LAS VEGAS, INC.)
22 D/B/A COX COMMUNICATIONS; IES)
23 RESIDENTIAL, INC.; SUNRISE VILLAS IX)
24 HOMEOWNERS ASSOCIATION; J&G LAWN)
25 MAINTENANCE; KEVIN BUSHBAKER; PW)
26 JAMES MANAGEMENT & CONSULTING,)
27 LLC; AND DOES 1-V, AND ROE)
28 CORPORATIONS I-V, inclusive)

Defendants)

29 **DEFENDANT SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION'S SECOND**
30 **SUPPLEMENTAL RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES**

31 COMES NOW, Defendant SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION
32 ("SUNRISE VILLAS"), by and through its counsel of record, the law firm of Springel & Fink LLP, and
33 hereby submits its Second Supplemental responses to Plaintiff SIMONE RUSSO'S First Set of
34 Interrogatories pursuant to NRCP 33:

PRELIMINARY STATEMENT

SUNRISE VILLAS objects to each and every one of these Interrogatories as to form in nature, boilerplate and “shotgun.”

It should be noted that SUNRISE VILLAS has not fully completed its investigation of the facts relating to this case, has not fully completed discovery in this action, and has not completed preparation for trial. All of the responses contained herein are based only upon such information and documents which are presently available to and specifically known to SUNRISE VILLAS, and disclose only those contentions which presently occur to it. As discovery proceeds, witnesses, facts, and evidence may be discovered which are not set forth herein, but which may have been responsive to an Interrogatory.

Facts and evidence now known may be imperfectly understood, or the relevance or consequence of such facts and evidence may be imperfectly understood and, accordingly, such facts and evidence may, in good faith, not be included in the following responses.

It is anticipated that further discovery, independent investigation, legal research, and analysis will supply additional facts, add meaning to the known facts, as well as establishing entire new factual conclusions and legal contentions, all of which may lead to substantial additions to, changes in, and variations from the contentions herein set forth. The following responses are given without prejudice to SUNRISE VILLAS’ right to produce evidence of any subsequently discovered facts or witnesses which it may later recall. SUNRISE VILLAS accordingly reserves the right to change any and all answers herein as additional facts are ascertained, analyses are made, legal research is completed, and contentions are made. The responses contained herein are made in a good faith effort to supply as much factual information and as much specification of legal contentions as is presently known, but should in no way be to the prejudice of SUNRISE VILLAS in relation to further discovery, research or analysis.

SUNRISE VILLAS assumes no obligation to voluntarily supplement or amend these responses to reflect witnesses, facts, and evidence following the filing of these responses other than required under NRC 26(e) and 16.1. In addition, because some of these responses may have been ascertained by its attorneys and investigators, SUNRISE VILLAS may not have personal knowledge of the information from which these responses are derived.

///

RESPONSES TO INTERROGATORIES**REQUEST NO. 1:**

Please describe in full detail the location of the cable/wire, in the area of the walkway in question prior to the incident that is the subject of this lawsuit, and if in need of repair state the date it became in need of repair and/or removal, why it was in need of repair and/or removal, and the plans of Defendant, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION to make repairs and/or removal.

RESPONSE TO REQUEST NO. 1:

Objection. SUNRISE VILLAS objects to this Interrogatory on the grounds that it is vague and overbroad. SUNRISE VILLAS' objection notwithstanding, SUNRISE VILLAS does not have any information responsive to this Interrogatory. It is SUNRISE VILLAS' understanding that the cable/wire where the wire was located is at the base of the driveway near the expansion joint between the driveway and the curb. SUNRISE VILLAS never received notice of the wire, and never received notice for any need for its repair. SUNRISE VILLAS employs a new management company, has a completely new Board, and is unaware of such information.

Discovery is ongoing, and SUNRISE VILLAS reserves the right to supplement its response.

SUPPLEMENTAL RESPONSES TO REQUEST NO. 1:

SUNRISE VILLAS withdraws its objection. SUNRISE VILLAS' response remains unchanged.

SECOND SUPPLEMENTAL RESPONSES TO REQUEST NO. 1

SUNRISE VILLAS consulted with its current management company and the current Board of Directors, including Board President Al Stubblefield, regarding the identity of any employees or Board officers who may have information pertinent to this Interrogatory. After failing to locate any employee or officer with knowledge of the location of the wire or its need of repair, SUNRISE VILLAS determined that it was without knowledge to respond to this Interrogatory.

REQUEST NO. 2:

Please identify each and every employee of Defendant, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION who participated in the installation, repair and/or removal of the cable/wire that was positioned across the lawn and/or walkway at 4617 Madreperla Street, Las Vegas, NV 89121 in the area where Plaintiff fell.

RESPONSE TO REQUEST NO. 2:

Objection. SUNRISE VILLAS objects to this Interrogatory on the grounds that it is vague and overbroad as to the meaning of the word “employee.” SUNRISE VILLAS’ objection notwithstanding, SUNRISE VILLAS does not have any information responsive to this Interrogatory. SUNRISE VILLAS employs a new management company, has a completely new Board, and is unaware of such information.

Discovery is ongoing, and SUNRISE VILLAS reserves the right to supplement its response.

SUPPLEMENTAL RESPONSES TO REQUEST NO. 2:

SUNRISE VILLAS withdraws its objection. SUNRISE VILLAS’ response remains unchanged, in that it does not have any information responsive to this request. No employees of SUNRISE VILLAS installed, repaired, or removed the cable wire.

SECOND SUPPLEMENTAL RESPONSE TO REQUEST NO. 2:

SUNRISE VILLAS’ answer remains the same. SUNRISE VILLAS consulted with its current management company and the current Board of Directors, including Board President Al Stubblefield, and could not identify any prior officers or Board members who knew of whether SUNRISE VILLAS installed, repaired or removed the cable wire. SUNRISE VILLAS believe that no such employee exists. SUNRISE VILLAS spoke with some former Board members, but they did not have the information requested.

REQUEST NO. 4:

Please identify all outside contractors who Defendant, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION, retained to care for the residences in the neighborhood, including but not limited to 4617 Madreperla Street, Las Vegas, NV 89121. Please provide information sufficient for the service of a subpoena.

RESPONSE TO REQUEST NO. 4:

Objection. SUNRISE VILLAS objects to this Interrogatory on the grounds that it is vague, overbroad, overly burdensome and likely to lead to inadmissible evidence. SUNRISE VILLAS’ objection notwithstanding, SUNRISE VILLAS does not maintain any of the residences on the Property. Regardless, SUNRISE VILLAS employs a new management company, has a completely new Board, and is unaware of such information.

Discovery is ongoing, and SUNRISE VILLAS reserves the right to supplement its response.

SUPPLEMENTAL RESPONSES TO REQUEST NO. 4:

SUNRISE VILLAS withdraws its objection. Please see the previously produced Association Meeting Minutes, Bates Numbers SVHA000557 – SVHA000562 concurrently produced with SUNRISE VILLAS’ Fourth Supplemental Disclosure of Witnesses and Documents, specifically, reference to the firms “Fascia Painting,” “Noble Tree (5967 Harrison Dr., Las Vegas, NV 89120),” and “Pacific View.” This is all the information SUNRISE VILLAS has on these entities at this time.

Discovery is ongoing, and SUNRISE VILLAS reserves the right to supplement its response.

SECOND SUPPLEMENTAL RESPONSES TO REQUEST NO. 4:

SUNRISE VILLAS consulted with its current management company and the current Board of Directors, including Board President Al Stubblefield, and inquired into any prior employees and Board members with this information. After consulting with current board President Al Stubblefield, SUNRISE VILLAS could only identify these contractors.

REQUEST NO. 6:

If anybody reported to Defendant SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION, an incident relating to a cable/wire in the Sunrise Villas IX neighborhood, prior to the incident that is the subject of this lawsuit, please identify each such individual and the facts and circumstances of each incident reported.

RESPONSE TO REQUEST NO. 6:

Objection. SUNRISE VILLAS objects to this Interrogatory on the grounds that it is vague and overbroad as to the meaning of the word “reported.” SUNRISE VILLAS’ objection notwithstanding, SUNRISE VILLAS does not have any information responsive to this request. SUNRISE VILLAS employs a new management company, has a completely new Board, and is unaware of such information.

Discovery is ongoing, and SUNRISE VILLAS reserves the right to supplement its response.

SUPPLEMENTAL RESPONSES TO REQUEST NO. 6:

SUNRISE VILLAS withdraws its objection. SUNRISE VILLAS’ response remains unchanged.

SECOND SUPPLEMENTAL RESPONSE TO REQUEST NO. 6:

SUNRISE VILLAS consulted with its current management company and the current Board of

1 Directors, including Board President Al Stubblefield, and SUNRISE VILLAS was unable to locate any
2 person or document indicating a warning about the wire before the incident. Thus, SUNRISE VILLAS
3 does not have any information responsive to this request.

4 **REQUEST NO. 8:**

5 Please identify all manuals, policies, procedures, guides or handbooks used by Defendant,
6 SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION, or any other written documents that address
7 customer/resident safety.

8 **RESPONSE TO REQUEST NO. 8:**

9 Objection. SUNRISE VILLAS objects to this Interrogatory on the grounds that it is vague,
10 overbroad, and likely to lead to the discovery of inadmissible evidence. SUNRISE VILLAS also objects
11 to this Interrogatory, as it is vague and does not define the meaning of the term “resident safety.”
12 SUNRISE VILLAS’ objection notwithstanding, SUNRISE VILLAS does not have any information
13 responsive to this request. SUNRISE VILLAS employs a new management company, has a completely
14 new Board, and is unaware of such information.

15 Discovery is ongoing, and SUNRISE VILLAS reserves the right to supplement its response.

16 **SUPPLEMENTAL RESPONSES TO REQUEST NO. 8:**

17 SUNRISE VILLAS withdraws its objection. SUNRISE VILLAS’ response remains unchanged.

18 **SECOND SUPPLEMENTAL RESPONSES TO REQUEST NO. 8**

19 SUNRISE VILLAS consulted with its current management company and the current Board of
20 Directors, including Board President Al Stubblefield, SUNRISE VILLAS was unable to locate any
21 manuals, policies, procedures, guides or handbooks pertaining to resident safety in its possession. Thus,
22 SUNRISE VILLAS could not identify any information responsive to this request.

23 **REQUEST NO. 11:**

24 Please identify each and every person and/or entity that performed and/or was responsible for
25 lawn maintenance, repair, and/or cleaning for 4617 Madreperla Street, Las Vegas, NV 89121 and the
26 surrounding homes from January 1, 2016 through September 15, 2016.

27 **RESPONSE TO REQUEST NO. 11:**

28 SUNRISE VILLAS objects to this Interrogatory on the grounds that it is overly broad and overly

1 burdensome. It also calls for the admission of inadmissible evidence. SUNRISE VILLAS' objection
2 notwithstanding, under the CC&Rs, SUNRISE VILLAS is not responsible for the cleaning of 4617
3 Madreperla Street. SUNRISE VILLAS employs a new management company, has a completely new
4 Board, and is unaware of such information. SUNRISE VILLAS has the understanding that it retained
5 J&G LAWN MAINTENANCE on or about August 2016.

6 Discovery is ongoing, and SUNRISE VILLAS reserves the right to supplement its response.

7 **SUPPLEMENTAL RESPONSES TO REQUEST NO. 11:**

8 SUNRISE VILLAS withdraws its objection. SUNRISE VILLAS believes it employed Richard
9 Duslak and Justin Sesman for lawn maintenance repair and/or cleaning prior to September 2016 and
10 terminated this contract before retaining J&G LAWN MAINTENANCE on or about September 8, 2016.

11 **SECOND SUPPLEMENTAL RESPONSES TO REQUEST NO. 12:**

12 SUNRISE VILLAS consulted with its current management company and the current Board of
13 Directors, including Board President Al Stubblefield, SUNRISE VILLAS discovered HOA Board
14 Meeting Minutes from 2016. These documents identified Mr. Sesman and Mr. Duslak who did lawn
15 maintenance prior to the date of September 15, 2016. It is unclear what time they began doing this work
16 for SUNRISE VILLAS, but it was during the time frame specified by PLAINTIFF. The Board
17 terminated Mr. Duslak on or about September 8, 2016. SUNRISE VILLAS reserves the right to
18 supplement its response if it locates any other additional people or entities.

19
20 DATED this 2nd day of March, 2018.

21
22 SPRINGEL & FINK LLP

23 By: /s/ Jonathan C. Pattillo
24 LEONARD T. FINK, ESQ.
25 Nevada Bar No. 6296
26 JONATHAN C. PATTILLO, ESQ.
27 Nevada Bar No. 13929
28 10655 Park Run Drive, Suite 275
Las Vegas, Nevada 89144

Attorneys for Defendant,
SUNRISE VILLAS IX HOMEOWNERS
ASSOCIATION

CERTIFICATE OF SERVICE
Simone Russo v. Cox Communications Las Vegas, Inc., et al.
District Court Case No. A-17-753606-C

STATE OF NEVADA)
) ss.
 COUNTY OF CLARK)

I, Phaedra L. Calaway, declare:

I am a resident of and employed in Clark County, Nevada. I am over the age of eighteen years and not a party to the within action. My business address is 10655 Park Run Drive, Suite 275, Las Vegas, Nevada, 89144.

On March 2, 2018, I served the document described as **DEFENDANT SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION'S SECOND SUPPLEMENTAL RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES** on the following parties:

SERVED VIA DISTRICT COURT'S E-FILING VENDOR SYSTEM

____ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas Nevada. I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage fully prepaid at Las Vegas, Nevada in the ordinary course of business

____ VIA FACSIMILE: by transmitting to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number at last given by that person on any document which he/she has filed in the cause and served on the party making the service. The copy of the document served by facsimile transmission bears a notation of the date and place of transmission and the facsimile telephone number to which transmitted. A confirmation of the transmission containing the facsimile telephone numbers to which the document(s) was/were transmitted will be maintained with the document(s) served.

 X VIA ELECTRONIC SERVICE: by submitting the foregoing to the Court's E-filing System for Electronic Service upon the Court's Service List pursuant to EDCR 8. The copy of the document electronically served bears a notation of the date and time of service. The original document will be maintained with the document(s) served and be made available, upon reasonable notice, for inspection by counsel or the Court.

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

Executed this 2nd day of March, 2018 at Las Vegas, Nevada.

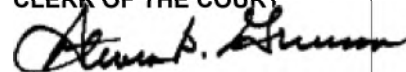
By: /s/ Phaedra L. Calaway
 Phaedra L. Calaway

Electronically Filed

2/4/2021 4:00 PM

Steven D. Grierson

CLERK OF THE COURT



LIPSON NEILSON P.C.
 DAVID A. CLARK (Bar No. 4443)
 JULIE A. FUNAI (Bar No. 8725)
 9900 Covington Cross Dr., Suite 120
 Las Vegas, NV 89144
 (702) 382-1500 Phone
 (702) 382-1512 Fax
dclark@lipsonneilson.com
jfunai@lipsonneilson.com
Attorneys for Defendant J. Chris Scarcelli

DISTRICT COURT**CLARK COUNTY, NEVADA**

SIMONE RUSSO,

Plaintiff,

vs.

COX COMMUNICATIONS LAS VEGAS,
 INC., D/B/A COX COMMUNICATIONS, IES
 RESIDENTIAL, INC., SUNRISE VILLAS IX
 HOMEOWNERS ASSOCIATION, J & G
 LAWN MAINTENANCE, KEVIN
 BUSHBAKER, PWJAMES MANAGEMENT
 & CONSULTING, LLC, J. CHRIS
 SCARCELLI, DOE LANDSCAPER,
 RICHARD DUSLAK, JUSTIN SESMAN,
 AND DOES I-V, and ROE CORPORATIONS
 I-V, inclusive,

Defendants.

KEVIN BUSHBAKER,

Cross-Claimant.

vs.

COX COMMUNICATIONS LAS VEGAS,
 INC., DBA COX COMMUNICATIONS; IES
 RESIDENTIAL INC.; SUNRISE VILLAS IX
 HOMEOWNERS ASSOCIATION: J. CHRIS
 SCARCELLI, DOES I-V, and ROE
 CORPORATIONS I-V,

Cross-Defendants.

CASE NO.: A-17-753606-C
DEPT. NO.: XVI

**SUGGESTION OF DEATH UPON THE
 RECORD OF DEFENDANT, J, CHRIS
 SCARCELLI PURSUANT TO NRCP
 25(A)**

Lipson Neilson P.C.
 9900 Covington Cross Drive, Suite 120
 Las Vegas, Nevada 89144
 Phone: (702) 382-1500 - Fax: (702) 382-1512

1 Counsel for Defendant, J. Chris Scarcelli, hereby files upon the record pursuant to
2 NRCP 25(a) the suggestion of the death of Defendant J. Chris Scarcelli. A true and correct,
3 redacted, copy of the Certificate of Death is attached hereto. Undersigned counsel is not aware of
4 the existence or identity of any successor representative or identifiable estate of the decedent.

5 Mr. Scarcelli passed away March 22, 2020. Although this matter was settled and
6 resolved by the Court's Order entered November 4, 2019, granting the Motion for Good Faith
7 Settlement, in light of recent filings that may seek to set aside that settlement, counsel files this
8 Suggestion of Death.

9 DATED this 4th day of February 2021.

10 LIPSON NEILSON P.C.

11 By: /s/ David A. Clark

12 DAVID A. CLARK (Bar No. 4443)

13 JULIE A. FUNAI (Bar No. 8725)

14 9900 Covington Cross Dr., Suite 120

15 Las Vegas, NV 89144

16 *Attorneys for Defendant J. Chris Scarcelli*

Lipson Neilson P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, Nevada 89144
Phone: (702) 382-1500 - Fax: (702) 382-1512

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 4th day of February, 2021, I electronically transmitted the foregoing **SUGGESTION OF DEATH UPON THE RECORD OF DEFENDANT, J, CHRIS SCARCELLI PURSUANT TO NRCP 25(A)** to the Clerk's Office using the Odyssey E-File & Serve System for transmittal to the following Odyssey E-File & Serve registrants:

David F. Sampson, Esq. LAW OFFICE OF DAVID SAMPSON 630 S. 3rd Street Las Vegas, NV 89101 <u>david@davidsampsonlaw.com</u> <i>Attorney for Plaintiff</i>	Will Lemkul, Esq. Christopher A. Turtzo, Esq. MORRIS, SULLIVAN & LEMKUL LLP 3960 Howard Hughes Pkwy., Suite 420 Las Vegas, NV 89169 <i>Attorneys for Defendants, IES Residential, Inc. and Cox Communications Las Vegas, Inc., d/b/a Cox Communications</i>
Leonard T. Fink, Esq. Jonathan C. Pattillo, Esq. SPRINGEL & FINK LLP 10655 Park Run Drive, Suite 275 Las Vegas, NV 89144 <u>lfink@springel.com</u> <u>jpattillo@springelfink.com</u> <i>Attorneys for Defendant, Sunrise Villa IX Homeowners Association</i>	Francis A. Arenas, Esq. SGRO & ROGER 720 South Seventh Street, 3rd Floor Las Vegas, NV 89101 <u>farenas@sgroandroger.com</u> <i>Attorney for Kevin Bushbaker</i>

/s/ Debra Marquez

An Employee of LIPSON NEILSON P.C.

STATE OF NEVADA

CERTIFICATION OF VITAL RECORD

8A App 1668

DEPARTMENT OF HEALTH AND HUMAN SERVICES DIVISION OF PUBLIC AND BEHAVIORAL HEALTH VITAL STATISTICS CERTIFICATE OF DEATH

CASE FILE NO. 4136153

2020005915
STATE FILE NUMBER

TYPE OR
PRINT IN
PERMANENT
BLACK INK

DECEDENT

IF DEATH
OCCURRED IN
INSTITUTION SEE
HANDBOOK
REGARDING
COMPLETION OF
RESIDENCE
ITEMS

PARENTS

DISPOSITION

TRADE CALL

CERTIFIER

REGISTRAR

CAUSE OF
DEATH

CONDITIONS IF
ANY WHICH
GAVE RISE TO
IMMEDIATE
CAUSE
STATING THE
UNDERLYING
CAUSE LAST

1a. DECEASED-NAME (FIRST,MIDDLE,LAST,SUFFIX) John Chris SCARCELLI				2. DATE OF DEATH (Mo/Day/Year) March 22, 2020		3a. COUNTY OF DEATH Clark	
3b. CITY, TOWN, OR LOCATION OF DEATH Las Vegas		3c. HOSPITAL OR OTHER INSTITUTION -Name (If not either, give street and city) Nathan Adelson Hospice-Tenaya				3e. If Hosp. or Inst. indicate DOA, OP/Emer, Rm. Inpatient(Specify) Hospice Facility (HFS)	
5. RACE (Specify) White		6. Hispanic Origin? Specify No - Non-Hispanic		7a. AGE-Last birthday (Years) 62		7b. UNDER 1 YEAR MOS DAYS HOURS MINS	
9a. STATE OF BIRTH (If not US/CA, name country) Pennsylvania		9b. CITIZEN OF WHAT COUNTRY United States		10. EDUCATION 18		11. MARITAL STATUS (Specify) Married	
13. SOCIAL SECURITY NUMBER [REDACTED]		14a. USUAL OCCUPATION (Give Kind of Work Done During Most of Year) Real Estate Broker/ Owner				14b. KIND OF BUSINESS OR INDUSTRY REAL ESTATE	
15a. RESIDENCE - STATE Nevada		15b. COUNTY Clark		15c. CITY, TOWN OR LOCATION Las Vegas		15d. STREET AND NUMBER 8021 Harbor Oaks Circle	
16. FATHER/PARENT - NAME (First Middle Last Suffix) John SCARCELLI				17. MOTHER/PARENT - NAME (First Middle Last Suffix) Hilda BYERS			
18a. INFORMANT- NAME (Type or Print) Marianne SCARCELLI				18b. MAILING ADDRESS (Street or R.F.D. No, City or Town, State, Zip) 8021 Harbor Oaks Circle Las Vegas, Nevada 89128			
19a. BURIAL, CREMATION, REMOVAL, OTHER (Specify) Cremation		19b. CEMETERY OR CREMATORY - NAME La Paloma Crematory		19c. LOCATION City or Town State Las Vegas Nevada 89122			
20a. FUNERAL DIRECTOR - SIGNATURE (Or Person Acting as Such) RYAN BOWEN		20b. FUNERAL DIRECTOR LICENSE NUMBER FD810		20c. NAME AND ADDRESS OF FACILITY Simple Cremation and Burial Services 3620 N Rancho Drive #101 Las Vegas NV 89130			
TRADE CALL - NAME AND ADDRESS							
21a. To the best of my knowledge, death occurred at the time, date and place and due to the cause(s) stated. (Signature & Title) SIGNATURE AUTHENTICATED MIKE Y JEONG DO				22a. On the basis of examination and/or investigation, in my opinion death occurred at the time, date and place and due to the cause(s) stated. (Signature & Title)			
21b. DATE SIGNED (Mo/Day/Yr) March 24, 2020		21c. HOUR OF DEATH 16:54		22b. DATE SIGNED (Mo/Day/Yr)		22c. HOUR OF DEATH	
21d. NAME OF ATTENDING PHYSICIAN IF OTHER THAN CERTIFIER (Type or Print)				22d. PRONOUNCED DEAD (Mo/Day/Yr)		22e. PRONOUNCED DEAD AT (Hour)	
23a. NAME AND ADDRESS OF CERTIFIER (PHYSICIAN, ATTENDING PHYSICIAN, MEDICAL EXAMINER, OR CORONER) (Type or Print) Mike Y Jeong DO 3150 N Tenaya Las Vegas, NV 89128						23b. LICENSE NUMBER DO1024	
24a. REGISTRAR (Signature) NANCY BARRY SIGNATURE AUTHENTICATED				24b. DATE RECEIVED BY REGISTRAR (Mo/Day/Yr) March 25, 2020		24c. DEATH DUE TO COMMUNICABLE DISEASE YES ☐ NO ☒	
25. IMMEDIATE CAUSE (ENTER ONLY ONE CAUSE PER LINE FOR (a), (b), AND (c).)							
PART I							
(a) End Stage Cerebral Vascular Disease Interval between onset and death							
(b) Intracranial Hemorrhage Interval between onset and death							
(c) Hypertension Interval between onset and death							
(d) DUE TO, OR AS A CONSEQUENCE OF: Interval between onset and death							
PART II OTHER SIGNIFICANT CONDITIONS-Conditions contributing to death but not resulting in the underlying cause given in Part 1. Alcohol Abuse							
28a. ACC., SUICIDE, HOM., UNDET. OR PENDING INVEST. (Specify)		28b. DATE OF INJURY (Mo/Day/Yr)		28c. HOUR OF INJURY		28d. DESCRIBE HOW INJURY OCCURRED	
28e. INJURY AT WORK (Specify Yes or No)		28f. PLACE OF INJURY- At home, farm, street, factory, office building, etc. (Specify)		28g. LOCATION STREET OR R.F.D. No. CITY OR TOWN STATE		27. WAS CASE REFERRED TO CORONER (Specify Yes or No) No	

STATE REGISTRAR

VRS-Rev-20120523a

"CERTIFIED TO BE A TRUE AND CORRECT COPY OF THE DOCUMENT ON FILE WITH THE REGISTRAR OF VITAL STATISTICS, STATE OF NEVADA." This copy was issued by the Southern Nevada Health District from State certified documents authorized by the State Board of Health pursuant to NRS 440.175.

DATE ISSUED: **APR 01 2020**

Registrar of Vital Statistics

By *[Signature]*

This Copy not valid unless prepared on engraved border displaying date, seal and signature of Registrar.
SOUTHERN NEVADA HEALTH DISTRICT • P.O. Box 3902 • Las Vegas, NV 89127 • 702-759-1010 • Tax ID # 88-0151573

ANY ALTERATION OR ERASURE VOIDS THIS CERTIFICATE

8A App 1668

A-17-753606-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

February 04, 2021

A-17-753606-C Simone Russo, Plaintiff(s)
vs.
Cox Communications Las Vegas, Inc., Defendant(s)

February 4, 2021 8:00 AM Minute Order re: Hearing on 2/11/21 at 9:05 a.m.

HEARD BY: Williams, Timothy C. **COURTROOM:** Chambers

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

- Department 16 Formal Request to Appear Telephonically

Please be advised that pursuant to Administrative Orders 20-10 and 20-24, Department 16 will temporarily require all matters to be heard via telephonic appearance. The court is currently scheduling all telephonic conferences through BlueJeans conferencing, wherein you dial in prior to your hearing to appear. Also, please check in with the Courtroom Clerk by 8:55 a.m. The call-in number is:

Dial the following number: **1-408-419-1715**

Meeting ID: **552 243 859**

To connect, dial the telephone number then enter the meeting ID followed by #.

PLEASE NOTE the following protocol each participant will be required to follow:

Place your telephone on **mute** while waiting for your matter to be called.

PRINT DATE: 02/04/2021

Page 1 of 2

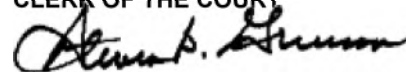
Minutes Date: February 04, 2021

A-17-753606-C

- Do not place the conference on hold as it may play wait/hold music to others.
- Identify yourself before speaking each and every time as a record is being made.
- Please be mindful of sounds of rustling of papers or coughing.

CLERK'S NOTE: A copy of this Minute Order has been electronically served to all registered users on this case in the Eighth Judicial District Court Electronic Filing System.

Electronically Filed
2/5/2021 9:36 AM
Steven D. Grierson
CLERK OF THE COURT


JOIN

LEONARD T. FINK, ESQ.

Nevada Bar No. 6296

SPRINGEL & FINK LLP

9075 W. Diablo Drive, Suite 302

Las Vegas, Nevada 89148

Telephone: (702) 804-0706

Facsimile: (702) 804-0798

E-Mail: *lfink@springelfink.com*

Attorneys for Defendant,

SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION

**DISTRICT COURT
CLARK COUNTY, NEVADA**

SIMONE RUSSO,

Plaintiff,

v.

COX COMMUNICATIONS LAS VEGAS, INC.
D/B/A COX COMMUNICATIONS; IES
RESIDENTIAL, INC.; SUNRISE VILLAS IX
HOMEOWNERS ASSOCIATION; J&G LAWN
MAINTENANCE; KEVIN BUSHBAKER; PW
JAMES MANAGEMENT & CONSULTING,
LLC; AND DOES 1-V, AND ROE
CORPORATIONS I-V, inclusive,

Defendants.

Case No.: A-17-753606-C

Dept. No.: XVI

**DEFENDANT, SUNRISE VILLAS IX
HOMEOWNERS ASSOCIATION'S
JOINDER TO INTERVENOR QBE
INSURANCE CORPORATION'S
CONSOLIDATE BRIEF RE: QBE'S
MOTION TO INTERVENE TO ENFORCE
SETTLEMENT AND PLAINTIFF'S
MOTION TO ENFORCE SETTLEMENT**

Defendant, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION ("SUNRISE VILLAS"),
by and through its counsel of record, the law firm of Springel & Fink LLP, hereby joins Intervenor QBE
INSURANCE CORPORATION'S Consolidate Brief RE: QBE's Motion to Intervene to Enforce Settlement
and Plaintiff's Motion to Enforce Settlement.

///

///

///

///

This Joinder is based upon the pleadings and papers on file herein, the Memorandum of Points and Authorities annexed thereto, and any oral argument that may be presented at the hearing set for this matter.

DATED this 5th day of February, 2021.

SPRINGEL & FINK LLP

/s/ Leonard T. Fink, Esq.

By: _____

LEONARD T. FINK, ESQ.

Nevada Bar No. 6296

9075 W. Diablo Drive, Suite 302

Las Vegas, NV 89148

Attorneys for Defendant,

*SUNRISE VILLAS IX HOMEOWNERS
ASSOCIATION*

CERTIFICATE OF SERVICE
Simone Russo v. Cox Communications Las Vegas, Inc., et al.
District Court Case No. A-17-753606-C

STATE OF NEVADA)
) ss.
 COUNTY OF CLARK)

I, Alma Duarte, declare:

I am a resident of and employed in Clark County, Nevada. I am over the age of eighteen years and not a party to the within action. My business address is 9075 W. Diablo Drive, Suite 302, Las Vegas, Nevada, 89148.

On **February 5, 2021**, I served the document described as **DEFENDANT, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION'S JOINDER TO INTERVENOR QBE INSURANCE CORPORATION'S CONSOLIDATE BRIEF RE: QBE'S MOTION TO INTERVENE TO ENFORCE SETTLEMENT AND PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT** on the following parties:

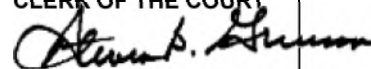
*****SEE ELECTRONIC SERVICE LIST*****

- _____ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada. I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage fully prepaid at Las Vegas, Nevada in the ordinary course of business.
- _____ VIA FACSIMILE: by transmitting to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number at last given by that person on any document which he/she has filed in the cause and served on the party making the service. The copy of the document served by facsimile transmission bears a notation of the date and place of transmission and the facsimile telephone number to which transmitted. A confirmation of the transmission containing the facsimile telephone numbers to which the document(s) was/were transmitted will be maintained with the document(s) served.
- X VIA ELECTRONIC SERVICE: by submitting the foregoing to the Court's E-filing System for Electronic Service upon the Court's Service List pursuant to EDCR 8. The copy of the document electronically served bears a notation of the date and time of service. The original document will be maintained with the document(s) served and be made available, upon reasonable notice, for inspection by counsel or the Court.

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

/s/ Alma Duarte

 An employee of Springel & Fink LLP



RFJN
Ramiro Morales
State Bar No.: 7101
William C. Reeves
State Bar No.: 8235
MORALES, FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Telephone: 702/699-7822
Facsimile: 702/699-9455

Attorneys for Intervenor
QBE Insurance Corporation

DISTRICT COURT
CLARK COUNTY, NEVADA

SIMONE RUSSO,	)	Case No.: A753606
	)	Dept: XVI
Plaintiff,	)	
	)	REQUEST FOR JUDICIAL NOTICE IN
vs.	)	SUPPORT OF CONSOLIDATED BRIEF
	)	RE: QBE'S MOTION TO INTERVENE TO
COX COMMUNICATIONS LAS VEGAS,	)	ENFORCE SETTLEMENT AND
INC., et al.	)	PLAINTIFF'S MOTION TO ENFORCE
	)	SETTLEMENT
Defendants.	)	
	)	Hearing Dates: February 11 and 25, 2021

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Attached hereto as Exhibit 14 is a true and correct copy of an Opposition filed on February 8, 2021 by Richard Duslak ("Duslak") and Justin Sesman ("Sesman") as to QBE's Motion to Dismiss which is pending in the matter styled *QBE v. Russo*, U.S.D.C., D. Nevada Case No.: 2:20-cv-02104-RFB-EJY ("Federal Matter").¹

Aside from the fact that the Opposition confirms improper collusion between ostensibly adverse parties given that Duslak and Sesman have now formally joined Plaintiff in this case in opposing the setting aside of the default judgment at issue in connection with the motions filed with this Court, the Opposition includes as Exhibit F an Affidavit from Attorney David Sampson (counsel for Plaintiff in this case) that provides as follows:

¹ QBE previously filed a Request for Judicial Notice on January 26, 2021 in this matter in which QBE requested that this Court take judicial notice of the Motion it filed in the parallel Federal Matter.

1 4. During the trial of Case No. A-17-753606-C the parties who had
 2 appeared in the lawsuit reached an agreement to settle the action, with
 3 the specific understanding that SIMONE had taken default judgments
 4 against RICHARD DUSLAK and JUSTIN SESMAN and that the
 5 settlement would not affect any of SIMONE's rights to pursue a
 6 default judgment against DUSLAK and/or SESMAN. After the
 7 settlement concluded as to the parties who had appeared in the matter,
 8 the Court entered a default judgment against DUSLAK and SESMAN
 9 in the amount of \$25,000,000.00 with interest accruing on the same.

10 4. (sic) At no time has SIMONE ever agreed to release DUSLAK
 11 and/or SESMAN from any liability for the Judgment that was duly
 12 entered in Case No. A-753606-C under any circumstances. There was
 13 an agreement that, for purposes of the said litigation, DUSLAK and
 14 SESMAN were independent contractors, which was based on
 15 SUNRISE VILLAS IX's representations to me and to the Court that
 16 DUSLAK and SESMAN were not SUNRISE's employees but instead
 17 were independent contractors. There was never any agreement to
 18 release DUSLAK and/or SESMAN as employees, and there has never
 19 been any agreement to release DUSLAK and/or SESMAN if it turned
 20 out that SUNRISE was incorrect in what it had represented to me and
 21 the Court about DUSLAK and SESMAN being independent
 22 contractors.

23 . . .

24 7. I do not understand the position that QBE and SUNRISE have
 25 taken in claiming that by agreeing DUSLAK and SESMAN were not
 26 employees, SIMONE somehow agreed to release DUSLAK and/or
 27 SESMAN as SUNRISE employees. That was never something to
 28 which SIMONE agreed. There was never any agreement to release
 DUSLAK and/or SESMAN in any manner. DUSLAK and SESMAN
 were specifically not released as SUNRISE employees (or to any
 other extent) because SUNRISE represented to me that DUSLAK and
 SESMAN were not employees of SUNRISE.

8. At present SIMONE has a Judgment against DUSLAK and
 SESMAN in the amount of \$25,000,000.00 with interest accruing
 since the date Judgment was entered in Case No. A-17-753606-C
 (December 17, 2019). The Judgment was entered against DUSLAK
 and SESMAN individually in Case No. A-17-753606-C because no
 one ever defended DUSLAK or SESMAN, and the active parties who
 had appeared in the matter allowed SIMONE to proceed with
 procuring a default judgment against DUSLAK and SESMAN
 individually because SUNRISE represented DUSLAK and SESMAN
 were independent contractors.

Exhibit 14, 142:17-144:17.

Given that counsel's representations run counter to the settlement reached in this matter and
 the corresponding default judgment subsequently entered by this Court, request is made that this
 Court take judicial notice of the entire Opposition, including counsel's Affidavit, in adjudicating

1 the motions pending before this Court.

2 Dated: February 9, 2021

3 MORALES FIERRO & REEVES

4
5 By: /s/ William C. Reeves
6 Ramiro Morales
7 William C. Reeves
8 600 S. Tonopah Dr., Suite 300
9 Las Vegas, NV 89106
10 Attorneys for QBE

11 Supporting Declaration

12 I, William Reeves, declare as follows:

13 1. I am an attorney with Morales Fierro & Reeves, counsel for QBE in this matter.

14 2. Attached hereto as Exhibit 14 is a true and correct copy of the Opposition filed by
15 Richard Duslak and Justin Sesman in the pending matter styled *QBE v. Russo*, U.S.D.C., D. Nevada
16 Case No.: 2:20-cv-02104-RFB-EJY.

17 I declare that the foregoing is true and correct based on my own personal knowledge.

18 Executed on the date specified below.

19 Dated: February 9, 2021

20
21 
22 William C. Reeves

Exhibit 14

1 KIMBALL JONES, ESQ.

Nevada Bar No.: 12982

2 EVAN K. SIMONSEN, ESQ.

3 Nevada Bar No.: 13762

BIGHORN LAW

4 2225 E. Flamingo Rd.

Building 2, Suite 300

5 Las Vegas, Nevada 89119

Email: Kimball@BighornLaw.com

6 Evans@BighornLaw.com

7 *Attorneys for Defendants/Counterclaimants*

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 QBE INSURANCE CORPORATION,
11 individually,

CASE NO.: 2:20-cv-02104-RFB-EJY

12 Plaintiff,

13 vs.

14 SIMONE RUSSO, RICHARD DUSLAK and
15 JUSTIN SESMAN,

16 Defendants.

**RESPONSE TO PLAINTIFF'S/COUNTER-
DEFENDANT'S MOTION TO DISMISS**

17 RICHARD DUSLAK and JUSTIN SESMAN,
18

19 Counterclaimants,

20 vs.

21 QBE INSURANCE CORPORATION,
22

23 Counter-Defendants.
24
25
26
27
28

1 RICHARD DUSLAK and JUSTIN SESMAN,

2 Third-Party Plaintiffs,

3 vs.

4 COMMUNITY ASSOCIATION
5 UNDERWRITERS OF AMERICA, INC.;
6 SUNRISE VILLAS IX HOMEOWNERS'
7 ASSOCIATION; DOES I-X AND ROE
BUSINESS ENTITIES I-X,

8 Third-Party Defendants.

9
10 **RESPONSE TO PLAINTIFF'S/COUNTER-DEFENDANT'S MOTION TO DISMISS**

11 COMES NOW, Defendants/Counterclaimants RICHARD DUSLAK and JUSTIN SESMAN,
12 by and through their counsel of record, KIMBALL JONES, ESQ. and EVAN K. SIMONSEN, ESQ.,
13 with the Law Offices of **BIGHORN LAW**, and hereby files this Response to Plaintiff/Counter-
14 Defendant QBE Insurance Corporation's Motion to Dismiss.

15 This Response is made and is based upon all of the pleadings and papers on file herein and
16 the attached Memorandum of Points and Authorities.

17
18 DATED this 8th day of February, 2021.

19 **BIGHORN LAW**

20 By: /s/ Kimball Jones

21 **KIMBALL JONES, ESQ.**

22 Nevada Bar No.: 12982

23 **EVAN K. SIMONSEN, ESQ.**

24 Nevada Bar No.: 13762

25 2225 E. Flamingo Rd.

26 Building 2, Suite 300

27 Las Vegas, Nevada 89119

28 *Attorneys for Defendants/Counterclaimants*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. STATEMENT OF RELEVANT FACTS**

3 **A. Introduction**

4 This case arises out of an underlying matter (*District Court Case No. A-17-753606-C*), wherein
5 Plaintiff/Counter-Defendant QBE Insurance Corporation (*hereinafter "QBE"*) refused to defend and
6 knowingly allowed judgment to be taken against Defendants/Counterclaimants RICHARD DUSLAK
7 and JUSTIN SESMAN (*hereinafter "Duslak and Sesman"*) in the underlying matter. QBE failed to
8 protect Duslak and Sesman, even though it was known that Duslak and Sesman were employees of
9 Plaintiff/Counter-Defendant QBE Insurance Corporation's insured (*Sunrise Villas IX Homeowners*
10 *Association*), and therefore, were entitled to having a proper defense in the underlying matter, provided
11 by Plaintiff/Counter-Defendant QBE Insurance Corporation.
12

13
14 As a result of QBE's bad faith and breach of contract in the underlying matter, Judgment has
15 been entered against Duslak and Sesman in the amount of \$25,000,000.00, with statutory interest
16 accruing thereon.

17 **B. QBE's Motion Fails as a Motion to Dismiss or as a Motion for Summary Judgment.**

18
19 In determining whether to dismiss a complaint, the Court must "accept as true all of the factual
20 allegations contained in the complaint." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1, 122 S.
21 Ct. 992, 995 (2002). Plaintiffs pled all necessary factual allegations for their causes of action within
22 their complaint (*See Dkt. 13*, at Pages 10-13, 24), and that those factual allegations must be accepted
23 as true. As such, as a motion to dismiss, QBE's Motion is meritless.

24 Since QBE relies on unverified "facts" outside of Duslak and Sesman's Counterclaims,
25 however, it may be viewed as a Motion for Summary Judgment:
26

27 Rule 12(b)(6) provides that when a defendant raises the defense of failure to state a
28 claim upon which relief can be granted and "matters outside the pleading 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*

1 *given reasonable opportunity to present all material made pertinent to such a motion*
2 *by Rule 56.”*

3 *Garaux v. Pulley*, 739 F.2d 437, 438 (9th Cir. 1984).

4 Nevertheless, the outcome is the same. Whether viewed as a motion to dismiss or as a motion
5 for summary judgment, QBE’s Motion fails. Duslak and Sesman’s allegations are sufficiently pled to
6 defeat QBE’s Motion to Dismiss. Moreover, the already-known facts in the case, as will be more fully
7 articulated below, demonstrate that QBE’s factual foundation for a Motion for Summary Judgment
8 does not just leave room for material dispute, but is rather directly contradicted by virtually all of the
9 evidence.
10

11 **C. QBE’s Motion to Dismiss Rests on False Representation Paraded as “Fact.”**

12 **a. There Was No Stipulation Releasing Duslak and/or Sesman, Regardless of**
13 **Employment Status.**

14 QBE’s Motion to Dismiss hinges upon an entirely erroneous premise. QBE asserts that a
15 stipulation between Russo and QBE somehow released Duslak and Sesman, apparently if and only if,
16 they were Sunrise employees. QBE’s only noted evidentiary support is found in a section of the
17 underlying settlement agreement:
18

19 FOR THE PURPOSES OF THIS LITIGATION AND FOR ANY AND ALL ISSUES
20 RELATED TO SIMONE RUSSO'S CLAIMS AND SETTLEMENT, THAT IN
21 AUGUST 2016 BOTH DEFENDANT RICHARD DUSLAK AND DEFENDANT
22 JUSTIN SESMAN WERE NATURAL PERSONS WHO WERE IN THE SERVICE
23 OF SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION AS INDEPENDENT
24 CONTRACTORS . . .”

25 See *Dkt. 24*, at 3:22-4:2.

26 QBE then concludes, “Based on this stipulation, it is legally impossible for the default to be
27 based on liability Duslak and/or Sesman face as former employees of Sunrise HOA as this liability
28 was expressly released before the default judgment was entered...it remains the case that Russo agreed
to release Duslak and Sesman for any liability arising from conduct as alleged former employees of
Sunrise HOA such that the counterclaim fails as a matter of law.” *Id.* at Page 4:4-14.

1 Obviously, QBE's conclusions fail. First, the conclusions are simply not the logical consequent
2 of the antecedent language. Just because Russo and Sunrise stipulated that Duslak and Sesman
3 "...were natural persons ... in the service of Sunrise ... as independent contractors," it does not follow
4 that Duslak and Sesman could not be defaulted based on their behavior in Sunrise's employ, nor does
5 it follow that they were "expressly released." There is simply no logical imperative tying QBE's
6 conclusions of "legally impossible" or "expressly released" to the stipulated language.
7

8 Second, both employees and independent contractors face liability for negligent behavior.
9 Likewise, employers are liable for the negligent behavior of employees and independent contractors
10 alike, so long as the negligence is committed in the service of the employer. As such, the statement in
11 the release does nothing to curb liability toward or away from Duslak, Sesman or Sunrise, nor does it
12 impact potential duties or coverage required by QBE.
13

14 Third, any opinion or stipulation between Russo, Sunrise, QBE or anyone else, regarding the
15 employment status of Duslak and Sesman is legally irrelevant. Either Duslak and Sesman were
16 employees of Sunrise or they were not employees of Sunrise—the opinions or stipulations of others is
17 irrelevant in making this legal determination.
18

19 Fourth, as will be more fully outlined below, QBE's insurance policy goes beyond providing
20 coverage for employees under the law (economic realities test) and provides contractual coverage for
21 "any natural person: (1) while in your service ... (2) whom you compensate directly... (3) whom you
22 have the right to direct and control while performing services for you." See Dkt. 22-4 at Page 19.
23 QBE's coverage extends to independent contractors, so long as they qualify for coverage under these
24 three provisions of the contract.
25

26 In addition to QBE's logical failures, QBE's argument is authoritatively debunked by not only
27 documents attesting to the exact opposite premise as the one propounded by QBE, but also by
28 statements on the record by Counsel for QBE, Sunrise, and Russo. Frankly, that Counsel for QBE had

1 the unmitigated temerity to make arguments so untethered to the objective fact that they could be
2 disproven by Counsel's own words on the record is astounding.

3 The underlying matter in this case revolves around a lawsuit filed in April 2017 by Doctor
4 SIMONE RUSSO (herein referred to as "Russo") filed against multiple Defendants in connection with
5 him tripping over a COX cable wire in the SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION
6 (herein referred to as "Sunrise"). In an Amended Complaint Russo also sued Duslak and Sesman as
7 Sunrise gave verified Interrogatories noting that Duslak and Sesman were "employed" as landscapers
8 by Sunrise.
9

10 As QBE failed to properly represent Duslak and Sesman in the underlying action, Duslak and
11 Sesman are now forced to rely upon the record to reconstruct the intention of both Russo and Sunrise
12 in the underlying litigation. Based on the record, it appears that on October 18, 2019 the active parties
13 to the settlement placed the terms of the settlement on the record. See Transcript, attached hereto as
14 **Exhibit "A."**
15

- 16 1. The settlement placed on the record in the underlying matter never releases Duslak
17 or Sesman.

18 The record notes that the settlement between the active parties did not include Duslak or
19 Sesman. Counsel for Sunrise at the time, Mr. Fink, asked the Court to make a finding of good faith
20 "because of the further actions Mr. Sampson is going to take against the defaulted parties [*Duslak and*
21 *Sesman*]." *Id* at P. 6 L. 4-9.

22 Counsel for Russo, Mr. Sampson, confirmed on the record that the settlement did not release
23 Duslak or Sesman and did not include them. Mr. Sampson made it more than clear, "there are two
24 other parties [*Duslak and Sesman*] who have been defaulted that we're still – ***this settlement does not***
25 ***affect them***". *Id* at P. 6 L. 15-19 (Emphasis added).
26

27 When counsel for the various parties then discussed reducing the settlement to writing, Mr.
28 Sampson AGAIN confirmed that in drafting any release or the like related to the settlement:

1 the terms of whatever documents we sign or that my client has asked to sign comport
2 with what was discussed Wednesday, and what's being discussed today, and ***no new***
3 ***terms***, and those types of things. And, I guess, ***most of all that nothing in any of these***
4 ***releases or any of the settlement affects any rights Dr. Russo may have against any***
5 ***person or entity related to the claims of the two individuals who have been defaulted,***
6 and any claims that they may have against anybody would not be affected by this
7 settlement. ***So as long as we're clear on all of that.***

8 *Id* at P. 10 L. 24 – P. 11 L. 12 (Emphasis added).

9 After Sampson asked to make it clear that no releases or any other settlement documents would
10 affect any rights Russo may have against the Duslak and Sesman, Mr. Fink then agreed that no releases
11 or settlement documents would affect any rights Russo may have against Duslak and/or Sesman. *Id* at
12 P. 11 L. 21.

13 These were not the only discussions on the record confirming that the settlement did not
14 include Duslak and Sesman. In hearing on November 7, 2019, the parties further discussed the
15 resolution of this matter. See November 7, 2019 Hearing, attached hereto as **Exhibit “B.”** Mr.
16 Sampson began by confirming the agreement that was placed on the record on October 18, 2019, in
17 the following discussion:

18 We were in front of your Honor three weeks ago now on Wednesday initially. And we
19 put the settlement on the record and the terms of the settlement on the record. We came
20 back on Friday, found out that the two other -- two other defendants who on Wednesday
21 said they hadn't gotten any confirmation from their client yet because it had just kind of
22 happened and that whole thing. They wanted to check with their clients, call back on
23 Friday, and confirmed their client did agree to do the settlement. ***And so under those***
24 ***terms – a couple of the terms, one was that – Two of the defendants who were named***
25 ***in the case who have never filed answers, who have been defaulted were not affected***
26 ***by the settlement, with the money that was being paid.***

27 THE COURT: And...

28 MR. SAMPSON: And my clients rights --

THE COURT: And Mr. Sampson, I don't want to cut you off. But please identify the
two defaulted defendants again for the record.

MR. SAMPSON: ***Duslak and Sesman are the last names.***

THE COURT: Thank you, sir. You may continue.

1 MR. SAMPSON: So then *Dr. Russo's rights against those two defaulted individuals*
2 *would not be affected at all. Everyone agreed.*

3 *Id* at P. 5 L. 18- P. 6 L. 19 (Emphasis added).

4 Mr. Sampson then stated that the release Sunrise proposed sought to potentially alter the
5 agreement that the settlement could not affect Russo's rights against Duslak and/or Sesman. Mr.
6 Sampson noted, "the release that was provided defines Sunrise as all employees, independent
7 contractors. It lays out other things that could potentially include Duslak and Sesman. *Id* at P. 9 L. 22-
8 25. Mr. Sampson then stated, "we are not going to include them [*Duslak and Sesman*] or anyone
9 affiliated with them." *Id* at P. 10 L. 1-3.

11 Mr. Fink subsequently stated:

12 I think the real hold up right now is whether or not the release that we negotiated was
13 intended to cover Mr. Sesman and Duslak, D-U-S-L-A-K, I think. Actually, I've got it
14 in front of me. Okay. Duslak, D-U-S-L-A-K, and Sesman, S-E-S-M-A-N, if they were
considered employees of Sunrise.

15 *Id* at P. 16 L. 14-19.

16 Mr. Fink continued, "There's never been one bit of evidence in this case that they were
17 employees." Mr. Fink then argued that Duslak and Sesman should be included in the release in the
18 event they were Sunrise employees by arguing "when you settle with an entity, you are settling with
19 the employees too." *Id* at P. 16 L. 23-25. Mr. Fink then stated "the only hang up is whether or not this
20 settlement included Mr. Duslak and Mr. Sesman if they are found to be employees of Sunrise. And I
21 think that's it." *Id* at P. 18 L. 6-9.

23 Mr. Sampson responded, "And the one that I take issue with is the one that seeks to stop my
24 client from being able to proceed against Sesman and Duslak." *Id* at P. 20 L. 13-15. Mr. Sampson
25 continued:

27 And yes, I do know and I understand if you release a party, you typically would be
28 releasing their employees, and board of directors, and those types of things unless you
clearly indicate otherwise when you put the settlement agreement together. So when
we put this on the record, that's why I made it a point to say, none of this settlement

1 involves Sesman or Duslak at all in any of their capacities. And if there was an idea
2 of, well, hold on, Sunrise wants all its employees, and there might be a claim that they're
3 employees, so that should have been brought up when we put the terms on the record. It
4 shouldn't have been dropped on me just like they couldn't come up later and say, we
5 want it confidential. Or, and there is language about indemnification and what not,
6 which we'll agree to even though it wasn't specifically put on the record. But if you
7 wanted those -- when I say -- make it a point to mention, and I'm sure had I said, for
8 example, you know, here's so and so, it's the CEO of Cox, we're not releasing any claims
9 against that person, I'm sure Mr. Lemkul would have piped up and said, oh, no, hold on.
10 ***We don't agree to that. We were stippling on the record putting the terms together. So
I think it's improper for Sunrise to stand there while we're putting the settlement on
the record, and I say Sesman and Duslak are not released in any way, shape, or form.
They remain parties. We still have all rights to proceed against them, and that's all
fine and dandy while we're on the record, and then to come back later in the release
and say, except they're not. Because if they're employees they're out.*** I don't think
they're employees either as I sit here right now. But I've not had a chance to find any of
that stuff out. I have not -- I have no confirmation as to any of that.

11 *Id* at P. 20 L. 16 - P. 22 L. 1 (Emphasis added).

12
13 Mr. Sampson then argued, "...what I proposed says specifically releasing each other as agreed
14 on the record. No more, no less. I don't think anybody should require that my client do any more or
15 any less for any of that . . . And my clients should not be -- my client should not be required to waive
16 any right at all that he -- that he specifically -- especially when he specifically preserved them on the
17 record when we -- when we resolved this thing and put the settlement on the record." *Id* at P. 22 L.
18 15-18; P. 23 L. 3-8.

19
20 Mr. Sampson then concluded that the proposed release language attempting to release Duslak
21 and Sesman, if employees, was not agreed to when he stated, "***And the term that I had an issue with
22 is this idea that if they're employees, then Sesman and Duslak are out. That was not agreed to.***" *Id*
23 P. 23 L. 12-15. Mr. Sampson continued by noting that on October 18, 2019 "we put on the record --
24 ***we're not waiving, releasing, or otherwise affecting anything against Sesman or Duslak.*** I don't
25 think anyone would dispute that . . . it was a pretty significant point that day." *Id* at P. 25 L. 6-16
26 (Emphasis added).

27
28 ///

1 The Court then asked, “Mr. Fink, are we disputing that?” *Id* at P. 25 L. 21-22. Mr. Fink
 2 answered, “My best recollection is that *when Mr. Sampson said he was specifically retaining his*
 3 *rights to go against Mr. Sesman and Mr. Duslak, we all agreed to that.*” *Id* at P. 26 L. 2-5 (Emphasis
 4 added). Mr. Fink further confirmed “So I didn’t – *I didn’t jump and say, well, to the extent they’re*
 5 *employees. This wouldn’t cover them. So that part is right.*” *Id* at P. 26 L. 7-9 (Emphasis added).
 6 Mr. Fink, after admitting that the settlement did not include Duslak and Sesman, then asked that the
 7 settlement nevertheless cover Duslak and Sesman if there was evidence that they were employees—
 8 asking for a hypothetical judgment, in other words.

9
 10 Mr. Sampson responded:

11 All I would ask, again, is the Court to consider, well, you know, *that should have been*
 12 *brought up on the record. Because I made clear --* and there is no dispute it sounds
 13 like. I made it clear *we want to preserve all rights against Sesman and Duslak.* They've
 14 been defaulted. We want to move forward against them. And *this release and this*
 15 *money doesn't go to affecting any of my client's rights against them, period.* And the
 response while we were on the record from Mr. Fink and everybody else was that is
 correct. *And we are in agreement.*

16 And if they were going to raise some kind of, well, hold on. If this, then okay. But if
 17 not, then that was the time to do it, and they did not do it. And they did it -- they had a
 18 chance on Wednesday and again on Friday. So we can't even blame it on, like, spur of
 19 the moment. I didn't have time to consider it. It just got tossed out there. *It was brought*
 20 *up specifically, and they agreed. And they can't now turn around and unagree, or try*
 21 *to undo it when we said -- again, all I want to do is enforce the terms that were placed*
 22 *on the record.* And I don't think my client should be forced to agree to terms that weren't
 placed on the record, which Mr. Fink is now asking to do.

23 *Id* at P. 28 L. 3 – P. 29 L. 2 (Emphasis added).

24 Mr. Sampson continued:

25 I'm a little concerned if he is so convinced they're not employees why this is a sticking
 26 point. Because it shouldn't be. If he's convinced they're not employees, I don't know how
 27 it would turn out, as he used the phrase, if they somehow would magically become
 28 employees other than perhaps if the carrier goes to Sunrise, and says, you know, I don't
 know. *Something goes on and all of a sudden that all -- that they come up W-2s that*
were not provided before and Mr. Fink's not aware of, and then we've somehow been
mislead.

Id at P. 29 L. 5-14 (Emphasis added).

1 Mr. Sampson then reiterated “the terms of the agreement were reached on the record, and we’re
2 just asking no more, no less than what was placed on the record be enforced.” *Id* at P. 29 L. 15-17.

3 The Court then asked if there was some way the matter could be worked out. The Court
4 reiterated “I think it’s always better for parties to come to some sort of resolution.” *Id* at P. 36 L. 15-
5 16. In attempting to reach a resolution Mr. Sampson suggested “Could we perhaps enter a stipulation
6 on the record here and now that for purposes of this litigation they’re not employees?” *Id* at P. 37 L.
7 13-15. Mr. Fink then stated he would “like to think about” Mr. Sampson’s suggestion and “That may
8 take care of all of this.” *Id* at P. 40 L. 4-8.

9
10 Before the hearing ended Mr. Sampson stated, “I would ask -- I would ask just -- Mr. Fink has
11 made a couple of comments today, and I think the Court also echoed them, along the lines of Sesman
12 and Duslak, *all rights against them, anybody who insures them, you know, all of those are preserved.*
13 *They’re not affected. I would like to make sure that is crystal clear in whatever iteration we end up*
14 *with.*” *Id* at P. 40 L. 16-22 (Emphasis added).

15
16 2. The signed settlement documents never release Duslak or Sesman.

17 When the settlement agreement on the record was reduced to writing, it is again patently
18 apparent that Russo preserved all rights to proceed against Duslak and Sesman, and that neither Duslak
19 and/or Sesman were being released under any circumstances, even if they were Sunrise employees.
20 *Incredibly, the settlement agreement goes out of its way to specifically exclude Sunrise employees*
21 *from the category of released persons* to ensure this point was made. On the other hand, each of the
22 other Defendants included in the agreement were identified as including the Defendants’ respective
23 employees among their released. On page one of the agreement the parties are identified. See
24 *Agreement*, attached hereto as **Exhibit “C.”** Defendant IES RESIDENTIAL, INC., is identified as:
25
26

27 IES RESIDENTIAL, INC. (hereinafter “IES”) and its affiliated companies, and each of
28 their respective past, present and future officers, directors, members, managers, agents,
representatives, shareholders, partners, associates, employees, attorneys, subsidiaries,
predecessors, beneficiaries, grantors, grantees, vendees, transferees, successors, assigns,

1 heirs, divisions, contractors, joint ventures, special purpose entities, legal and equitable
2 owners and insurers;

3 *Id* (Emphasis added).

4 Defendant COX is identified as:

5 COX COMMUNICATIONS LAS VEGAS, INC. D/B/A COX COMMUNICATIONS
6 (hereinafter "COX") and its affiliated companies, and each of their respective past,
7 present and future officers, directors, members, managers, agents, representatives,
8 shareholders, partners, associates, employees, attorneys, subsidiaries, predecessors,
9 beneficiaries, grantors, grantees, vendees, transferees, successors, assigns, heirs,
divisions, contractors, joint ventures, special purpose entities, legal and equitable
owners and insurers;

10 *Id* (Emphasis added).

11 Defendant PW JAMES is identified as:

12 PW JAMES MANAGEMENT & CONSULTING, LLC (hereinafter "PW JAMES")
13 and its affiliated companies, and each of their respective past, present and future officers,
14 directors, members, managers, agents, representatives, shareholders, partners,
15 associates, employees, attorneys, subsidiaries, predecessors, beneficiaries, grantors,
16 grantees, vendees, transferees, successors assigns, heirs, divisions, contractors, joint
ventures, special purpose entities, legal and equitable owners and insurers (potentially
Community Association Underwriters, Inc., QBE Insurance Corporation, Alliant
Insurance Services, Inc., DSCM, Inc. and Armour Risk Management, Inc.);

17 *Id* (Emphasis added).

18 *In contrast, Defendant SUNRISE is identified as:*

19
20 SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION (hereinafter "SUNRISE")
21 and its affiliated companies, and each of their respective past, present and future officers,
22 directors, members, managers, agents, representatives, shareholders, partners,
23 associates, insurers (Community Association Underwriters, Inc., QBE Insurance
24 Corporation, Alliant Insurance Services, Inc., DSCM, Inc. and Armour Risk
Management, Inc. - but only as it relates to SUNRISE), **EXCLUDING RICHARD
25 DUSLAK AND/OR JUSTIN SESMAN OR ANYONE ASSOCIATED OR
26 AFFILIATED WITH THEM, INCLUDING ANY ACTUAL OR POTENTIAL
INSURER (per the stipulation attached in exhibit "A")**, attorneys, subsidiaries,
predecessors, beneficiaries, grantors, grantees, vendees transferees, successors, assigns,
heirs, divisions, contractors, joint ventures, special purpose entities, legal and equitable
owners;

27 *Id* (Emphasis in original).

1 *The word “employees” is specifically deleted from and NOT used in the description of*
 2 *Sunrise as a Defendant*, further indicating that Russo, who specifically retained all rights on the record
 3 to any/all claims against Duslak and Sesman, did not release any claims involving Duslak and Sesman,
 4 even if they were employees of Sunrise. Additionally, on page 4 of the release, the description of the
 5 released parties includes all of Defendants’ “employees **EXCLUDING RICHARD DUSLAK**
 6 **AND/OR JUSTIN SESMAN . . .**”. *Id* at P. 4 (Emphasis in original). When referencing the released
 7 employees of any of the Defendants it was made clear that the released “employees” did not include
 8 Duslak or Sesman, and that neither Duslak nor Sesman were being released, even if they were later
 9 deemed employees of Sunrise.
 10

11 Additionally, in reducing the agreed upon settlement to writing, the release to which Sunrise
 12 and QBE agreed stated that “PLAINTIFF,” “Dr. SIMONE RUSSO” was releasing Sunrise and QBE
 13 “**EXCLUDING RICHARD DUSLAK AND/OR JUSTIN SESMAN OR ANYONE**
 14 **ASSOCIATED OR AFFILIATED WITH THEM, INCLUDING ANY ACTUAL OR**
 15 **POTENTIAL INSURER**”. *See Exhibit “C,”* at P. 1 (Emphasis in original).
 16

17 Apparently to further confirm that the release and any accompanying documentation did not
 18 affect any rights Russo may have against Duslak and/or Sesman in any manner, the release to which
 19 Sunrise and QBE agreed further stated, “PLAINTIFF [RUSSO] shall retain **all rights** to pursue **any**
 20 **claims** against RICHARD DUSLAK and/or JUSTIN SESMAN”. *See Exhibit “C,”* at P. 4 (Emphasis
 21 added).
 22

23 The release further confirmed, “ANY LANGUAGE IN THIS RELEASE THAT IS
 24 CONTRARY TO THE LANGUAGE OF THIS SPECIFIC PARAGRAPH, AND/OR **ANY**
 25 **LANGUAGE THAT WOULD BE READ TO IN ANY WAY IMPACT PLAINTIFF’S RIGHTS**
 26 **AGAINST RICHARD DUSLAK and/or JUSTIN SESMAN . . . SHALL BE DEEMED NULL AND**
 27 **VOID.**” *Id* (Emphasis added).
 28

1 It is clear from the language on the record, as well as the language of the release itself, that
2 QBE and Sunrise never attempted to save Duslak and Sesman through any release or judgment. As a
3 result, Duslak and Sesman were never released by Russo, who went on to obtain a massive judgment
4 against them. Unfortunately, QBE's claim of a stipulation to release Duslak and Sesman appears so
5 clearly contradicted by the record that it is difficult to align with candor.
6

7 **b. Sunrise's Actions in the Underlying Matter Indicate Sunrise Knew Duslak and**
8 **Sesman were "Employees"—not Independent Contractors.**

9 QBE claims, "no evidence exists that either [*Duslak or Sesman*] were actual HOA employees,
10 the release of any claims based on this theory was negotiated out of an abundance of caution so as to
11 protect both the HOA and QBE." *See Dkt. 24*, at 3:25. This claim is as obviously false now as it was
12 during the underlying case. *See Declaration of Richard Duslak*, attached hereto as **Exhibit "D."**

13 Moreover, QBE's claim is puzzling as it is facially contradicted by documents in QBE's
14 possession, that were entered on the record in the underlying case. In fact, there exists substantial
15 evidence in the form of Interrogatory Answers from Sunrise that Duslak and Sesman were employees
16 of Sunrise. On March 2, 2018, Sunrise answered interrogatories from Russo and noted, "SUNRISE
17 VILLAS believes it employed Richard Duslak and Justin Sesman for lawn maintenance repair and/or
18 cleaning prior to September 2016 and terminated this contract before retaining J&G LAWN
19 MAINTENANCE on or about September 8, 2016." *See Dkt. 22-11*, at 8:8-10.
20

21 This statement, entered on the record in the underlying matter in 2018, should have been
22 sufficient for QBE to at least investigate the matter and tender a defense in favor of Duslak and
23 Sesman. For QBE to now double down on this refusal to believe Sunrise's own characterization of
24 Duslak's and Sesman's employment status is baffling.
25

26 Furthermore, in minutes from the February 17, 2016 Sunrise Board of Directors Meeting,
27 Sunrise stated, "The Board reviewed the job descriptions as submitted by employees Richard Duslak
28 and Justin Sesman. Secretary Morales [*Secretary of Sunrise*] volunteered to oversee the work

1 performed on property by Mr. Duslak and Mr. Sesman and will report to the Board regarding progress
2 on maintenance projects. A motion was made by Treasurer Alexis seconded by Secretary Morales for
3 the petty cash to not be maintained by the employees at this time.” This shows that Duslak and Sesman
4 were in the service of Sunrise, were compensated by Sunrise, that Sunrise (*via Secretary Morales*)
5 had, and exercised, the right to direct and their work, and that Sunrise considered Duslak and Sesman
6 to be employees. See Dkt. 22-3 at page 12.

8 **c. Duslak and Sesman were “Covered Employees” Under the Plain Language of**
9 **the QBE Policy.**

10 Even if Duslak and Sesman were not clearly employees of Sunrise under the economic realities
11 test (they *were* clearly employees under the economic realities test), they would have still been covered
12 by QBE’s policy as independent contractors since Duslak and Sesman are obviously “Covered
13 Employees” under the contractual language of the policy. Under what is believed¹ to be the plain
14 language of the applicable policy, QBE’s policy defines a “Covered Employee” as:

15 (a) Any natural person:

- 16 (1) While in your service (and for 30 days after termination of service);
17 and
18 (2) Whom you compensate directly by salary, wages or commissions;
19 and
20 (3) Whom you have the right to direct and control while performing
21 services for you.

22 See Dkt. 22-4 at Page 19.

23 As noted above, Sunrise’s Board Minutes from the February 17, 2016 Board of Directors
24 Meeting noted that Sunrise’s Secretary Morales oversaw Duslak and Sesman’s work. Furthermore,
25 the November 16, 2015 board minutes show that Duslak and Sesman were paid Holiday Bonuses. See
26

27
28

¹ Duslak and Sesman were only recently provided with a copy of what is alleged to be the applicable policy and cannot testify to its authenticity.

1 Dkt. 22-3 at Pages 19-20. Furthermore, minutes from the September 8, 2016 Sunrise Board of
2 Directors Meeting stated, under the hearing Richard Duslak, “Board unanimously agreed to terminate
3 the position of a onsite maintenance/poll man the board is in agreement that there is no longer a need
4 for this position therefore they are all in agreement to terminate Mr. Duslak.” This shows Duslak was
5 employed by Sunrise on August 27, 2016 and that Sunrise did not terminate him until at least
6 September 8, 2016, which was after August 27, 2016 when Russo was injured.

8 The degree of control which Sunrise exercised over Duslak and Sesman invariably results in a
9 finding that they were (1) in Sunrise’s service, and (2) compensated directly by Sunrise by salary,
10 wages or commissions; and that (3) Sunrise had the right to direct and control while performing
11 services for Sunrise. Duslak and Sesman, regardless of whether they were labeled as employees
12 (*though it appears undisputed that they were labeled as employees by Sunrise*) or whether they were
13 labeled as independent contractors (*which Sunrise attempted to do ex post facto during hearing before*
14 *the judge*), were covered employees under QBE and Sunrise’s insurance policy and QBE had an
15 obligation to defend them.

17 **d. Employment Status Has No Impact on the Underlying Judgment.**

18 It is ironic that QBE, who for years could not be bothered to support and protect their insured,
19 now is fighting to define their employment status in an ongoing attempt to avoid doing the right thing.

21 As a general principle of insurance law, QBE was legally obligated to defend its insured,
22 including its insured’s employees. Here, QBE was further obligated by contract to defend any
23 “Covered Employees”—regardless of their label under law, so long as Duslak and Sesman worked on
24 Sunrise’s behalf, were compensated by Sunrise, and if Sunrise could control/direct their labor. This
25 plain language properly results in Duslak and Sesman being found to be covered employees under the
26 contract. Moreover, Duslak and Sesman were employees by law.

28 ///

Case law is clear that labels, which an employer utilizes, have no significance in determining whether an individual is an independent contractor or an employee. In determining whether an individual is an employee under Federal Law, courts apply an “economic reality” test that evaluates the circumstances of the relationship in question to determine whether the putative employee is economically dependent upon the alleged employer. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). See also *Saleem v. Corp. Transportation Grp., Ltd.*, 854 F.3d 131, 139 (2d Cir. 2017) (*economic realities test is a “totality of the circumstances” test to determine “whether, as a matter of economic reality, the workers depend upon someone else’s business for the opportunity to render service or are in business for themselves.”*); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981) (*economic reality test asks “whether, as a matter of economic reality, the individuals ‘are dependent upon the business to which they render service.’”*) (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947)).

Courts in applying the “economic reality” test consider the following factors: (1) the degree of the alleged employer’s right to control the manner in which the work is to be performed; (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer’s business. *Real*, 603 F.2d at 754. “Neither the presence nor the absence of any individual factor is determinative.” *Donovan*, 656 F.2d at 1370. **Contractual labels and the subjective intent of the parties are not relevant factors in this analysis.** *Real*, 603 F.2d at 755 (Emphasis added). “When a disposition in either direction can be justified, the Court must err in favor of a broader reading of ‘employee.’” *Hanson v. Trop, Inc.*, 167 F.Supp.3d 1324, 1328 (N.D. Ga. 2016) (*citing Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1311 (5th Cir. 1976)).

1 Clearly, dismissal of Duslak's and Sesman's counterclaims is impossible at this point.
2 However, based upon the limited evidence already revealed in this case—summary judgment on the
3 issue of Duslak's and Sesman's employment status in their favor may not be far away. They are clearly
4 "employees" under guiding law. As such, even under the flawed logic of QBE's argument—that QBE
5 could retroactively agree with Russo to adjust the nature and description of Duslak's and Sesman's
6 employment, thus robbing Duslak and Sesman of recourse against QBE in this matter, fails as any
7 "agreement" by Sunrise and Russo is irrelevant to the Court's inquiry as to whether Duslak and
8 Sesman were employees.
9

10 Furthermore, any arguments relating to the description of Duslak's and Sesman's employment
11 is moot, as the \$25,000,000.00 judgement was actually entered against them. See Judgment, attached
12 hereto as **Exhibit "E."** The judgment is concrete and absolute. As with all final judgments, there is no
13 clause in the judgment which operates to make the judgment hypothetical, conditional, or which calls
14 for further investigation into Duslak's and/or Sesman's employment status. Rather, the Judgment was
15 entered against them individually and absolutely—all because QBE failed to defend and indemnify,
16 despite being obligated to do so by law and independently under their policy with Sunrise.
17

18 **e. Sunrise's Motion to Set Aside the Judgment in the Underlying Case Will Not**
19 **Succeed as it is Untimely and Lacks Merit.**

20 Duslak and Sesman were unaware of the \$25,000,000.00 Judgment until long after the deadline
21 to contest the Judgment had passed. On the other hand, QBE and Sunrise allowed Duslak and Sesman
22 to be defaulted, without a defense, in the underlying matter years ago. QBE and Sunrise were further
23 aware of the prove-up hearing wherein the judgment was finalized. Judgment was ultimately entered
24 against Duslak and Sesman in this matter on December 17, 2019, with notice of entry of the Judgment
25 being sent to all parties that same day. Sunrise filed its motion to set aside or amend the Judgment in
26 this matter on January 21, 2021, over thirteen (13) months after notice of entry of the December 17,
27
28

2019 Judgment. QBE's assertion that the Judgment may be set aside in the underlying matter is whimsical and not grounded in reality.

N.R.C.P. 60 notes:

(b) Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later. The time for filing the motion cannot be extended under Rule 6(b).

Certainly, on a preliminary note, there has been no showing that Sunrise even has standing to set aside a default entered against two (2) separate parties, particularly as Sunrise continues to legally dispute the relevant employment status of Duslak and Sesman. See Dkt. 28, at 3:24-27 and 4:1-26. However, should the Court in the underlying matter deign to consider that Sunrise could have standing to set aside a Judgment against Duslak and Sesman, it remains the case that Sunrise's Motion was filed thirteen (13) months after Judgment was entered.

As such, Sunrise is foreclosed from setting aside judgment for mistake, newly discovered evidence, or fraud. Likewise, Sunrise cannot argue that the judgment was satisfied, as it still exists and follows Duslak and Sesman.

Moreover, Sunrise cannot reasonably argue that the Judgment is void. This is an unwinnable presumption. First, Sunrise would still have to establish that their Motion was made in a "reasonable time"—which cannot be shown as they knew of the Judgment from the time it was entered. Then,

1 Sunrise would also have to show that the underlying Court had no personal or subject matter
2 jurisdiction to hear Russo's claims:

3 N.R.C.P. 60(b) provides that a district court may relieve a party from
4 a void final judgment, so long as a motion requesting such action is made within a
5 reasonable time. A final judgment is void when a "defect [exists] in the court's authority
6 to enter judgment through either lack of personal jurisdiction or jurisdiction over the
7 subject matter in the suit." *Gassett*, 111 Nev. at 1419, 906 P.2d at 261 (*concluding*
8 *that default judgment against a defendant was void because the original service was*
9 *defective*). If the judgment is not void, a motion to set aside a final judgment must be
10 filed "not more than 6 months after the proceeding was taken [*4] or the date that
11 written notice of entry of the judgment or order was served." N.R.C.P. 60(b). Here,
12 given that HSBC was properly served with the complaint, we find nothing in the record
13 to suggest that the default judgment was void. Therefore, HSBC's motion to vacate
14 the default judgment pursuant to N.R.C.P. 60(b) was untimely because it was not filed
15 within six months after notice of entry of the order of default judgment. As such, we
16 conclude that the district court abused its discretion when it set aside default and
17 vacated the default judgment against HSBC.

18 *Desert Valley Assocs. v. HSBC Bank USA*, No. 60846, 2013 Nev. Unpub. LEXIS 1961,
19 at *3-4 (Dec. 18, 2013).

20 Sunrise's Motion in the underlying matter is doomed to fail. The Judgment will not be swept
21 away by the Court as Sunrise waited far too long to ask to set it aside and cannot show that the Court
22 lacked jurisdiction to hear Russo's claims.

23 Moreover, at all times Sunrise and QBE had all of the information in their possession necessary
24 to know that Duslak and Sesman were Sunrise employees and that it was their duty to protect Duslak
25 and Sesman. Nevertheless, QBE and Sunrise chose to let Duslak's and Sesman's lives to be financially
26 ruined through a \$25,000,000.00 Judgment. QBE's and Sunrise's far-too-late effort to lift the
27 Judgment now does not appear an honest effort to fix a wrong. Rather, QBE and Sunrise appear to
28 simply be creating an appearance of caring, but only because Duslak and Sesman are now seeking
justice in response to QBE's lawsuit against them.

Numerous avenues of discovery must be fully traversed before QBE's Motion could ever be
granted. Duslak and Sesman should be allowed to depose Sunrise employees and Sunrise's 30(b)(6)
representatives regarding employment, why Sunrise did not do its duty as Duslak's and Sesman's

1 employer, and why Sunrise chose to engage with QBE and others to create the false narrative that
2 Duslak and Sesman were not employees. Deposition of QBE's 30(b)(6) representatives and claims
3 handlers must go forward to determine whether QBE knew of their status as "covered employees."
4 Further discovery inquiries into QBE's case files and Sunrise's employee files must be undertaken.
5 QBE asks the court to merely take their word—despite the numerous factual discrepancies and logical
6 fallacies noted above and below. These facts all exist outside of Duslak and Sesman's Complaint and
7 must be explored through discovery. As such, QBE's Motion must be DENIED.

9 II. LEGAL ARGUMENT AND ANALYSIS

10 A. Legal Standard.

11 A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove
12 no set of facts in support of the claim that would entitle the plaintiff to relief. *Sprewell v. Golden State*
13 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), opinion amended on denial of reh'g, 275 F.3d 1187 (9th
14 Cir. 2001); see also *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir.1999). A properly pled complaint
15 must provide "[a] short and plain statement of the claim showing that the pleader is entitled to relief."
16 Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

17 The Court must accept as true all of the factual allegations contained in the complaint.
18 *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1, 122 S. Ct. 992, 995 (2002). A well-pleaded
19 complaint may proceed even if it strikes a judge that actual proof of those facts is improbable, although
20 a recovery is very remote and unlikely. *Id.*

21 There is a strong presumption against dismissing an action for failure to state a
22 claim. See *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir.1997). The court should not grant
23 a motion to dismiss "for failure to state a claim unless it appears beyond doubt that the plaintiff can
24 prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355
25 U.S. 41, 45–46 (1957); see also *Hicks v. Small*, 69 F.3d 967, 969 (9th Cir.1995). A claim is sufficient
26
27
28

1 if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint
2 asserts the wrong legal theory or asks for improper relief. See *United States v. Howell*, 318 F.2d 162,
3 166 (9th Cir.1963).

4 **B. QBE's Motion to Dismiss Fails as it Relies on Facts Outside the Four Corners of the**
5 **Complaint.**

6 **a. The Factual Allegations in Duslak and Sesman's Counterclaims Defeat a**
7 **Motion to Dismiss as they Must be Accepted as True**

8 In determining whether to dismiss a complaint, the Court must "accept as true all of the factual
9 allegations contained in the complaint." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1, 122 S.
10 Ct. 992, 995 (2002). As such, the allegations plead in Duslak and Sesman's counterclaim clearly
11 demonstrate that there is no merit to QBE's motion to dismiss.

12
13 The four corners of Duslak and Sesman's counterclaim allege the following facts, which must
14 be accepted as true by the court. Namely:

15 7. At all times relevant to this action, SUNRISE was a business organization, form
16 unknown, which employed RICHARD and JUSTIN and held a policy for insurance
17 sold by QBE and/or CAU, which covered SUNRISE's employees, including
18 RICHARD and JUSTIN. See *Dkt. 13*, at Page 10:23-26.

19
20 12. That QBE and/or CAU, and each of them, issued policy number CAU234378-1,
21 covering named insured SUNRISE (including employees acting in the course and
22 scope of their employment), and "Covered Employees" as defined in said policy, which
23 policy insured SUNRISE's "Covered Employees", as defined in the said policy, and
24 others and covered SUNRISE's "Covered Employees", and others, for the losses
25 RUSSO alleged he suffered in Case No. A-17-753606-C. See Exhibit "2". That
26 pursuant to the policy of insurance, QBE and/or CAU, and each of them, retained
27 counsel to defend SUNRISE in Case No. A-17- 753606-C.
28

- 1 13. At all relevant times related to the August 27, 2016 incident, RICHARD and JUSTIN
- 2 were agents, employees, and/or assigns of SUNRISE and were contractually, legally,
- 3 equitably, and/or otherwise insureds by SUNRISE, and/or QBE, and/or CAU, and/or
- 4 DOES I through X, and/or ROE BUSINESS ENTITIES I through X, and each of them.
- 5
- 6 14. Prior to the subject incident and for some time thereafter, SUNRISE paid RICHARD
- 7 and JUSTIN for work.
- 8
- 9 15. Prior to the subject incident and for some time thereafter, SUNRISE paid RICHARD
- 10 as an onsite maintenance / pool man.
- 11
- 12 16. Prior to the August 27, 2016 incident, there were times when Secretary John Morales
- 13 of SUNRISE's board oversaw work performed by RICHARD and JUSTIN.
- 14
- 15 17. Prior to the August 27, 2016 incident, there were times when Secretary John Morales
- 16 of SUNRISE's board would inspect the work performed by RICHARD and JUSTIN,
- 17 provide corrective feedback and direction regarding how RICHARD and JUSTIN
- 18 could better perform their work, and assign projects for RICHARD and JUSTIN to
- 19 work on.
- 20
- 21 18. At all relevant times during their working relationship with SUNRISE, SUNRISE
- 22 provided RICHARD and JUSTIN with an hourly work schedule.
- 23
- 24 19. At all relevant times during their working relationship with SUNRISE, the amount
- 25 SUNRISE paid RICHARD and JUSTIN was entirely based on hours worked and the
- 26 hourly wage.
- 27
- 28 20. At all relevant times during their working relationship with SUNRISE, SUNRISE
- actually paid RICHARD and JUSTIN all wages owed based on the hours RICHARD
- and JUSTIN worked.

///

- 1 21. At all relevant times during their working relationship with SUNRISE, the tasks
2 assigned to RICHARD and JUSTIN were assigned by SUNRISE or by a member of
3 SUNRISE's board.
- 4 22. At all relevant times during their working relationship with SUNRISE, SUNRISE had
5 the discretion to choose the manner in which RICHARD and JUSTIN were to perform
6 their work for SUNRISE, if SUNRISE chose to do so.
- 7 23. At all relevant times during their working relationship with SUNRISE, all equipment
8 and materials for tasks to be performed by RICHARD and JUSTIN were provided by
9 SUNRISE; RICHARD and JUSTIN were not required to provide their own equipment
10 or materials.
- 11 24. At all relevant times during their working relationship with SUNRISE, all equipment
12 for lawncare, property maintenance and pool maintenance was provided by SUNRISE.
13 Further, SUNRISE paid RICHARD a monthly payment for RICHARD's cell phone
14 bill.
- 15 25. At all relevant times during their working relationship with SUNRISE, SUNRISE did
16 not require RICHARD or JUSTIN to have special skills beyond those of maintenance
17 persons; rather, the tasks assigned were simple tasks that one would expect an onsite
18 maintenance man or pool man to be able to perform.
- 19 27. At all relevant times during their working relationship with SUNRISE, RICHARD and
20 JUSTIN were provided a relatively consistent work schedule during which time
21 RICHARD and JUSTIN were expected to be working for SUNRISE.
- 22 28. At all relevant times during their working relationship with SUNRISE, RICHARD and
23 JUSTIN were considered employees by SUNRISE for tax purposes and were provided
24 a W-2 by SUNRISE.
- 25
26
27
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1 29. At all relevant times during their working relationship with SUNRISE, RICHARD and
2 JUSTIN provided work for SUNRISE, which SUNRISE was required to provide
3 according to their agreement with the homeowners in the association.

4 30. At all relevant times during their working relationship with SUNRISE, RICHARD and
5 JUSTIN provided work for the association and the work provided included
6 maintenance of property, which SUNRISE was required to provide under the
7 homeowner association's bylaws.

8 31. At all relevant times during their working relationship with SUNRISE, SUNRISE
9 never required that RICHARD or JUSTIN hold a business license.

10 32. At all relevant times during their working relationship with SUNRISE, the previously
11 identified policy of insurance from QBE and/or CAU was in effect.

12 33. At all relevant times during their working relationship with SUNRISE, SUNRISE
13 referred to RICHARD and JUSTIN as employees.

14 34. At all relevant times during their working relationship with SUNRISE, RICHARD and
15 JUSTIN were never referred to in writing by SUNRISE as independent contractors.

16 35. At all relevant times during their working relationship with SUNRISE, RICHARD and
17 JUSTIN were considered SUNRISE employees for purposes of the QBE insurance
18 policy.

19 *Id.* at Page 12:1-14:27.

20 Based upon these factual allegations properly contained in Duslak and Sesman's Complaint,
21 the Court is constrained to consider at this juncture that these items are settled, that Duslak and Sesman
22 were employees of Sunrise and that they were covered under the QBE policy.

23 Furthermore, the Counterclaim alleges that a judgment was made against Duslak and Sesman,
24 and that no action was taken to analyze whether they were covered:

1 82. That because QBE, CAU and SUNRISE, and each of them, did not defend RICHARD
2 and JUSTIN despite being aware of the lawsuit, and being aware that default had been
3 taken against QBE's insureds, on December 17, 2019, the court in Case No. A-17-
4 753606-C entered Judgment against RICHARD and JUSTIN in the amount of
5 \$25,000,000.00, which accrues interest at the statutory rate until paid in full. See Exhibit
6 "11". That Notice of Entry of the said Judgment was filed on December 17, 2019. See
7 Exhibit "12".
8

9 83. Prior to judgment being entered against RICHARD and JUSTIN, no action or attempt
10 otherwise to seek or procure Declaratory Relief as to the issue of insurance coverage
11 was brought by the QBE, CAU and SUNRISE, and each of them, or the DOE and ROE
12 Third Party Defendants, or any of them.
13

14 *Id.* at 24:17-28.

15 QBE's Motion to Dismiss, if considered to be a Motion to Dismiss, is thus defeated because it
16 rests upon factual allegations which are diametrically opposed to those noted in Duslak and Sesman's
17 Counterclaim. Duslak and Sesman allege that they were employed by Sunrise and that QBE was
18 obligated to mount a defense for them, which they failed to do. Furthermore, Duslak and Sesman
19 allege that they had a judgment ordered against them that was not subject to any hypothetical outcome
20 of whether they were employees or independent contractors. In fact, the Counterclaim alleges that this
21 inquiry was NEVER made by QBE or Sunrise.
22

23 As such, based upon these facts which the Court must accept as true, the Motion to Dismiss
24 cannot be granted in QBE's favor.
25

26 ///

27 ///

28 ///

b. If the Court Converts QBE's Improperly Filed "Motion to Dismiss" into a "Motion for Summary Judgment"—no Judgment can be Made in QBE's Favor as the Facts Contradict QBE's Claims, Including the Nature of the Settlement Agreement and the Employment Status of Duslak and Sesman

As noted above, QBE improperly brought a "Motion to Dismiss" which relied wholly upon numerous unverified "facts"—albeit "facts" which are directly contradicted by testimony on the record, the release itself, and by Sunrise's own Interrogatories in the underlying matter-- outside of Duslak and Sesman's Counterclaims. The Ninth Circuit has noted that when this occurs, then their Motion to Dismiss must be converted into a Motion for Summary Judgment:

Rule 12(b)(6) provides that when a defendant raises the defense of failure to state a claim upon which relief can be granted and "matters outside the pleading 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.*"

Garaux v. Pulley, 739 F.2d 437, 438 (9th Cir. 1984).

It should be noted that QBE brings this motion before Discovery has begun in earnest. There are still numerous facts—nearly all—left to be discovered. QBE has argued, without offering the opportunity for Duslak and Sesman to vet the evidence, that an agreement was forged by two (2) parties with no legal authority to contract for Duslak and Sesman, excusing them from liability.

Yet, even before Discovery has begun, there is voluminous pieces of evidence showing a lack of candor and credibility in QBE's argument. This evidence contradicts QBE's specious arguments and creates a genuine issue of material fact for the Court to consider.

In addition to the evidence outlined above and below—the testimony by counsel on the record, the interrogatories served by Sunrise calling Duslak and Sesman employees, the Board's minutes noting the employment and payment status of the two individuals, and the agreement itself—Counsel for Dr. Russo in the underlying matter, David Sampson, Esq. has submitted a sworn affidavit

1 contradicting the various arguments propounded by QBE without corroboration. See Mr. Sampson's
2 Affidavit, attached hereto as **Exhibit "F."**

3 **In his affidavit, Mr. Sampson notes:**

4 4. At no time has SIMONE ever agreed to release DUSLAK and/or SESMAN from any
5 liability for the Judgment that was duly entered in Case No. A-753606-C under any
6 circumstances. There was an agreement that, for purposes of the said litigation
7 DUSLAK and SESMAN were independent contractors, which was based on SUNRISE
8 VILLAS representations to me and to the Court that DUSLAK and SESMAN were not
9 SUNRISE's employees but instead were independent contractors. There was never any
10 agreement to release DUSLAK and/or SESMAN as employees, and there has never
11 been any agreement to release DUSLAK and/or SESMAN if it turned out that SUNRISE
12 was incorrect in what it had represented to me and the Court about DUSLAK and
13 SESMAN being independent contractors.

14 5. I made multiple statements on the record in Case No. A-I 7-753606-C that SIMONE
15 was not releasing and would not be releasing DUSLAK or SESMAN to any degree in
16 Case No. A-17-753606-C, and that the settlement with the active parties in Case No. A-
17 17-753606 would have no affect on any of SIMONE's rights against DUSLAK or
18 SESMAN. SUNRISE and the other active parties agreed DUSLAK and SESMAN were
19 not released to any degree.

20 6. The release in Case No. A-17-753606-C does not release DUSLAK or SESMAN to
21 any degree. Instead, the release states that SUNRISE is released **"EXCLUDING
22 RICHARD DUSLAK AND/OR JUSTIN SESMAN"**. (emphasis in original). The
23 release does not include SUNRISE employees as releasees. In identifying the released
24 Defendants, the release states it releases Defendants' "employees **EXCLUDING
25 RICHARD DUSLAK AND/OR JUSTIN SESMAN ...**". (emphasis in original). The
26 release also states "PLAINTIFF [RUSSO] shall retain ***all rights*** to pursue ***any claims***
27 against RICHARD DUSLAK and/or JUSTIN SESMAN". (emphasis added). The
28 release further confirmed, "ANY LANGUAGE IN THIS RELEASE THAT IS
CONTRARY TO THE LANGUAGE OF THIS SPECIFIC PARAGRAPH, AND/OR
ANY LANGUAGE THAT WOULD BE READ TO IN ANY WAY IMPACT
PLAINTIFF'S RIGHTS AGAINST RICHARD DUSLAK and/or JUSTIN SESMAN
... SHALL BE DEEMED NULL AND VOID." *Id* (Emphasis in original).

29 This contradiction, point by point, of the arguments lodged by QBE can, at best, result in this
30 issue being a disputed, unsettled, genuine issue of material fact. Furthermore, by scouring hearings,
31 statements and settlement documents made by Mr. Sampson and Mr. Fink, it is apparent that QBE
32 lacks candor regarding the purported release as there was **no agreement** made by the parties to excuse
33 Duslak and Sesman from judgment. The Order itself does not excuse Duslak and Sesman from liability
34 for the judgment in any case—regardless of their employment status as either Sunrise employees or

1 independent contractors. So, while it may be the case that this topic lacks any need of further discovery
2 due to it being so clearly established against QBE's claims to the contrary, it remains clear that QBE's
3 requests associated with the purported release are not justified.

4 At a minimum, if QBE's illogical, uncorroborated argument have not been sufficiently
5 debunked to the Court's satisfaction, more time should be granted to, at a minimum, continue to
6 investigate this issue. There are numerous avenues to explore Duslak's and Sesman's employment
7 roles—but they require discovery and deposition of QBE and Sunrise's 30(b)(6) representatives, other
8 Sunrise and QBE employees, as well as discovery into Sunrise's employment files, and QBE's claims
9 file. This is not "mere hope" or "whimsy" by Duslak and Sesman at escaping a Motion to
10 Dismiss/Motion for Summary Judgment—but rather, it is Duslak and Sesman's good faith belief that
11 they are employees and are unfortunately subject to this judgment, and that both QBE and SUNRISE
12 failed in their obligations in the underlying matter.

13
14
15 **C. QBE's Motion Lacks Substantive Merit.**

16 **a. There was no Stipulation between Russo and Sunrise to Excuse Duslak and**
17 **Sesman from Liability.**

18 Ignoring the specious logic of QBE—that Russo and Sunrise could make a gentlemen's
19 agreement to contract away liability for two (2) individuals who never made an appearance before the
20 Court and who neither party had power of attorney over—there exists a dearth of evidence that Russo
21 ever agreed to excuse Duslak and Sesman from liability. It is difficult to believe QBE could even make
22 such an argument with a straight face, given the complete lack of corroborating evidence.

23
24 Conversely, the record is replete with references from both Mr. Fink and Mr. Sampson, counsel
25 for Sunrise and Russo, respectively, that Russo would be allowed to pursue Judgment against Duslak
26 and Sesman after the underlying settlement of the remaining parties. See Exhibits A and B.

27 Even the very language of the "release" notes that Duslak and Sesman were NOT excluded
28 from liability. See Exhibit C.

Moreover, as is the case with final Judgments as a rule, the Judgment in the underlying case does not detail any conditional “if/then” language to limit the Judgment beyond the individuals named therein. The Judgment was concretely entered by the State District Court thirteen (13) months ago—it still stands and Duslak and Sesman are obligated to pay the Judgment due to QBE’s refusal to represent them. As such, QBE’s Motion is inherently faulty. There was never any agreement to excuse Duslak and Sesman from liability. Thus, QBE’s Motion must be DENIED.

b. Duslak and Sesman were Acknowledged Employees of Sunrise.

QBE’s argument that there was a stipulation also rests upon the presumption that Duslak and Sesman were independent contractors, not employees. This flies in the face of interrogatory answers given by Sunrise, which admitted that they “employed” Duslak and Sesman. Furthermore, board minutes noted that Duslak and Sesman were paid directly by Sunrise, controlled by Sunrise’s Board, and ultimately fired by Sunrise. QBE’s motion, which already fails because there was no agreement between the parties, fails again, as there is every indication that Duslak and Sesman were employees, not Independent Contractors.

c. Duslak and Sesman were “Covered Employees” under the Policy.

Even should the Court ignore Sunrise’s categorization of Duslak and Sesman as “Employees” in their interrogatory answers and Board Minutes—then the Court may look to the nature of their employment and the plain language of the QBE/Sunrise Policy. As noted above, QBE was obligated to provide coverage for any and all “Covered Employees” which were defined as:

(a) Any natural person:

(1) While in your service (and for 30 days after termination of service); and (2) Whom you compensate directly by salary, wages or commissions; and (3) Whom you have the right to direct and control while performing services for you.

See Dkt. 22-4, Pg. 19.

///

1 The Sunrise interrogatory responses and board minutes demonstrate that Duslak and Sesman
2 worked in service of Sunrise, were controlled by Sunrise, paid by Sunrise, and fired by Sunrise.

3 Based upon this plain language, regardless of whatever label Russo and Sunrise chose to use
4 in their release, Duslak and Sesman are properly found to be “Covered Employees” under QBE’s own
5 definition of their work.
6

7 **d. Under Controlling Federal Law, the Economic Realities Test Determines**
8 **Whether Duslak and Sesman were Employees; Labels by QBE/Sunrise/Russo**
9 **are Irrelevant.**

10 As this Court is well aware, Courts do not rely upon internal labels to determine if a worker is
11 an employee, or an independent contractor. Rather, Courts utilize the Economic Realities Test to
12 measure an individual’s employment status.

13 Courts in applying the “economic reality” test consider the following factors: (1) the degree of
14 the alleged employer’s right to control the manner in which the work is to be performed; (2) the alleged
15 employee’s opportunity for profit or loss depending upon his managerial skill; (3) the alleged
16 employee’s investment in equipment or materials required for his task, or his employment of helpers;
17 (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working
18 relationship; and (6) whether the service rendered is an integral part of the alleged employer’s
19 business. *Real*, 603 F.2d at 754. “Neither the presence nor the absence of any individual factor is
20 determinative.” *Donovan*, 656 F.2d at 1370. **Contractual labels and the subjective intent of the**
21 **parties are not relevant factors in this analysis.** *Real*, 603 F.2d at 755. “When a disposition in either
22 direction can be justified, the Court must err in favor of a broader reading of ‘employee.’” *Hanson v.*
23 *Trop, Inc.*, 167 F.Supp.3d 1324, 1328 (N.D. Ga. 2016) (citing *Usery v. Pilgrim Equip. Co., Inc.*, 527
24 F.2d 1308, 1311 (5th Cir. 1976).
25
26

27 Should the Court ignore the lack of any agreement to excuse Duslak and Sesman from liability,
28 at a minimum, QBE’s Motion warrants discovery into the employment relationship of Duslak and

1 Sesman to Sunrise. An exploration of the degree of control may be unnecessary as the Court may look
2 to the Board's Minutes and take notice of the control exerted by Sunrise over Duslak and Sesman.
3 Should the Court need further evidence of Duslak and Sesman's working environment—this may only
4 be obtained through discovery. Such an exploration necessarily defeats QBE's Motion to Dismiss on
5 this matter.
6

7 **e. The Underlying Default will not be Set Aside.**

8 QBE argues that Sunrise will successfully have the Judgment set aside. Such an argument
9 ignores the law and facts at issue.

10 First, Sunrise has no standing to have a default judgment set aside as it involves two (2)
11 separate parties. Second, Sunrise sat on their hands for thirteen (13) months after they knew that a
12 default judgment had been ordered against Duslak and Sesman. Any opportunity to lift the judgment
13 under N.R.C.P. 60 was cut off at least seven (7) months ago. Third, Sunrise's argument that the
14 Judgment is "void" is a fool's errand. Judgments are void only when the Court entering final Judgment
15 lacks personal or subject matter jurisdiction, which Sunrise is not even arguing in their motion.
16 Moreover, Sunrise would further have to establish that their motion was filed in a "reasonable time,"
17 which clear is not the case. A such it is clear that there is no legal basis to grant Sunrise's Motion to
18 Set Aside the Default Judgment in the underlying matter.
19
20

21 ///

22 ///

23 ///

24 ///

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26 ///

27 ///

28 ///

CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5, I hereby certify that I am an employee of **BIGHORN LAW**, and on the 8th day of February, 2021, I served a copy of the foregoing ***RESPONSE TO PLAINTIFF'S/COUNTER-DEFENDANT'S MOTION TO DISMISS*** as follows:

☒ Electronic Service – By serving a copy thereof through the Court's electronic service system; and/or

☐ U.S. Mail – By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below:

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An employee of **BIGHORN LAW**

EXHIBIT “A”

1 CASE NO. A-17-753606-C

2 DOCKET U

3 DEPT. XVI

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5

6

DISTRICT COURT

7

CLARK COUNTY, NEVADA

8

* * * * *

9 SIMONE RUSSO,

10 Plaintiff,

11 vs.

12 COX COMMUNICATIONS LAS VEGAS,

13 Defendant.

14

REPORTER'S TRANSCRIPT
OF
MOTIONS

15

16

17 BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

18

DISTRICT COURT JUDGE

19

20 DATED FRIDAY, OCTOBER 18, 2019

21

22

23

24

25 REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

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1 LAS VEGAS, NEVADA; FRIDAY, OCTOBER 18, 2019

2 9:09 A.M.

3 P R O C E E D I N G S

4 * * * * *

5
6 THE COURT: All right. Good morning. Let's
7 go ahead and place our appearances for the record.

8 MS. SAMPSON: David Sampson for Dr. Russo.

9 MR. FINK: Good morning, your Honor. Leonard
09:09:55 10 Fink for Sunrise Villas IX HOA.

11 MR. TURTZO: Good morning, your Honor.
12 Christopher Turtzo for IES Residential and Cox
13 Communications Las Vegas.

14 MR. MELORIO: Good morning, your Honor.
09:10:04 15 Joseph Meloro for Kevin Bushbaker.

16 MS. FUNAI: Good morning, your Honor. Julie
17 Funai on behalf of the defendant Chris Scarcelli.

18 MR. CLARK: And good morning, your Honor.
19 David Clark on behalf of the defendant Chris Scarcelli.

09:10:16 20 THE COURT: All right. Once again good
21 morning. I see there's one matter on calendar this
22 morning. But did we come to some sort of resolution
23 that would make the issue moot; do we know?

24 MR. FINK: Your Honor, we have -- as of last
09:10:26 25 night about 4:30 4:45, we have a global settlement

09:10:30 1 involving all the parties that are involved.

2 THE COURT: All right. That makes it moot,
3 right?

4 MR. FINK: Well, we still need to have the
09:10:35 5 Court determine the settlement is in good-faith --

6 THE COURT: I understand.

7 MR. FINK: -- because of the further actions
8 Mr. Sampson is going to take against the defaulted
9 parties.

09:10:42 10 THE COURT: I know you agree.

11 MS. SAMPSON: I do. And I think Mr. Fink said
12 it correctly, but I wanted to make sure it was on the
13 record that, yes, it's against all parties that
14 answered and are currently involved.

09:10:49 15 THE COURT: In this case.

16 MS. SAMPSON: Well, there are two other
17 parties in this case who have been defaulted that we're
18 still -- **this settlement does not affect them**, which is
19 the purpose of the good faith.

09:10:56 20 MR. FINK: And it will also include PW James.

21 MS. SAMPSON: Correct. That is correct.

22 MR. CLARK: I guess --

23 THE COURT: Mr. Clark, sir.

24 MR. CLARK: I guess for the record, your

09:11:06 25 Honor, we would join in the global settlement. I would

09:11:09 1 make an oral motion as a joinder to the motion for
2 good-faith settlement.

3 THE COURT: Okay. Mr. Meloro.

4 MR. MELORIO: We join as well for the
09:11:17 5 good-faith settlement.

6 THE COURT: Okay. And I just want to make
7 sure the record is very clear in this regard. I've had
8 an opportunity to review the motion for good-faith
9 settlement. And notwithstanding the fact there's no
09:11:31 10 opposition, based upon the current status of Nevada
11 law, and NRS 17.245, all the case law specifically
12 interpreting the statute including Velsicol, MGM
13 factors, and the like, it clearly meets that.

14 I also included -- I also considered the
09:11:58 15 liability permutations. I think that's in Velsicol and
16 so on. And especially under the facts of this case,
17 there's no question this is good faith. I can say that
18 with no doubt.

19 So as far as the motion of good-faith
09:12:12 20 settlement and reflecting the global settlement of the
21 parties to this case that have actively litigated, I'm
22 granting that motion.

23 MR. FINK: That would also be including PW
24 James?

09:12:23 25 THE COURT: Yes, sir.

09:12:24 1 MR. FINK: Thank you, your Honor.

2 MS. SAMPSON: Ones that are actively litigated

3 and PW James.

4 THE COURT: Yes.

09:12:30 5 MR. TURTZO: Maybe out of the abundance of

6 caution given how long --

7 THE COURT: Mr. Turtzo, go ahead.

8 MR. TURTZO: -- it's taken to get to this

9 point, I think we ought to make sure we have a clear

09:12:40 10 record of we put material terms of the partial

11 settlement on the record on Wednesday. Now we've got

12 some two additional parties joining in. I think unless

13 anybody disagrees, it would be good to just

14 re-kind-of-confirm exactly what the additional

09:12:57 15 settlement terms are.

16 MR. FINK: Agreed.

17 MR. TURTZO: Okay.

18 MS. SAMPSON: No objection.

19 MR. TURTZO: As far as I understand it, so the

09:13:04 20 settlement payment to the plaintiff is not -- has not

21 changed. That's still the amount that was put on the

22 record \$355 thousand. It's being funded by insurance

23 carriers on behalf of Cox and IES Residential and

24 Sunrise Villas IX.

09:13:21 25 And then additionally parties receiving a

09:13:24 1 release from the plaintiff include IES Residential, Cox
2 Communications, the Sunrise HOA, PW James, and now
3 defendant Chris Scarcelli and defendant Kevin Bushbaker
4 will also be released as part of that settlement. The
09:13:42 5 plaintiff is releasing his claims against them.

6 In addition, all of the parties that I just
7 named are releasing any current or future cross-claims
8 for equitable indemnity, contribution, or otherwise.
9 All currently alleged or potential cross-claims amongst
09:14:03 10 those parties only are being released as part of the
11 global settlement.

12 MR. FINK: Including any current claims for
13 fees and costs by anyone that's currently involved in
14 the case.

09:14:14 15 MR. CLARK: That's the part I was going to
16 say.

17 THE COURT: Everyone agree.

18 MR. CLARK: Agreed.

19 MR. MELORIO: Yes, your Honor.

09:14:22 20 THE COURT: Great job, Mr. Turtzo.

21 MR. TURTZO: And as before, the settlement
22 will be reduced to a settlement agreement and release.
23 One thing that we didn't state on Wednesday is the
24 plaintiff will be responsible for satisfaction of any
09:14:32 25 liens as typical in settlement of any personal injury

09:14:35 1 action.

2 THE COURT: I understand.

3 Is that correct, Mr. Sampson?

4 MS. SAMPSON: That's correct. And that's the

09:14:38 5 only other thing I would ask is again that the

6 agreement, any document that's generated: One, I'd

7 like to have that document generated as soon as

8 possible. I recommended perhaps next Tuesday since

9 everyone seemed to have their schedule booked out today

09:14:55 10 and Monday for trial, we ought to have plenty of time

11 to draft a release. But whatever documents they want

12 drafted, if I could have that the sooner the better. I

13 don't want to wait two, three weeks for it. Because

14 one of the -- one of the things I was able to utilize

09:15:10 15 to -- for and my client relied upon to agree to the

16 settlement was that he would get his money in

17 relatively short order. I think we talked about two

18 weeks from when he signs the documentation.

19 I certainly wouldn't hold it as a material

09:15:24 20 term if it took three weeks, but I don't want to wait

21 three weeks for the release and then three more weeks

22 for the check. That kind of thing. So I just want to

23 get it done in short order.

24 And then that the terms of whatever documents

09:15:35 25 we sign or that my client has asked to sign comport

09:15:39 1 with what was discussed Wednesday, and what's being
2 discussed today, and no new terms, and those types of
3 things. And, I guess, most of all that nothing in any
4 of these releases or any of the settlement effects -- I
09:15:52 5 apologize.

6 THE MARSHAL: That's all right.

7 MS. SAMPSON: Affects any rights Dr. Russo may
8 have against any person or entity related to the claims
9 of the two individuals who have been defaulted, and any
09:16:04 10 claims that they may have against anybody would not be
11 affected by this settlement. So as long as we're clear
12 on all of that.

13 MR. FINK: I'm sorry. The last clause, that
14 they would have...

09:16:13 15 MS. SAMPSON: That they would have against --

16 MR. FINK: Not against --

17 MS. SAMPSON: Obviously, not for contribution
18 against a party.

19 THE COURT: And/or equitable indemnity.

09:16:19 20 MR. CLARK: Right.

21 MR. FINK: Right.

22 MR. TURTZO: Right.

23 MR. FINK: Between Mr. Turtzo and I, we'll
24 work out getting the settlement agreement done.

09:16:26 25 MR. TURTZO: Yes.

09:16:26 1 THE COURT: And I think they understand,
2 Mr. Sampson, time is of the essence. In fact, it's
3 okay if you turn your phones on again.

4 Anyway, is there anything else I can help you
09:16:37 5 with?

6 MR. FINK: No, Judge. I know that we were
7 waiting, obviously, to have a jury come in, and so we
8 could dismiss the jury. My only question is we had one
9 juror who wasn't going to be here until I think 10:30
09:16:48 10 or 11:00 o'clock because of, I think, a dental --

11 MR. CLARK: Doctor's appointment.

12 THE COURT: Doctor's appointment.

13 MR. FINK: Doctor's appointment.

14 THE COURT: And we'll deal with him. You
09:16:53 15 don't have to wait for him.

16 MR. FINK: We don't have to wait for them.

17 THE COURT: No, no, no. You don't have to
18 wait for them.

19 And just as important too, if you want to
09:16:59 20 wait, you probably should because we're going to bring
21 the panel in. I'm going to explain to them the impact
22 of service, and it doesn't always result in a verdict;
23 right? For example, if they didn't come down here
24 today, this case would not be resolved, and served;
09:17:13 25 right?

09:17:13 1

MR. FINK: Right.

2

THE COURT: I mean, really. That's just kind

3

of how it is. It is all part of the process. And I

4

want to explain to them because I don't want them to

09:17:21 5

walk away with a bad taste saying they wasted their

6

time coming down to the courthouse. They didn't. And

7

the days they've spent, what was it five days? Is it

8

five days? Four days?

9

MR. FINK: It's been a week.

09:17:32 10

THE COURT: Yeah. I mean, that's as important

11

as sitting through October 31 because ultimately it

12

resulted in a resolution. And I'll explain all that to

13

them.

14

MR. FINK: And in these circumstances I

09:17:44 15

usually like to be around to offer any answer to any

16

questions about the process we're doing. So that's

17

something I think that's important for us.

18

THE COURT: You can stay here. If they want

19

to talk, some of them will talk. I'm going to tell you

09:17:53 20

this, I anticipate they'll be very pleased.

21

MR. FINK: I think.

22

MS. SAMPSON: Ms. Erickson will be very

23

pleased.

24

THE COURT: Yes. They'll be very pleased.

09:18:00 25

But, yeah, that's what we'll do. And so we

09:18:02 1 won't tell them anything.

2 And at 9:30, line them up, Mr. Marshal.

3 THE MARSHAL: Yes, your Honor.

4 THE COURT: We'll bring them in. And I'll
09:18:10 5 talk to them for a little bit and explain to them what
6 happened. And I'll explain how that's part of the
7 process. And let them know. And there's no question
8 about this, if they wouldn't have served, I mean,
9 people aren't willing to serve, we can't have trials.

09:18:26 10 We can't have resolution. And this is actually a
11 better resolution because there's no appeals. It's
12 final; right?

13 MS. SAMPSON: That's right.

14 THE COURT: So anyway...

09:18:35 15 MR. TURTZO: We will submit -- I guess, we're
16 still on the record; correct?

17 THE COURT: Yes.

18 MR. TURTZO: To be clear on the motion for
19 good-faith settlement, Mr. Scarcelli and Mr. Bushbaker
09:18:44 20 orally join in the motion; correct?

21 MR. CLARK: Correct.

22 MR. TURTZO: And so when we submit the order
23 to the Court what we will do is we will reflect the
24 relief -- if it's acceptable to the Court we will --
09:18:55 25 the order will not include the summary judgment request

09:18:59 1 or dismissal of cross-claims. It will instead indicate
2 the parties have agreed to release all such claims, and
3 it will simply be a standard good-faith settlement
4 determination including Mr. Scarcelli and Mr. Bushbaker
09:19:13 5 as well if that's acceptable.

6 THE COURT: There's acceptable. Because, I
7 mean, those are the facts.

8 MR. TURTZO: And we will circulate that order
9 to everybody, obviously, to get input.

09:19:24 10 MR. CLARK: Yes.

11 MR. TURTZO: We will have it ready. And we'll
12 submit. But I just want to make sure in terms of the
13 good-faith settlement it will include those parties as
14 well, and we'll amend the proposed relief accordingly.

09:19:33 15 THE COURT: And, Mr. Turtzo, I appreciate the
16 details because details do matter as you know.

17 And last, but not least, as far as that's
18 concerned I'm going to be here all next week. So just
19 like the order shortening time, you're not --

09:19:46 20 MS. SAMPSON: I'd like to know. We'd like to
21 do a request to get our default prove-up set against
22 with the defaulted parties as quickly as we can. So
23 that's one thing I was thinking.

24 THE COURT: Here's the thing, you have to
09:19:57 25 understand this, I can't circumvent due process.

09:20:00 1

MS. SAMPSON: No.

2

THE COURT: So you have to do the application
and prove up. And there is a reason for that. Because
at the end of the day what it does, it saves people a

09:20:06 5

lot of time. It does. Because one of -- I mean, I
don't mind differences of opinions in this regard where
I might decide an issue on the merits, and the Supreme
Court might disagree with the merits of whatever
decision I make.

09:20:23 10

However, I'm not going to get reversed based
upon due process issue and notice issue. It's not
going to happen. It just isn't. Because that's so
obvious. You can take care of that before it occurs.

14

09:20:42 15

Because you have to go through the steps, you
know. And that's part of the process. And I have a
lot of faith in the process. I really and truly do.

17

THE COURT CLERK: Your Honor.

18

THE COURT: All I'm saying is this, if you get
that to me Monday, I'll be here. You get it to me

09:20:55 20

Tuesday, I'll be here. I'm here all next week. And
just like I was here last night waiting for the order
shortening time to come through.

23

MR. TURTZO: Yes, I want to say on the record
we really appreciate that to the Court and all the --

09:21:07 25

THE COURT: Right.

09:21:07 1 MR. TURTZO: -- all the members of the
2 department who assisted us with that. Very much
3 appreciated.

4 THE COURT: Still consider myself a lawyer at
09:21:16 5 heart, I mean.

6 So what we'll do, we'll break. And as soon as
7 they're ready, we will bring them in. And we will talk
8 to them for a little bit. And you can talk to them.
9 But I'll let them know specifically what happened. I
09:21:26 10 mean, I won't tell them the details and all that, but
11 I'll let them know there's a resolution, you know. And
12 I'll let them know how that happens. And I'll just be
13 candid with them and say that's some of the things the
14 lawyers were talking about yesterday.

09:21:38 15 And it's much better to be done on October 18
16 versus October 31.

17 MR. TURTZO: That's right.

18 THE COURT: That's right.

19 MR. FINK: Really.

09:21:45 20 MS. SAMPSON: For all of us.

21 MR. FINK: For all of us.

22 THE COURT: For everybody. All right.

23 IN UNISON: Thank you, Judge.

24 THE COURT: Once again, congratulations.

09:43:10 25 (brief pause in proceedings.)

09:43:10 1

(The prospective jurors enter the
courtroom.)

2

3

4

THE COURT: All right. Do the parties
stipulate to the presence of the jury?

09:45:17 5

IN UNISON: Yes, your Honor.

6

7

THE COURT: Okay. Ladies and gentlemen of the
panel, good morning. How you doing today?

8

9

IN UNISON: Good morning.

09:45:26 10

THE COURT: We got started a little closer on
time. I just want to thank all of you for coming down.
I do have some news for you. The case is settled. I
just want to let you know that. It has.

13

THE MARSHAL: It was like Christmas.

14

09:45:39 15

THE COURT: And here's the thing, and I think
it's important for you to truly understand how the
process works.

17

18

19

09:45:55 20

And there's no question a lot of things as you
can now see get done outside of your presence; right?
So there were a lot of legal issues that had to be
resolved. And they were resolved. And so the parties
got closer and closer.

22

23

24

09:46:10 25

And so we took yesterday off in order to give
them an opportunity to potentially finalize the
resolution of the case. So I can't tell you what's
going on, right, but -- and we kind of, we've talked

09:46:12 1 about this, and, really and truly, it's about having
2 faith in the process, right?

3 Because understand this, and I want everyone
4 to know this, and this is of paramount importance for
09:46:25 5 me, the fact that this case resolved, resolved because
6 of your willingness to come down and serve.

7 You have to understand that. Because I think
8 some of the panel members talked about serving and the
9 case settled during trial, and that sometimes happens.
09:46:44 10 It doesn't happen all the time, but the only way a case
11 can ultimately resolve is when you have the potential
12 for finality, right?

13 And that's done by having a trial date. And
14 that's done by having the lawyers willing to come to
09:47:01 15 trial, the parties willing to have their cases
16 litigated. But more importantly, We the People willing
17 to serve. Right?

18 And so the fact that you didn't hear all the
19 evidence and arrive at a verdict, is not really what's
09:47:19 20 most important. The fact that you came down willing to
21 do that is what matters. And it really does matter.
22 Because I -- we've talked about this. And I really do
23 feel that when you look at the Preamble to the
24 Constitution of the United States of America, and if
09:47:37 25 the first concern raised by the founders of this nation

09:47:43 1 was justice. Because they wanted a justice system
2 where a judge didn't decide the outcome. And I know
3 many times people -- you know, we forget that I don't
4 decide the case, right? And lawyers don't decide the
09:48:00 5 cases. The governor doesn't decide it. The presidents
6 don't decide it. Senators they don't decide it, you
7 know.

8 Just the average person that's truly the most
9 important cog in this whole democracy comes down and
09:48:19 10 decides it, right? And, I mean, really.

11 And just as important too, you can look at it
12 through this lens and think about this for a second.
13 Because from time to time, and we hope this never
14 happens, but we get -- if you get involved in civil
09:48:34 15 litigation of some sort that has to be heard and
16 decided, wouldn't you want We the People to decide
17 versus some political appointee, right? You know.
18 Think -- and so that's what really -- and that's the
19 great unknown. And you look at the -- in the
09:48:58 20 Constitution, and this is often overlooked, but, and no
21 one talks about the Seventh Amendment too much, right?
22 It's right there. You got a right to a jury trial in a
23 civil case.

24 You know. And from a historical perspective,
09:49:12 25 think about it from this, from this standpoint. If you

09:49:15 1 go back to the middle ages, and they used to have some
2 concept called trial by ordeal. Anybody ever hear
3 about that? You know, where they tried to decide
4 whether the person is telling the truth or not. They
09:49:32 5 do -- and you see it in some movies but this is how
6 that concept works. There was many ways to determine
7 what the ordeal was, but one was this, they'd have a
8 vat of boiling oil, and have a rock or pebble in it.
9 And if you can reach down and pull it out without
09:49:47 10 screaming, you were telling the truth, you know. Think
11 about it, you know. And then because we've come a long
12 way. We have.

13 And there was a time in this country where
14 sometimes disputes were decided by dueling, right? You
09:50:03 15 remember that and reading about it.

16 And so, you know, whether we agree or disagree
17 politically on a lot of different issues, but I think
18 our justice system -- and I think you really appreciate
19 it if you serve, right? You come down, and you see it.
09:50:18 20 And it's a great system.

21 And I realize, I feel very strongly about this
22 too. Because I say -- I try to frame points for
23 different reasons. But no doubt it's been
24 inconvenient. I get that. It has. But when you think
09:50:32 25 about it, what's convenient about a democracy, right?

09:50:35 1 And this is -- this is one of the most important
2 aspects of the democracy we just don't talk about.
3 And, for example, I'm on the Eighth Judicial
4 District Court Jury Commission. And right now we're
09:50:52 5 looking at ways we can make service easier. But it's
6 tough. It is. We're just trying to figure out -- we'd
7 love to make it -- if it was up to me, they would pay
8 more money for jury service, you know. I would. I
9 mean, I think if you're going to come down and serve,
09:51:07 10 at a minimum when you're here, they should pay you \$20,
11 \$25 an hour; something like that; right? But I'm not
12 in charge.

13 But and I get it. But the bottom line is
14 this, and I think the lawyers want to talk to you just
09:51:20 15 very briefly afterwards. Everyone that came down here,
16 I just want to thank you for your service, you know. I
17 do.

18 I would have, of course, loved to have had
19 this case resolved in a way where you participate in
09:51:35 20 deliberations, but, you know what, and here's what's
21 great about case resolution by the parties, there's no
22 appeals. It's final. They've agreed.

23 Because even after jury trial, you have to
24 understand, sometimes there is appeals; right? And
09:51:49 25 it's not -- it doesn't happen often, but sometimes

09:51:52 1 cases have to be re-tried, you know.

2 And so, anyway, on behalf of the parties, you
3 know, to this litigation, counsel, my staff, hopefully
4 they've been -- they've helped, been helpful, I just
09:52:07 5 want to thank each and every one of you for coming down
6 and participating in our civil and criminal justice
7 system as a member of Clark County and the battle born
8 great state of Nevada. I just want to thank each and
9 every one of you.

09:52:28 10 So with that in mind, Mr. Marshal, it's my
11 understanding we have -- their checks are ready to go.

12 THE MARSHAL: Yes, sir. It's pay day.

13 THE COURT: It's pay day. And fortunately,
14 it's not 10:00 o'clock, right? You can be done. It's
09:52:40 15 Friday. And you're done. Don't have to bother about
16 next week. I did promise we'd get done by October 31.
17 You didn't think it would be this early, right? And so
18 and that's how it goes sometimes.

19 And, I guess, when you look back on it and you
09:52:56 20 reflect, and I know it's like -- remember the combat
21 war vet. He said I'm used to hurry up and wait. I
22 think that's so true when it comes to jury service. It
23 just is. But now you can kind of see. And I know
24 you're probably frustrated. But at the end of the day
09:53:12 25 maybe the wait was worth it because we've -- now you're

09:53:15 1 going to be gone today. You don't have to worry about
2 being here to the 31st potentially. And its over. And
3 you don't have to worry about getting a summons in the
4 mail for quite a while. How about that? Because
09:53:27 5 you've served.

6 Once again, I just want to thank everyone.

7 Mr. Marshal.

8 THE MARSHAL: Yes, your Honor. All rise.

9 THE COURT: If you -- if the lawyers, they
09:53:35 10 might have questions for you. And, you know, they
11 probably just want to thank you for coming down and
12 serving.

13 So they're in you're control, sir.

14 THE MARSHAL: Thank you, your Honor.

09:53:44 15 Everybody if you could wait for me outside, I will
16 disburse your checks and I'll have some words for you.
17 And starting with you, sir.

18 THE COURT: And everyone, enjoy your weekend.

19 IN UNISON: Thank you.

12:08:03 20 (The prospective jury exits the
21 courtroom.)

22 THE COURT: All right, counsel. Okay. It's
23 been a pleasure.

24 IN UNISON: Thank you, your Honor.

09:54:55 25 THE COURT: Enjoy your weekend. Oh, trial

09:54:59 1 exhibits, seven boxes; what do you want us to do with
2 them?

3 MR. TURTZO: We'll --

4 MR. FINK: Can we handle it, hang on until
09:55:08 5 Monday?

6 THE COURT: Yeah. That's fine. They can come
7 get them Monday.

8 MR. TURTZO: We'll send over -- Allison from
9 my office will coordinate.

09:55:13 10 THE COURT CLERK: Absolutely.

11 MR. TURTZO: And we'll have somebody come pick
12 them up along with everything else that we brought
13 over.

14 MS. SAMPSON: I think I have some in your ante
09:55:20 15 room. If I left my dolly, I'll bring them right now if
16 I can get let in.

17 THE COURT: Okay. We'll --

18 MS. SAMPSON: Otherwise, I'll come back.

19 THE COURT: Mr. Sampson, we'll do that for
09:55:29 20 you.

21 MS. SAMPSON: Thank you very much.

22 THE COURT: And, you know, I was thinking
23 about this case. And what I -- I feel very -- I feel
24 this is an very important issue. And this is one of
09:55:37 25 the things I try to do is get out of the way, you know.

09:55:40 1 And I was talking to my law clerk, Chris, and I was
2 talking to CJ. And it could have been handled many
3 different ways. Some judges would have said, no, you
4 be ready to go to trial tomorrow and continue on and
09:55:53 5 on, but I actually have faith in the process. I do.
6 And I know when lawyers are talking, I get out of the
7 way. Good things, typically, happen. Not always, but
8 they do. Right?

9 MR. FINK: Appreciate that. I think that --
09:56:04 10 we were talking about I think most judges would have
11 had us continue on with the jury selection.

12 THE COURT: No, no, no.

13 MR. FINK: Most judges would have.

14 THE COURT: Yeah. I know everyone here.
09:56:11 15 You've appeared in front of me many times. And I just
16 I had confidence in you saying, Look, Judge, maybe...
17 I'm going to listen. And I'm going to do what I think
18 is best. If we lost a day, so be it. But I thought
19 there was an -- it was more likely true than not.

09:56:28 20 MR. FINK: That's the theme.

21 THE COURT: A greater probability, right? And
22 so I went with that. Because I feel it's very
23 important in this regard. I consider, we talk about
24 trials and trial days. I think trials are actually
09:56:41 25 the -- they're very, very important. But it's much

09:56:46 1 better to have the case resolved by settlement. It
2 really and truly is. So I don't -- I'm not -- I used
3 to be concerned about my trial days. I'm not concerned
4 anymore. I'm more concerned about closing. You know,
09:56:56 5 because I think it's better to be a closer as a trial
6 judge versus having cases settled. It's like Glengarry
7 and Glen Ross. You ever see that movie? I love that
8 movie, you know. Coffee's for closers, right?

9 That's a great movie. It just is. The
09:57:12 10 staff -- I mean, the actors are just unbelievable in
11 that movie.

12 MR. TURTZO: First prize is a Cadillac.
13 Second prize is a set of steak knives. Third prize is
14 you're fired.

09:57:23 15 THE COURT: You're fired. I love that. And
16 Baldwin is amazing in that movie, right?

17 MR. TURTZO: Yes.

18 THE COURT: Jack Lemon. That's one of his
19 last movies. I mean, it's a great staff. Al Pacino --
09:57:33 20 I mean, a great cast of actors. Oh my God, it's a
21 great movie.

22 MR. TURTZO: Yes, it is.

23 THE COURT: Yes.

24 MR. TURTZO: Thank you, your Honor.

09:57:45 25 MR. FINK: Thank you, Judge.

09:57:47

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MS. FUNAI: Thank you, your Honor.

(Proceedings were concluded.)

* * * * *

Peggy Isom, CCR 541, RMR

REPORTER'S CERTIFICATE

STATE OF NEVADA)

:SS

COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE
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STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
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ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
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PEGGY ISOM, RMR, CCR 541

Peggy Isom, CCR 541, RMR

EXHIBIT “B”

1 CASE NO. A-17-753606-C

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DISTRICT COURT

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CLARK COUNTY, NEVADA

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SIMONE RUSSO,

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Plaintiff,

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vs.

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COX COMMUNICATIONS LAS VEGAS,

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Defendant.

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REPORTER'S TRANSCRIPT
OF
HEARING

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BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

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DISTRICT COURT JUDGE

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DATED THURSDAY, NOVEMBER 7, 2019

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REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

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1 LAS VEGAS, NEVADA; THURSDAY NOVEMBER 7, 2019

2 12:01 P.M.

3 P R O C E E D I N G S

4 * * * * *

5
6 MR. SAMPSON: This is David Sampson.

7 THE COURT: All right. Mr. Sampson, good
8 morning.

9 MR. SAMPSON: Good morning.

10 THE COURT: And...

11 MR. LEMKUL: Good morning, your Honor. Judge,
12 Will Lemkul here.

13 THE COURT: All right. Good morning. And I
14 see we have plaintiff's motion to compel settlement on
15 an order shortening time.

16 MR. SAMPSON: Yes, Judge, thank you. So we
17 were -- the Court is, I'm sure -- well remembers this
18 case. We were in front of your Honor three weeks ago
19 now on Wednesday initially. And we put the settlement
20 on the record and the terms of the settlement on the
21 record. We came back on Friday, found out that the two
22 other -- two other defendants who on Wednesday said
23 they hadn't gotten any confirmation from their client
24 yet because it had just kind of happened and that whole
25 thing. They wanted to check with their clients, call

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8A.App.1747

12:01:56 1 back on Friday, and confirmed their client did agree to
2 do the settlement. And so under those terms -- a
3 couple of the terms, one was that --

4 (Reporter clarification)

12:02:06 5 MR. SAMPSON: Two of the defendants who were
6 named in the case who have never filed answers, who
7 have been defaulted were not affected by the
8 settlement, with the money that was being paid.

9 THE COURT: And...

12:02:17 10 MR. SAMPSON: And my clients rights --

11 THE COURT: And Mr. Sampson, I don't want to
12 cut you off. But please identify the two defaulted
13 defendants again for the record.

14 MR. SAMPSON: Duslak and Sesman are the last
15 names.

16 THE COURT: Thank you, sir. You may continue.

17 MR. SAMPSON: So then Dr. Russo's rights
18 against those two defaulted individuals would not be
19 affected at all. Everyone agreed. And then the
12:02:41 20 comment was made that the provisions of the settlement
21 would be reduced to a writing and released. Then we
22 would sign off on. And the money would be paid to my
23 client within two weeks of the release being signed.

24 So I raised two issues when the release was
12:02:58 25 brought up. I said, number one, we agreed there is

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12:03:01 1 going to be nothing in the release that's not agreed to
2 on the record today. There's not going to be any new
3 terms or new anything going on. And it's going to
4 comport with -- the release will comport with what
12:03:11 5 we've agreed to on the record today. Everyone agreed
6 that was the case. No problem. Not an issue.

7 The next thing I say is this idea that the
8 money will be paid within two weeks of release being
9 signed. I then said, well, I don't want the release to
12:03:27 10 take, you know, two weeks to get to me and then two
11 more weeks before you sign it. And so a month out and
12 we still don't have our money.

13 And the comments from the defense were, of
14 course, we'd never do that. Mr. Sampson, don't be
12:03:40 15 ridiculous. Why you got to always assume the worse,
16 that whole thing.

17 Yet here we sit three weeks later now. We're
18 three weeks and a day from Wednesday, and tomorrow is
19 two weeks from the Friday, and I don't have a release
12:03:53 20 that I can have my client sign to get the money. I did
21 get -- which we resolved it on Friday, I want to say
22 the 18th, on Monday, Mr. Fink sent an email over, and
23 he said here is the release that he had typed up. He
24 made no bones about it. Sunrise does not agree and has
12:04:11 25 not authorized this to be a release we can use in the

12:04:14 1 case.

2 And if we stand here today, we still don't
3 have anything from Sunrise that agrees we can use to
4 resolve the case.

12:04:21 5 I sent out some changes to what Mr. Fink
6 provided and asked for comment. I did get word from
7 Mr. Bushbaker's counsel, Mr. Meloro, to have some
8 rather insignificant changes we needed to make that
9 didn't affect any substance. I incorporated those
12:04:38 10 changes. And asked Cox, IES, Sunrise, anybody for
11 Mr. Scarcelli, anybody else have comments. I heard
12 nothing until the following Monday.

13 So on the following Monday I said, all right,
14 it's been a week that Mr. Fink provided this. And I
12:04:54 15 sent back my changes. I've heard nothing from anybody.
16 So I assume what I sent back was going to work and have
17 my client sign it. He expected his money in two weeks.

18 And then all of a sudden within like 15
19 minutes, I heard from Mr. Fink, oh, no, Sunrise hasn't
12:05:09 20 agreed yet. We told you we don't agree. We don't --
21 I'll pass it by to take a look at. Cox sent back word
22 very quickly from Mr. Turtzo, Oh, no, Cox hasn't
23 agreed. And I essentially wrote back and said, Well,
24 then get your clients to agree. I mean, what's he --
12:05:23 25 let me know what changes you have because it's -- I've

12:05:25 1 waited a week very patiently. I don't want this to
2 stall out. Because my client's losing patience. We
3 don't have anything for him to authorize.

4 We need to get this taken care of. I
12:05:36 5 ultimately did get comments from Cox, and we've
6 incorporated the changes they want. My understanding,
7 although Mr. Meloro would have to address this, my
8 understanding from the communications I received from
9 Mr. Meloro because he sent something a week ago Tuesday
12:05:52 10 saying, is this that Mr. Sampson sent out something we
11 can have my client sign and conclude. So I don't think
12 there is any additional issues.

13 I've not heard from Scarcelli's counsel other
14 than it was a side question about renters insurance,
12:06:05 15 and there isn't any. So I think, but I've not heard
16 conclusively, that Mr. Scarcelli is on board with what
17 I sent over.

18 But Sunrise now, between a week ago Tuesday
19 and Thursday, Mr. Fink and I were sending things back
12:06:23 20 and forth. What we're looking at is, again, we want to
21 preserve all rights against the defaulted defendants,
22 just like we said on the record. And the release that
23 was provided defines Sunrise as all employees,
24 independent contractors. It lays out other things that
12:06:40 25 could potentially include Duslak and Sesman.

12:06:44 1 So I included in there that we are not going
2 to include them specifically or anyone affiliated with
3 them. And I think, as I understand it, Sunrise no
4 longer agrees. So as of last Thursday, Halloween, was
12:06:57 5 my last conversation with Mr. Fink until yesterday.

6 And I've been calling every day since then trying to
7 work all this out. I got no response at all.

8 And so I did, when I didn't get it worked out
9 on Halloween, filed this motion. Let's get it in front
12:07:12 10 of the judge. It's been -- it's been silence since
11 then until yesterday. And even yesterday Mr. Fink on
12 the phone as we were talking sounded like maybe we
13 could work something out, but he sent over some
14 proposed language even this morning that, again, says
12:07:27 15 Seslak and Dusman [sic] are to be dismissed if it turns
16 out they're employees, for example, of Sunrise. Which
17 we -- so I sent something over yesterday. And I'll
18 just read it to the Court.

19 My email says: "It appears what I sent
12:07:44 20 earlier --" Well, I sent something over. I'm sorry.
21 I sent something over where I proposed since we haven't
22 got an agreement yet -- the problem was the first one I
23 sent over was red lined. So I said, it was so
24 ridiculously red lined that it looks like the actual
12:07:58 25 language I proposed didn't go through. But here is

12:08:01 1 what I propose our release should say.

2 Settlement release agreement. And it
3 identifies each party by name. Dr. Russo, Sunrise,
4 IES, Cox, PWJames, Kevin Bushbaker, Chris Scarcelli
12:08:16 5 hereby agree to settle the disputes between them and
6 release each other pursuant to the terms set forth on
7 the record on October 16 and October 18, 2019, in case
8 number, and I laid the case number out, pending in the
9 Eighth Judicial District, Clark County, Nevada, which
12:08:34 10 terms are incorporated herein by this reference.

11 And everybody signed it. And says it seems to
12 me to be the best way if, as we agreed, the release
13 isn't -- isn't any different than what was confirmed on
14 the record, all rights are going to be given in the
12:08:49 15 release nor taken away from the release than what was
16 confirmed on the record. This is really the only way
17 to do it.

18 And I have gotten a response I think from Cox
19 that they're not agreeable. I assume given I was given
12:09:02 20 the proposed changes from Mr. Fink perhaps they're not
21 agreeable either. But, you know, we really don't need
22 a release because, as your Honor pointed out a couple
23 times in voir dire, this case is pending a long time.
24 Happened back in October of 2016. And there is no
12:09:20 25 statute of limitations long run at this point in time.

12:09:22 1 So there really is no reason for a release. I
2 have no problem putting one -- or signing off on one as
3 long as it does two things:

4 One, doesn't delay my client getting his money
12:09:34 5 which now, it has;

6 And two, strictly comports with what was
7 placed on the record which the release I've now just
8 read into the record absolutely would do.

9 And if that are not agreeable, then I don't
12:09:46 10 know. I would ask the Court either enforce the
11 settlement and say, you know, since there was radio
12 silence regarding the release, I'm not going to require
13 one anymore. Or I will require one, but it's just
14 going to say what Mr. Sampson pointed out that you're
12:10:00 15 settling the case pursuant to the terms that were
16 placed on the record.

17 I've also given -- suggested a third option
18 that I'll now suggest to the Court that perhaps we just
19 print up the record, both days, and all the parties
12:10:13 20 sign it. And go, so agreed. And we're all released
21 pursuant to what this document says.

22 But what I don't want to do is keep spinning
23 my wheels with the parties with the defendants that's,
24 number one, going to delay my client getting his money.
12:10:27 25 And number two, potentially would add or takeaway from

12:10:31 1 the rights and claims that the parties agreed with not
2 be released or otherwise affected when we put this all
3 on the record.

4 So I'm just reaching out to the Court. I do
12:10:43 5 understand that the check from Sunrise is now in
6 Las Vegas. I understand the Cox one is either here or
7 should be here shortly. So I want to get my client his
8 money as we agreed to three weeks ago. I want to put
9 this thing to bed without waiving any rights other than
12:10:59 10 those that were specifically put on the record. So I
11 would ask for instruction or direction from the Court
12 on how we can best do that, please.

13 THE COURT: Okay. Thank you, sir.

14 MR. CLARK: If it please the Court, David
12:11:13 15 Clark for Chris Scarcelli. Mr. Sampson is right. We
16 did have a side issue on the additional insured
17 provision of the lease agreement.

18 Last week we got communications from
19 Mr. Sampson on that issue. And I can now say that my
12:11:29 20 client is going to go forward and just sign off on a
21 complete release and settlement.

22 THE COURT: Okay.

23 MR. CLARK: And if that's -- so I'm not really
24 involved in the other issues. I don't think my client
12:11:39 25 is going to pay me for this appearance now. But if it

12:11:42 1 please the Court, I have another appearance I need to
2 make. So if I'm not needed, and I don't know if
3 Mr. Sampson still needs me, but Mr. Scarcelli says
4 he'll just sign it when it's in final form.

12:11:56 5 THE COURT: I understand. And we don't need
6 you, sir, I don't think.

7 MR. CLARK: Okay. I'll take my leave now.
8 Thank you all.

9 MR. FINK: Your Honor, Leonard Fink for
12:12:03 10 Sunrise.

11 Mr. Sampson's recitation of what happened
12 since the Friday when we put the settlement on the
13 record is mostly correct. I want to throw in a few
14 things that I think are important here.

12:12:18 15 Number one is that I got everybody the
16 release, the proposed. And we said although we were
17 putting this on the record it was very clear that we
18 were going to be putting together an actual settlement
19 agreement.

12:12:32 20 I don't remember if that part was on the
21 record. I think it was. Mr. Lemkul might remember
22 that differently, but I do.

23 However, I did that Sunday night. And if
24 anybody knows me, the fact that I actually did it that
12:12:43 25 quickly shows that I was trying to be a person of my

12:12:46 1 word and get this done for Mr. Sampson. Especially
2 because I knew that his client -- that he was having
3 issues with that.

4 So I got that done. I sent it out either
12:12:55 5 Sunday night or early Monday morning. I did in the
6 email say my client had not yet agreed to the terms.
7 The reason is that I had a case with then Judge Bayliss
8 where a plaintiff went in to enforce the settlement
9 that was based upon terms that were negotiated between
12:13:09 10 counsel. And the reason the court enforced the
11 settlement, even though my client had not agreed to it,
12 was because counsel had agreed to it and he thought
13 that that was good enough.

14 So since that time, I made sure that unless my
12:13:21 15 client has absolutely signed off on it, every email
16 that goes out when we're talking about settlement
17 agreements, make sure it's clear. My client has not
18 yet agreed to these terms. I didn't think it would be
19 a problem, but I wanted to make sure everybody
12:13:33 20 understood that.

21 So I sent that out again either Sunday night
22 or early Monday morning waiting to hear back from
23 people as to what changes they were going to want, so
24 that we can get a final agreement, so then we can get
12:13:43 25 our respective clients to sign off on it.

12:13:46 1 And I don't recall, and I think Mr. Sampson is
2 probably correct. I think the next thing we probably
3 heard was maybe that next Friday. And then there was
4 some back and forth up until Thursday which was the
12:13:56 5 October 31, which is Halloween.

6 I got sick on Thursday, Friday. Then I had a
7 deposition on Monday which is why I never responded to
8 Mr. Sampson's phone calls. Again, I explained that to
9 him when I talked to him. So I wasn't shining him on
12:14:09 10 or anything like that. I just literally got sick and
11 wasn't do anything.

12 So we resumed trying to get this done. The
13 hold up, and Mr. Sampson I think said it but I'll say
14 it again, I think the real hold up right now is whether
12:14:24 15 or not the release that we negotiated was intended to
16 cover Mr. Sesman and Duslak, D-U-S-L-A-K, I think.
17 Actually, I've got it in front of me. Okay. Duslak,
18 D-U-S-L-A-K, and Sesman, S-E-S-M-A-N, if they were
19 considered employees of Sunrise.

12:14:43 20 There's never been one bit of evidence in this
21 case that they were employees. It was always that they
22 were independent contractors. But as I'm sure the
23 Court has dealt with thousands of settlements, when you
24 settle with an entity, you are settling with the
12:14:57 25 employees too.

12:14:58 1 There's nothing in Mr. Sampson's amended
2 complaint that even suggests or asserts that either one
3 of these gentlemen is an employee. There is nothing in
4 any one of his disclosures that asserts they're
12:15:09 5 employees.

6 So the idea here is that not only is Sunrise
7 getting itself out of the case, but it's also getting
8 out its employees, which also includes board members.
9 Although, we didn't specifically say that on the record
12:15:22 10 either, but also Cox, IES, they're also getting their
11 employees out.

12 In fact, the gentleman Curtis, I think
13 was always the name that came up. But, again, that
14 wasn't specifically on the record. So I think it's an
12:15:34 15 understood term. When you're getting an entity out
16 that includes their employees. If somebody is saying
17 that somebody acted within the course and scope of
18 their employment, unless you're saying they weren't
19 acting within the course and scope of employment,
12:15:45 20 which, again, wasn't an issue in the case because it
21 was never made an issue in the case.

22 So to the extent this is what we were trying
23 to do with the settlement agreement, and Mr. Sampson is
24 right, I did throw in independent contractors in the --
12:15:55 25 in one of the versions of the draft. But as of this

12:15:59 1 morning, I sent out something that I intended to send
2 out before the hearing and realized when I was talking
3 to Mr. Clark when I got here that I didn't press send
4 on my computer. So I think I sent it out maybe 9:15,
12:16:10 5 maybe 9:30 this morning.

6 So I think that the only hang up is whether or
7 not this settlement includes Mr. Duslak and Mr. Sesman
8 if they are found to be employees of Sunrise. And I
9 think that's it.

12:16:23 10 If they're not and they're independent
11 contractors, then the settlement agreement absolutely
12 does not cover them. Would allow Mr. Sampson to do
13 what he needs to do. And even try to go after my
14 client's insurance carriers to see if there is coverage
12:16:38 15 for them as independent contractors. We all agree
16 that -- that was one of the things that was important
17 to him. We aren't seeking to release that.

18 But to the extent they're employees, this
19 should cover it. And I think, I think that's really
12:16:48 20 where we are, Judge. And, of course, I'd certainly
21 leave it up to Mr. Bushbaker's counsel -- I think I
22 always stumble on your name -- sorry, Joe -- and
23 Mr. Lemkul for anything else.

24 THE COURT: Okay. Anything you want to add?

12:17:01 25 MR. MELORO: Joseph Meloro on behalf of Kevin

12:17:04 1 Bushbaker. Your Honor, Mr. Fink did prepare a release
2 agreement that Sunday evening. During that week I made
3 some minor requests for some changes. I've been trying
4 to cooperate through this whole matter.

12:17:19 5 You know, the issues that's going on between
6 Mr. Sampson and Mr. Fink really have nothing to do with
7 my client. I just want to make sure that we're not
8 releasing anyone who wasn't a party to this action that
9 we might have some claims against in the future.

12:17:36 10 But I don't see that in the agreement that was
11 presented, if that's the case at this point. But we're
12 trying to get this along just as much as everyone else,
13 your Honor.

14 THE COURT: I understand.

12:17:48 15 Mr. Lemkul.

16 MR. LEMKUL: Yeah, your Honor, how are you?

17 THE COURT: Good.

18 MR. LEMKUL: Good, good. So the position of
19 Cox and IES, your Honor, is basically we sent back
12:17:59 20 changes to Mr. Sampson that were incorporated into the
21 release that he sent out.

22 I don't have any issue with Monday's changes.
23 I do agree that part and parcel to the Cox and IES
24 release would come, officers, agents, the typical
12:18:18 25 language that we all see in these releases. And that's

12:18:20 1 what we sent out.

2 So I really have nothing else to offer other
3 than to answer questions should the Court have them for
4 me or my clients.

12:18:29 5 THE COURT: Okay. I have no questions, sir,
6 at this point.

7 Okay. Mr. Sampson, have you had a chance to
8 see the revised proposed settlement agreement that's
9 been sent by Mr. Fink in this matter at approximately
12:18:43 10 9:30 this morning?

11 MR. SAMPSON: I didn't see a proposed
12 settlement agreement. I saw, like, a list of here's
13 some items. And the one that I take issue with is the
14 one that seeks to stop my client from being able to
12:18:56 15 proceed against Sesman and Duslak.

16 And yes, I do know and I understand if you
17 release a party, you typically would be releasing their
18 employees, and board of directors, and those types of
19 things unless you clearly indicate otherwise when you
12:19:10 20 put the settlement agreement together.

21 So when we put this on the record, that's why
22 I made it a point to say, none of this settlement
23 involves Sesman or Duslak at all in any of their
24 capacities. And if there was an idea of, well, hold
12:19:25 25 on, Sunrise wants all its employees, and there might be

12:19:29 1 a claim that they're employees, so that should have
2 been brought up when we put the terms on the record.
3 It shouldn't have been dropped on me just like they
4 couldn't come up later and say, we want it
12:19:39 5 confidential. Or, and there is language about
6 indemnification and what not, which we'll agree to even
7 though it wasn't specifically put on the record. But
8 if you wanted those -- when I say -- make it a point to
9 mention, and I'm sure had I said, for example, you
12:19:50 10 know, here's so and so, it's the CEO of Cox, we're not
11 releasing any claims against that person, I'm sure
12 Mr. Lemkul would have piped up and said, oh, no, hold
13 on. We don't agree to that. We were stippling on the
14 record putting the terms together.

12:20:05 15 So I think it's improper for Sunrise to stand
16 there while we're putting the settlement on the record,
17 and I say Sesman and Duslak are not released in any
18 way, shape, or form. They remain parties. We still
19 have all rights to proceed against them, and that's all
12:20:19 20 fine and dandy while we're on the record, and then to
21 come back later in the release and say, except they're
22 not. Because if they're employees they're out.

23 I don't think they're employees either as I
24 sit here right now. But I've not had a chance to find
12:20:32 25 any of that stuff out. I have not -- I have no

12:20:34 1 confirmation as to any of that. So but the bottom line
2 is, you know, what I proposed now is, again, the
3 settlement that says here's all the people. We agree
4 to release each other pursuant to the terms reached on
12:20:48 5 the record on those two days we were there. And then
6 we all sign it.

7 I don't see why anyone would have a problem
8 having that serve as the release given that it does
9 exactly what we agreed to do. The only thing I can
12:21:00 10 envision as to why that would be a problem for someone
11 is: One, they want to continue to delay things, which
12 is an inappropriate reason and shouldn't be permitted;
13 or two, they're looking to change the deal that was
14 reached on the record.

12:21:14 15 Because what I proposed says specifically
16 releasing each other as agreed on the record. No more,
17 no less. I don't think anybody should require that my
18 client do any more or any less for any of that.

19 So given, again, EDCR allows a settlement to
12:21:31 20 be enforceable if it's placed on the record, so we've
21 done that. Mr. Fink kept talking about we're looking
22 at getting people out. Well, they are out. Anybody
23 pursuant to the terms that were set forth on the
24 record, they're out. The agreement is enforceable on
12:21:49 25 the record. Beside the fact that the statute of

12:21:50 1 limitations ran over a year ago at this point.

2 So it's not a question about that. I don't
3 know what else is going on. And my clients should not
4 be -- my client should not be required to waive any
12:22:02 5 right at all that he -- that he specifically --
6 especially when he specifically preserved them on the
7 record when we -- when we resolved this thing and put
8 the settlement on the record.

9 So, again, I appreciate your Honor asking if
12:22:14 10 I've had a chance to review what they sent me. Again,
11 I didn't get an actual release. I just got an email
12 from Mr. Fink that had some terms. And the term that I
13 had an issue with is this idea that if they're
14 employees, then Sesman and Duslak are out. That was
12:22:27 15 not agreed to.

16 But I think what you should perhaps ask is, to
17 the defendants, you know, what about what Mr. Sampson
18 sent you guys Wednesday and Tuesday? Say, we hereby
19 release each other as agreed on the record, and it's
12:22:40 20 incorporated by this reference. And we're done. Why
21 wouldn't that work?

22 And if they're going to balk and somehow say
23 that won't work, then, clearly, they must be either
24 looking to just drag this thing out or trying to get
12:22:52 25 something in the release that wasn't on the record,

12:22:54 1 which I don't think the Court should permit.

2 THE COURT: Do we have a copy of that portion
3 of the record? Have we ordered one or no?

4 MR. SAMPSON: I've not ordered one. I mean,
12:23:06 5 again, that's another proposal is I will order a copy
6 of Wednesday and Friday's transcripts and just have
7 everyone just sign the transcripts so agreed, so
8 released.

9 THE COURT: All right. Anything else?

12:23:22 10 MR. SAMPSON: But whatever is on -- yeah.
11 Whatever is on the transcript from Wednesday and Friday
12 would be incorporated by reference with exactly what I
13 proposed. And it just says release each other as per
14 what was put on the record. And then we all sign off
12:23:36 15 and get my client his money. And then we're done.

16 THE COURT: Well, I don't know if it's -- I
17 wish it was just that simple.

18 The reason why I asked that question regarding
19 a copy of the transcript, I wish I could say with
12:23:51 20 computer-like recollection I can remember every
21 utterance in court regarding the general terms of the
22 settlement and the like, but I can't.

23 And so all I'm saying is this: As to whether
24 anyone is correct as to specifically what was placed on
12:24:06 25 the record, I'd need a copy of the transcript to make

12:24:08 1 that determination. That's what I'm saying.

2 MR. SAMPSON: I don't know that anyone is
3 disputing what I'm talking about. In fact, I think
4 Mr. Fink indicated that my discussion with what was
12:24:19 5 placed on the record was accurate.

6 I mean, my position is -- I'm telling you, we
7 put on the record -- we're not waiving, releasing, or
8 otherwise affecting anything against Sesman or Duslak.
9 I don't think anyone would dispute that.

12:24:34 10 And if they don't dispute it, I mean, we can
11 keep a transcript -- we can get a transcript if we need
12 to, but I don't think it's disputed what I'm telling
13 you as to what we agreed to.

14 THE COURT: Is it --

12:24:44 15 MR. SAMPSON: It was a pretty significant
16 point that day.

17 THE COURT: Is it disputed? Anyone?

18 MR. SAMPSON: Not -- I'm not disputing. I'm
19 not disputing my version of what happened. I tell you
12:24:58 20 that. This is Dave Sampson.

21 THE COURT: Okay. Mr. Fink, are we disputing
22 that?

23 MR. FINK: Well, first I did send this out at
24 9:35 this morning which included, like, I think, six
12:25:10 25 bullet points, five bullet points of things that were

12:25:13 1 kind of core to the agreement.

2 My best recollection is that when Mr. Sampson
3 said he was specifically retaining his rights to go
4 against Mr. Sesman and Mr. Duslak, we all agreed to
12:25:27 5 that. There was no specific discussion as to whether
6 or not they were independent contractors or employees.
7 So I didn't -- I didn't jump and say, well, to the
8 extent they're employees. This wouldn't cover them.
9 So that part is right.

12:25:41 10 But then I didn't know that I had to do that
11 because when you're releasing Sunrise, you're releasing
12 their employees, their board members, all of that. So
13 I don't know that I was thinking that that's something
14 I needed to specifically do.

12:25:53 15 I completely understood that to the extent
16 that Sesman and Duslak were his independent
17 contractors, which we all think they are, that the HOA
18 hired to do the lawn maintenance that it --
19 shouldn't -- it didn't and shouldn't affect
12:26:07 20 Mr. Sampson's rights to go after them. That was the
21 point.

22 But certainly not if it turns out that they
23 were my client's employees, which, again -- and I
24 appreciate Mr. Sampson recognizing that in most cases
12:26:20 25 that's what's included, but that's exactly what I was

12:26:22 1 thinking was excluded here. If they're employees,
2 they're covered.

3 THE COURT: So the impact of the -- what would
4 be considered the material terms of the settlement is
12:26:34 5 an issue.

6 MR. FINK: If -- if the -- I think the only
7 issue, if I'm not mistaken, is whether or not the
8 settlement covers those two gentlemen if it turns out
9 they're employees. That's it.

12:26:46 10 If they're not employees, there's no question
11 the settlement doesn't cover them. And allows
12 Mr. Sampson whatever avenue or avenues he needs to try
13 to recover money from them, including going after
14 Sunrise's insurance carrier if for some reason that
12:27:01 15 that carrier should have defended or indemnified those
16 two gentlemen as independent contractors. And that's
17 language that my carrier agreed to that's in that
18 agreement. Which is fine. And that absolutely was not
19 part of a negotiation to get them out.

12:27:16 20 But the issue really is, is whether or not if
21 it turns out that these two were employees and getting
22 W-2s, which there's been no evidence and no allegation
23 that there they were, that it's our belief that the
24 settlement covers them under that one circumstance.

12:27:34 25 THE COURT: Okay. Mr. Sampson.

12:27:35 1 MR. SAMPSON: Your Honor.

2 THE COURT: Go ahead.

3 MR. SAMPSON: Sure. All I would ask, again,
4 is the Court to consider, well, you know, that should
12:27:42 5 have been brought up on the record. Because I made
6 clear -- and there is no dispute it sounds like. I
7 made it clear we want to preserve all rights against
8 Sesman and Duslak. They've been defaulted. We want to
9 move forward against them. And this release and this
12:27:56 10 money doesn't go to affecting any of my client's rights
11 against them, period.

12 And the response while we were on the record
13 from Mr. Fink and everybody else was that is correct.
14 And we are in agreement.

12:28:08 15 And if they were going to raise some kind of,
16 well, hold on. Is this, then okay. But if not, then
17 that was the time to do it, and they did not do it.
18 And they did it -- they had a chance on Wednesday and
19 again on Friday. So we can't even blame it on, like,
12:28:23 20 spur of the moment. I didn't have time to consider it.
21 It just got tossed out there. It was brought up
22 specifically, and they agreed. And they can't now turn
23 around and unagree, or try to undo it when we said --
24 again, all I want to do is enforce the terms that were
12:28:39 25 placed on the record. And I don't think my client

12:28:41 1 should be forced to agree to terms that weren't placed
2 on the record, which Mr. Fink is now asking to do. I
3 think -- I hope Mr. Fink is correct when he says
4 they're not employees.

12:28:51 5 I'm a little concerned if he is so convinced
6 they're not employees why this is a sticking point.
7 Because it shouldn't be. If he's convinced they're not
8 employees, I don't know how it would turn out, as he
9 used the phrase, if they somehow would magically become
12:29:06 10 employees other than perhaps if the carrier goes to
11 Sunrise, and says, you know, I don't know. Something
12 goes on and all of a sudden that all -- that they come
13 up W-2s that were not provided before and Mr. Fink's
14 not aware of, and then we've somehow been mislead.

12:29:20 15 But the terms of the agreement were reached on
16 the record, and we're just asking no more, no less than
17 what was placed on the record be enforced. And since
18 it's been three weeks now and they can't seem to come
19 up with an agreement, that Sunrise would be on board
12:29:37 20 with that comports with what was on the record, then I
21 think the Court either just find that that's waived at
22 this point, or that they sign what I proposed. Which
23 is we just release each other pursuant to what was
24 placed on the record.

12:29:51 25 THE COURT: Anything else? There is no way

12:29:52 1 this can be worked out.

2 MR. FINK: Never say no way. But your Honor,
3 again --

4 THE COURT: And the reason why I do that, I
12:30:01 5 think everybody understands this, it's always easier.

6 MR. FINK: Right. I mean, it's -- it's
7 problematic. I mean, look, there's nothing in the
8 complaint. So when Mr. Sampson says, Well, then we
9 should have said something. The problem here is that
12:30:12 10 if we are looking at the record, we're looking at the
11 entire record.

12 And the entire record is the amended complaint
13 which makes no allegation, even an allegation, that
14 either one of those two gentlemen were employees of
12:30:23 15 Sunrise, or were working within the course and scope of
16 being employees of Sunrise.

17 So if that's what he has alleged, then that's
18 why I have no problem releasing them as to how he's
19 alleged it. Had he alleged in his amended complaint
12:30:36 20 that they were employees of Sunrise, that would have
21 been a different discussion on the record.

22 Should that have been made more clear from
23 both sides? Probably, which we wouldn't be here. But
24 the fact is it's -- again, it's in the operative
12:30:51 25 complaint. There is no allegations that they are

12:30:53 1 employees, which is why I didn't feel the need that I
2 had to clarify that.

3 And again, nothing in any 16.1 disclosure, up
4 until and including trial, that alleged that either one
12:31:02 5 of them were employees. And I also think and I didn't
6 check this before the hearing, but even when we did the
7 motion for summary judgment, and even the renewed
8 motion for summary judgment -- or I think it was a
9 motion for reconsideration, I don't believe, and I'll
12:31:15 10 apologize if I'm wrong here, I don't believe that even
11 then Mr. Sampson -- Mr. Sampson said they were
12 employees.

13 And then there was a motion in limine related
14 to keeping the gardener's statements out of evidence.
12:31:29 15 And, again, he didn't say they were employees. He said
16 that we argued about whether or not agent in principal
17 whether or not that would --

18 So there has never been an allegation by
19 Mr. Sampson in this case that they're employees. And I
12:31:39 20 think that's true which is what I said all along. I
21 don't think they were. I thought they were independent
22 contractors, two guys on a mower.

23 However, I'm sure the Court can appreciate
24 that even though I'm really, really comfortable with
12:31:53 25 that, I'm also not that comfortable with just leaving

12:31:57 1 it to wind.

2 So, I mean, maybe the best thing to do is to
3 get a copy of the transcripts from those two hearings
4 and try to hash it out. I mean, the good thing is we
12:32:06 5 do have the money, so we're not waiting on that. So if
6 there is no delay here, no one is trying to delay
7 anything. We're just trying to get it right and trying
8 to save our own --

9 THE COURT: Well, here's the issue. I mean,
12:32:18 10 I've been listening patiently. And it appears to be no
11 dispute that hypothetically they're independent
12 contractors and potentially additional insureds under
13 the insurance policy, there would be coverage.

14 MR. FINK: Well, well, no, no. Not a coverage
12:32:33 15 issue, but would allow them to go after my insurance
16 carrier.

17 THE COURT: Right.

18 MR. FINK: Absolutely.

19 THE COURT: I understand. It's not a
12:32:38 20 stipulation.

21 MR. FINK: Right.

22 THE COURT: It's not a stipulation of
23 coverage.

24 MR. FINK: Right.

12:32:41 25 THE COURT: But there's not a -- I get the

12:32:43 1 significance.

2 MR. FINK: Right.

3 MR. MELORO: And your Honor.

4 THE COURT: Yes.

12:32:48 5 MR. MELORO: Joseph Meloro on behalf of
6 Mr. Bushbaker.

7 Mr. Fink did send an email earlier today. And
8 there were some bullet points. One of the bullet
9 points that I want to make clear was that Mr. Bushbaker
12:32:59 10 is not waiving any claims against any insurance
11 carriers.

12 Also I'd like the record to reflect that
13 Mr. Sampson in his motion did state that Mr. Bushbaker
14 is not doing anything to delay this settlement and that
12:33:14 15 we've been cooperative.

16 And so I just want to make that clear that
17 we're not doing anything. This is a dispute. I think
18 it's pretty narrow on whether these are independent
19 contractors or employees. Doesn't really regard my
12:33:29 20 client. But we're trying to help facilitate a
21 settlement here.

22 MR. FINK: We'd like nothing more than to give
23 Mr. Sampson the money.

24 MR. SAMPSON: Your Honor.

12:33:38 25 THE COURT: Yes. Yes, Mr. Sampson.

12:33:39 1 MR. SAMPSON: Well, so given that's the case,
2 I think then why don't we do this. Why doesn't the
3 Court order the money be paid to Dr. Russo, you know,
4 forthwith, or however you want to do it. Within, I
12:33:51 5 don't know, by middle of the next week or something.
6 If it's here in town, it could even be by the end of
7 this week. But order that the funds be paid. And that
8 we set maybe a status check or something. Or where we
9 can look at --

12:34:03 10 I don't know what Mr. Fink -- I've never known
11 him to say something that's not accurate, but I don't
12 know that my complaint doesn't make those allegations.
13 I know I typically have a paragraph in every complaint
14 I've done that involves respondeat superior potentially
12:34:18 15 that says the parties -- that the defendants were all
16 agents, principals, employees, employers, managers and
17 service with one another. Perhaps it's not in there.
18 I don't know. I don't know what was said. Sounds like
19 neither does Mr. Fink with much surety about what was
12:34:33 20 said in relation to motions that were filed.

21 But I think you say, Look, the Court is going
22 to enforce the terms that were reached on the record.
23 So go ahead and pay the money. We'll figure out a way
24 to draft it and get it written up. But we're going to
12:34:45 25 enforce it pursuant to what was placed on the record.

12:34:47 1 And the other issue I've got is if, you know,
2 Mr. Fink is saying, Well, we never had any allegation
3 that he thought they were employees. We never -- it
4 was never anything that would have ever even entered my
12:34:57 5 mind, well then why now? Because I didn't bring it up.

6 Why now when all of a sudden it's the sticking
7 point. Something has gone on, and it sure -- I mean,
8 again, I only see two reasons why we would do anything
9 other than sign something that says the terms reached
12:35:12 10 on the record are incorporated herein and we agree to
11 them. Unless they're trying to delay things or put
12 something in there that wasn't reached on the record.

13 And the Court shouldn't permit either one of
14 those to take place. So, you know, I haven't heard any
12:35:24 15 objection to what I proposed a day or two ago saying
16 let's just sign something saying that we agree to the
17 terms as proposed on the record, or as placed on the
18 record and incorporated by this reference and then pay
19 the money, then we're done.

12:35:38 20 So, again, I would just ask we either do that
21 or the Courts say, look, as Mr. Fink said and I'm sure
22 Mr. Lemkul probably agrees, they'd love nothing more
23 than to give Dr. Russo his money. So go ahead and give
24 it to him. And then we can sit down at some point if
12:35:52 25 we need to have an evidentiary hearing or some other

12:35:54 1 kind of status check where we go over complaints or the
2 transcript from when we put it on the record. Because
3 at some point we'll have a release in place that
4 Dr. Russo will sign that comports to what was placed on
12:36:05 5 the record. No more, no, less.

6 THE COURT: I don't think I can do that, as
7 far as ordering payments of monies without an execution
8 of some sort of closing documents, or release, or
9 something like that.

12:36:22 10 MR. SAMPSON: So then what about the one I
11 proposed that now no one has as of this point had an
12 objection to?

13 THE COURT: Well, here's --

14 MR. SAMPSON: That I've heard.

12:36:31 15 THE COURT: This is the -- I think it's always
16 better for parties to come to some sort of resolution.
17 Because I can anticipate -- and I don't mind saying
18 this, and then I want to go to lunch. I think we all
19 do. But and I don't know this, but I can anticipate
12:36:57 20 potentially without having it all tied up, there could
21 be litigation as to the impact of the release under one
22 remote scenario. Right?

23 And that's the concern I have. And, I mean,
24 it doesn't matter, I mean, from a personal level. But
12:37:16 25 from a judicial perspective, that's why I always want

12:37:20 1 you to try to come to some sort of accord before I make
2 decisions because realistically it could be litigation.
3 I mean, the chances are remote. I get that.

4 Because when you look at it from this
12:37:36 5 perspective if there was truly evidence -- I mean, this
6 makes perfect sense. If there was evidence that they
7 were employees, there would not have been a default
8 judgment entered against them. There would have been
9 motions to set aside, answers, and the like. And
12:37:50 10 that's pretty much the status of the case because I
11 can't -- I can't foresee either Mr. Lemkul or Mr. Fink
12 permitting an employee to be defaulted; right?

13 MR. SAMPSON: Could we perhaps enter a
14 stipulation on the record here and now that for
12:38:06 15 purposes of this litigation they're not employees?

16 THE COURT: Well, I think -- here's the thing,
17 and I don't -- I mean, as far as -- and, I mean, you
18 know, when you look at it, this is so layered. I'd
19 hate to go down this rabbit hole. But there could be
12:38:22 20 arguments made based upon the law of the case; or facts
21 of the case; or how the case has developed; as it has
22 an impact, what does the release cover? And so those
23 are issues. I think -- I don't mind saying this. I
24 think it's almost -- it rises to a level of a
12:38:47 25 significant presumption they're not employees because

12:38:50 1 there would have been an answer filed, you know. But I
2 just want everyone to come to some sort of accord on
3 this.

4 MR. SAMPSON: Well, the problem is it's been
12:38:59 5 three weeks, and we haven't. And I've spent two weeks,
6 Monday the 21st until the following week before I heard
7 anything and Thursday until yesterday where I go with
8 no communication from the -- from Sunrise. Or -- and
9 one of those weeks was including Cox, and then three
12:39:19 10 weeks with Scarcelli. I'm glad to hear he's on board.
11 But I don't want any further -- I mean, I don't want to
12 tell my client, well you don't get your money and you
13 don't get your verdict either. So...

14 THE COURT: I understand.

12:39:30 15 MR. SAMPSON: I mean, I need at this point for
16 the Court to please take action to tell these
17 defendants, do what -- enter into a release that
18 comports no more no less than what was placed on the
19 record and give the doctor his money.

12:39:44 20 MR. MELORO: Your Honor, I take exception to
21 being grouped as defendants by Mr. Sampson. There are
22 separate entities here. I communicated with
23 Mr. Sampson and the other parties in this action, not
24 only that first week after we made this agreement but
12:40:01 25 the following week I did a follow up saying have we

12:40:05 1 come to any agreements. So I just want it clear when
2 Mr. Sampson says "defendants", which defendants he's
3 speaking of, please. Thank you.

4 MR. FINK: Your Honor --

12:40:15 5 MR. SAMPSON: And I thought -- I don't know
6 what comes through on the phone, but I thought I said
7 some of the defendants, specifically Sunrise. I
8 went -- I got the release either Sunday night, Monday
9 morning. Didn't hear anything for a week. And then we
12:40:29 10 talked from Monday to Thursday. I didn't hear anything
11 for another week until yesterday. Cox I didn't hear
12 for the first week, but we did deal with them the
13 following week. We got it all worked out.

14 Scarcelli I hadn't heard from hardly at all,
10:27:58 15 but it sounds today like they're on board.

16 (Reporter clarification)

17 So that's where we are at. And again, I
18 just -- I don't want -- please don't make me go back
19 and tell Dr. Russo you don't get your money; you don't
12:40:49 20 get your trial either. There is some kind of limbo.

21 I'd like to think there is some way the Court
22 can take action under the settlement to say here's what
23 you need to do, and it includes -- and it should
24 include signing the release that comports and provides
12:41:05 25 no more no less than what was placed on the record, and

12:41:08 1 tender the funds pretty quickly. We've already been
2 three weeks into this.

3 THE COURT: Mr. Fink.

4 MR. FINK: Good, your Honor. Mr. Sampson made
12:41:16 5 an interesting suggestion that I'd like to think about
6 and that may work. That if we say for the purposes of
7 this litigation they weren't employees. That may take
8 care of all of this. I would just need to run that by
9 my people. But that may take care of all of our
12:41:31 10 concerns at that point, and then we can -- we can be
11 done.

12 THE COURT: How's that, Mr. Sampson?

13 MR. SAMPSON: It was my suggestion, so I still
14 totally agree with it.

12:41:40 15 THE COURT: Well, you know what --

16 MR. SAMPSON: I would ask -- I would ask
17 just -- Mr. Fink has made a couple of comments today,
18 and I think the Court also echoed them, along the lines
19 of Sesman and Duslak, all rights against them, anybody
12:41:53 20 who insures them, you know, all of those are preserved.
21 They're not affected. I would like to make sure that
22 is crystal clear in whatever iteration we end up with.
23 I put some language in there that Mr. Fink has asked to
24 modify. And I think he and I hopefully can work that
12:42:08 25 out, and say, you know, that sentiment that, I believe,

12:42:11 1 was expressed much more clearly today than in the
2 agreement be set out very, very clearly.

3 THE COURT: And I think he has no problem with
4 that because that was his idea, you know, so regarding
12:42:24 5 the fact that if they're independent contractors,
6 there's no waiver of the right to seek coverage for
7 this case. I mean, I get that based upon the insurance
8 policy. And no big deal there.

9 But, okay. How about this? Because I know
12:42:41 10 your client wants their money. And I've been in that
11 situation before.

12 How long do you think it would take you,
13 Mr. Fink, to run that passed your clients?

14 MR. FINK: Well, I can try to do that now.
12:42:55 15 They're on the east coast, Philly. So I can try to do
16 that now. But I would say for sure -- and they're,
17 obviously, they're hot on this issue. I would say if I
18 can't get that by them today for whatever reason,
19 tomorrow morning. You know, I get up early. I'm
12:43:09 20 usually up east coast time anyway. So I think I can
21 get an answer from them, again, either this afternoon
22 or before everybody generally wakes up in the morning.
23 But I think it's -- I think it's a workable solution
24 from where I'm sitting.

12:43:25 25 And yeah, Mr. Sampson and I, other than this

12:43:28 1 one thing, we're in complete agreement. I don't think
2 we have any issues on that.

3 THE COURT: So how about this then.

4 (Off-the-record scheduling discussion
01:24:06 5 between the court clerk and the Court.)

6 THE COURT: How about a status check,
7 telephonic status check at 9:30?

8 MR. FINK: That would be fine for Sunrise,
9 Judge.

12:43:52 10 THE COURT: Is that fine, Mr. Sampson?

11 MR. SAMPSON: That's fine.

12 THE COURT: Okay.

13 MR. SAMPSON: In the meantime, Mr. Fink can
14 just re-forward to me whatever the final version is
12:44:04 15 he's claiming. Or perhaps what we're talking the
16 stipulation he'd be okay with, the last one I provided.
17 And then I get a chance to look that over, and we can
18 talk it out tomorrow and find out where we're at, but
19 what if anything else we would do from there.

12:44:16 20 THE COURT: Well, I think this -- I think it's
21 actually much simpler than that in this regard.

22 Hypothetically, Mr. Fink hears back from the
23 east coast sometime today. He gives you a phone call
24 or email, says, Look, my client has no problems with
12:44:32 25 the stipulation. You guys move from -- with that, with

12:44:36 1 the stipulation and whatever release language you feel
2 would be appropriate. And everything is covered. I
3 make my phone call tomorrow at 9:30. Say, Look, Judge,
4 we've resolved this issue.

12:44:50 5 MR. SAMPSON: That would be nice too.

6 THE COURT: I mean, I can foresee that
7 happening. And the reason -- and what that does is
8 this, and remember this is important too, that gives
9 finality.

12:45:02 10 MR. SAMPSON: Yeah.

11 THE COURT: That's a big -- and I'm -- and,
12 Mr. Sampson, I understand your plight, and I respect
13 it. And I'm not just kicking the can down the road.
14 I'd rather give you finality now than maybe appeals,
12:45:17 15 those types of things. And we don't need that. We
16 need to just put this case to bed. Because 24 hours
17 could save you a year and a half, right?

18 MR. FINK: Mr. Sampson, did you get a copy of
19 the email I just sent over to you?

12:45:31 20 MR. SAMPSON: I don't know.

21 MR. FINK: Okay.

22 MR. SAMPSON: I'm not in a position to check
23 my emails right now.

24 MR. FINK: All right. Let me know if you
12:45:37 25 didn't get it. I just sent it over again, so I can

12:45:40 1 do --

2 MR. SAMPSON: All right. I'll take a look.

3 THE COURT: So what we'll do, we'll set a

4 9:00 o'clock conference call, and we'll use Court Call.

12:45:46 5 9:30, I'm sorry.

6 MR. FINK: 9:30.

7 THE COURT: 9:30. We'll use Court Call. And

8 we'll -- how do we do that?

9 THE COURT CLERK: Do you all have

12:45:56 10 instructions?

11 MR. LEMKUL: No.

12 MR. FINK: I'm sure my office does somewhere.

13 THE COURT CLERK: No worries.

14 MR. FINK: Those are all beyond my

12:46:03 15 capabilities.

16 THE COURT: And it's just a continuation of

17 today's hearing, Mr. Sampson and Mr. Lemkul. That's

18 all it is.

19 MR. LEMKUL: Sounds good, your Honor.

12:46:14 20 MR. SAMPSON: Sounds good.

21 THE COURT: All right. Everyone enjoy your

22 day.

23 MR. FINK: Thank you.

24 THE COURT: All right.

12:46:16 25 MR. SAMPSON: All right.

Peggy Isom, CCR 541, RMR

(702)671-4402 - CROERT48@GMAIL.COM

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12:46:21 1

MR. MELORO: Have a good lunch, your Honor.

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(Proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF NEVADA)

:SS

COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO
HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE
PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE
TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
STENOGRAPHY NOTES WERE TRANSCRIBED INTO TYPEWRITING AT
AND UNDER MY DIRECTION AND SUPERVISION AND THE
FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND
ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE
PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED
MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF
NEVADA.

PEGGY ISOM, RMR, CCR 541

Peggy Isom, CCR 541, RMR

(702) 671-4402 - CROERT48@GMAIL.COM

Pursuant to NRS 239.053, illegal to copy without payment.

EXHIBIT “C”

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter "Agreement") is entered into by and between:

1. Dr. SIMONE RUSSO (hereinafter "PLAINTIFF");
2. SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION (hereinafter "SUNRISE") and its affiliated companies, and each of their respective past, present and future officers, directors, members, managers, agents, representatives, shareholders, partners, associates, insurers (Community Association Underwriters, Inc., QBE Insurance Corporation, Alliant Insurance Services, Inc., DSCM, Inc. and Armour Risk Management, Inc. – but only as it relates to SUNRISE), **EXCLUDING RICHARD DUSLAK AND/OR JUSTIN SESMAN OR ANYONE ASSOCIATED OR AFFILIATED WITH THEM, INCLUDING ANY ACTUAL OR POTENTIAL INSURER (per the stipulation attached in exhibit "A")**, attorneys, subsidiaries, predecessors, beneficiaries, grantors, grantees, vendees, transferees, successors, assigns, heirs, divisions, contractors, joint ventures, special purpose entities, legal and equitable owners;
3. IES RESIDENTIAL, INC. (hereinafter "IES") and its affiliated companies, and each of their respective past, present and future officers, directors, members, managers, agents, representatives, shareholders, partners, associates, employees, attorneys, subsidiaries, predecessors, beneficiaries, grantors, grantees, vendees, transferees, successors, assigns, heirs, divisions, contractors, joint ventures, special purpose entities, legal and equitable owners and insurers;
4. COX COMMUNICATIONS LAS VEGAS, INC. D/B/A COX COMMUNICATIONS (hereinafter "COX") and its affiliated companies, and each of their respective past, present and future officers, directors, members, managers, agents, representatives, shareholders, partners, associates, employees, attorneys, subsidiaries, predecessors, beneficiaries, grantors, grantees, vendees, transferees, successors, assigns, heirs, divisions, contractors, joint ventures, special purpose entities, legal and equitable owners and insurers;
5. PW JAMES MANAGEMENT & CONSULTING, LLC (hereinafter "PW JAMES") and its affiliated companies, and each of their respective past, present and future officers, directors, members, managers, agents, representatives, shareholders, partners, associates, employees, attorneys, subsidiaries, predecessors, beneficiaries, grantors, grantees, vendees, transferees, successors, assigns, heirs, divisions, contractors, joint ventures, special purpose entities, legal and equitable owners and insurers (potentially Community Association Underwriters, Inc., QBE Insurance Corporation, Alliant Insurance Services, Inc., DSCM, Inc. and Armour Risk Management, Inc.);
6. KEVIN BUSHBAKER (hereinafter "BUSHBAKER") and his successors, assigns, heirs, and insurers; and
7. CHRIS SCARCELLI (hereinafter "SCARCELLI") and his successors, assigns, heirs, and insurers.



Any of the above-named entities may be referred to as a "PARTY" herein or all of the above-named entities may collectively be referred to as the "PARTIES" herein and/or "SETTLING PARTIES." SUNRISE, IES, COX, PW JAMES, BUSHBAKER and SCARCELLI will also be referred to as "DEFENDANTS."

This Agreement shall be effective as of the date the Agreement is fully executed.

RECITALS

This Agreement is entered into with reference to the following facts:

PLAINTIFF asserts that on or about August 20, 2015 he tripped and fell when exiting a cab in front of the home that he rented from BUSHBAKER. PLAINTIFF subsequently filed a lawsuit entitled *Russo v. Cox Communications Las Vegas, Inc. D/B/A Cox Communications, et al.*, Eighth Judicial District Court Case No. A-17-753606-C, alleging that his injuries were caused by DEFENDANTS' negligence and seeking damages. This action shall be referred to as the "SUBJECT ACTION".

The PARTIES have conducted settlement discussions and direct arms-length negotiations and now wish to settle, dismiss, release, discharge, and terminate any and all claims, demands, controversies, causes of action, damages, rights, liabilities, and obligations between them relating to the SUBJECT ACTION.

The PARTIES hereby acknowledge the following: Under the Medicare Secondary Payer ("MSP") statute, 42 U.S.C. §1395y(b), and its accompanying regulations ("the MSP Provisions"), the Centers for Medicare and Medicaid Services (the "CMS"), in certain circumstances, have an obligation to seek reimbursement of conditional payments made by the Medicare program (Title XVIII of the Social Security Act) (the "Medicare Program") for the claim, items, and services relating to injuries allegedly sustained by PLAINTIFF as a consequence of the SUBJECT ACTION. The PARTIES seek to fully comply with all MSP Provisions as further detailed throughout this Agreement.

NOW, THEREFORE, for valuable consideration, the receipt and adequacy of which are hereby acknowledged, and subject to District Court's approval, the PARTIES hereto agree to enter into this settlement as follows:

1. SETTLEMENT PAYMENT TERMS AND CONDITIONS.

THE PARTIES hereby agree that in full and complete settlement of the claims in the SUBJECT ACTION, SUNRISE'S insurer will pay PLAINTIFF the total sum of ONE-HUNDRED-FORTY THOUSAND DOLLARS (\$140,000.00) for itself and PW JAMES. IES' insurer, on behalf of IES and COX, will pay PLAINTIFF the total sum of TWO-HUNDRED FIFTEEN THOUSAND DOLLARS (\$215,000). Both BUSHBAKER and SCARCELLI will pay nothing towards the settlement and agree to waive any rights that they may have from any other settled PARTY for fees and/or costs.

The settlement payments expressly include the payment of any and all damages PLAINTIFF may have recovered in the SUBJECT ACTION, including, but not limited to, general damages, special damages, attorneys' fees, expert fees, costs, prejudgment, liens and any and all other damages. PLAINTIFF acknowledges that the settlement funding is being paid by SUNRISE's, IES' and COX's insurers, and SUNRISE, IES, COX and PW JAMES shall not in any way act as a guarantor of any payments that are being funded by its insurer, but that full funding is a condition precedent to this Agreement being binding.

SUNRISE and IES agree that they will cause their insurers to deliver drafts for \$140,000.00 and \$215,000.00, respectively, made payable to "Simone Russo and his attorney, The Law Office of David Sampson, LLC" to RUSSO's counsel within fourteen days of PLAINTIFF'S signing this Agreement. The Law Office of David Sampson's referencing Tax ID No. is 45-3548937. These settlement funds shall then be held in trust until the Stipulation and Order for Dismissal with Prejudice of the SUBJECT ACTION has been signed by PLAINTIFF'S counsel and provided to counsel for DEFENDANTS. The PARTIES agree that none of the consideration for this release is for lost wages or earning capacity whether past, future or present, and that all sums set forth herein constitute damages on account of personal injuries or sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code of 1986, as amended.

2. COVENANT NOT TO SUE AND DISMISSAL.

Upon full execution of this Confidential Agreement and receipt of the settlement payments of \$140,000.00, and \$215,000.00, PLAINTIFF shall dismiss his operative Complaint with prejudice as to DEFENDANTS. BUSHBAKER shall dismiss his Cross-Claim against COX and IES with prejudice. The PARTIES also agree that the Court shall retain jurisdiction to ensure that PLAINTIFF receives all settlement proceeds due under this Agreement.

Furthermore, PLAINTIFF covenants and agrees that he has not and that it will not, bring any other claim, action, suit or proceeding against DEFENDANTS (including their insurers except as noted on page 1 paragraph 2) related to the SUBJECT ACTION, except to enforce the terms of this Agreement.

3. WARRANTY AND HOLD HARMLESS REGARDING NON-ASSIGNMENT OF CLAIMS.

Each PARTY to this Agreement hereby represents and warrants to the others that it is a rightful owner of all rights, title, and interest in every claim and other matter which it releases herein and has not heretofore sold, assigned, conveyed or otherwise transferred all or a portion of any interest or any claim which they may have against the others or each of the other's respective parents, affiliates, subsidiaries, predecessors, and each other person, firm, insurer or other entity released and discharged pursuant to this Agreement. The PARTIES upon a proper and timely tender agree to hold each other and each of the other's parents, affiliates, subsidiaries, predecessors, and each other person, firm, insurer or other entity released pursuant to this Agreement harmless from any liabilities, claims, demands, damages, costs, expenses and attorneys' fees incurred as a



result of any person asserting any claim or cause of action based upon any such assignment or transfer.

4. RELEASE.

i) In consideration for the full and timely performance of all terms and conditions of this Agreement in the manner prescribed herein, including, but not limited to, all releases, dismissals, waivers, covenants, warranties, and representations, PLAINTIFF: hereby releases and forever discharges DEFENDANTS and all of their heirs, executors, administrators, insurers, trustors, trustees, beneficiaries, predecessors, successors, assigns, members, partners, partnerships, parents, subsidiaries, affiliates and related entities, and each of the foregoing respective officers, directors, stockholders, controlling persons, principals, agents, servants, employees **EXCLUDING RICHARD DUSLAK AND/OR JUSTIN SESMAN OR ANYONE ASSOCIATED OR AFFILIATED WITH THEM INCLUDING ANY ACTUAL OR POTENTIAL INSURER (per the Stipulation, Attached as Exhibit "A")** sureties, attorneys, consultants, and experts, who are or may ever become liable to them, of and from any and all claims, demands, causes of action, obligations, liens, taxes, damages, losses, costs, attorneys' fees, expert fees, costs, interest, and any other expenses of any kind and nature whatsoever, at law or in equity, direct or derivative, known or unknown, fixed, liquidated or contingent, tort, contract, statutory or mixed, by reason of any act or omission, matter, cause or thing arising out of or connected with the SUBJECT ACTION that was or could have been filed, including any representation, misrepresentation or omission in connection with any of the above, any and all claims for incidental, consequential, ensuing, or resulting damage therefrom, including, without limitation, claims for injuries, or any other economic loss or non-economic loss, the prosecution of any complaint or cross-complaint, and the defense, handling or settlement of the actions, as well as any and all matters and issues raised, or which could have been raised, or in the future might have been raised. It is the intention of the PARTIES to hereby fully, finally, and forever settle and release any and all disputes and differences, known or unknown, suspected or unsuspected, as to the released matters.

ii) Nothing in this release shall release, discharge, or in any way impact PLAINTIFF's rights against RICHARD DUSLAK and/or JUSTIN SESMAN in any manner (per the Stipulation attached as Exhibit "A"). Additionally, any rights RICHARD DUSLAK and/or JUSTIN SESMAN have had, currently have, or may have, other than those specifically disposed of by the Court in a prior hearing regarding good faith settlement, shall not be released, discharged or in any way impacted by this release. PLAINTIFF shall retain all rights to pursue any claims against RICHARD DUSLAK and/or JUSTIN SESMAN, and shall retain all powers to pursue any claims RICHARD DUSLAK and/or JUSTIN SESMAN have had, have, or may have if the same are ever obtained by PLAINTIFF INCLUDING CLAIMS AGAINST ANY ACTUAL OR POTENTIAL INSURER OF DUSLAK AND/OR SESMAN. ANY LANGUAGE IN THIS RELEASE THAT IS CONTRARY TO THE LANGUAGE OF THIS SPECIFIC PARAGRAPH, AND/OR ANY LANGUAGE THAT WOULD BE READ TO IN ANY WAY IMPACT PLAINTIFF'S RIGHTS AGAINST RICHARD DUSLAK and/or JUSTIN SESMAN, THEIR INSURED, EMPLOYERS, OR ANY OTHER RELATED OR AFFILIATED PERSONS OR ENTITIES OR THE RIGHTS RICHARD DUSLAK and/or JUSTIN SESMAN HAVE HAD, HAVE, OR MAY HAVE AGAINST ANY PERSON OR ENTITY AT ANY TIME (INCLUDING PLAINTIFF'S RIGHTS TO PURSUE THE SAME ON BEHALF OF DUSLAK AND/OR SESMAN) SHALL BE DEEMED NULL AND VOID

iii) In further consideration for the full and timely performance of all terms and conditions of this Agreement in the manner prescribed herein, including, but not limited to, all releases, dismissals, waivers, covenants, warranties, and representations, DEFENDANTS: hereby releases and forever discharge PLAINTIFF and every other DEFENDANT and all of their heirs, executors, administrators, insurers, trustors, trustees, beneficiaries, predecessors, successors, assigns, members, partners, partnerships, parents, subsidiaries, affiliates and related entities, and each of the foregoing respective officers, directors, stockholders, controlling persons, principals, agents, servants, employees, representatives, and all persons, firms, and entities connected with them, including, without limitation, its insurers, sureties, attorneys, consultants, and experts, who are or may ever become liable to them, of and from any and all claims, demands, causes of action, obligations, liens, taxes, damages, losses, costs, attorneys' fees, expert fees, costs, interest, and any other expenses of any kind and nature whatsoever, at law or in equity, direct or derivative, known or unknown, fixed, liquidated or contingent, tort, contract, statutory or mixed, including any and all other potential entitlements that DEFENDANTS ever had, may now have or may hereafter have by reason of any act or omission, matter, cause or thing arising out of or connected with the SUBJECT ACTION that was or could have been filed, including any representation, misrepresentation or omission in connection with any of the above, any and all claims for incidental, consequential, ensuing, or resulting damage therefrom, including, without limitation, claims for injuries, or any other economic loss or non-economic loss, the prosecution of any complaint or cross-complaint, and the defense, handling or settlement of the actions, as well as any and all matters and issues raised, or which could have been raised, or in the future might have been raised. It is the intention of the PARTIES to hereby fully, finally, and forever settle and release any and all disputes and differences, known or unknown, suspected or unsuspected, as to the released matters.

iii) Notwithstanding any provision to the contrary, the PARTIES, and each of them, recognize and acknowledge that this Agreement is not intended to, and shall not, release any of the PARTIES from liability or damages, if any, caused by, or arising out of, the failure or refusal of a PARTY to perform any or all of the acts required on their respective parts to be done, as per the terms and conditions of this Agreement.

5. HANDLING OF SETTLEMENT FUNDS.

PLAINTIFF agrees that he will be solely and completely responsible for any necessary outstanding payments, repayments or reimbursements for treatment, liens (including attorney liens) and/or other types of damages related to the events that are the subject of the SUBJECT ACTION. PLAINTIFF further agrees to, UPON PROPER AND TIMELY TENDER, fully and expressly indemnify, save and hold harmless DEFENDANTS for and against all claims, liens (including attorney liens), demands, causes of action, damages, costs, losses, and liabilities, including, but not limited to, attorneys' fees and other legal costs, if any, arising out of any lien relating to the proceeds of any recovery or any failure to make any outstanding payments or repayments, as referenced above.

6. REPRESENTATION BY COUNSEL.

The PARTIES hereto acknowledge that they have been represented by or had the opportunity to rely upon counsel of their own choosing in the negotiations for the preparation of



this Agreement, that they have read this Agreement, have had its contents fully explained to them or had the opportunity to have the contents fully explained to them by such counsel, and are fully aware of and understand all of its terms and the legal consequences thereof. It is acknowledged that the PARTIES hereto have mutually participated in the preparation of this Agreement.

7. DISPUTED CLAIMS.

This Agreement represents the settlement of disputed claims and does not constitute any admission of liability by any PARTY to any other PARTY. Each PARTY to this Agreement hereby expressly denies any liability to the other PARTIES.

8. FURTHER ASSURANCES.

The PARTIES hereby agree to execute such other documents and to take such other action as may be reasonably necessary to further the purposes of this Agreement, including, but not limited to the execution of the stipulation for dismissal with prejudice.

9. NO REPRESENTATIONS OR WARRANTIES OTHER THAN THOSE IN THIS AGREEMENT.

Each of the PARTIES to this Agreement acknowledges that no other PARTY, nor any agent or attorney of any other PARTY has made any promise, representation or warranty whatsoever, express or implied, not contained herein concerning the subject matter hereof to induce them to execute this Agreement, and acknowledges that he, she or it has not executed this instrument in reliance on any such promise, representation, or warranty not contained herein, and further acknowledges that there have not been, and are no other, agreements or understandings between the PARTIES relating to this settled litigation except as stated in this Agreement.

10. BENEFIT AND BURDEN.

This Agreement shall be binding upon and inure to the benefit of the PARTIES hereto and their respective heirs, representatives, successors, and assigns.

11. WAIVER AND AMENDMENT.

No breach of any provision hereof can be waived unless in writing. Waiver of any one breach of any provision hereof shall not be deemed to be a waiver of any other breach of the same or any other provision hereof. This Agreement may be amended only by a written agreement executed by the PARTIES in interest at the time of the modification.

12. CAPTIONS AND INTERPRETATIONS.

Titles or captions contained herein are inserted as a matter of convenience and for reference, and no way define, limit, extend, or describe the scope of this Agreement or any provision hereof. Whenever the context hereof shall so require, the singular shall include the plural, and male gender shall include the female gender and the neuter, and vice versa. Furthermore, no

provision in this Agreement is to be interpreted for or against any PARTY because that PARTY or his legal representative drafted such provision.

13. AUTHORITY TO EXECUTE.

Each of the PARTIES represents and warrants that it is competent to enter into this Agreement and has the full right, power and authority to enter into and perform the obligations under this Agreement.

14. INTEGRATION.

This Agreement constitutes the entire, final, and integrated agreement between the PARTIES hereto pertaining to the subject matter hereof, fully supersedes all prior understandings, representations, warranties, and agreements between the PARTIES hereto, or any of them, pertaining to the subject matter hereof, and may be modified only by written agreement signed by all the PARTIES in interest at the time of the modification.

15. SEVERANCE.

If any provision of this Agreement is determined by a court of competent jurisdiction to be illegal, invalid, or unenforceable, such provision will be deemed to be severed and deleted from the Agreement as a whole, and neither such provision nor its severance and deletion shall in any way affect the validity of the remaining provisions of the Agreement.

16. VOLUNTARY AGREEMENT.

The PARTIES hereto, and each of them, further represent and declare that they have carefully read this Agreement and know the contents thereof, and that they signed the same freely and voluntarily.

17. GOVERNING LAW.

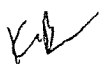
This Agreement has been negotiated and entered into in the State of Nevada, and shall be governed by, construed and enforced in accordance with the internal laws of the State of Nevada.

18. COUNTERPARTS.

This Agreement may be executed in two or more counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument. Additionally, facsimile or scanned copies of signatures shall be considered an original signature.

19. ATTORNEYS' FEES.

i) Attorney's Fees and Costs: All PARTIES to this Agreement agree to bear their own attorneys' fees, expert fees and costs incurred in connection with the defense and prosecution of this action except as otherwise set forth in this Agreement. PLAINTIFF acknowledges that the



settlement payments it shall receive include full payment of all statutory attorney's fees, expert fees and costs that it could be entitled to receive.

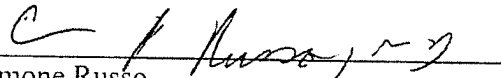
ii) Attorney's Fees For Future Action: Should any PARTY hereto reasonably retain counsel for the purpose of enforcing or preventing the breach of any provision of this Agreement, the prevailing PARTY shall be reimbursed by the losing PARTY for all costs and expenses incurred thereby including, but not limited to, reasonable attorneys' fees, expert fees and costs.

A handwritten signature in black ink, appearing to be 'FJR', is located in the bottom right corner of the page.

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date affixed by their signature.

Dated: _____

SIMONE RUSSO


Simone Russo

Dated: _____

**SUNRISE VILLAS IX HOMEOWNERS'
ASSOCIATION**

Sunrise Villas IX Homeowner's Association

Dated: _____

IES RESIDENTIAL, INC.

IES Residential, Inc.

Dated: _____

**COX COMMUNICATIONS LAS VEGAS, INC.
D/B/A COX COMMUNICATIONS**

COX Communications Las Vegas, Inc., dba COX
Communications

Dated: _____

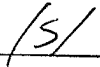
**PW JAMES MANAGEMENT &
CONSULTING, LLC**

PW James Management & Consulting, LLC

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date affixed by their signature.

Dated: _____

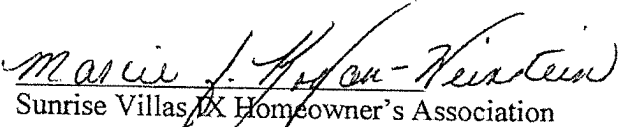
SIMONE RUSSO



Simone Russo

Dated: _____

**SUNRISE VILLAS IX HOMEOWNERS'
ASSOCIATION**



Sunrise Villas IX Homeowner's Association

Dated: _____

IES RESIDENTIAL, INC.

IES Residential, Inc.

Dated: _____

**COX COMMUNICATIONS LAS VEGAS, INC.
D/B/A COX COMMUNICATIONS**

COX Communications Las Vegas, Inc., dba COX
Communications

Dated: _____

**PW JAMES MANAGEMENT &
CONSULTING, LLC**

PW James Management & Consulting, LLC

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Dated: _____

SIMONE RUSSO

Simone Russo

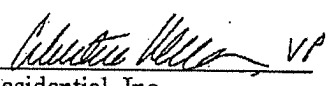
Dated: _____

SUNRISE VILLAS IX HOMEOWNERS'
ASSOCIATION

Sunrise Villas IX Homeowner's Association

Dated: 12/4/19

IES RESIDENTIAL, INC.

 VP
IES Residential, Inc.

Dated: _____

COX COMMUNICATIONS LAS VEGAS, INC.
D/B/A COX COMMUNICATIONS

COX Communications Las Vegas, Inc., dba COX
Communications

Dated: _____

PW JAMES MANAGEMENT &
CONSULTING, LLC

PW James Management & Consulting, LLC

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date affixed by their signature.

Dated: _____

SIMONE RUSSO

Simone Russo

Dated: _____

**SUNRISE VILLAS IX HOMEOWNERS'
ASSOCIATION**

Sunrise Villas IX Homeowner's Association

Dated: _____

IES RESIDENTIAL, INC.

IES Residential, Inc.

Dated: 1/12/20

**COX COMMUNICATIONS LAS VEGAS, INC.
D/B/A COX COMMUNICATIONS**

Stephane Roue
COX Communications Las Vegas, Inc., dba COX
Communications

Dated: _____

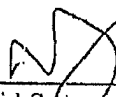
**PW JAMES MANAGEMENT &
CONSULTING, LLC**

PW James Management & Consulting, LLC

APPROVED AS TO FORM AND CONTENT:

Dated: 11-12-19

LAW OFFICE OF DAVID SAMPSON, LLC

By: 
David Sampson, Esq.
Law Office of David Sampson, LLC
Attorneys for Plaintiff

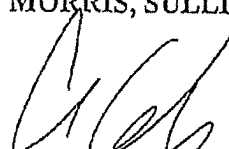
Dated: _____

SPRINGEL & FINK, LLP

By: _____
Leonard T. Fink, Esq.
Attorneys for Defendant,
Sunrise Villas LX Homeowners' Association

Dated: _____

MORRIS, SULLIVAN & LEMKUL

By: 
Chris Turtzo, Esq.
Attorneys for Defendants,
IES Residential, Inc. and COX Communications Las
Vegas, Inc., dba COX Communications

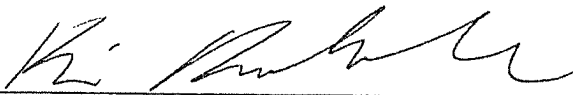
Dated: _____

SGRO & ROGER

By: _____
Joseph Mcloro, Esq.
Attorneys for Defendant, Kevin Bushbaker

Dated: 11/22/2019

KEVIN BUSHBAKER



Kevin Bushbaker

Dated: _____

CHRIS SCARCELLI

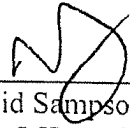
Chris Scarcelli

SIGNATURES TO FOLLOW ON NEXT PAGE

APPROVED AS TO FORM AND CONTENT:

Dated: 11-12-19

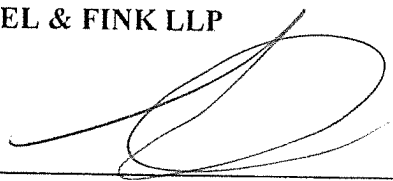
LAW OFFICE OF DAVID SAMPSON, LLC

By: 

David Sampson, Esq.
Law Office of David Sampson, LLC
Attorneys for Plaintiff

Dated: 1/10/20

SPRINGEL & FINK LLP

By: 

Leonard T. Fink, Esq.
Attorneys for Defendant,
Sunrise Villas IX Homeowners' Association

Dated: _____

MORRIS, SULLIVAN & LEMKUL

By: _____

Chris Turtzo, Esq.
Attorneys for Defendants,
IES Residential, Inc. and COX Communications Las
Vegas, Inc., dba COX Communications

Dated: _____

SGRO & ROGER

By: _____

Joseph Meloro, Esq.
Attorneys for Defendant, Kevin Bushbaker

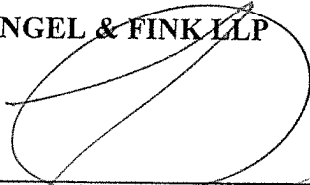
APPROVED AS TO FORM AND CONTENT:

Dated: _____

LAW OFFICE OF DAVID SAMPSON, LLC

By: _____
David Sampson, Esq.
Law Office of David Sampson, LLC
Attorneys for Plaintiff

Dated: 1/10/20

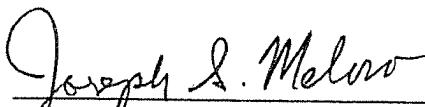
SPRINGEL & FINK LLP
By: _____

Leonard T. Fink, Esq.
Attorneys for Defendant,
Sunrise Villas IX Homeowners' Association

Dated: _____

MORRIS, SULLIVAN & LEMKUL

By: _____
Chris Turtzo, Esq.
Attorneys for Defendants,
IES Residential, Inc. and COX Communications Las
Vegas, Inc., dba COX Communications

Dated: 12/05/19

SGRO & ROGER
By: _____

Joseph Meloro, Esq.
Attorneys for Defendant, Kevin Bushbaker

Dated: _____

LIPSON NEILSON

By: _____
Julie Funai, Esq.
Attorneys for Defendant, Chris Scarcelli

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date affixed by their signature.

Dated: _____

SIMONE RUSSO

Simone Russo

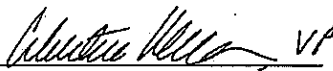
Dated: _____

**SUNRISE VILLAS IX HOMEOWNERS'
ASSOCIATION**

Sunrise Villas IX Homeowner's Association

Dated: 12/4/19

IES RESIDENTIAL, INC.

 VP
IES Residential, Inc.

Dated: _____

**COX COMMUNICATIONS LAS VEGAS, INC.
D/B/A COX COMMUNICATIONS**

COX Communications Las Vegas, Inc., dba COX
Communications

Dated: _____

**PW JAMES MANAGEMENT &
CONSULTING, LLC**

PW James Management & Consulting, LLC

IN WITNESS WHEREOF, the undersigned have executed this Agreement on the date affixed by their signature.

Dated: _____

SIMONE RUSSO

Simone Russo

Dated: _____

**SUNRISE VILLAS IX HOMEOWNERS'
ASSOCIATION**

Sunrise Villas IX Homeowner's Association

Dated: _____

IES RESIDENTIAL, INC.

IES Residential, Inc.

Dated: 1/12/20

**COX COMMUNICATIONS LAS VEGAS, INC.
D/B/A COX COMMUNICATIONS**

Stephen Houe
COX Communications Las Vegas, Inc., dba COX
Communications

Dated: _____

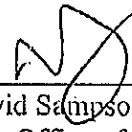
**PW JAMES MANAGEMENT &
CONSULTING, LLC**

PW James Management & Consulting, LLC

APPROVED AS TO FORM AND CONTENT:

Dated: 11-12-19

LAW OFFICE OF DAVID SAMPSON, LLC

By: 
David Sampson, Esq.
Law Office of David Sampson, LLC
Attorneys for Plaintiff

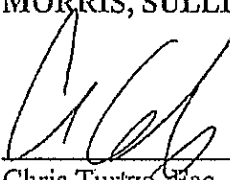
Dated: _____

SPRINGEL & FINK LLP

By: _____
Leonard T. Fink, Esq.
Attorneys for Defendant,
Sunrise Villas IX Homeowners' Association

Dated: _____

MORRIS, SULLIVAN & LEMKUL

By: 
Chris Turtzo, Esq.
Attorneys for Defendants,
IES Residential, Inc. and COX Communications Las
Vegas, Inc., dba COX Communications

Dated: _____

SGRO & ROGER

By: _____
Joseph Meloro, Esq.
Attorneys for Defendant, Kevin Bushbaker

Dated: 11/22/2019

KEVIN BUSHBAKER



Kevin Bushbaker

Dated: _____

CHRIS SCARCELLI

Chris Scarcelli

SIGNATURES TO FOLLOW ON NEXT PAGE

APPROVED AS TO FORM AND CONTENT:

Dated: _____

LAW OFFICE OF DAVID SAMPSON, LLC

By: _____

David Sampson, Esq.
Law Office of David Sampson, LLC
Attorneys for Plaintiff

Dated: _____

SPRINGEL & FINK LLP

By: _____

Leonard T. Fink, Esq.
Attorneys for Defendant,
Sunrise Villas IX Homeowners' Association

Dated: _____

MORRIS, SULLIVAN & LEMKUL

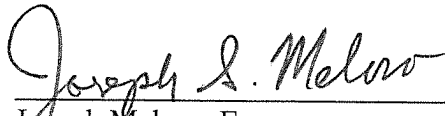
By: _____

Chris Turtzo, Esq.
Attorneys for Defendants,
IES Residential, Inc. and COX Communications Las
Vegas, Inc., dba COX Communications

Dated: 12/05/19

SGRO & ROGER

By: _____


Joseph Meloro, Esq.
Attorneys for Defendant, Kevin Bushbaker

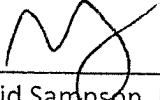
STIPULATION BETWEEN SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION AND SIMONE RUSSO RELATED TO CASE A-17-753606 (SIMONE RUSSO V. COX COMMUNICATIONS LAS VEGAS, INC.).

IT IS HEREBY STIPULATED THAT FOR THE PURPOSES OF THIS LITIGATION AND FOR ANY AND ALL ISSUES RELATED TO SIMONE RUSSO'S CLAIMS AND SETTLEMENT, THAT IN AUGUST 2016 BOTH DEFENDANT RICHARD DUSLAK AND DEFENDANT JUSTIN SESMAN WERE NATURAL PERSONS WHO WERE IN THE SERVICE OF SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION AS INDEPENDENT CONTRACTORS, WHOM SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION COMPENSATED, AND WHOM SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION HAD THE NON-EXCLUSIVE RIGHT TO DIRECT AND CONTROL BY ASSIGNING PROJECTS WHILE DUSLAK AND SESMAN PERFORMED SERVICES FOR SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION.

Dated: 11-12-19

LAW OFFICE OF DAVID SAMPSON, LLC

By:



David Sampson, Esq.
Law Office of David Sampson, LLC
Attorneys for Plaintiff

Dated: _____

SPRINGEL & FINK LLP

By:

Leonard T. Fink, Esq.
Attorneys for Defendant,
Sunrise Villas IX Homeowners' Association

EXHIBIT “D”

DECLARATION OF RICHARD DUSLAK

I, under penalty of perjury under the laws of the State of Nevada, declare the following is true and correct:

1. My name is Richard Duslak.
2. I was employed by SUNRISE VILLAS HOMEOWNERS ASSOCIATION (Sunrise) on August 27, 2016 and for some period of time prior to that date.
3. While I was employed by Sunrise, the work projects I was given were assigned to me by the Sunrise Board and my work was in the service of Sunrise. The Sunrise Board controlled the projects I would work on and directed me as to the work that was to be completed. A member of the Sunrise Board would often direct me in the specific manner that the work must be completed.
4. That while I was employed by Sunrise, my pay was a set hourly rate and paid directly to me by Sunrise. There was no opportunity to earn a higher rate of pay above that which was established by the Board.
5. I had a regular daily work schedule that was set by the Board. My normal work day would begin at 8:00 A.M. and would end at 5:00 P.M., with a one-hour lunch break.
6. The tools and equipment I used to complete my assignments at Sunrise were paid for and owned by Sunrise. I was not responsible for purchasing my own equipment.
7. I had no special training or education in general landscaping or maintenance for the work that I did at Sunrise other than prior work experience in the field and a one-week course to certify as a swimming pool operator.
8. I was not free to contract to do side projects for homeowners for more pay. I was only permitted to perform work decided upon by the Board.
9. I was never required to obtain or maintain a business license in order to perform my duties.

This Declaration is made in good faith, and not for the purposes of delay.

FURTHER DECLARANT SAYETH NAUGHT.



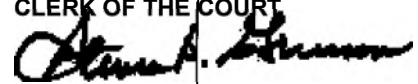
Signature



Date

EXHIBIT “E”

Electronically Filed
12/17/2019 9:48 AM
Steven D. Grierson
CLERK OF THE COURT



1 **JMT**

2 DAVID F. SAMPSON, ESQ.

3 Nevada Bar No. 6811

4 LAW OFFICE OF DAVID SAMPSON, LLC

5 630 S. 3rd Street

6 Las Vegas, NV 89101

7 Tel: 702-605-1099

8 Fax: 888-209-4199

9 Email: david@davidsampsonlaw.com

10 Attorney for Plaintiff

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 SIMONE RUSSO,)

14 Plaintiff,)

15 vs.)

CASE NO: A-17-753606-C

DEPT. NO: XVI

HEARING REQUESTED

16 COX COMMUNICATIONS LAS VEGAS,)

17 INC., D/B/A COX COMMUNICATIONS,)

18 IES RESIDENTIAL, INC., SUNRISE)

19 VILLAS IX HOMEOWNERS)

20 ASSOCIATION, J & G LAWN)

21 MAINTENANCE, KEVIN BUSHBAKER,)

22 PWJAMES MANAGEMENT &)

23 CONSULTING, LLC., J. CHRIS)

24 SCARCELLI, DOE LANDSCAPER,)

25 RICHARD DUSLAK, JUSTIN SESMAN,)

26 AND DOES I V, and ROE)

27 CORPORATIONS I V, inclusive,)

28 Defendants.)

DEFAULT JUDGMENT

This matter having duly come before the Court and the matter being considered
JUDGMENT IN FAVOR OF SIMONE RUSSO AND AGAINST DEFENDANTS RICHARD
DUSLAK AND JUSTIN SESMAN AS FOLLOWS:

Past Medical Expenses: \$ 592,846.46

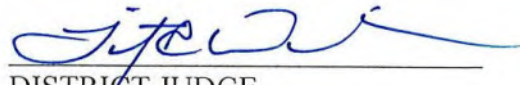
Future Medical Expenses: \$ 250,000.00

General Damages: \$ 24,157,153.54

TOTAL JUDGMENT: \$ 25,000,000.00

The said Judgment shall accrue interest accruing from the date of entry of each respective JUDGMENT until each respective JUDGMENT is paid in full, with an award of costs may follow upon the presentation of a memorandum of costs to the Court.

DATED this 17th day of December, 2019.


DISTRICT JUDGE

Submitted by:

LAW OFFICE OF DAVID SAMPSON, LLC.

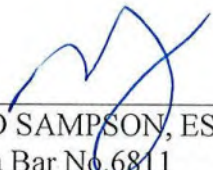
BY: 
DAVID SAMPSON, ESQ.
Nevada Bar No. 6811
LAW OFFICE OF DAVID SAMPSON
630 S. 3rd Street
Las Vegas, Nevada 89101
Fax No: 888-209-4199
Attorney for Plaintiff

EXHIBIT “F”

AFFIDAVIT OF DAVID SAMPSON, ESQ.

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

DAVID SAMPSON, ESQ. being first duly sworn, deposes and says:

1. I am a resident of Clark County Nevada and the attorney for SIMONE RUSSO in the matter of *Russo v. Cox et al*, Case No. A-17-753606-C in the Eighth Judicial District Court for Clark County Nevada.

2. I am personally familiar with the facts and circumstances surrounding this matter and am competent to testify hereto.

3. Two of the many defendants in Case No. A-17-753606-C were RICHARD DUSLAK and JUSTIN SESMAN. My office served DUSLAK and SESMAN with the proper Complaint. Neither DUSLAK nor SESMAN ever appeared in Case No. A-17-753606-C. My client therefore had defaults entered against Defendants DUSLAK and SESMAN.

4. During the trial of Case No. A-17-753606-C the parties who had appeared in the lawsuit reached an agreement to settle the action, with the specific understanding that SIMONE had taken default judgments against RICHARD DUSLAK and JUSTIN SESMAN and that the settlement would not affect any of SIMONE's rights to pursue a default judgment against DUSLAK and/or SESMAN. After the settlement concluded as to the parties who had appeared in the matter, the Court entered a default judgment against DUSLAK and SESMAN in the amount of \$25,000,000.00 with interest accruing on the same.

4. At no time has SIMONE ever agreed to release DUSLAK and/or SESMAN from any liability for the Judgment that was duly entered in Case No. A-753606-C under any circumstances. There was an agreement that, for purposes of the said litigation, DUSLAK and

1 SESMAN were independent contractors, which was based on SUNRISE VILLAS IX's
2 representations to me and to the Court that DUSLAK and SESMAN were not SUNRISE's
3 employees but instead were independent contractors. There was never any agreement to release
4 DUSLAK and/or SESMAN as employees, and there has never been any agreement to release
5 DUSLAK and/or SESMAN if it turned out that SUNRISE was incorrect in what it had
6 represented to me and the Court about DUSLAK and SESMAN being independent contractors.
7

8 5. I made multiple statements on the record in Case No. A-17-753606-C that SIMONE
9 was not releasing and would not be releasing DUSLAK or SESMAN to any degree in Case No.
10 A-17-753606-C, and that the settlement with the active parties in Case No. A-17-753606 would
11 have no affect on any of SIMONE's rights against DUSLAK or SESMAN. SUNRISE and the
12 other active parties agreed DUSLAK and SESMAN were not released to any degree.
13

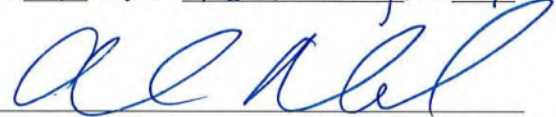
14 6. The release in Case No. A-17-753606-C does not release DUSLAK or SESMAN to
15 any degree. Instead, the release states that SUNRISE is released "**EXCLUDING RICHARD**
16 **DUSLAK AND/OR JUSTIN SESMAN**". (emphasis in original). The release does not
17 include SUNRISE employees as releasees. In identifying the released Defendants, the release
18 states it releases Defendants' "employees *EXCLUDING RICHARD DUSLAK AND/OR*
19 *JUSTIN SESMAN . . .*". (emphasis in original). The release also states "PLAINTIFF
20 [RUSSO] shall retain *all rights* to pursue *any claims* against RICHARD DUSLAK and/or
21 JUSTIN SESMAN". (emphasis added). The release further confirmed, "ANY LANGUAGE IN
22 THIS RELEASE THAT IS CONTRARY TO THE LANGUAGE OF THIS SPECIFIC
23 PARAGRAPH, AND/OR ANY LANGUAGE THAT WOULD BE READ TO IN ANY WAY
24 IMPACT PLAINTIFF'S RIGHTS AGAINST RICHARD DUSLAK and/or JUSTIN
25 SESMAN . . . SHALL BE DEEMED NULL AND VOID." *Id* (emphasis in original).
26
27
28

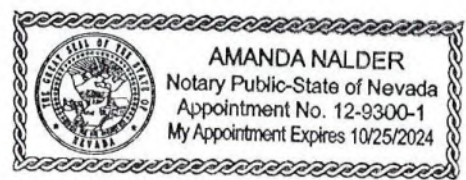
1 7. I do not understand the position that QBE and SUNRISE have taken in claiming that
2 by agreeing DUSLAK and SESMAN were not employees, SIMONE somehow agreed to
3 release DUSLAK and/or SESMAN as SUNRISE employees. That was never something to
4 which SIMONE agreed. There was never any agreement to release DUSLAK and/or SESMAN
5 in any manner. DUSLAK and SESMAN were specifically not released as SUNRISE
6 employees (or to any other extent) because SUNRISE represented to me that DUSLAK and
7 SESMAN were not employees of SUNRISE.
8

9
10 8. At present SIMONE has a Judgment against DUSLAK and SESMAN in the amount
11 of \$25,000,000.00 with interest accruing since the date Judgment was entered in Case No. A-
12 17-753606-C (December 17, 2019). The Judgment was entered against DUSLAK and
13 SESMAN individually in Case No. A-17-753606-C because no one ever defended DUSLAK or
14 SESMAN, and the active parties who had appeared in the matter allowed SIMONE to proceed
15 with procuring a default judgment against DUSLAK and SESMAN individually because
16 SUNRISE represented DUSLAK and SESMAN were independent contractors.
17

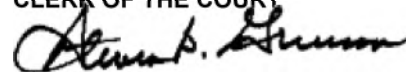
18
19 DATED this 8th day of February, 2021.

20
21 
22 _____
23 DAVID SAMPSON, ESQ.

24 SUBSCRIBED AND SWORN TO before me
25 this 8 day of February, 2021.
26 
27 _____
28 Notary Public in an for said County and State.



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2/9/2021 11:56 AM
Steven D. Grierson
CLERK OF THE COURT


JOIN

LEONARD T. FINK, ESQ.

Nevada Bar No. 6296

SPRINGEL & FINK LLP

9075 W. Diablo Drive, Suite 302

Las Vegas, Nevada 89148

Telephone: (702) 804-0706

Facsimile: (702) 804-0798

E-Mail: *lfink@springelfink.com*

Attorneys for Defendant,

SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION

**DISTRICT COURT
CLARK COUNTY, NEVADA**

SIMONE RUSSO,

Plaintiff,

v.

COX COMMUNICATIONS LAS VEGAS, INC.
D/B/A COX COMMUNICATIONS; IES
RESIDENTIAL, INC.; SUNRISE VILLAS IX
HOMEOWNERS ASSOCIATION; J&G LAWN
MAINTENANCE; KEVIN BUSHBAKER; PW
JAMES MANAGEMENT & CONSULTING,
LLC; AND DOES 1-V, AND ROE
CORPORATIONS I-V, inclusive,

Defendants.

Case No.: A-17-753606-C

Dept. No.: XVI

**DEFENDANT, SUNRISE VILLAS IX
HOMEOWNERS ASSOCIATION'S
JOINDER TO INTERVENOR QBE
INSURANCE CORPORATION'S REQUEST
FOR JUDICIAL NOTICE IN SUPPORT OF
CONSOLIDATED BRIEF RE: QBE'S
MOTION TO INTERVENE TO ENFORCE
SETTLEMENT AND PLAINTIFF'S
MOTION TO ENFORCE SETTLEMENT**

Defendant, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION ("SUNRISE VILLAS"),
by and through its counsel of record, the law firm of Springel & Fink LLP, hereby joins Intervenor QBE
INSURANCE CORPORATION'S Request for Judicial Notice in Support of Consolidated Brief RE: QBE's
Motion to Intervene to Enforce Settlement and Plaintiff's Motion to Enforce Settlement.

///

///

///

///

This Joinder is based upon the pleadings and papers on file herein, the Memorandum of Points and Authorities annexed thereto, and any oral argument that may be presented at the hearing set for this matter.

DATED this 9th day of February, 2021.

SPRINGEL & FINK LLP

/s/ Leonard T. Fink, Esq.

By:

LEONARD T. FINK, ESQ.
Nevada Bar No. 6296
9075 W. Diablo Drive, Suite 302
Las Vegas, NV 89148
Attorneys for Defendant,
*SUNRISE VILLAS IX HOMEOWNERS
ASSOCIATION*

CERTIFICATE OF SERVICE
Simone Russo v. Cox Communications Las Vegas, Inc., et al.
District Court Case No. A-17-753606-C

STATE OF NEVADA)
) ss.
 COUNTY OF CLARK)

I, Alma Duarte, declare:

I am a resident of and employed in Clark County, Nevada. I am over the age of eighteen years and not a party to the within action. My business address is 9075 W. Diablo Drive, Suite 302, Las Vegas, Nevada, 89148.

On **February 9, 2021**, I served the document described as **DEFENDANT, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION'S JOINDER TO INTERVENOR QBE INSURANCE CORPORATION'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF CONSOLIDATED BRIEF RE: QBE'S MOTION TO INTERVENE TO ENFORCE SETTLEMENT AND PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT** on the following parties:

*****SEE ELECTRONIC SERVICE LIST*****

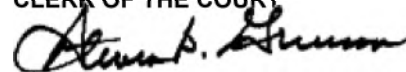
- _____ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada. I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage fully prepaid at Las Vegas, Nevada in the ordinary course of business.
- _____ VIA FACSIMILE: by transmitting to a facsimile machine maintained by the person on whom it is served at the facsimile machine telephone number at last given by that person on any document which he/she has filed in the cause and served on the party making the service. The copy of the document served by facsimile transmission bears a notation of the date and place of transmission and the facsimile telephone number to which transmitted. A confirmation of the transmission containing the facsimile telephone numbers to which the document(s) was/were transmitted will be maintained with the document(s) served.
- X VIA ELECTRONIC SERVICE: by submitting the foregoing to the Court's E-filing System for Electronic Service upon the Court's Service List pursuant to EDCR 8. The copy of the document electronically served bears a notation of the date and time of service. The original document will be maintained with the document(s) served and be made available, upon reasonable notice, for inspection by counsel or the Court.

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

/s/ Alma Duarte

 An employee of Springel & Fink LLP

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Steven D. Grierson
CLERK OF THE COURT


SUPP

DAVID F. SAMPSON, ESQ.
Nevada Bar No. 6811
LAW OFFICE OF DAVID SAMPSON, LLC.
630 S. 3rd Street
Las Vegas, NV 89101
Tel: 702-605-1099
Fax: 888-209-4199
Email: david@davidsampsonlaw.com
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

SIMONE RUSSO,)

Plaintiff,)

vs.)

CASE NO: A-17-753606-C

DEPT. NO: XVI

COX COMMUNICATIONS LAS VEGAS,)

INC., D/B/A COX COMMUNICATIONS,)

IES RESIDENTIAL, INC., SUNRISE)

VILLAS IX HOMEOWNERS)

ASSOCIATION, J & G LAWN)

MAINTENANCE, KEVIN BUSHBAKER,)

PWJAMES MANAGEMENT &)

CONSULTING, LLC., J. CHRIS)

SCARCELLI, DOE LANDSCAPER,)

RICHARD DUSLAK, JUSTIN SESMAN,)

AND DOES I-V, and ROE)

CORPORATIONS I-V, inclusive,)

Defendants.)

**FIRST SUPPLEMENT TO OPPOSITION TO MOTION TO SET ASIDE AND/OR
AMEND JUDGMENT**

COMES NOW, Plaintiff, SIMONE RUSSO, by and through his attorney of record, and supplements his opposition to SUNRISE's motion and QBE's joinder¹ to the motion to set aside

¹ As of the filing of this opposition QBE is not a party to this action. QBE filed a motion to intervene over a year after judgment was entered in this matter, which motion has not yet been

and/or amend the judgment that was duly entered in this matter on December 17, 2019, and for which Notice of Entry of the said Judgment was served December 17, 2019.

In addition to the points and authorities set forth in SIMONE's opposition to the motion to set aside and/or amend judgment, SIMONE directs this Court to NRCP 59(e) which states "A motion to alter or amend a judgment must be filed no later than 28 days after service of written notice of entry of judgment." The written notice of entry of the judgment in this matter was served on all parties on December 17, 2019. The instant motion to set aside or amend the judgment was filed January 21, 2021, which is well over a year after written notice of entry of the judgment was sent. The motion to set aside of amend the judgment must therefore be denied as untimely.

CONCLUSION

For the foregoing reasons SIMONE respectfully requests this Court deny SUNRISE's motion to set aside an/or amend the judgment.

DATED this 10th day of February, 2021.

LAW OFFICE OF DAVID SAMPSON, LLC.

BY: /s/ David Sampson

DAVID SAMPSON, ESQ.

Nevada Bar No.6811

LAW OFFICE OF DAVID SAMPSON, LLC.

630 S. 3rd Street

Las Vegas NV 89101

Fax No: 888-209-4199

Attorney for Plaintiff

heard and should be denied as a party is not permitted to intervene after judgment is entered as required in *Nalder v. Eighth Judicial Dist. Ct.*, 136 Nev.Adv.Op. 24 (2020). The joinder, as well as any other documents filed by QBE in this matter, are improper and represent rogue pleadings which the Court should disregard.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the LAW OFFICE OF DAVID SAMPSON, LLC., and that on this 10th day of February, 2021, I served a copy of the foregoing **SUPPLEMENT** on all the remaining parties in this matter via the court's electronic online filing system and as follows:

RAMIRO MORALES, ESQ.
600 S. Tonopah Dr. Suite 300
Las Vegas NV 89106
Attorneys for Non-Party QBE
Insurance Corporation

LEONARD FINK, ESQ.
9075 W. Diablo Dr. Suite 302
Las Vegas NV 89148
Counsel for SUNRISE

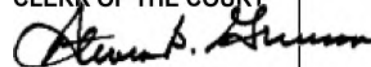
And

Via U.S. Mail:
JUSTIN SESMAN
4775 Topaz Street, Apt. 235
Las Vegas, NV 89121

Via U.S. Mail:
RICHARD DUSLAK
4012 Abrams Ave.
Las Vegas, NV 89110

/s/ *Amanda Nalder*
An Employee of The LAW OFFICE OF DAVID SAMPSON, LLC.

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2/12/2021 2:54 PM
Steven D. Grierson
CLERK OF THE COURT



RFJN
Ramiro Morales
State Bar No.: 7101
William C. Reeves
State Bar No.: 8235
MORALES, FIERRO & REEVES
600 S. Tonopah Drive, Suite 300
Las Vegas, NV 89106
Telephone: 702/699-7822
Facsimile: 702/699-9455

Attorneys for Intervenor
QBE Insurance Corporation

DISTRICT COURT
CLARK COUNTY, NEVADA

SIMONE RUSSO,	)	Case No.: A753606
	)	Dept: XVI
Plaintiff,	)	
	)	REQUEST FOR JUDICIAL NOTICE IN
vs.	)	SUPPORT OF OPPOSITION TO
	)	PLAINTIFF'S MOTION TO ENFORCE
COX COMMUNICATIONS LAS VEGAS,	)	SETTLEMENT
INC., et al.	)	
	)	DATE: March 3, 2021
Defendants.	)	TIME: 1:30 p.m.

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Attached hereto as Exhibit 15 is a true and correct copy of QBE's Reply to the Response filed by Richard Duslak and Justin Sesman as to QBE's Motion to Dismiss pending in the matter styled *QBE v. Russo*, U.S.D.C., D. Nevada Case No.: 2:20-cv-02104-RFB-EJY.

Dated: February 12, 2021

MORALES FIERRO & REEVES

By: /s/ William C. Reeves
Ramiro Morales
William C. Reeves
600 S. Tonopah Dr., Suite 300
Las Vegas, NV 89106
Attorneys for QBE

Exhibit 15

Ramiro Morales
 State Bar No.: 7101
 William C. Reeves
 State Bar No.8235
 MORALES, FIERRO & REEVES
 600 S. Tonopah Drive, Suite 300
 Las Vegas, NV 89106
 Telephone: 702/699-7822
 Facsimile: 702/699-9455

Attorneys for Plaintiff/Counter-Defendant
 QBE Insurance Corporation

UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA

QBE INSURANCE CORPORATION,	)	Case No.: 2:20-cv-02104-RFB-EJY
Plaintiff,	)	REPLY TO RESPONSE TO MOTION TO
vs.	)	DISMISS [Dkt. No. 24]
SIMONE RUSSO, et al.	)	<u>Accompanying Document</u> : Supp. Dec. of W.
Defendants.	)	Reeves (Exs C-F)
	)	ORAL ARGUMENT REQUESTED
_____	)	
and related cross-claims	)	
_____	)	

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Plaintiff and Counter-Defendant QBE Insurance Corp. ("QBE") hereby files the following
 Reply to the Response filed by Defendants and Counterclaimants Richard Duslak ("Duslak") and
 Justin Sesman ("Sesman") [Dkt. No. 38] to QBE's Motion to Dismiss.

Introduction

The gravamen of the claims asserted by Duslak and Sesman against QBE in this matter is
 that each were employees of Sunrise Villas IX Homeowners Association ("Sunrise HOA") such that
 each qualify as insureds under a liability policy QBE issued and are therefore entitled to be
 indemnified by QBE for a default judgment entered against them in connection with the Underlying
 Matter.¹ In making this argument, however, each ignore the fact that the Plaintiff in the Underlying

¹ As neither Duslak nor Sesman appeared in the Underlying Matter, neither incurred defense expenses such that the duty to defend is not at issue.

1 Matter agreed to not proceed against Duslak and Sesman as former HOA employees and instead
 2 proceed against them solely as independent contractors, consistent with the understanding of
 3 Sunrise HOA at the time. See Dkt. No. 24-1, Ex. A., ex 1; see also Exhibit B.² Given this, the
 4 claims Duslak and Sesman have asserted against QBE in this matter each fail as the judgment
 5 entered against them is not based on liability as alleged former HOA employees.

6 Interestingly, Plaintiff in the Underlying Matter now disputes this position, likely
 7 recognizing that QBE does not cover independent contractors. See Supplemental Declaration of W.
 8 Reeves. Exhibits C and D; see also Exhibits E and F.³ Given this, and in apparent collusion with
 9 the Plaintiff in the Underlying Matter, Duslak and Sesman likewise dispute this position in their
 10 Response to QBE's Motion.

11 As the efforts by Duslak and Sesman to dispute the scope and extent of the release and
 12 corresponding judgment ring hollow, this Court may proceed to adjudicate QBE's Motion based on
 13 the record before it. Alternatively, this Court has the option of holding on ruling on QBE's motion
 14 in order to permit for the court in the Underlying Matter to rule on the pending motions before it
 15 given that the hearing date has been rescheduled for March 3, 2021.

16 Discussion

17 In connection with a motion to dismiss, a Court may consider extrinsic evidence which is
 18 properly the subject of a request for judicial notice. *Harlow v. LSI Title Agency, Inc.*, 2012 WL
 19 5425722 (D. Nev. 2012). In that regard, the Court need not accept as true allegations that are
 20 contradicted by documents for which the Court may properly take judicial notice. *Wingo v.*
 21 *Gedney*, 2016 WL 721306 (D. Nev. 2016), citing *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992,
 22 998 (9th Cir.2010).⁴

23 In this case, the Plaintiff in the Underlying Matter agreed to limit his claims against Duslak

24
 25 ² The fact that Duslak and Sesman contend otherwise now highlights why the the HOA and QBE required that any
 settlement with Plaintiff include a release of any claims against them as former HOA employees.

26 ³ Request is made that this Court take judicial notice of these filings as well as the balance of documents filed in the
 27 Underlying Matter.

28 ⁴ As QBE has only requested that this Court take judicial notice of court filings (for which there has been no objection),
 its motion is not converted into a motion for summary judgment.

1 and Sesman as follows:

2 IT IS HEREBY STIPULATED THAT FOR THE PURPOSES OF
 3 THIS LITIGATION AND FOR ANY AND ALL ISSUES
 4 RELATED TO SIMONE RUSSO'S CLAIMS AND SETTLEMENT,
 5 THAT IN AUGUST 2016 BOTH DEFENDANT RICHARD
 6 DUSLAK AND DEFENDANT JUSTIN SESMAN WERE
 7 NATURAL PERSONS WHO WERE IN THE SERVICE OF
 8 SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION AS
 9 INDEPENDENT CONTRACTORS . . .

10 Dkt. No. 24-1, Exhibit A, exhibit 1.

11 By virtue of this stipulation, it is plain and obvious that the judgment subsequently entered
 12 against Duslak and Sesman is not premised on either as alleged former HOA employees such that
 13 the contentions asserted in this matter to the contrary fail.

14 Plaintiff in the Underlying Matter, however, ostensibly disputes this position. See
 15 Supplemental Declaration of W. Reeves, Exs. C-D. This position is hotly contested with a hearing
 16 set for March 3, 2021 to adjudicate the issue. See Declaration of W. Reeves, Exs. E-F.

17 While this Court may proceed to adjudicate QBE's Motion based on the record before it, this
 18 Court also has the discretion to defer ruling until the trial court rules on the pending motions. As it
 19 likely makes sense to obtain confirmation from the trial court regarding the released claims before
 20 ruling on the instant motion, QBE's respectfully submits that it would be appropriate to defer ruling
 21 on its motion until the trial court rules.

22 Conclusion

23 For the reasons set forth herein, QBE requests that this Court defer on ruling on QBE's
 24 motion until after March 3, 2021. Alternatively, if this Court prefers otherwise, request is made that
 25 this Court grant QBE's motion.

26 Dated: February 12, 2021

27 MORALES FIERRO & REEVES

28 By /s/ William C. Reeves
 William C. Reeves
 600 S. Tonopah Dr., Suite 300
 Las Vegas, NV 89106
 Attorneys for QBE Ins. Corp.

I am over the age of eighteen years and not a party to the within cause.

On the date specified below, I served the following document:

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF OPPOSITION TO PLAINTIFF'S
MOTION TO ENFORCE SETTLEMENT

Service was effectuated in the following manner:

BY FACSIMILE:

XXX

BY ODYSSEY: I caused such document(s) to be electronically served through

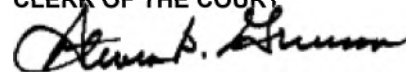
Odyssey for the above-entitled case to the parties on the Service List maintained on Odyssey's website for this case on the date specified below.

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

Dated: February 12, 2021

William Reeves

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2/17/2021 2:51 PM
Steven D. Grierson
CLERK OF THE COURT


REPLY

DAVID F. SAMPSON, ESQ.
Nevada Bar No. 6811
LAW OFFICE OF DAVID SAMPSON, LLC.
630 S. 3rd Street
Las Vegas, NV 89101
Tel: 702-605-1099
Fax: 888-209-4199
Email: david@davidsampsonlaw.com
Attorney for Plaintiff

**DISTRICT COURT
CLARK COUNTY, NEVADA**

SIMONE RUSSO,)

Plaintiff,)

vs.)

CASE NO: A-17-753606-C

DEPT. NO: XVI

COX COMMUNICATIONS LAS VEGAS,)
INC., D/B/A COX COMMUNICATIONS,)
IES RESIDENTIAL, INC., SUNRISE)
VILLAS IX HOMEOWNERS)
ASSOCIATION, J & G LAWN)
MAINTENANCE, KEVIN BUSHBAKER,)
PWJAMES MANAGEMENT &)
CONSULTING, LLC., J. CHRIS)
SCARCELLI, DOE LANDSCAPER,)
RICHARD DUSLAK, JUSTIN SESMAN,)
AND DOES I-V, and ROE)
CORPORATIONS I-V, inclusive,)

Defendants.)

REPLY TO OPPOSITION TO MOTION TO ENFORCE SETTLEMENT

COMES NOW, Plaintiff, SIMONE RUSSO, by and through his attorney of record, and
replies to the opposition filed by Defendant SUNRISE and joined by QBE¹ to RUSSO's motion

¹ As of the filing of this opposition QBE is not a party to this action. QBE filed a motion to intervene over a year after judgment was entered in this matter, which motion has not yet been ruled upon and should be denied as a party is not permitted to intervene after judgment is

to enforce the settlement in this matter that was placed on the record October 18, 2019. This reply and the underlying motion are made and based upon the pleadings and papers filed herein, the attached Points and Authorities, and upon oral argument at the time of hearing.

POINTS AND AUTHORITIES

I. The Court Should Enforce The Plain Terms Of The Settlement.

Long before there was any talk about a settling any part of this case SIMONE had certain rights against DUSLAK and SESMAN. As trial approached SIMONE had sued DUSLAK and SESMAN, served DUSLAK and SESMAN, and had taken defaults against DUSLAK and SESMAN as they failed to appear in this action. While many things have been disputed in this matter, the parties to this action should at least be able to agree that before any settlement occurred as to any parties in this matter, SIMONE had certain rights against DUSLAK and SESMAN.

When the settlement was put together with SUNRISE and the other parties, *the one thing SIMONE absolutely insisted on was that the settlement have no affect at all on any of SIMONE's rights against DUSLAK and SESMAN*. SIMONE repeatedly insisted that the same rights SIMONE had against DUSLAK and/or SESMAN before the settlement was ever even discussed, would be the same rights SIMONE would continue to have against DUSLAK and/or SESMAN after the settlement. SIMONE absolutely insisted on that, and all parties involved agreed to that very essential term of the settlement.

Counsel for SIMONE insisted in the October 18, 2019 hearing that the settlement not affect any of SIMONE's rights against DUSLAK and/or SESMAN. *All parties involved in the*

entered as required in *Nalder v. Eighth Judicial Dist. Ct.*, 136 Nev.Adv.Op. 24 (2020). The joinder, as well as any other documents filed by QBE in this matter, are improper and represent rogue pleadings which the Court should disregard.

settlement agreed to that term. SIMONE’s counsel stated, “there are two other parties [DUSLAK and SESMAN] who have been defaulted that we’re still – ***this settlement does not affect them***”. See, Exhibit “3” to SIMONE’s opposition to the renewed motion to intervene and enforce settlement at P. 6 L. 15-19 (emphasis added). When the Court asked, “Everyone agree?”, ***all parties agreed.*** *Id* at P. 9 L. 12-19.

After all parties agreed that the settlement would not affect any of SIMONE’s rights against DUSLAL and/or SESMAN, the parties addressed putting the agreement that was placed on the record in writing. At that point counsel for SIMONE made sure that everyone understood that, while the agreement could be reduced to writing, the essential term that none of SIMONE’s rights against DUSLAK and/or SESMAN would be affected by the settlement would not be altered by any written agreement(s). Counsel for SIMONE made this very clear when he stated:

the terms of whatever documents we sign or that my client has asked to sign comport with what was discussed Wednesday, and what's being discussed today, and ***no new terms***, and those types of things. And, I guess, ***most of all that nothing in any of these releases or any of the settlement affects any rights Dr. Russo may have against any person or entity related to the claims of the two individuals who have been defaulted***, and any claims that they may have against anybody would not be affected by this settlement. ***So as long as we're clear on all of that.***

Id at P. 10 L. 24 – P. 11 L. 12 (emphasis added).

It was made very clear, and SIMONE’s counsel even used the word “clear”, that all parties to the agreement entered into on October 18, 2019 agreed that the settlement did not and would not affect any rights SIMONE had ever had against DUSLAK and/or SESMAN. All parties to the settlement agreed that the same rights SIMONE had against DUSLAK and SESMAN before the settlement, would be the same rights SIMONE would have against DUSLAK and SESMAN after the settlement. *Id.*

At the November 7, 2019 Mr. Fink, counsel for SUNRISE and for QBE, suggested changing the agreement such that DUSLAK and SESMAN could be released if it somehow turned out they were SUNRISE employees. ***Counsel for SUNRISE emphatically said no.*** See, Exhibit 1 to SIMONE’s second supplement to opposition to renewed motion to intervene and enforce settlement at P. 23 L. 12-15. Counsel for SIMONE reminded the Court that when the settlement was placed on the record on October 18, 2019, “we put on the record -- ***we’re not waiving, releasing, or otherwise affecting anything against Sesman or Duslak.*** I don’t think anyone would dispute that . . . it was a pretty significant point that day.” *Id* at P. 25 L. 6-16 (emphasis added). The Court then asked SUNRISE’s counsel, “Mr. Fink, are we disputing that?” *Id* at P. 25 L. 21-22. Mr. Fink answered, “My best recollection is that ***when Mr. Sampson said he was specifically retaining his rights to go against Mr. Sesman and Mr. Duslak, we all agreed to that.***” *Id* at P. 26 L. 2-5 (emphasis added). Mr. Fink confirmed on November 7, 2019 that, pursuant to the express terms of the settlement, the same rights SIMONE had against DUSLAK and SESMAN before the settlement, would be the same rights SIMONE would have against DUSLAK and SESMAN after the settlement.

Following a discussion on November 7, 2019 regarding possibly stipulating that DUSLAK and SESMAN were not SUNRISE employees, counsel for SIMONE noted that while the parties might agree that the gentlemen were not employees, no matter what the gentlemen in fact were, “along the lines of Sesman and Duslak, ***all rights against them,*** anybody who insures them, you know, ***all of those are preserved. They’re not affected. I would like to make sure that is crystal clear in whatever iteration we end up with.***” *Id* at P. 40 L. 16-22 (emphasis added).

Again, counsel for SIMONE made it clear, even using the words “crystal clear”, and all involved agreed, that the same rights SIMONE had against DUSLAK and SESMAN before the settlement, would be the same rights SIMONE would have against DUSLAK and SESMAN after the settlement.

When the agreement was put together to confirm the settlement, and to confirm the fact that the same rights SIMONE had against DUSLAK and SESMAN before the settlement would be the same rights SIMONE would have against DUSLAK and SESMAN after the settlement, the agreement stated SIMONE “shall retain all rights to pursue any claims against RICHARD DUSLAK and/or JUSTIN SESMAN”. *See*, Exhibit “4” to SIMONE’s opposition to the renewed motion to intervene and enforce settlement at P. 4. The agreement further stated, “Nothing in this release shall release, discharge, or in any way impact Plaintiff’s rights against RICHARD DUSLAK and/or JUSTIN SESMAN *in any manner*”. *Id* (emphasis added). The agreement made it even more clear that the settlement would not affect any of SIMONE’s rights against DUSLAK and/or SESMAN by stating “ANY LANGUAGE THAT WOULD BE READ TO IN ANY WAY IMPACT PLAINTIFF’S RIGHTS AGAINST RICHARD DUSLAK and/or JUSTIN SESMAN . . . SHALL BE DEEMED NULL AND VOID”. *Id*.

SIMONE had certain rights against DUSLAK and SESMAN before the agreement occurred, and by the express terms of the settlement that was placed on the record and subsequently codified in the written agreement itself, SIMONE retained all of those rights after the agreement. SUNRISE went so far as to agree that if there was any language indicating SIMONE did not maintain all of those same rights he had before against DUSLAK and SESMAN, then that language is deemed null and void. *Id*.

SIMONE simply asks that the settlement reached in this matter, which included the specific provision that the settlement would not affect any of the rights SIMONE had against DUSLAK and/or SESMAN, be enforced. There is a fundamental principle that parties say what they mean and mean what they say. As the active parties stood before the court on October 18, 2019, with the venire panel in the hallway, and the active parties confirmed the settlement on the record, *counsel for SUNRISE agreed that the settlement did not affect any of SIMONE's rights against DUSLAK and/or SESMAN*. At the November 7, 2019 hearing counsel for SUNRISE again confirmed that his clients agreed to that term. The written agreement confirms the parties agreed to that term and that none of SIMONE's rights against DUSLAK and/or SESMAN would be in any way affected by the settlement.

Now SUNRISE and its carrier QBE have come to the Court over a year after agreeing to the settlement, and claim they didn't mean it. SUNRISE and QBE now claim that when SUNRISE and QBE said the settlement did not and would not affect any of SIMONE's rights against DUSLAK and/or SESMAN, SUNRISE and QBE meant that the settlement actually did affect some of SIMONE's rights against DUSLAK and/or SESMAN.

Neither SUNRISE nor QBE can be permitted to get away with reneging on the duly entered agreement. SUNRISE and QBE must be made to honor the agreement that was placed on the record on October 18, 2019, and specifically the term that SIMONE would retain all of the same rights against DUSLAK and SESMAN that he had before the settlement was reached. If SUNRISE and/or QBE wanted the settlement to affect SIMONE's rights against DUSLAK and SESMAN then they should not have agreed that the settlement does not affect any of SIMONE's rights against DUSLAK and/or SESMAN. SUNRISE and QBE should have said on October 18, 2019 that the settlement would affect some of SIMONE's rights against DUSLAK

and SESMAN, and SIMONE would have said there was no deal. The court could have then brought the venire panel back in and trial would have proceeded. But instead, SUNRISE agreed the settlement does not and would not affect any of SIMONE's rights. SUNRISE agreed that the same rights SIMONE had against DUSLAK and/or SESMAN before the settlement was reached would be the same rights SIMONE would have after the settlement was reached. SUNRISE must honor that agreement.

II. SUNRISE Cannot Set The Settlement Aside Based On Its Own Mistake.

In its latest filing SUNRISE asks, for the first time, that the settlement be set aside based on "no meeting of the minds". *See*, SUNRISE's opposition at P. 3 L. 9-10. From the outset it must be noted that there was a very clear meeting of the minds on the issue that the settlement would in no way shape or form affect any of SIMONE's rights against DUSLAK and/or SESMAN. The agreement could not have been more clear in confirming that SIMONE was retaining all of the same rights he had against DUSLAK and SESMAN before the settlement was consummated. The agreement releases SUNRISE "EXCLUDING RICHARD DUSLAK AND/OR JUSTIN SESMAN". *See* Exhibit "4" to SIMONE's opposition to motion to intervene and enforce judgment at P. 1. The agreement releases Defendants' "employees **EXCLUDING RICHARD DUSLAK AND/OR JUSTIN SESMAN**". *Id* at P. 4. The agreement states "Nothing in this release shall release, discharge, or in any way impact PLAINTIFF's rights against RICHARD DUSLAK and/or JUST IN SESMAN in any manner". *Id*. The agreement further states "PLAINTIFF shall retain all rights to pursue any claims against RICHARD DUSLAK and/or JUSTIN SESMAN". *Id*. Finally, the agreement notes that "ANY LANGUAGE THAT WOULD BE READ TO IN ANY WAY IMPACT PLAINTIFF'S

RIGHTS AGAINST RICHARD DUSLAK AND/OR JUSTIN SESMAN . . . SHALL BE DEEMED NULL AND VOID”. *Id.*

Frankly, SIMONE’s counsel cannot envision how it could have been made any more clear that SIMONE retained the same rights against DUSLAK and SESMAN after the settlement that he had before the settlement. There was an obvious meeting of the minds. SUNRISE is simply seeking to undo the agreed upon settlement as it now appears SUNRISE’s representations to the court that DUSLAK and SESMAN were not employees was incorrect, and DUSLAK and SESMAN have asked SUNRISE to explain itself in the federal declaratory relief action.

SUNRISE may not claim mutual mistake given the circumstances of this matter. In *Anderson v. Sanchez*, 132 Nev.Adv.Op. 34 (2016) the Supreme Court of Nevada held that the doctrine of mutual mistake is not grounds for rescission of a contract when the party bears the risk of mistake. The Court further held that a party bears the risk of mistake if the party is aware at the time of the formation of the contract that they only have limited knowledge of the facts to which the mistake relates, but treats that knowledge as sufficient, the court will allocate the risk of mistake to that party. *Id.* This seems to be exactly what happened with SUNRISE in this matter. SUNRISE represented to SIMONE and to the court that DUSLAK and SESMAN were not employees. Over a year later it now appears SUNRISE was incorrect, or worse deceitful², in its representations. SUNRISE has no right to set the agreement aside based on its own incorrect representations.

² SIMONE does not assert that counsel for SUNRISE attempted to deceive SIMONE or the court to any degree. SIMONE understands that counsel for SUNRISE may very well have been relaying exactly what SUNRISE told its counsel.

Additionally, in *In re Irrevocable Trust Agreement of 1979*, 130 Nev. Adv. Op. 63 (Nev. 2014); (citing) *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997) the Nevada Supreme Court held that *conscious ignorance cannot support a defense of mutual mistake*. SUNRISE's representations to SIMONE and to this court that DUSLAK and SESMAN were not employees, and SUNRISE's further representations that there was "no evidence" that DUSLAK and SESMAN were employees of SUNRISE, could have only been made 1) in an attempt to deceive SIMONE and/or the court, or 2) out of conscious ignorance regarding SUNRISE's own relationship with DUSLAK and/or SESMAN. The defense of mutual mistake or failure to have a meeting of the minds is not available to SUNRISE in either circumstance.

III. SUNRISE Cannot Set The Judgment Aside Based On Its Own Mistake.

SUNRISE also suggests the court set the judgment against DUSLAK and SESMAN aside for "mutual mistake". See, SUNRISE's opposition at P. 3 L. 9-10. SUNRISE fails to provide any authority for its position that a judgment can be set aside for any such purpose at this point.

NRCP 60(b)(1), which governs requests for relief from judgment, permits relief from a judgment based on "mistake". NRCP 60(c)(1) however states that any motion for relief under NRCP 60(b)(1) for "mistake" must be made "no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever is later." Notice of Entry of the Judgment against DUSLAK and SESMAN in this matter was filed on December 17, 2019. As SUNRISE did not seek relief from the Judgment within 6 months of December 17, 2019, and instead waited well over a year after December 17, 2019, SUNRISE's motion to set the Judgment aside for mistake must be denied.

///

CONCLUSION

For the foregoing reasons SIMONE respectfully requests this Court enforce the settlement agreement confirmed on the record on October 18, 2019 and hold that the settlement did not affect SIMONE's rights against DUSLAK and/or SESMAN as agreed by the parties to the settlement.

DATED this 17th day of February, 2021.

LAW OFFICE OF DAVID SAMPSON, LLC.

BY: /s/ *David Sampson*

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I certify that I am an employee of the LAW OFFICE OF DAVID SAMPSON, LLC., and that on this 17th day of February, 2021, I served a copy of the foregoing **REPLY** on all the remaining parties in this matter via the court's electronic online filing system and as follows:

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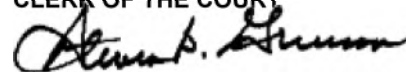
And

Via U.S. Mail:
JUSTIN SESMAN
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Via U.S. Mail:
RICHARD DUSLAK
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Las Vegas, NV 89110

/s/ *Amanda Nalder*
An Employee of The LAW OFFICE OF DAVID SAMPSON, LLC.

Electronically Filed
2/18/2021 10:21 AM
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

SIMONE RUSSO,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CASE NO: A-17-753606-C
	)	DEPT. NO: XVI
COX COMMUNICATIONS LAS VEGAS,	)	
INC., D/B/A COX COMMUNICATIONS,	)	
IES RESIDENTIAL, INC., SUNRISE	)	
VILLAS IX HOMEOWNERS	)	
ASSOCIATION, J & G LAWN	)	
MAINTENANCE, KEVIN BUSHBAKER,	)	
PWJAMES MANAGEMENT &	)	
CONSULTING, LLC., J. CHRIS	)	
SCARCELLI, DOE LANDSCAPER,	)	
RICHARD DUSLAK, JUSTIN SESMAN,	)	
AND DOES I-V, and ROE	)	
CORPORATIONS I-V, inclusive,	)	
	)	
Defendants.	)	
	)	

ERRATA TO REPLY TO OPPOSITION TO MOTION TO ENFORCE SETTLEMENT

Plaintiff, SIMONE RUSSO, files this errata to note that the bolded sentence on line 3 of page 4 of the reply should read “***Counsel for SIMONE emphatically said no.***”

///

///

Counsel for SIMONE apologizes for any confusion the typographical error may have caused.

DATED this 18th day of February, 2021.

LAW OFFICE OF DAVID SAMPSON, LLC.

BY: /s/ David Sampson

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Attorney for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the LAW OFFICE OF DAVID SAMPSON, LLC., and that on this 18th day of February, 2021, I served a copy of the foregoing **ERRATA** on all the remaining parties in this matter via the court's electronic online filing system and as follows:

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