

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 09:14 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX
VOLUME 10

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Exhibit 26

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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.

**COUNTERCLAIMANTS' MOTION TO
AMEND ANSWER, COUNTERCLAIM AND
THIRD-PARTY COMPLAINT**

18 RICHARD DUSLAK and JUSTIN SESMAN,

19 Counterclaimants,

20 vs.

21 QBE INSURANCE CORPORATION,

22 Counter-Defendants.
23
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
8 BUSINESS ENTITIES I-X,

9 Third-Party Defendants.

10 **COUNTERCLAIMANTS' MOTION TO AMEND ANSWER, COUNTERCLAIM AND**
11 **THIRD-PARTY COMPLAINT**

12 COMES NOW, Defendants/Counterclaimants RICHARD DUSLAK and JUSTIN SESMAN,
13 by and through their counsel of record, KIMBALL JONES, ESQ. and EVAN K. SIMONSEN, ESQ.,
14 with the Law Offices of **BIGHORN LAW**, and hereby files this Motion to Amend their Answer,
15 Counterclaim and Third-Party Complaint.

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

18 DATED this 19th day of March, 2021.

19 **BIGHORN LAW**

20 By: /s/ Kimball Jones

21 **KIMBALL JONES, ESQ.**

22 Nevada Bar No.: 12982

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

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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. Amendment is Needed.**

18
19 Duslak and Sesman recently became aware of improper motion practice and a fraudulent
20 affidavit in the underlying matter that requires an amendment to the pleadings to add one party,
21 Amanda Davis, and to add claims against QBE and Sunrise regarding these issues.

22 One of the improper motions in the underlying matter was a motion for summary judgment by
23 Sunrise and against Russo, wherein Sunrise, through QBE's hand-picked counsel, falsely claimed
24 Duslak and Sesman were not Sunrise employees. On August 10, 2018, in support of their Reply to
25 Sunrise's Motion for Summary Judgment, Sunrise and QBE produced an affidavit from one
26 AMANDA DAVIS. See Affidavit, attached hereto as **Exhibit "1."** Ms. Davis' affidavit fraudulently
27 attested that "based upon...personal knowledge" she knew that Counterclaimants Duslak and Sesman
28

1 were independent contractors and “kept their own hours, had their own equipment and had a wide
2 amount of discretion to perform their own duties,” and that “Sunrise gave them basic projects such as
3 lawn maintenance and then they determined the means in which to go about them.”

4 This affidavit by Ms. Davis was erroneous and fraudulent and QBE, SUNRISE and AMANDA
5 DAVIS knew that this affidavit was untruthful in whole or in part.

6
7 Duslak and Sesman’s initial Answer, Counterclaim, and Third-Party Complaint against QBE
8 and Sunrise properly and timely contained claims for Civil Conspiracy and Fraud against all the named
9 Counterdefendants and Third-Party Defendants. However, Duslak and Sesman have just learned about
10 Ms. Davis’ role in perpetuating this fraud against the Counterclaimants, which has left them with a
11 \$25,000,000.00 judgment hanging over their heads. This request is timely made within the applicable
12 statute of limitations for civil fraud. As such, they wish to amend their claim to add Ms. Davis as an
13 essential party to the fraud committed against Duslak and Sesman.
14

15 II. LEGAL AUTHORITY AND ARGUMENT

16 Rule 15 of the Federal Rules of Civil Procedure mandates that leave to amend “be freely given
17 when justice so requires.” Fed.R.Civ.P. 15(a). “This policy is to be applied with extreme
18 liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.2003) (quotation
19 omitted). In *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962), the Supreme Court
20 offered several factors for district courts to consider in deciding whether to grant a motion to amend
21 under Rule 15(a):
22

23 In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory
24 motive on the part of the movant, repeated failure to cure deficiencies by amendments previously
25 allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of
26 amendment, etc.—the leave sought should, as the rules require, be ‘freely given.’ *Foman*, 371 U.S.
27
28

1 at 182; *see also Smith v. Pac. Prop. Dev. Co.*, 358 F.3d 1097, 1101 (9th Cir.2004)
 2 (citing *Forman* factors).

3 Counterclaimants have only just learned of Ms. Davis' role in appealing QBE and Sunrise in
 4 supplying a false and fraudulent affidavit to the Court. "An action for fraud accrues when the
 5 aggrieved party discovers the facts constituting the fraud." *Torrealba v. Kesmetis*, 124 Nev. 95, 105,
 6 178 P.3d 716, 723 (2008). Counterclaimants Duslak and Sesman have three (3) years from the date
 7 of discovery of these facts to file an action for fraud. See N.R.S. 11.190. As such, the amendment of
 8 Counterclaimants' claim to include Ms. Davis is timely made.
 9

10 **A. DUSLAK AND SESMAN ARE PERMITTED TO SUBSTITUTE AN**
 11 **IDENTIFIED PARTY IN PLACE OF A DOE.**

12 Recently in *Banks*, the District Court ratified the Nevada Supreme Court's findings in
 13 *Nurenberger*. In *Banks v. Joyce*, Case No. 2:13-cv-00324-RCJ-PAL (D. Nev. Mar 12, 2015) at *4-
 14 *6, defendant Joyce argued that because the statute of limitations had run as to unidentified Doe
 15 Defendants, the plaintiff was required to meet the burden established by F.R.C.P. 15(c) in order for
 16 any amended pleading to relate back to the Amended Complaint, which was filed before the statute
 17 of limitations ran. With respect to the Doe Defendants listed in the caption, but not identified and
 18 substituted, the defendant was incorrect because the Court was to apply Nevada law. *Id.*
 19

20 The *Banks* Court found that N.R.C.P. 10(a) allows a plaintiff to plead a claim against a party
 21 whose name is unknown and when the name is discovered, the pleading may be amended. "While
 22 the substitution is pending, the statute of limitations is effectively tolled." *Id.*, *quoting Nurenberger*
 23 *Hercules-Werke GMBH v. Virostek*, 822 P.2d 1100, 1106 (Nev. 1991) (describing fictitious
 24 defendants as "already parties in legal contemplation"). The *Banks* Court further noted that when a
 25 Rule 10(a) amendment is properly granted, "it automatically relates back to the commencement of
 26 the action." *Id.* The *Banks* Court found this result buttressed by the Nevada Supreme Court's
 27 instruction that "meritorious causes of action should not be frustrated where, despite reasonable
 28

1 diligence, the true identity of culpable parties is uncertain or unknown to plaintiff." *Id.* (quoting
2 *Nurenberger*, 822 P.2d at 1103).

3 Moreover, the "relation back effect" of Rule 10(a) was clarified when the Court found the
4 rule to be "a self-contained rule that is independent of N.R.C.P. 15(c)," and that Rule 15(c) "has no
5 application to the process of adding or substituting names under N.R.C.P. 10(a)." *Id.* at *6, *quoting*
6 *Nurenberger*, 822 at 1106. Accordingly, in order to effectively use Rule 10(a), a plaintiff must only:
7 (a) plead fictitious or doe defendants in the caption of the complaint; (b) plead the basis for naming
8 defendants by other than their true identities; (c) clearly specify the connection between the intended
9 defendants and the conduct, activity, or omission upon which the claim is based; and (d) exercise
10 reasonable diligence in ascertaining the true identities of the intended defendants and promptly
11 moving to amend the complaint to substitute the actual for the fictional. *Id.*

12
13 Here, Duslak and Sesman have satisfied the *Nurenberger* test as ratified by the Court in *Banks*.
14 Counterclaimants are not adding any new or different claims to their proposed Amended Complaint,
15 attached hereto as **Exhibit "2,"** in some improper effort to thwart the statute of limitations or even
16 diversity jurisdiction. Indeed, Counterclaimants' causes of action are the same claims
17 Counterdefendants and Third-Party Defendants were notified of in the initial Counterclaim and Third-
18 Party Claim. Therefore, this Court should allow Counterclaimants leave to file their amended
19 complaint for the purpose adding Ms. Davis as a party in this complaint for her fraudulent actions
20 claiming that Duslak and Sesman were independent contractors.

21
22
23 **B. NEVADA AND FEDERAL LAW ALLOW AMENDMENT TO ADD**
24 **DEFENDANT(S) AFTER THE STATUTE OF LIMITATIONS RUNS IF THE**
25 **DEFENDANT (1) HAS NOTICE, (2) IS A PROPER DEFENDANT, AND (3) IS NOT**
26 **PREJUDICED BY THE AMENDMENT.**

27 The Ninth Circuit has stated that even time barred claims are deemed to be timely if it arises
28 out of the same conduct, transaction, or occurrence as the initial complaint. The Court noted that same
conduct, transactions, and occurrences "will likely be proved by the 'same kind of evidence' offered

1 in support of the original pleading.” *Percy v. S.F. Gen. Hosp.*, 841 F.2d 975, 978 (9th Cir.1988)
2 (quoting *Rural Fire Prot. Co. v. Hepp*, 366 F.2d 355, 362 (9th Cir.1966)). To relate back, “the
3 original and amended pleadings [must] share a common core of operative facts so that the adverse
4 party has fair notice of the transaction, occurrence, or conduct called into question.” *Martell*, 872
5 F.2d at 325. The relation back doctrine of Rule 15(c) is “liberally applied.” *Clipper Exxpress v.*
6 *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 n. 29 (9th Cir.1982).” *ASARCO,*
7 *LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014). The Ninth Circuit later noted, “Indeed,
8 Rule 15's purpose “is to provide maximum opportunity for each claim to be decided on its merits
9 rather than on procedural technicalities.” *Id.*

11 The District Court noted the burden which a party must meet to amend a Complaint to add a
12 new defendant. “Plaintiff must show these defendants: (a) received notice of the action such that they
13 will not be prejudiced in defending on the merits; (b) knew or should have known the action would
14 be brought against them; (c) but for a mistake concerning their identities.” *Banks v. Joyce*, No. 2:13-
15 CV-00324-RCJ-PA, 2015 WL 1137756, at *3 (D. Nev. Mar. 13, 2015).

17 Certainly, Counterclaimants meet the three (3) prong *Banks* test as it relates to Ms. Davis. Ms.
18 Davis knowingly made a fraudulent, sworn, affidavit to the Court in order to assist QBE and Sunrise
19 win summary judgment in the underlying matter. Furthermore, this attempt to amend their complaint
20 is timely, and Ms. Davis will have every opportunity afforded to her to defend against these claims.
21 The fraud arises from the same conduct, transactions and occurrences pled in the initially filed
22 Counterclaim in this matter. Counterclaimants’ Motion should therefore be Granted and this case
23 permitted to proceed on the merits against this newly-identified true party in interest.
24

25 Furthermore, the elements listed by the Supreme Court in *Foman* do not apply to
26 Counterclaimants’ proposed amendment, namely there has been no “undue delay, bad faith or dilatory
27 motive on the part of the movant, repeated failure to cure deficiencies by amendments previously
28

1 allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of
2 amendment.” *Foman* at 182. Counterclaimants have just been apprised of the existence of this
3 affidavit and Ms. Davis’ identity and participation in the fraud—and Counterclaimants have
4 immediately sought to amend their Counterclaim. As neither Ms. Davis, nor the other properly named
5 Counterdefendants and Third-party Defendants will not be prejudiced by Ms. Davis’ inclusion--and
6 as the elements of the *Banks* and *Foman* tests are met—Duslak and Sesman respectfully request that
7 the Court GRANT their Motion.
8

9 III. CONCLUSION

10 For the foregoing reasons, Defendants/Counterclaimants/Third-party Plaintiffs Duslak and
11 Sesman respectfully request this Court GRANT their Motion to Amend their Complaint.
12

13 DATED this 19th day of March, 2021.

BIGHORN LAW

14 By: /s/ Kimball Jones

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16 Nevada Bar No.: 12982

17 **EVAN K. SIMONSEN, ESQ.**

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22 *Attorneys for Defendants/Counterclaimants*
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24
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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 19th day of March, 2021, I served a copy of the foregoing ***COUNTERCLAIMANTS' MOTION TO AMEND ANSWER, COUNTERCLAIM AND THIRD-PARTY COMPLAINT*** 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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Las Vegas, Nevada 89169
Attorneys for Third-Party Defendant,
SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION

/s/ Erickson Finch
An employee of **BIGHORN LAW**

EXHIBIT “1”

AFFIDAVIT OF AMANDA DAVIS IN SUPPORT OF SUNRISE VILLAS IX HOMEOWNER'S
ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
 COUNTY OF CLARK)

I, Amanda Davis, declare as follows:

1. I am over eighteen (18) years of age and have personal knowledge of the facts set forth herein, and I am competent to testify to these facts.
2. I previously worked for PW James Management, which managed Sunrise Villas IX Homeowners Association during the year 2016. .
3. I make this Affidavit based upon my personal knowledge and observations, and that I am competent to testify as to the matters set forth herein.
4. Sunrise employed two gentleman named Richard Duslak and Justin Sesman as Independent Contractors as lawn maintenance workers.
5. They kept their own hours, had their own equipment and had a wide amount of discretion to perform their own duties.
6. Sunrise gave them basic projects such as lawn maintenance and then they determined the means in which to go about them.
7. I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of Nevada.

FURTHER THE AFFIANT SAYETH NAUGHT

DATED this 6 day of August, 2018.


 Amanda Davis

SUBSCRIBED and SWORN to before me

1 this 6TH day of August, 2018.

2
3 Norma Ramirez
4 Notary Public

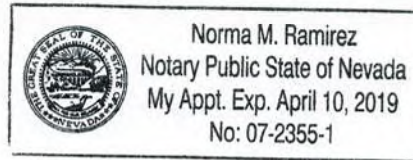


EXHIBIT “2”

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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.

**AMENDED ANSWER, COUNTERCLAIM
AND THIRD-PARTY COMPLAINT**

17 RICHARD DUSLAK and JUSTIN SESMAN,
18

19 Counterclaimants,
20

21 vs.

22 QBE INSURANCE CORPORATION,
23

24 Counterdefendants.
25
26
27
28

RICHARD DUSLAK and JUSTIN SESMAN,

Third-Party Plaintiffs,

vs.

SUNRISE VILLAS IX HOMEOWNERS'
ASSOCIATION; AMANDA DAVIS; DOES I-X
AND ROE BUSINESS ENTITIES I-X,

Third-Party Defendants.

ANSWER

Defendants RICHARD DUSLAK and JUSTIN SESMAN (hereinafter “Richard” and “Justin”), by and through their counsel of record KIMBALL JONES, ESQ. and EVAN K. SIMONSEN, ESQ., with the Law Offices of **BIGHORN LAW**, hereby answers Plaintiff’s First Amended Complaint for Declaratory Relief as follows:

PARTIES

1. Answering paragraph 1 of the complaint, RICHARD and JUSTIN do not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained in this paragraph and, on that basis, deny the allegations contained therein.
2. Answering paragraph 2 of the complaint, RICHARD and JUSTIN do not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained in this paragraph and, on that basis, deny the allegations contained therein
3. Answering paragraph 3 of the complaint, RICHARD and JUSTIN admit the allegations contained therein.
4. Answering paragraph 4 of the complaint, RICHARD and JUSTIN deny the allegations contained therein.

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JURISDICTION AND VENUE

5. Answering paragraph 5 of the complaint, RICHARD and JUSTIN admit the allegations contained therein.
6. Answering paragraph 6 of the complaint, RICHARD and JUSTIN admit the allegations contained therein.

GENERAL ALLEGATIONS

7. Answering paragraph 7 of the complaint, RICHARD and JUSTIN admit the allegations contained therein, to the degree that RICHARD and JUSTIN confirm RUSSO's contention that QBE had a duty to provide insurance coverage for RICHARD and JUSTIN in the UNDERLYING MATTER, including a duty to defend and indemnify RICHARD and JUSTIN, "under an insurance policy issued by Plaintiff regarding the UNDERLYING MATTER." RICHARD and JUSTIN do not have sufficient knowledge or information upon which to base a belief as to the truth of the other allegations contained in this paragraph, to include QBE's true motive in filing this action, and, on that basis, deny the remaining allegations contained therein.
8. Answering paragraph 8 of the complaint, RICHARD and JUSTIN admit they are not named in the UNDERLYING MATTER (*attached as exhibit 1 to QBE's Amended Complaint*). RICHARD and JUSTIN deny that the initial complaint made by RUSSO did not include an alleged connection between J&G Lawn Maintenance and SUNRISE VILLAS HOA as the complaint attached by QBE specifically alleges that Defendants and each of them were authorized agents, servants, and employees of each other and were acting within the course and scope of their employment. Otherwise, RICHARD and JUSTIN do not have sufficient knowledge or information upon which to base a belief as to the truth of the other allegations contained in this paragraph and, on that basis, deny the allegations contained therein.

- 1 9. Answering paragraph 9 of the complaint, RICHARD and JUSTIN admit the allegations
2 contained therein, relying on the representation that Exhibit 2 and Exhibit 3 to QBE's
3 Complaint are authentic.
- 4 10. Answering paragraph 10 of the complaint, RICHARD and JUSTIN admit the allegations
5 contained therein, relying on the representation that Exhibit 2 and Exhibit 3 to QBE's
6 Complaint are authentic.
- 7 11. Answering paragraph 11 of the complaint, RICHARD and JUSTIN admit QBE issued an
8 insurance policy to SUNRISE, which should have provided for a defense and
9 indemnification of RICHARD and JUSTIN in the UNDERLYING MATTER. RICHARD
10 and JUSTIN do not have sufficient knowledge or information upon which to base a belief as
11 to the truth of the other allegations contained in this paragraph and, on that basis, deny the
12 allegations contained therein.
- 13 12. Answering paragraph 12 of the complaint, RICHARD and JUSTIN deny the allegations
14 therein.
- 15 13. Answering paragraph 13 of the complaint, RICHARD and JUSTIN deny the allegations
16 therein.
- 17 14. Answering paragraph 14 of the complaint, RICHARD and JUSTIN deny they were
18 independent contractors and admit they were employees of SUNRISE. RICHARD and
19 JUSTIN deny that any party in the UNDERLYING MATTER had any right or ability to alter
20 the reality of their employment status with SUNRISE and/or the rights and protections owed
21 to RICHARD and JUSTIN, regardless of whether or not parties in the UNDERLYING
22 MATTER erroneously opined and/or stipulated that RICHARD and JUSTIN were
23 independent contractors rather than employees. RICHARD and JUSTIN deny that any
24 purported stipulated language between parties in the UNDERLYING MATTER has any
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1 legal impact on the rights of RICHARD and/or JUSTIN. RICHARD and JUSTIN do not
2 have sufficient knowledge or information upon which to base a belief as to the truth of the
3 other allegations contained in this paragraph and, on that basis, deny the allegations
4 contained therein.

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6 15. Answering paragraph 15 of the complaint, it appears this paragraph contains a typographical
7 error as to the amount of the judgment. With that in mind, RICHARD and JUSTIN admit the
8 allegations contained therein regarding a \$25,000,000.00 judgment.

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10 16. Answering paragraph 16 of the complaint, RICHARD and JUSTIN do not have sufficient
11 knowledge or information upon which to base a belief as to the truth of the allegations
12 contained in this paragraph and, on that basis, deny the allegations contained therein.

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14 17. Answering paragraph 17 of the complaint, RICHARD and JUSTIN do not have sufficient
15 knowledge or information upon which to base a belief as to the truth of the allegations
16 contained in this paragraph and, on that basis, deny the allegations contained therein.

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18 18. Answering paragraph 18 of the complaint, RICHARD and JUSTIN do not have sufficient
19 knowledge or information upon which to base a belief as to the truth of the allegations
20 contained in this paragraph and, on that basis, deny the allegations contained therein.

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22 19. Answering paragraph 19 of the complaint, RICHARD and JUSTIN do not have sufficient
23 knowledge or information upon which to base a belief as to the truth of the allegations
24 contain in this paragraph and, on that basis, deny the allegations contained therein.

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26 20. Paragraph 20 of the complaint incorporates the preceding paragraphs in the complaint which
27 do not require any admissions or denials by RICHARD and JUSTIN. To the extent this
28 paragraph could be construed as calling for a response, RICHARD and JUSTIN admit they
were "Covered Employees" under the QBE policy and that they were covered employees as a
matter of law. RICHARD and JUSTIN do not have sufficient knowledge or information upon

1 which to base a belief as to the truth of the other allegations contained in this paragraph and,
2 on that basis, deny the allegations contained therein.

3 21. Answering paragraph 21 of the complaint, RICHARD and JUSTIN admit they have valid
4 claims against QBE and SUNRISE and that QBE owed RICHARD and JUSTIN a duty to
5 defend and indemnify in connection with QBE's insurance policy in the UNDERLYING
6 MATTER. Furthermore, RICHARD and JUSTIN are entitled to recover funds from QBE and
7 SUNRISE to satisfy the duly entered judgment against them. RICHARD and JUSTIN do not
8 have sufficient knowledge or information upon which to base a belief as to the truth of the
9 other allegations contained in this paragraph and, on that basis, deny the allegations
10 contained therein.
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12 22. Answering paragraph 22 of the complaint, RICHARD and JUSTIN deny the allegations and
13 opinions contained therein.
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15 23. Answering paragraph 23 of the complaint, this allegation appears to be directed to RUSSO
16 only. To the degree a response is requested, RICHARD and JUSTIN do not have sufficient
17 knowledge or information upon which to base a belief as to the truth of the allegations
18 contained in this paragraph and, on that basis, deny the allegations contained therein.
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20 24. Answering paragraph 24 of the complaint, this allegation appears to be directed to RUSSO
21 only. To the degree a response is requested, RICHARD and JUSTIN do not have sufficient
22 knowledge or information upon which to base a belief as to the truth of the allegations
23 contained in this paragraph and, on that basis, deny the allegations contained therein.
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25 25. Answering paragraph 25 of the complaint, RICHARD and JUSTIN reassert their prior
26 admissions and denials as outlined in the prior paragraphs.

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1 26. Answering paragraph 26 of the complaint, RICHARD and JUSTIN do not have sufficient
2 knowledge or information upon which to base a belief as to the truth of the allegations
3 contained in this paragraph and, on that basis, deny the allegations contained therein.

4 27. Answering paragraph 27 of the complaint, RICHARD and JUSTIN deny the allegations and
5 opinions contained therein.

6 28. Answering paragraph 28 of the complaint, RICHARD and JUSTIN admit the allegations and
7 opinions contained therein.

8 29. Answering paragraph 29 of the complaint, RICHARD and JUSTIN admit the allegations and
9 opinions contained therein.

10 30. Plaintiff's prayer for relief immediately following paragraph 29 of the complaint does not
11 contain any factual allegations that would require a response from RICHARD and JUSTIN.
12 To the extent the prayer for relief could be construed as calling for a response, RICHARD
13 and JUSTIN deny that Plaintiff is entitled to the relief requested therein.

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16 **AFFIRMATIVE AND OTHER DEFENSES**

17 RICHARD and JUSTIN assert the following affirmative defenses to Plaintiff's complaint.

18 **FIRST DEFENSE**

19 The complaint, and each and every cause of action thereof, fails to state a claim upon which
20 relief can be granted.

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22 **SECOND DEFENSE**

23 Any damages sustained by Plaintiff by reason of the events alleged in the complaint were
24 proximately caused or contributed to by Plaintiff's own breach of the subject insurance contract.

25 **THIRD DEFENSE**

26 Plaintiff failed to take reasonable steps to avoid the damages, if any, alleged in the complaint,
27 and each and every cause of action contained therein.

1 **FOURTH DEFENSE**

2 Plaintiff has engaged in acts, omissions and conduct that constitute a breach of Plaintiff's
3 obligations under the subject policy.

4 **FIFTH DEFENSE**

5 Plaintiff's handling of RICHARD and JUSTIN'S claim was not correct, was not proper and
6 was not reasonable under the terms of the subject policy.

7 **SIXTH DEFENSE**

8 Plaintiff failed to act in good faith and acted without with justification or probable cause and
9 with malice toward its insureds.

10 **SEVENTH DEFENSE**

11 Plaintiff's actions failed to comply with N.R.S. 686A.310.

12 **EIGHTH DEFENSE**

13 Plaintiff's conduct was malicious, oppressive and/or fraudulent pursuant to N.R.S. 42.010.

14 **NINTH DEFENSE**

15 Plaintiff's cause of action is barred by the doctrine of are barred by reason of laches, waiver,
16 estoppel, unclean hands and/or any other equitable defense.

17 **TENTH DEFENSE**

18 Plaintiff failed to properly and fully mitigate, minimize or avoid damages they allegedly
19 sustained.

20 **ELEVENTH DEFENSE**

21 Plaintiff is not entitled to attorney's fees pursuant to any of the claims alleged in the
22 complaint.

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1 **TWELFTH DEFENSE**

2 Pursuant to F.R.C.P. 11, as amended, all possible affirmative and other defenses may not
3 have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon
4 the filing of this answer, and therefore, RICHARD and JUSTIN reserve the right to amend this
5 answer to allege additional affirmative defenses if subsequent investigation so warrants.
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7 WHEREFORE, and for the reasons set forth in the counterclaim below, RICHARD and JUSTIN
8 pray for judgment as follows:

- 9 1. For a declaration and determination that RICHARD and JUSTIN are insureds under the
10 policy between Plaintiff and SUNRISE, and that the defense of the claims against RICHARD
11 and JUSTIN were duly tendered and/or constructively tendered to Plaintiff, that Plaintiff did
12 owe RICHARD and JUSTIN a defense, indemnification, fiduciary duties, and good faith and
13 fair dealing for claims arising out of the underlying action.
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15 2. For attorney's fees;
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17 3. For costs of suit;
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19 4. For interest; and
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21 5. For all other relief the Court deems just and proper.

22 **AMENDED COUNTERCLAIM/THIRD-PARTY COMPLAINT**

23 COMES NOW Counterclaimants/Third-Party Plaintiffs RICHARD DUSLAK and JUSTIN
24 SESMAN, by and through their attorney, KIMBALL JONES, ESQ. and EVAN K. SIMONSEN,
25 ESQ., with the Law Offices of **BIGHORN LAW**, and for their claims for relief against
26 Counterdefendant QBE INSURANCE CORPORATION, Third-Party Defendant SUNRISE VILLAS
27 IX HOMEOWNERS' ASSOCIATION, and AMANDA DAVIS, and each of them, allege and
28 complain as follows:

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PARTIES

1. At all times relevant to this action, Counterclaimants/Third-Party Plaintiffs RICHARD and JUSTIN (hereinafter “RICHARD and JUSTIN”) were residents of Clark County, Nevada.
2. At all times relevant to this action, Co-Defendant SIMONE RUSSO (“Russo”) was a resident of Clark County, Nevada.
3. At all times relevant to this action, Plaintiff/Counterdefendant, QBE INSURANCE CORPORATION (hereinafter “QBE”) was at all times relevant to this action an insurance company based in Pennsylvania and was operating and conducting business in Nevada.
4. At all times relevant to this action, Third-Party Defendant, SUNRISE VILLAS IX HOMEOWNERS’ ASSOCIATION (hereinafter “SUNRISE”) was at all times relevant to this action a business organization, form unknown, doing business in Nevada.
5. At all times relevant to this action, SUNRISE was a business organization, form unknown, which employed RICHARD and JUSTIN and held a policy for insurance sold by QBE, which covered SUNRISE’s employees, including RICHARD and JUSTIN.
6. At all times relevant to this action, AMANDA DAVIS was an individual and a resident of Clark County Nevada.
7. At all times relevant to this action, AMANDA DAVIS was acting on behalf of and as an agent for QBE and SUNRISE.
8. That the true names and capacities, whether individual, corporate, partnership, associate or otherwise, of Third-Party Defendants, DOES I through X and ROE BUSINESS ENTITIES I through X, are unknown to RICHARD and JUSTIN, who therefore sue said Third-Party Defendants by such fictitious names. RICHARD and JUSTIN are informed and believe and thereon allege that each of the Third-Party Defendants designated herein as DOE and ROE are responsible in some manner for the events and happenings referred to and caused

1 damages proximately to RICHARD and JUSTIN as herein alleged, and that RICHARD and
2 JUSTIN will seek leave of this Court to amend this Third-Party Complaint to insert the true
3 names and capacities of DOES I through X and ROE BUSINESS ENTITIES I through X,
4 when the same have been ascertained, and to join such Third-Party Defendants in this action.
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6 **GENERAL ALLEGATIONS**

- 7 9. On and before August 27, 2016 RICHARD and JUSTIN were working for SUNRISE as
8 maintenance personnel and landscapers.
- 9 10. On August 27, 2016 Co-Defendant RUSSO tripped over a cable and was injured while on the
10 property at SUNRISE. The injury allegedly resulted from negligent act or omission by
11 RICHARD and JUSTIN.
- 12 11. On April 6, 2017 RUSSO filed a lawsuit against SUNRISE claiming that SUNRISE, its
13 maintenance personnel and/or landscapers, and other individuals (including certain DOE and
14 ROE Third-Party Defendants) had created a hazard on the property of 4617 Madreperla in
15 the SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION, which hazard caused harm to
16 RUSSO (Court Case No. A-17-753606-C). See Exhibit "1". Upon information and belief,
17 initial information received by RUSSO from SUNRISE indicated that "J&G LAWN
18 MAINTENANCE" handled the maintenance and landscaping at the time RUSSO was
19 injured and, as a result, "J&G LAWN MAINTENANCE" was named as a defendant in the
20 action. *Id.*
- 21 12. That QBE issued policy number CAU234378-1, covering named insured SUNRISE
22 (including employees acting in the course and scope of their employment), and "Covered
23 Employees" as defined in said policy, which policy insured SUNRISE's "Covered
24 Employees", as defined in the said policy, and others and covered SUNRISE's "Covered
25 Employees", and others, for the losses RUSSO alleged he suffered in Case No. A-17-
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1 753606-C. See Exhibit "2". That pursuant to the policy of insurance, QBE retained counsel
2 to defend SUNRISE in Case No. A-17-753606-C.

3 13. At all relevant times related to the August 27, 2016 incident, RICHARD and JUSTIN were
4 agents, employees, and/or assigns of SUNRISE and were contractually, legally, equitably,
5 and/or otherwise insureds by SUNRISE, and/or QBE, and/or DOES I through X, and/or ROE
6 BUSINESS ENTITIES I through X, and each of them.

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8 14. Prior to the subject incident and for some time thereafter, SUNRISE paid RICHARD and
9 JUSTIN for work.

10 15. Prior to the subject incident and for some time thereafter, SUNRISE paid RICHARD as an
11 onsite maintenance / pool man.

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13 16. Prior to the August 27, 2016 incident, there were times when Secretary John Morales of
14 SUNRISE's board oversaw work performed by RICHARD and JUSTIN.

15 17. Prior to the August 27, 2016 incident, there were times when Secretary John Morales of
16 SUNRISE's board would inspect the work performed by RICHARD and JUSTIN, provide
17 corrective feedback and direction regarding how RICHARD and JUSTIN could better
18 perform their work, and assign projects for RICHARD and JUSTIN to work on.

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20 18. At all relevant times during their working relationship with SUNRISE, SUNRISE provided
21 RICHARD and JUSTIN with an hourly work schedule.

22 19. At all relevant times during their working relationship with SUNRISE, the amount SUNRISE
23 paid RICHARD and JUSTIN was entirely based on hours worked and the hourly wage.

24 20. At all relevant times during their working relationship with SUNRISE, SUNRISE actually
25 paid RICHARD and JUSTIN all wages owed based on the hours RICHARD and JUSTIN
26 worked.
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- 1 21. At all relevant times during their working relationship with SUNRISE, the tasks assigned to
2 RICHARD and JUSTIN were assigned by SUNRISE or by a member of SUNRISE's board.
- 3 22. At all relevant times during their working relationship with SUNRISE, SUNRISE had the
4 discretion to choose the manner in which RICHARD and JUSTIN were to perform their
5 work for SUNRISE, if SUNRISE chose to do so.
- 6 23. At all relevant times during their working relationship with SUNRISE, all equipment and
7 materials for tasks to be performed by RICHARD and JUSTIN were provided by SUNRISE;
8 RICHARD and JUSTIN were not required to provide their own equipment or materials.
- 9 24. At all relevant times during their working relationship with SUNRISE, all equipment for
10 lawncare, property maintenance and pool maintenance was provided by SUNRISE. Further,
11 SUNRISE paid RICHARD a monthly payment for RICHARD's cell phone bill.
- 12 25. At all relevant times during their working relationship with SUNRISE, SUNRISE did not
13 require RICHARD or JUSTIN to have special skills beyond those of maintenance persons;
14 rather, the tasks assigned were simple tasks that one would expect an onsite maintenance
15 man or pool man to be able to perform.
- 16 26. The working relationship between SUNRISE and RICHARD ended on a date after the
17 subject incident, when SUNRISE hired J&G for landscaping and determined that with the
18 contracting of J&G, SUNRISE no longer needed an onsite maintenance/pool man.
- 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 RICHARD
21 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 a W-2
24 by SUNRISE.
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29. At all relevant times during their working relationship with SUNRISE, RICHARD and JUSTIN provided work for SUNRISE, which SUNRISE was required to provide according to their agreement with the homeowners in the association.

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

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

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

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

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

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

36. The incident of August 27, 2016, the aforesaid Case No. A-17-753606-C ("the UNDERLYING MATTER), and related claims were noticed upon and submitted to RICHARD, JUSTIN, SUNRISE, QBE, DOES I through X and ROE BUSINESS ENTITIES I through X, and each of them.

37. Upon information and belief, during litigation of the UNDERLYING MATTER, QBE retained defense counsel to defend RUSSO's claims against SUNRISE.

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- 1 38. Upon information and belief, during litigation of the UNDERLYING MATTER, defense
2 counsel for SUNRISE consulted with and/or informed QBE and SUNRISE regarding its
3 litigation strategy.
- 4 39. Upon information and belief, during litigation of the UNDERLYING MATTER, defense
5 counsel for SUNRISE provided information to QBE and SUNRISE regarding the discovery
6 and evidence produced in the case.
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8 40. Upon information and belief, during litigation of the UNDERLYING MATTER, defense
9 counsel for SUNRISE submitted its billing requests and billing to QBE, for payment and
10 approval.
- 11 41. Upon information and belief, during litigation of the UNDERLYING MATTER, defense
12 counsel for SUNRISE provided QBE and SUNRISE copies of the disclosures, discovery and
13 evidence in the case.
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15 42. Upon information and belief, during litigation of the UNDERLYING MATTER, SUNRISE
16 informed RUSSO that “J&G LAWN MAINTENANCE” was not handling maintenance or
17 landscaping for SUNRISE at the time RUSSO was injured, and that in fact RICHARD and
18 JUSTIN were employed by SUNRISE to handle maintenance and landscaping for SUNRISE
19 at the time RUSSO was injured.
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21 43. Upon information and belief, during the litigation of the underlying matter, SUNRISE
22 provided a response to one of RUSSO’s interrogatories wherein SUNRISE stated that
23 RICHARD and JUSTIN were employed by SUNRISE at the time of the subject incident.
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25 44. Upon information and belief, on November 29, 2017, RUSSO filed a motion in Case No. A-
26 17-753606-C seeking to amend the Complaint in that matter to add additional defendants.
27 See Exhibit “3”. The amended complaint identified RICHARD and JUSTIN as Defendants
28 and alleged that Defendants, and each of them (which would include RICHARD and

1 JUSTIN) were responsible for the maintenance and landscaping for SUNRISE when RUSSO
2 was injured. See Exhibit “4,” at paragraphs 13, 19, and 20. At the time the Amended
3 Complaint was filed QBE, were actively defending SUNRISE in Case No. A-17-753606-C.

4 45. Upon information and belief, the Motion to Amend and Amended Complaint were provided
5 to counsel for all parties in Case No. A-17-753606-C, which included counsel for SUNRISE
6 as well as QBE. *Id.*

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8 46. Upon information and belief, on December 22, 2017 RUSSO filed a supplement to the
9 motion to amend the complaint. See Exhibit “5”. The supplement specified that SUNRISE
10 had indicated “J&G LAWN MAINTENANCE” was not handling landscaping and
11 maintenance for SUNRISE at the time RUSSO was injured, and again sought leave to amend
12 the complaint, as set forth in the proposed amended complaint, which identified RICHARD
13 and JUSTIN as the actual individuals responsible for landscaping and maintenance at the
14 SUNRISE property. See Exhibit “5”. This proposed amended complaint was provided to
15 counsel for QBE and SUNRISE, and each of them.

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17 47. Upon information and belief, on February 7, 2018 the Court in Case No. A-17-753606-C
18 entered an Order permitting RUSSO to amend his Complaint and add RICHARD and
19 JUSTIN as Defendants in Case No. A-17-753606-C. See Exhibit “6”. This order was
20 provided to QBE and SUNRISE, and each of them.

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22 48. That the Amended Complaint in Case No. A-17-753606-C alleged, *inter alia*, negligence
23 against RICHARD and JUSTIN, including specific claims that RICHARD and JUSTIN
24 “...maintained and controlled those premises...” as “...duly authorized agents ... acting
25 within the course of their employment and scope of their authority...” for SUNRISE at the
26 time RUSSO was injured. See Exhibit “4,” at paragraphs 13, 19, and 20. QBE was
27 defending SUNRISE, and QBE and SUNRISE, and each of them, were provided the
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1 Amended Complaint at this time either directly or through counsel in the UNDERLYING
2 MATTER.

3 49. On February 13, 2018, RUSSO served JUSTIN with the Amended Complaint. See Exhibit
4 **“8”**.

5 50. On February 14, 2018, RUSSO served RICHARD with the Amended Complaint. See
6 **Exhibit “7”**.

7 51. RICHARD and JUSTIN advised QBE and SUNRISE, and each of them, of the suit. In
8 response, SUNRISE informed RICHARD that SUNRISE had insurance coverage to protect
9 RICHARD and JUSTIN from the claims being brought against them in the UNDERLYING
10 MATTER, that SUNRISE already had attorneys in place defending RICHARD and JUSTIN
11 in the UNDERLYING MATTER and that RICHARD and JUSTIN had nothing to worry
12 about with respect to the claims made against them since QBE’s and SUNRISE’s, and each
13 of their, attorneys were already defending RICHARD and JUSTIN.

14 52. At the time the Amended Complaint was filed in the UNDERLYING MATTER, QBE and
15 SUNRISE, had documents in their possession and/or available to them, which demonstrated
16 conclusively that RICHARD and JUSTIN were employees of SUNRISE, at the time of the
17 subject incident.

18 53. QBE and SUNRISE, and each of them, were in fact aware that RICHARD and JUSTIN were
19 employees of SUNRISE, at the time of the incident giving rise to the UNDERLYING
20 MATTER.

21 54. QBE and SUNRISE, and each of them, had retained counsel, who was actively defending
22 SUNRISE in Case No. A-17-753606-C, when the Complaint was amended to add RICHARD
23 and JUSTIN as Defendants in the underlying action, which counsel had a tripartite
24 relationship with SUNRISE and Defendants, and each of them, including QBE, who was
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1 well aware of, and were on notice of, the fact that RICHARD and JUSTIN had been sued in
2 Case No. A-17-753606-C, at least as of February 14, 2018.

3 55. Upon information and belief, QBE and SUNRISE, and each of them, received constructive
4 tender of the action against RICHARD and JUSTIN, Case No. A-17-753606-C. See
5 *California Shoppers, Inc., v. Royal Globe Ins. Co.*, 175 Cal.App.3d 1, 799 P.2d 1360 (1985);
6 *Millennium Labs., Inc. v. Darwin Select Ins. Co.*, 2014 U.S. Dist. LEXIS 170439 (S.D. Cal.
7 Dec. 9, 2014); *Dearborn Ins. Co. v. International Surplus Lines Ins. Co.*, No. 1-97-0724,
8 1999 Ill. App. LEXIS 667 (Ill. Ct. App. Sept. 23, 1999); *Gray v. Zurich Ins. Co.*, 65 Cal. 2d
9 263, 276; *Devin v. United Servs. Auto. Ass'n.*, 6 Cal. App. 4th 1149, 1157 (1992) (“The duty
10 to defend arises as long as the facts (either as expressed or implied in the third party’s
11 complaint, or as learned from other sources) give rise to a potentially covered claim”)
12 (citing *Fresno Economy Import Used Cars, Inc. v. United States Fidelity & Guar. Co.*, 76
13 Cal. App. 3d 272, 279 (1977)).

14 56. That when Counterdefendants, and each of them including QBE became aware of the action
15 against RICHARD and JUSTIN, Case No. A-17-753606-C, Counterdefendants, and each of
16 them including QBE were on notice to investigate the issue of coverage.

17 57. That QBE and SUNRISE, and each of them, failed to investigate the issue of coverage for
18 RICHARD and JUSTIN, even after becoming aware of the action against RICHARD and
19 JUSTIN.

20 58. That “an insurer . . . bears a duty to defend its insured whenever it ascertains facts which give
21 rise to the potential of liability under the policy.” See *Century Surety v. Andrew*, 134
22 Nev.Adv.Op. 100, 432 P.3d 180 (2018) (citing *United Nat’l Ins. Co. v. Frontier Ins. Co.,*
23 *Inc.*, 120 Nev. 678, 684 (2004)).

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59. That when QBE became aware of the Amended Complaint in Case No. A-17-753606-C, QBE ascertained (*and reasonably should have ascertained*) facts giving rise to the potential of liability under the policy covering RICHARD and JUSTIN.

60. That when QBE became aware of the Amended Complaint in Case No. A-17-753606-C, had QBE performed an investigation it would have ascertained (*and reasonably should have ascertained*) facts giving rise to the potential of liability under the policy covering RICHARD and JUSTIN.

61. That “the duty to defend arises when there is a potential for coverage based on the allegations in a complaint.” See *United Nat’l Ins. Co. v. Frontier Ins. Co., Inc.*, 120 Nev. 678, 684 (2004). That when QBE learned of the Amended Complaint in Case No. A-17-753606-C, QBE was aware there was a potential for coverage based on the allegations against RICHARD and JUSTIN in the said Amended Complaint.

62. That the Nevada Supreme Court has held that “where there is potential for coverage based on ‘comparing the allegations of the complaint with the terms of the policy,’ an insurer does have a duty to defend.” See *Century Surety v. Andrew*, 134 Nev.Adv.Op. 100, 432 P.3d 180 (2018).

63. That under the insurance contract with SUNRISE, QBE was obligated to defend and indemnify any “Covered Employee” of SUNRISE, as defined by the insurance policy with SUNRISE. See *Exhibit “2”*. The said policy defines a “Covered Employee” 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.

1 See Exhibit "2," at P. SVHA 000018.

2 64. That on August 27, 2016, RICHARD and JUSTIN were natural people who were in the
3 service of SUNRISE, whom SUNRISE compensated directly by salary, wages, or
4 commissions, and whom SUNRISE had the right to direct and control while RICHARD and
5 JUSTIN performed duties for SUNRISE. See Exhibit "9". That RICHARD and JUSTIN
6 were parties to a contract of insurance with QBE and SUNRISE, and each of them, and/or
7 were an intended beneficiaries to the same. The said contract carried liability coverage for
8 losses such as those suffered by RUSSO.
9

10 65. That *Exhibit "9,"* at page SVHA0000557, are minutes from the February 17, 2016 SUNRISE
11 Board of Directors Meeting, wherein SUNRISE stated, "The Board reviewed the job
12 descriptions as submitted by employees Richard Duslak and Justin Sesman. Secretary
13 Morales [Secretary of SUNRISE] volunteered to oversee the work performed on property by
14 Mr. Duslak and Mr. Sesman and will report to the Board regarding progress on maintenance
15 projects. A motion was made by Treasurer Alexis seconded by Secretary Morales for the
16 petty cash to not be maintained by the employees at this time." This shows that RICHARD
17 and JUSTIN were in the service of SUNRISE, were compensated by SUNRISE, and that
18 SUNRISE (*via Secretary Morales*) had, and exercised, the right to direct and control
19 RICHARD and JUSTIN, while RICHARD and JUSTIN performed duties for SUNRISE.
20

21
22 66. That *Exhibit "9,"* at page SVHA0000559, are minutes from the July 18, 2016 SUNRISE
23 Board of Directors Meeting, wherein SUNRISE stated under the heading Richard, "the board
24 unanimously agreed to terminate the petty cash for Richard they agreed to give him \$66.00 a
25 month for his cell phone bill." This shows SUNRISE compensated RICHARD, in addition to
26 providing RICHARD with compensation in the form of wages, salary, and/or commission.
27

28 ///

67. That *Exhibit "9,"* at page SVHA0000561, are minutes from the September 8, 2016 SUNRISE Board of Directors Meeting, wherein SUNRISE stated under the hearing Richard Duslak, "Board unanimously agreed to terminate the position of an onsite maintenance/pool man the board is in agreement that there is no longer a need for this position therefore they are all in agreement to terminate Mr. Duslak." This shows RICHARD was employed by SUNRISE on August 27, 2016 and that SUNRISE did not terminate him until at least September 8, 2016, which was after August 27, 2016 when RUSSO was injured.

68. That *Exhibit "9,"* at page SVHA0000564 are minutes from the November 16, 2015 SUNRISE Board of Directors Meeting, wherein SUNRISE stated, "It was the consensus of the Board that Richard Dulkas (sic), Justin, and Carson has provided valuable service to the community. The Board agreed to holiday gratuity for \$300 to Richard, \$300 for Carson, and \$100 for Justin and directed the manager to process payment for holiday gratuity through Covenant." This shows SUNRISE compensated RICHARD and JUSTIN, in addition to providing RICHARD and JUSTIN with compensation in the form of wages, salary, and/or commission.

69. That *Exhibit "9,"* at page SVHA0000566 is a record of SUNRISE paying \$100.00 to JUSTIN for "Holiday gratuity". This shows SUNRISE compensated JUSTIN, in addition to providing JUSTIN with compensation in the form of wages, salary, and/or commission.

70. That QBE having been notified that RUSSO had filed an action against SUNRISE, RICHARD and JUSTIN in Case No. A-17-753606-C, and given RICHARD and JUSTIN qualified as "Covered Employees" of SUNRISE under Policy No. CAU234378-1, QBE had duty to defend RICHARD and JUSTIN and to investigate whether RICHARD and/or JUSTIN were entitled to coverage under Policy No. CAU234378-1, yet QBE failed to do so.

///

1 71. That QBE Defended SUNRISE in Case No. A-17-753606-C, yet, despite having a duty to
2 defend RICHARD and JUSTIN against RUSSO's claim, and despite having knowledge that
3 RUSSO's claim was proceeding against SUNRISE, RICHARD and JUSTIN, QBE never
4 took any steps to defend or indemnify RICHARD and JUSTIN in Case No. A-17-753606-C.
5

6 72. That during the course of litigation in the UNDERLYING MATTER, QBE and SUNRISE
7 conspired with AMANDA DAVIS to create a fraudulent affidavit in an effort to obtain
8 summary judgment on behalf of SUNRISE.

9 73. That AMANDA DAVIS' fraudulent affidavit was for the purposes of convincing the court in
10 the UNDERLYING MATTER that RICHARD and JUSTIN were independent contractors.

11 74. That AMANDA DAVIS' fraudulent affidavit stated that it was "based upon ... personal
12 knowledge."
13

14 75. That AMANDA DAVIS fraudulent affidavit stated that RICHARD and JUSTIN were
15 "Independent Contractors," that they "kept their own hours, had their own equipment and
16 had a wide amount of discretion to perform their own duties," that "Sunrise gave them basic
17 projects such as lawn maintenance and then they determined the means in which to go about
18 them."
19

20 76. That QBE, SUNRISE and AMANDA DAVIS knew that this affidavit was untruthful in
21 whole or in part.

22 77. That QBE, SUNRISE and AMANDA DAVIS conspired to produce the same for the benefit
23 of QBE, SUNRISE and AMANDA DAVIS.

24 78. That QBE, SUNRISE and AMANDA DAVIS produced the fraudulent affidavit with a
25 conscious disregard for the harm it would cause RICHARD and JUSTIN.
26

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1 79. That because QBE never took any steps to defend or indemnify RICHARD and JUSTIN in
2 Case No. A-17-753606-C, the Court entered defaults against RICHARD and JUSTIN in Case
3 No. A-17-753606-C. See Exhibit “11”.

4 80. Upon information and belief, on September 18, 2019 counsel for RUSSO faxed a letter to
5 QBE and SUNRISE, and each of them, (*Fax No: 267-757-7434*), and emailed the same letter
6 to QBE and SUNRISE, and each of them, at email address: hstavakis@cauinsure.com, which
7 letter stated:
8

9 As you aware, some time ago our office initiated litigation against Justin
10 Sesman, Richard Duslak, as well as PW James Management & Consulting
11 related to the above-noted incident. We write at this time to advise
12 Community Association Underwriters Agency that the Court has entered
13 default against Justin Sesman, Richard Duslak, and PW James Management &
14 Consulting in this matter. We have attached a copy of the defaults for your
15 convenience.
16

17 Please contact our office with any questions.

18 See Exhibit “10”.

19
20 81. Upon information and belief, at no time did QBE and SUNRISE, and each of them, contact
21 the office of counsel for RUSSO, nor did QBE and SUNRISE, and each of them, at any time
22 deny having received prior notice that Case No. A-17-753606-C included claims against its
23 insureds and “Covered Employees” RICHARD and JUSTIN.

24 82. Upon information and belief, at no time did QBE and SUNRISE, and each of them, or any of
25 them, submit, notice, and/or otherwise direct said claim and/or action to any further policy of
26 insurance providing coverage for the same and, in particular, did not submit, notice, and/or
27
28

1 direct the same to the attention and consideration of any other policies of general liability
2 insurance.

3 83. Upon information and belief, the aforesaid legal action (*Case No. A-17-753606-C*) against
4 SUNRISE and others was initially defended by QBE under policy number CAU234378-1,
5 through the association of and payment of a defense firm, Springel & Fink.

6
7 84. That at no time did QBE and SUNRISE, and each of them, defend RICHARD or JUSTIN in
8 Case No. A-17-753606-C, even after being given specific notice that the action was pending
9 against RICHARD and JUSTIN, and even after being notified that defaults had been taken
10 against RICHARD and JUSTIN.

11 85. That when an insurance company receives notice from an attorney that a default has been
12 taken against a party, the insurance company should inquire regarding the reason for which
13 an attorney would provide such notice. Yet, QBE and SUNRISE, and each of them, took no
14 action when advised of RUSSO's default against its insureds, RICHARD and JUSTIN.

15
16 86. QBE and SUNRISE, and each of them, failed to offer, suggest, and/or provide independent
17 *Cumis* counsel to advise RICHARD and JUSTIN as to the failure to defend them in Case No.
18 A-17-753606-C, and/or indemnity, or pertinent pleadings and Orders before and by the
19 Court, and of any related matters.

20
21 87. That SUNRISE failed to specifically alert QBE that RICHARD and JUSTIN, who were
22 known to be employees, should be defended by QBE and SUNRISE, and each of them, or did
23 inform QBE that RICHARD and JUSTIN were known to be employees and QBE
24 nevertheless failed to defend RICHARD and JUSTIN.

25
26 88. That QBE failed to review the discovery in the UNDERLYING MATTER that was available
27 for review, which demonstrated that RICHARD and JUSTIN were, in fact, SUNRISE
28 employees covered under QBE's insurance policy.

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

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

91. That the conduct of QBE, in not defending RICHARD and JUSTIN, constituted a breach of the duty to defend under the insurance contract that covered RICHARD and JUSTIN as "Covered Employees."

92. That under *Century Surety v. Andrew*, 134 Nev.Adv.Op. 100, 432 P.3d 180 (2018) an insurer is liable for all consequential damages arising out of any breach of the duty to defend an insured. Additionally, "an insurer's liability for the breach of the duty to defend is not capped at the policy limits, even in the absence of bad faith." The Nevada Supreme Court subsequently reiterated that the reasonableness of an insurer's refusal to defend "is irrelevant for determining damages upon a breach of the duty to defend." *Nalder v. United Auto Ins. Co.*, No. 70504, 2019 WL 5260073.

93. Upon information and belief, on November 4, 2020 counsel for RUSSO faxed a letter to QBE and SUNRISE, and each of them, (*Fax No: 267-757-7434*), and emailed the same letter to QBE and SUNRISE, and each of them, including QBE (email address: hstavakis@cauinsure.com) which stated:

As you aware, some time ago our office initiated litigation against Justin Sesman, Richard Duslak, as well as PW James Management & Consulting related to the above-noted incident. As we informed you over a year ago, the Court entered default against Justin Sesman, Richard Duslak, and PW James Management & Consulting in this matter. In December of 2020 the Court entered Judgment against Justin Sesman, Richard Duslak in the amount of \$25,000,000.00. We have attached a copy of the Judgment against your insureds for your convenience. Please contact our office to make arrangements to satisfy the Judgment against your insureds.

See Exhibit "13".

FIRST CAUSE OF ACTION

(Breach of Contract – QBE and SUNRISE)

94. RICHARD and JUSTIN reallege and reassert each and every statement and allegation contained in the preceding paragraphs as though set forth fully hereunder.

95. At all times pertinent hereto, QBE had a contractual duty to defend and indemnify RICHARD and JUSTIN, regarding certain claims for negligence and resulting injuries caused by them to include, but not limited to, those brought by RUSSO in District Court Case number A-17-753606-C.

96. The failure of QBE to reasonably and continuously defend and/or indemnify RICHARD and/or JUSTIN under said policy insurance coverage and/or other policies of insurance actually and/or potentially affording coverage to RICHARD and/or JUSTIN as alleged herein constitutes a breach of contract on the part of QBE and SUNRISE, and each of them, under the terms and conditions as the policies set forth.

///

1 97. The failure of SUNRISE to ensure that its contracted employees were defended and/or
2 indemnified by QBE, under said policy insurance coverage and/or other policies of
3 insurance, actually and/or potentially affording coverage to RICHARD and/or JUSTIN as
4 alleged herein, constitutes a breach of the employment contract on the part of SUNRISE.

5
6 98. QBE and SUNRISE, and each of them, willfully attempted to strip RICHARD and JUSTIN
7 of their rights as employees and coverage as insureds in the UNDERLYING MATTER. This
8 conspiratorial effort between QBE and that of SUNRISE, is evident from their combined
9 efforts to convince RUSSO, through counsel, to stipulate that RICHARD and JUSTIN were
10 independent contractors in their joint settlement agreement, even though QBE and SUNRISE,
11 and each of them, all knew and had documentation available to them, that showed
12 RICHARD and JUSTIN were W-2 employees acting in the course and scope of their
13 employment with SUNRISE, at all relevant times in this matter. That with actual malice and
14 with a conscious disregard for the welfare of RICHARD and JUSTIN, QBE and SUNRISE,
15 and each of them, fraudulently attempted to destroy employment rights, so that SUNRISE
16 would bear no responsibility for negligence and so that QBE would bear no responsibility to
17 defend and/or indemnify.
18

19
20 99. Moreover, QBE and SUNRISE, and each of them, in seeking to entirely avoid their
21 responsibilities and duties respecting RICHARD and JUSTIN, through their settlement
22 agreement, agreed that any settlement would specifically exclude RICHARD and JUSTIN,
23 and anyone associated or affiliated with them. The settlement release included SUNRISE
24 employees, except for RICHARD and JUSTIN, or anyone associated or affiliated with them.
25 The settlement release also specifically stated that, "Nothing in this release shall release,
26 discharge, or in any way impact [RUSSO's] rights against RICHARD DUSLAK and/or
27
28

1 JUSTIN SESMAN in any manner,” thereby leaving RICHARD and JUSTIN without
2 protection in the underlying settlement.

3 100. Furthermore, the release stated that any language in the release that could be read to in any
4 way impact the rights of RICHARD and JUSTIN against any entity (including QBE or any
5 other insurer) “SHALL BE DEEMED NULL AND VOID.” Nevertheless, QBE has now
6 refused to abide by their agreement and has sought to further destroy the rights of RICHARD
7 and JUSTIN by bringing this action, long after judgment was entered against RICHARD and
8 JUSTIN. It is evident that QBE now seeks to specifically enforce part of the language in an
9 agreement—to which RICHARD and JUSTIN were not parties—even though the language
10 QBE seeks to enforce is specifically stricken since it “SHALL BE DEEMED NULL AND
11 VOID” to the degree it impacts the rights of RICHARD and JUSTIN.
12

13
14 101. As such, QBE and SUNRISE, and each of them, first rejected and refused to abide by their
15 duties and contractual obligations toward RICHARD and JUSTIN and instead acted with
16 malice and in bad faith with respect to RICHARD and JUSTIN, by knowingly withholding
17 the rights and protections they were legally and duty-bound to provide to RICHARD and
18 JUSTIN. SUNRISE breached its employment agreement and expected protections as
19 RICHARD’s and JUSTIN’s employer. QBE breached its insurance contract and its duty to
20 act in good faith as RICHARD’s and JUSTIN’s insurer. Then, after these clear breaches of
21 contract and bad faith actions and omissions, QBE now seeks to destroy RICHARD’s and
22 JUSTIN’s ongoing rights to protect themselves now that QBE and SUNRISE, and each of
23 them, have saddled RICHARD and JUSTIN with a judgment, which should have been
24 defended against and ultimately paid by QBE and SUNRISE, and each of them.
25

26
27 102. Because QBE and SUNRISE, and each of them, breached their contracts and acted in bad
28 faith toward RICHARD and JUSTIN in these identified instances, and upon information and

1 belief in many other instances, RICHARD and JUSTIN were defaulted with a massive
2 judgment in the UNDERLYING MATTER, and RICHARD and JUSTIN are now forced to
3 retain an attorney to defend themselves and to prosecute this matter.

4 103. Although in their relationship with QBE and SUNRISE, and each of them, RICHARD and
5 JUSTIN are clearly the aggrieved parties that have been sorely mistreated by QBE and
6 SUNRISE, and each of them, it is QBE that has added insult to injury by suing RICHARD
7 and JUSTIN to strip them further of their rights.

8 104. That after receiving notice of the damages caused by their malicious breaches of contract and
9 bad faith, QBE continued to reject its obligation to RICHARD and JUSTIN and indemnify,
10 but instead further damaged RICHARD and JUSTIN by filing suit against RICHARD and
11 JUSTIN.

12 105. That as a direct and proximate result of the aforesaid breaches of contract on the part of QBE
13 and SUNRISE, and each of them, RICHARD and JUSTIN have been damaged in an amount
14 in excess of Fifteen Thousand Dollars (\$15,000.00).

15 106. RICHARD and JUSTIN have satisfied the terms of the contract with QBE, and have done
16 everything they are required to do under the insurance policy.

17 107. RICHARD and JUSTIN have satisfied the terms of the employment agreement with
18 SUNRISE and have done everything they are required to do in their role as employees to
19 receive defense and indemnification under the subject insurance policy.

20 108. That the conduct of QBE, in refusing to defend RICHARD and JUSTIN for the action
21 brought by RUSSO, constituted a breach of the duty to defend.

22 109. The conduct of QBE, alleged in the foregoing paragraphs, constitutes a breach of the
23 insurance contract.

24 ///

1 110. As a result of the breach by QBE and SUNRISE, and each of them, of the contract, Judgment
2 has been entered against RICHARD and JUSTIN in the amount of \$25,000,000.00 with
3 statutory interest accruing thereon.

4 111. That RICHARD and JUSTIN have been required to obtain the services of an attorney to
5 prosecute this claim and is therefore entitled to their costs and reasonable attorney's fees
6 incurred.

7
8 112. QBE and SUNRISE, and each of them, breached their contract(s) with a conscious disregard
9 for the rights and harms these actions would have on RICHARD and JUSTIN, which rises to
10 the level of oppression, fraud, or malice, and which subjected RICHARD and JUSTIN to
11 cruel and unjust hardship. RICHARD and JUSTIN are therefore entitled to punitive damages
12 against QBE and SUNRISE, and each of them, in an amount in excess of Fifteen Thousand
13 Dollars (\$15,000.00).
14

15 **SECOND CAUSE OF ACTION**

16 **(Breach of Fiduciary Duty – QBE and SUNRISE)**

17 113. RICHARD and JUSTIN reallege and reassert each and every statement and allegation
18 contained in the preceding paragraphs as though set forth fully hereunder.

19
20 114. The expressed and/or implied agreement between QBE and RICHARD and JUSTIN, carries
21 with it a fiduciary duty.

22 115. The contract of insurance as alleged herein carries with it a fiduciary duty.

23 116. QBE has breached their fiduciary duty by the acts and omissions alleged herein.

24 117. That as a direct and proximate result of the aforesaid breach of fiduciary duty on the part of
25 QBE, RICHARD and JUSTIN have been damaged, and are entitled to punitive damages, in
26 an amount in excess of Fifteen Thousand Dollars (\$15,000.00).
27
28

1 118. QBE and SUNRISE, and each of them, violated their fiduciary duties with a conscious
2 disregard for the rights of RICHARD and JUSTIN, which rises to the level of oppression,
3 fraud, and/or malice, and which subjected RICHARD and JUSTIN to cruel and unjust
4 hardship. RICHARD and JUSTIN are therefore entitled to punitive damages against QBE
5 and SUNRISE, and each of them, in an amount in excess of Fifteen Thousand Dollars
6 (\$15,000.00).
7

8 **THIRD CAUSE OF ACTION**

9 **(Negligence – All Counterdefendants and Third-Party Defendants)**

10 119. RICHARD and JUSTIN reallege and reassert each and every statement and allegation
11 contained in the preceding paragraphs as though set forth fully hereunder.
12

13 120. SUNRISE had a duty to ensure, that their employees RICHARD and JUSTIN, were provided
14 the rights inherent in their employment, which included the right to a defense and
15 indemnification through SUNRISE's insurance.

16 121. SUNRISE was negligent in alerting QBE that RICHARD and JUSTIN were employed and/or
17 failed to follow up to ensure RICHARD and JUSTIN were properly defended and/or
18 indemnified by QBE, and/or SUNRISE did properly inform QBE of RICHARD's and
19 JUSTIN's employment with SUNRISE, but QBE nevertheless refused to defend RICHARD
20 and JUSTIN.
21

22 122. QBE had documentation in their possession and/or available to them demonstrating that
23 RICHARD and JUSTIN were employees of SUNRISE, but QBE neglected its duty and
24 failed to investigate, even after RUSSO's counsel specifically informed QBE that it had
25 defaulted RICHARD and JUSTIN in the UNDERLYING MATTER. QBE's negligent failure
26 to investigate resulted in damages to RICHARD and JUSTIN.
27

28 ///

1 123. That as a direct, legal, and proximate result of the aforesaid negligence of QBE and
2 SUNRISE, and each of them, RICHARD and JUSTIN have been damaged, and are entitled
3 to damages, in an amount in excess of Fifteen Thousand Dollars (\$15,000.00).

4 124. QBE and SUNRISE, and each of them, grossly neglected their duties toward RICHARD and
5 JUSTIN, with a conscious disregard for the rights of RICHARD and JUSTIN, which rises to
6 the level of oppression, fraud, and/or implied malice, and which subjected RICHARD and
7 JUSTIN to cruel and unjust hardship. RICHARD and JUSTIN are therefore entitled to
8 punitive damages against QBE and SUNRISE, and each of them, in an amount in excess of
9 Fifteen Thousand Dollars (\$15,000.00).
10

11 **FORTH CAUSE OF ACTION**

12 **(Bad Faith – Counterdefendants QBE)**

13
14 125. RICHARD and JUSTIN reallege and reassert each and every statement and allegation
15 contained in the preceding paragraphs as though set forth fully hereunder.

16 126. That at all times pertinent hereto, QBE undertook to provide insurance coverage, defense,
17 and indemnity of SUNRISE, giving the reasonable and foreseeable expectation to RICHARD
18 and JUSTIN that they were and would be covered, defended, and/or indemnified with respect
19 to the claims and actions against them, but then unilaterally and unreasonably denied
20 coverage, defense, and indemnification to RICHARD and JUSTIN.
21

22 127. The aforesaid acts and omissions on the part of QBE create in equity and/or law a promise
23 and agreement by QBE to cover, defend, and/or indemnify RICHARD and JUSTIN,
24 regarding the aforesaid claims and actions against him, requiring that QBE be estopped from
25 denying and refusing such coverage, defense, and indemnification, and that QBE be
26 mandated and judicially compelled to cover, defend, and/or indemnify RICHARD and
27 JUSTIN, including, but not limited to, paying any and all damages assessed against
28

RICHARD and JUSTIN, made and/or reduced to judgment against RICHARD and JUSTIN, and/or otherwise imposed against RICHARD and JUSTIN as related hereto, all in an amount entitling RICHARD and JUSTIN to monetary damages in excess of Fifteen Thousand Dollars (\$15,000.00) and equitable relief to include, but not limited to, Estoppel and/or Mandamus as this Honorable Court sees just under the premises, and Declaratory Relief in the form of an Order, Judgment, and/or directive otherwise that QBE and SUNRISE, and each of them, are liable to RICHARD and JUSTIN, for the full amount of the aforesaid Judgment entered against RICHARD and JUSTIN, interest thereon, incidental and consequential damages, and general and special damages.

128. QBE denied the benefits owed with a conscious disregard for the rights of RICHARD and JUSTIN, which rises to the level of oppression, fraud, or malice, and which subjected RICHARD and JUSTIN to cruel and unjust hardship. RICHARD and JUSTIN are therefore entitled to punitive damages against QBE in an amount in excess of Fifteen Thousand Dollars (\$15,000.00).

FIFTH CAUSE OF ACTION

(Unfair Claims Practices – Counterdefendants QBE)

129. RICHARD and JUSTIN reallege and reassert each and every statement and allegation contained in the preceding paragraphs as though set forth fully hereunder.

130. QBE's actions were indecent and in violation of general fair claims practices. Moreover, QBE's actions were specifically in violation of the provisions of the Unfair Claims Practices Act (N.R.S. 686A.310 et seq.), violation of which was done with QBE's actual, constructive and/or implied knowledge.

131. Pursuant to N.R.S. 686A.310(2), QBE are liable for any damages sustained by RICHARD and/or JUSTIN, as a result of QBE's violations of the unfair claims practices, including, but

1 not limited to, damages for benefits denied under the insurance policy(ies), consequential
2 damages, emotional distress, and attorneys' fees, in an amount in excess of Fifteen Thousand
3 Dollars (\$15,000.00).

- 4 132. QBE denied the benefits owed with a conscious disregard for the rights of RICHARD and
5 JUSTIN, which rises to the level of oppression, fraud, or malice, and which subjected
6 RICHARD and JUSTIN to cruel and unjust hardship. RICHARD and JUSTIN are therefore
7 entitled to punitive damages against QBE in an amount in excess of Fifteen Thousand
8 Dollars (\$15,000.00).
9

10 **SIXTH CAUSE OF ACTION**

11 **(Civil Conspiracy and Fraud – All Counterdefendants and Third-Party Defendants)**

- 12 133. RICHARD and JUSTIN reallege and reassert each and every statement and allegation
13 contained in the preceding paragraphs as though set forth fully hereunder.
14
15 134. At the time of settlement and the stipulation and order in the UNDERLYING MATTER,
16 which was between RUSSO and QBE and SUNRISE in this matter, SUNRISE had specific
17 knowledge that RICHARD and JUSTIN, at all relevant times, were SUNRISE employees.
18 SUNRISE was aware that RICHARD and JUSTIN were provided W-2s for taxes rather than
19 1099s, that RICHARD and JUSTIN qualified as employees under the terms of the insurance
20 contract with QBE, as well as under employment law standards, and that in all of
21 SUNRISE's written documentation, RICHARD and JUSTIN were referred to as employees
22 (*not independent contractors*). On the other hand, SUNRISE had absolutely no information
23 or evidence suggesting that RICHARD or JUSTIN were independent contractors or that they
24 should not be covered under SUNRISE's insurance policy with QBE.
25
26 135. At the time of settlement and the stipulation and order in the UNDERLYING MATTER,
27 which was between RUSSO and QBE and SUNRISE, in this matter, QBE received
28

1 documentation through SUNRISE and their joint attorneys at Springel & Fink, which
2 combined to demonstrate that RICHARD and JUSTIN were SUNRISE employees at all
3 relevant times. Moreover, at no point did QBE have any reasonable basis to believe
4 RICHARD or JUSTIN were independent contractors or anything less than covered
5 employees under QBE's policy.
6

7 136. Nevertheless, with knowledge that RICHARD and JUSTIN were, in fact, SUNRISE
8 employees at all relevant times, QBE and SUNRISE, and each of them, acted to deceive
9 RUSSO, and the Court in the UNDERLYING MATTER, into believing that RICHARD and
10 JUSTIN were merely independent contractors and not employees at all. These efforts were
11 for the calculated purpose of creating reliance by RUSSO and the Court, which sought to
12 result in terrible harm to RICHARD and JUSTIN, including a loss of employment rights and
13 insurance coverage, including defense and indemnity for negligence that RICHARD and
14 JUSTIN may have engaged in while under SUNRISE's employment.
15

16 137. That the desired result was in fact achieved by QBE and SUNRISE, and each of them, as
17 SUNRISE successfully withheld its obligations as RICHARD's and JUSTIN's employer, and
18 QBE successfully withheld a defense and indemnity, resulting in a \$25,000,000.00 judgment
19 against RICHARD and JUSTIN, that QBE and SUNRISE, and each of them, are still
20 claiming is owed by RICHARD and JUSTIN only.
21

22 138. QBE and SUNRISE, and each of them, willfully attempted to strip RICHARD and JUSTIN
23 of their rights as employees and coverage as insureds in the UNDERLYING MATTER. This
24 conspiratorial effort between QBE and that of SUNRISE, is evident from their combined
25 efforts to convince RUSSO, through counsel, to stipulate that RICHARD and JUSTIN were
26 independent contractors in their joint settlement agreement, even though QBE and SUNRISE,
27 and each of them, all knew, and had documentation available to them, that showed
28

1 RICHARD and JUSTIN were W-2 employees acting in the course and scope of their
2 employment with SUNRISE, at all relevant times in this matter. That with actual malice and
3 with a conscious disregard for the welfare of RICHARD and JUSTIN, QBE and SUNRISE,
4 and each of them, fraudulently attempted to destroy employment rights so that SUNRISE
5 would bear no responsibility for negligence and so that QBE would bear no responsibility to
6 defend and/or indemnify.
7

8 139. QBE, SUNRISE and AMANDA DAVIS conspired together with malicious intent or with a
9 conscious disregard for the harm to RICHARD and JUSTIN and created a fraudulent
10 affidavit, which was signed by AMANDA DAVIS and used by QBE and SUNRISE as a tool
11 to disclaim the employment status of RICHARD and JUSTIN.
12

13 140. Upon information and belief, the fraudulent affidavit was created by QBE and SUNRISE and
14 then presented to AMANDA DAVIS for signature, which she signed knowing the statements
15 therein were false, at least in part.

16 141. This fraudulent affidavit was first used as a tool by QBE and SUNRISE to obtain summary
17 judgment in SUNRISE's favor and against RUSSO in the UNDERLYING MATTER.
18 However, when that failed, it continued to be used by QBE and SUNRISE as a false
19 proclamation to justify the further abuses taken against RICHARD and JUSTIN.
20

21 142. Moreover, QBE and SUNRISE, and each of them, seeking to entirely avoid their
22 responsibilities and duties respecting RICHARD and JUSTIN through their settlement
23 agreement, agreed that any settlement would specifically exclude RICHARD and JUSTIN,
24 and anyone associated or affiliated with them. The settlement release included SUNRISE
25 employees, except for RICHARD and JUSTIN, or anyone associated or affiliated with them.
26 The settlement release also specifically stated that, "Nothing in this release shall release,
27 discharge, or in any way impact [RUSSO's] rights against RICHARD DUSLAK and/or
28

1 JUSTIN SESMAN in any manner,” thereby leaving RICHARD and JUSTIN without
2 protection in the underlying settlement.

3 143. Furthermore, the release stated that any language in the release that could be read to, in any
4 way, impact the rights of RICHARD and JUSTIN against any entity (including QBE, or any
5 other insurer) “SHALL BE DEEMED NULL AND VOID.” Nevertheless, QBE has now
6 refused to abide by its agreement and has sought to further destroy the rights of RICHARD
7 and JUSTIN, by bringing this action long after judgment was entered against RICHARD and
8 JUSTIN. It is evident that QBE now seeks to specifically enforce part of the language in an
9 agreement—to which RICHARD and JUSTIN were not parties—even though the language
10 QBE seeks to enforce is specifically stricken since it “SHALL BE DEEMED NULL AND
11 VOID” to the degree it impacts the rights of RICHARD and JUSTIN.
12

13
14 144. As such, QBE and SUNRISE, and each of them, first rejected and refused to abide by their
15 duties and contractual obligations toward RICHARD and JUSTIN, and instead acted with
16 malice and in bad faith, with respect to RICHARD and JUSTIN, by knowingly withholding
17 the rights and protections they were legally and duty-bound to provide to RICHARD and
18 JUSTIN. SUNRISE breached its employment agreement and expected protections as
19 RICHARD’s and JUSTIN’s employer. QBE breached its insurance contract and its duty to
20 act in good faith as RICHARD’s and JUSTIN’s insurer. Then, after these clear breaches of
21 contract and bad faith actions and omissions, QBE now seek to destroy RICHARD’s and
22 JUSTIN’s ongoing rights to protect themselves now that QBE and SUNRISE, and each of
23 them, have saddled RICHARD and JUSTIN with a judgment, which should have been
24 defended against and ultimately paid by QBE and SUNRISE, and each of them.
25

26
27 145. Because QBE and SUNRISE, and each of them, breached their contracts and acted in bad
28 faith toward RICHARD and JUSTIN, in these identified instances, and upon information and

1 belief in many other instances, RICHARD and JUSTIN were defaulted with a massive
2 judgment in the UNDERLYING MATTER, and RICHARD and JUSTIN are now forced to
3 retain an attorney to defend themselves and to prosecute this matter.

4 146. Although in their relationship with QBE and SUNRISE, and each of them, RICHARD and
5 JUSTIN are clearly the aggrieved parties that have been sorely mistreated by QBE and
6 SUNRISE, and each of them, it is now QBE that has added insult to injury, by suing
7 RICHARD and JUSTIN, to strip them further of their rights.

8 147. Furthermore, QBE, SUNRISE and AMANDA DAVIS, and each of them, were aware of the
9 tortuous nature of their fraud, and conspired with each other to achieve their tortuous
10 purposes.

11 148. RICHARD and JUSTIN have been seriously harmed by QBE, SUNRISE and AMANDA
12 DAVIS, and each of them, fraud and conspiracy, resulting in monetary damages in excess of
13 Fifteen Thousand Dollars (\$15,000.00).

14 149. Moreover, QBE's, SUNRISE's and AMANDA DAVIS', and each of their, actions were
15 malicious and worthy of punitive or exemplary damages.

16 **WHEREFORE**, RICHARD and JUSTIN pray for judgment against QBE, SUNRISE and
17 AMANDA DAVIS, and each of them, as follows:

18 **ON ALL CAUSES OF ACTION**

- 19
- 20 1. General damages in an amount in excess of \$25,000,000.00;
 - 21 2. For general damages in an amount in excess of \$15,000.00;
 - 22 3. For consequential damages in an amount in excess of \$15,000.00;
 - 23 4. For special damages in an amount to be determined at trial;
 - 24 5. For punitive damages in an amount to be determined at time of trial;
 - 25 6. For declaratory and equitable relief as pled and as the court sees fit in the premises;
- 26
27
28

1 7. Costs of this suit;

2 8. Attorney's fees; and

3 9. For such other and further relief as to the Court may seem just and proper in the premises.

4 DATED this ____ day of March, 2021.

5
6 **BIGHORN LAW**

7 By: ____/s/ Kimball Jones____

8 **KIMBALL JONES, ESQ.**

9 Nevada Bar No.: 12982

10 **EVAN K. SIMONSEN, ESQ.**

11 Nevada Bar No.: 13762

12 2225 E. Flamingo Rd.

13 Building 2, Suite 300

14 Las Vegas, Nevada 89119

15 *Attorneys for Plaintiff*

CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5, I hereby certify that I am an employee of **BIGHORN LAW**, and on the ____ day of March, 2021, I served the foregoing **AMENDED ANSWER, COUNTERCLAIM AND THIRD-PARTY COMPLAINT** 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:

Ramiro Morales, Esq.
 William C. Reeves, Esq.
MORALES, FIERRO & REEVES
 600 South Tonopah Drive, Suite 300
 Las Vegas, Nevada 89106
Attorneys for Plaintiff/Counter-Defendant,
QBE INSURANCE CORPORATION

David F. Sampson, Esq.
THE LAW OFFICE OF DAVID SAMPSON, LLC
 630 South 3rd Street
 Las Vegas, Nevada 89101
Attorneys for Defendant,
SIMONE RUSSO

Shannon G. Splaine, Esq.
LINCOLN, GUSTAFSON & CERCOS, LLP
 3960 Howard Hughes Pkwy., Suite 200
 Las Vegas, Nevada 89169
Attorneys for Third-Party Defendant,
SUNRISE VILLAS IX HOMEOWNERS’ ASSOCIATION

/s/ Erickson Finch
 An employee/agent of **BIGHORN LAW**

I, William Reeves, declare that:

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

Service was effectuated in the following manner:

BY FACSIMILE:

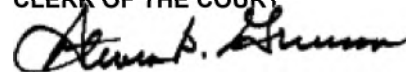
XXXX BY ODYSSEY: I caused such document(s) to be electronically served through Odyssey for the above-entitled case to the parties on the Service List maintained on Odyssey's website for this case on the date specified below.

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

Dated: March 20, 2021


William Reeves

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3/22/2021 1:26 PM
Steven D. Grierson
CLERK OF THE COURT


JOIN

LEONARD T. FINK, ESQ.

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Attorneys for Defendant,

SUNRISE HOA 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 HOA 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**

///

///

**DEFENDANT, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION'S JOINDER TO
INTERVENOR QBE INSURANCE CORPORATION'S REQUEST FOR JUDICIAL
NOTICE**

Defendant, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION ("SUNRISE VILLAS"), by and through its counsel of record, the law firm of Springel & Fink LLP and the firm of Lincoln, Gustafson & Cercos, LLP, joins Intervenor QBE INSURANCE CORPORATION'S Request for Judicial Notice, filed on March 20, 2021.

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 22nd day of March, 2021.

SPRINGEL & FINK LLP

/s/ Leonard T. Fink, Esq.

By: _____

LEONARD T. FINK, ESQ.
Nevada Bar No. 6296
RAVEN M. YIM, ESQ.
Nevada Bar No. 14972
9075 W. Diablo Drive, Suite 302
Las Vegas, NV 89148
Attorneys for Defendant,
*SUNRISE HOA VILLAS IX HOMEOWNERS
ASSOCIATION*

LINCOLN, GUSTAFSON & CERCOS LLP

/s/ Shannon G. Splaine, Esq.

By: _____

SHANNON G. SPLAINE, ESQ.
NEVADA BAR NO: 8241
3960 Howard Hughes Pkwy., Suite 200
Las Vegas, NV 89169
Attorneys for Defendant
*SUNRISE HOA 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 275, Las Vegas, Nevada, 89148.

On **March 22, 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** on the following parties:

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

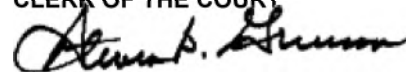
- _____ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada. I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice, it would 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


JOIN

LEONARD T. FINK, ESQ.

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Facsimile: (702) 257-2203

E-mail: *ssplaine@lgclawoffice.com*

Attorneys for Defendant,

SUNRISE HOA 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 HOA 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
ADDENDUM TO ITS JOINDER TO
INTERVENOR QBE INSURANCE
CORPORATION'S REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
THE PENDING MOTIONS RE
SETTING ASIDE THE DEFAULT AND
SETTLEMENT AGREEMENT**

///

///

**DEFENDANT, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION'S ADDENDUM
TO ITS JOINDER TO INTERVENOR QBE INSURANCE CORPORATION'S REQUEST
FOR JUDICIAL NOTICE IN SUPPORT OF THE PENDING MOTIONS RE SETTING
ASIDE THE DEFAULT AND SETTLEMENT AGREEMENT**

Defendant, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION ("SUNRISE VILLAS"), by and through its counsel of record, the law firm of Springel & Fink LLP and the firm of Lincoln, Gustafson & Cercos, LLP, files this Addendum to its Joinder to Intervenor QBE INSURANCE CORPORATION'S ("QBE") Request for Judicial Notice in Support of the Pending Motions to Set Aside the Default and Settlement Agreement, filed on March 20, 2021.

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.

Since the time that QBE filed its Request for Judicial Notice, Simone Russo ("RUSSO") and Richard Duslak and Justin Sessman (combined as "D&S"), filed 2 separate Motions to Compel QBE's Discovery Responses. While the overwhelming substance of those disputes has only some value with respect to the Motions that this Court currently has under review, it is important to note that D&S argue throughout their motion that they were SUNRISE's employees as the bases for their Motion. Importantly, RUSSO then "incorporated all of D&S' arguments by reference" in his Motion. Thus RUSSO, counter to what his counsel argued in the underlying pleadings and during the extensive oral argument, is no doubt asserting that D&S were SUNRISE's employees, which is completely counter to what the stipulation that He suggested be part of the Settlement Agreement, namely that for "all purposes of this litigation" that D&S were SUNRISE's independent contractors.

Further, attached to QBE's Request for Judicial Notice as Exhibit 26, is D&S' Motion for Leave to File a Third Party Complaint against Amanda Davis, a former PW James employee, who provided an affidavit in support of SUNRISE's prior Motion for Summary Judgment that it was not responsible for D&S' work as independent contractors. The crux of D&S' argument is that SUNRISE's counsel somehow conspired with QBE and Ms. Davis to perpetrate some type of fraud upon THIS court to get its Motion for Summary Judgment granted. Part of the motion that QBE's counsel did not quote states as follows:

Counterclaimants have only just learned of Ms. Davis' role in appeasing QBE and Sunrise in applying a false and fraudulent affidavit to the Court.

See Exhibit 26, page 5, lines 3-4.

While D&S' counsel have ZERO evidence of this alleged fraud, they nonetheless assert it with reckless abandon, while RUSSO's counsel either explicitly or tacitly ratifies it. As this Court is aware, SUNRISE's lead counsel during this suit has a long and positive history with this Court and it is an understatement to say that he takes exception to such a bald faced allegation that D&S' counsel has made solely for the purpose of gaining some type of litigation advantage, which is improper on its face¹. Further, had D&S bothered to respond to the lawsuit in a timely fashion after RUSSO served them with his amended Complaint, they would have "discovered" SUNRISE's position that they were not its employees at a more appropriate time in the litigation, and these issues could have been fleshed out well before anyone had to file a Federal Action. Thus, D&S, and then RUSSO, should not be allowed to profit by their own actions or failures to act.

It should go without saying, but apparently D&S' counsel does not seem to understand, that if SUNRISE had prevailed on its Motion for Summary Judgment (which it did not), it would have exposed itself to D&S' later claims that they were employees if SUNRISE did, in fact, know that they were, yet sought to "pull one over" on this Court. It literally makes no sense to an attorney that actually thinks about their case rather than just trying throw whatever they can up against a wall and hope that it sticks. While RUSSO's counsel has not, to SUNRISE'S knowledge ever explicitly stated that SUNRISE's counsel intentionally misled this Court, he would certainly benefit from D&S' counsel's actions.

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¹ Indeed, SUNRISE's counsel is currently weighing all options to put a stop to this ridiculous assertion, through either a complaint to bar counsel, a cease and desist or some other type of action.

The long and short of it is that, as RUSSO's counsel noted in his own briefing subsequent to the oral argument on the pending motions, these pending Motions are a "big deal." This Court has an opportunity for everyone to avoid this continued assault if it exercises its judicial discretion and, at the very least, sets aside RUSSO's default judgment against D&S (the bases for which have already been fully briefed). That way, they can defend themselves against the claims and still seek coverage under SUNRISE's QBE policy and the parties can continue to litigation their employment status in THIS court.

DATED this 29th day of March, 2021.

SPRINGEL & FINK LLP

/s/ Leonard T. Fink, Esq.

By: _____

LEONARD T. FINK, ESQ.
Nevada Bar No. 6296
RAVEN M. YIM, ESQ.
Nevada Bar No. 14972
9075 W. Diablo Drive, Suite 302
Las Vegas, NV 89148
Attorneys for Defendant,
*SUNRISE HOA VILLAS IX HOMEOWNERS
ASSOCIATION*

LINCOLN, GUSTAFSON & CERCOS LLP

/s/ Shannon G. Splaine, Esq.

By: _____

SHANNON G. SPLAINE, ESQ.
NEVADA BAR NO: 8241
3960 Howard Hughes Pkwy., Suite 200
Las Vegas, NV 89169
Attorneys for Defendant
*SUNRISE HOA 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 275, Las Vegas, Nevada, 89148.

On **March 29, 2021**, I served the document described as **DEFENDANT, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION'S ADDENDUM TO ITS JOINDER TO INTERVENOR QBE INSURANCE CORPORATION'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THE PENDING MOTIONS RE SETTING ASIDE THE DEFAULT AND SETTLEMENT AGREEMENT** on the following parties:

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

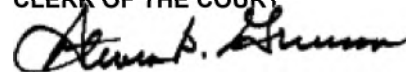
- _____ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada. I am "readily familiar" with the firm's practice of collection and processing correspondence by mailing. Under that practice, it would 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


RPLY

DAVID F. SAMPSON, ESQ.
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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 SUNRISE'S
ADDENDUM TO QBE'S REQUEST FOR
JUDICIAL NOTICE

REPLY TO SUNRISE'S ADDENDUM TO QBE'S REQUEST FOR JUDICIAL NOTICE

Plaintiff, SIMONE RUSSO, hereby replies to SUNRISE's addendum to its joinder to QBE's request for judicial notice.

SUNRISE's addendum asserts that "D&S argue throughout their motion that they were SUNRISE employees as the bases (sic) for their Motion."¹ *See*, Addendum at P. 2 L. 15-16. SUNRISE however does not direct the Court to any language in D&S's motion to compel where D&S argue that they were employees. This is unfortunately another example of SUNRISE's history of misrepresenting facts to this Court in its arguments to set aside the Judgment and/or settlement in this matter. SUNRISE argued at the March 3, 2021 hearing in this matter that SUNRISE based the settlement of this case on SUNRISE's belief that D&S were not employees. Yet at no time in the October 18, 2019 hearing wherein the settlement was placed on the record did SUNRISE at any time even raise the issue of whether D&S were SUNRISE employees or independent contractors. Indeed SUNRISE did not raise the question of whether D&S were employees or contractors until the November 5, 2019 hearing which took place long after the agreement was reached and placed on the record in this matter. Counsel for SIMONE challenged counsel for SUNRISE to provide the Court with any evidence indicating the issue of D&S being employees or contractors was ever raised before or at the time the settlement was placed on the record on October 18, 2019. SUNRISE has not been able to do so as the issue was not raised until after the settlement was placed on the record and the deal was done.

When it became clear during the March 3, 2021 hearing that SUNRISE never actually raised the issue of whether D&S were employees or contractors at the October 18, 2019 hearing, or at any time before the settlement was placed on the record, counsel for SUNRISE asserted that during the October 18, 2019 hearing he advised SIMONE, the other parties, and the Court that he did not have authority to enter into the settlement. Counsel for SIMONE then directed

¹ SUNRISE reference to "D&S" is assumed to refer to DUSLAK and SESMAN. SIMONE will therefore refer to DUSLAK and SESMAN as "D&S" for simplicity's sake.

the Court to page 5 line 24 of the October 18, 2019 hearing where counsel for SUNRISE himself told this Court “Your Honor, we have – as of last night about 4:30 4:45, we have a global settlement involving all the parties that are involved.” Counsel for SUNRISE then said, “we still need to have the Court determine the settlement is in good faith because of the further actions Mr. Sampson is going to take against the defaulted parties [D&S]”. *Id* at P. 6 L. 4-9. Counsel for SIMONE advised the Court that Counsel SUNRISE confirmed he had full authority to conclude the settlement and place all of the terms of the settlement on the record at the October 18, 2019 hearing, which occurred, and that counsel for SUNRISE never stated he did not have authority to conclude the settlement. When counsel for SIMONE challenged counsel for SUNRISE to provide the Court with any evidence from the October 18, 2019 transcript where counsel for SUNRISE claimed he did not have authority counsel for SUNRISE was unable to do so.

Just as SUNRISE misrepresented the October 18, 2019 hearing to the Court, SUNRISE has misrepresented D&S’s motion to compel in the federal action. D&S’s motion sets forth the events that occurred during the federal meet and confer conference. D&S then argue that D&S are entitled to proper responses from QBE in the declaratory relief action QBE chose to file. What is crucial is that D&S do not nakedly claim they are employees. Instead D&S note that D&S “allege” they were SUNRISE employees. *See* D&S’s motion at P. 13 L. 25-28. SIMONE, by incorporating D&S’s motion, acknowledges that D&S indeed to allege they were employees. This is not tantamount to SIMONE making that allegation, but rather is simply an acknowledgement by SIMONE that D&S claim they were employees. SIMONE acknowledging that D&S claim they were employees does not violate any portion of the

settlement in this matter, and certainly does not give rise to any reason to set the duly entered Judgment aside under NRCP 60.

Likewise, SIMONE acknowledging that D&S may currently claim that QBE and SUNRISE have committed fraud against D&S does not mean SIMONE agrees that such occurred. D&S's motion set forth events that took place during the federal meet and confer meeting, sets forth case law regarding QBE's discovery obligations, and states allegations D&S are making in the declaratory relief action. SIMONE's incorporation of the motion simply sets forth the events as counsel for D&S assert they occurred, sets forth the case law to which D&S direct the Court, and acknowledge that D&S have made various allegations. This does not mean SIMONE agrees with the said allegations nor does it result in SIMONE doing anything other than acknowledging D&S have made various allegations. Such is not grounds to gut SIMONE's rights under the settlement agreement nor does it provide any cause to set aside the Judgment that was duly entered well over a year ago.

SIMONE has only asked, and is still asking, that the stipulation and the agreement be enforced as specified in its express terms. SIMONE asks that the Court recognize that under the agreement SIMONE: 1) released SUNRISE "**EXCLUDING RICHARD DUSLAK AND/OR JUSTIN SESMAN**" as specifically stated in all capitol and bolded letters on page 1 of the agreement; 2) released Defendants' "employees **EXCLUDING RICHARD DUSLAK AND/OR JUSTIN SESMAN**" as specifically stated in all capitol and bolded letters in the agreement on the top of page 4 of the agreement' 3) retained all rights to pursue any claims against D&S as specifically stated on the bottom of page 4; and agreed to take Judgment against D&S as individuals and not as SUNRISE employees as SIMONE agreed, and still agrees, that

for purposes of this lawsuit D&S were independent contractors based on what SUNRISE represented to SIMONE and the Court.

SIMONE has not strayed from the agreement or the stipulation. SIMONE still agrees that for purposes of this action D&S were independent contractors, and that SIMONE was therefore justified in procuring Judgment against D&S as individuals. The fact that SIMONE acknowledges that D&S allege they were employees does not change the fact that SIMONE agrees that for purposes of the instant action D&S were not employees as far as SIMONE is concerned.

SIMONE's actions were specifically envisioned in the agreement and stipulation, and were appropriate for SIMONE to take, which is why SUNRISE did not object to SIMONE doing so in late 2019, and is why SUNRISE did not seek to amend the Judgment nor set it aside at any time in 2020.

SIMONE continues to ask that the Court enforce the agreement and the stipulation and find that under the agreement SIMONE released SUNRISE excluding D&S, retained all rights against D&S, and properly procured Judgment against D&S as individuals given SUNRISE's representations and SIMONE's agreement that D&S were independent contractors. The agreement stands as written and the Judgment was properly entered and should not be disturbed.

SUNRISE'S MOTION IS NOT PROPER

SUNRISE's Addendum admits that SUNRISE is seeking to punish SIMONE for the conduct of D&S. SIMONE procured his Judgment as envisioned when the settlement was placed on the record on October 18, 2019. QBE chose to file a federal declaratory relief action against D&S and SIMONE. SIMONE filed an Answer which does not make any allegations but simply Answers QBE's lawsuit. While D&S have responded to the lawsuit QBE filed against

them and have alleged that D&S were employees, that is not something that can be attributed to SIMONE, and is not something for which SIMONE should be punished or otherwise required to lose his rights under the settlement and/or the duly entered Judgment.

SIMONE is not asking, and has not asked, SUNRISE to pay for any portion of the Judgment as the Judgment was entered against D&S as individuals and not as SUNRISE employees. SIMONE asks only that the Court enforce the agreement as written, which did not release D&S, and specifically permitted SIMONE to procure his Judgment against D&S individually based on SUNRISE's representations and SIMONE's agreement based on the same that D&S were independent contractors. SIMONE stands by the agreement and the stipulation and asks that SUNRISE not be permitted to set the Judgment and/or the agreement aside based on the actions of D&S in the declaratory relief action.

SUNRISE has already admitted that it is seeking relief from the duly entered Judgment *based on its own mistake*. SUNRISE, in its response to SIMONE's post hearing that brief asked that this Court to set the Judgment aside and invalidate the settlement agreement because "the default and corresponding judgment are a product of the lack of any meeting of the minds because *SUNRISE permitted the default based on a misunderstanding regarding the settlement and the impact of it.*" (emphasis added). As SUNRISE is seeking relief from the Judgment based on its own mistake (an alleged misunderstanding regarding the settlement), such relief can only be permitted under NRCP 60(b)(1) ("mistake, inadvertence, surprise, or excusable neglect"), which under NRCP 60(c)(1) "must be made . . . no more than 6 months after . . . service of written notice of entry of the judgment". SUNRISE, by its own admission, is seeking relief for its mistake long after the statutorily prescribed time to do so has expired. Such cannot be permitted.

SUNRISE's request to set the settlement agreement aside for "the lack of any meeting of the minds because SUNRISE permitted the default based on a misunderstanding regarding the settlement and the impact of it" also flies in the face of the Nevada Supreme Court's holding in *Anderson v. Sanchez*, 132 Nev.Adv.Op. 34 (2016) wherein the Court held that ***the doctrine of 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.* The Court made similar findings in *In re Irrevocable Trust Agreement of 1979*, 130 Nev. Adv. Op. 63 (Nev. 2014) and *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997) when the Court held that a party's own misunderstanding cannot support a claim for mistake in seeking to set aside an agreement.

SUNRISE cannot be permitted to manufacture excuses to set the settlement and/or the duly entered Judgment aside for the actions of D&S. D&S have made allegations which SIMONE has done nothing more than acknowledge D&S made. SIMONE stands by the agreement. SUNRISE acknowledged that it made a mistake and is asking for relief under NRCP 60 due to SUNRISE's own mistake. ***The rules and case law in Nevada do not permit relief from a mistake over a year after judgment was entered,*** and never permit an agreement to be set aside based on a party's mistake when the party bore the risk of the mistake and treated its knowledge at the time of formation as sufficient.

SUNRISE's addendum ignores the fact that this matter is already resolved via the duly entered Judgment. SUNRISE and its carrier considered D&S contractors and chose not to defend them and will have to answer for that in the declaratory relief action QBE chose to file.

As this matter has already resolved via the duly entered Judgment there is no authority permitting SUNRISE a “do over” simply because D&S now allege SUNRISE erred in its conclusion that D&S were not SUNRISE employees. The Court should therefore deny SUNRISE’s motion. As SUNRISE continues to allege D&S were not employees there is certainly no reason to set aside the duly entered Judgment in this matter and no authority permits such in any event.

CONCLUSION

For the foregoing reasons SUNRISE’s motions should be denied.

DATED this 29th day of March, 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 St.

Las Vegas NV 89101

Fax No: 888-209-4199

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 29th day of March, 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:

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

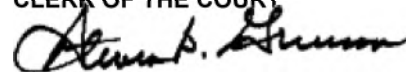
And

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.

Electronically Filed
3/30/2021 9:27 AM
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
Email: david@davidsampsonlaw.com
Attorney for Plaintiff

**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.)
)

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

SUPPLEMENT TO RUSSO's REPLY TO
SUNRISE'S ADDENDUM TO QBE'S
REQUEST FOR JUDICIAL NOTICE

**SUPPLEMENT TO REPLY TO SUNRISE'S ADDENDUM TO QBE'S REQUEST FOR
JUDICIAL NOTICE**

Plaintiff, SIMONE RUSSO, hereby supplements his reply to SUNRISE's addendum to its
joinder to QBE's request for judicial notice by noting that SIMONE has filed an ERRATA to

///

the motion to compel in the declaratory action which states the following¹:

COMES NOW Defendant Dr. SIMONE RUSSO, by and through his attorney of record, THE LAW OFFICE OF DAVID SAMPSON, LLC., and provides this Errata to his motion to compel (Document No. 55) and corrects the same by confirming that the sentence beginning on page 26 line 16 should read as follows: “RUSSO also incorporates the factual allegations related to the meet and confer, and the case law and other authority regarding discovery obligations set forth in the motion to compel filed by Defendants DUSLAK and SESMAN (Document No. 54) as if set forth herein. RUSSO does not incorporate any of the factual allegations related to whether DUSLAK and/or SESMAN were employees or contractors, and does not incorporate any allegations regarding whether QBE and/or SUNRISE committed fraud.” The sentence that begins on Page 26 line 16 in the said motion is hereby removed and replaced with the above-noted sentence in its place and stead.

See, Exhibit “1”.

SUNRISE’s addendum claimed that SIMONE has made various assertions in his motion compel when SIMONE incorporated the motion to compel D&S filed, even though all SIMONE did was acknowledge that D&S made various claims. It is unfortunate that SUNRISE is so eager to manufacture a breach of the agreement that SUNRISE is willing make allegations against SIMONE that are completely unfounded. Rather than seek to enforce the agreement as written, SUNRISE has demonstrated a clear desire to manufacture a breach of the agreement in its continued attempts to ruin SIMONE’s life by undoing the settlement that was agreed upon over a year ago. Such must not be permitted.

SIMONE has filed an ERRATA making it clear SIMONE is only incorporating the factual allegations related to the meet and confer, and the case law and authority related to discovery

¹ As noted in the original Reply, incorporating the motion filed by D&S did nothing more than acknowledge that D&S had made various claims, and was not tantamount to SIMONE making and/or adopting those claims. Nevertheless, as SUNRISE asserts that SIMONE has made and/or adopted such claims, then in an abundance of caution, SIMONE has filed an ERRATA to his motion in the declaratory relief action to clarify that he has not adopted nor is he making any such claims.

obligations and that he is ***not*** incorporating any of the factual allegations D&S may have made regarding whether D&S were employees, there is nothing in SIMONE's motion to compel that should impact the instant matter in any way.

The requests for judicial notice that QBE and SUNRISE have filed make it abundantly clear that QBE and SUNRISE are asking in the Court to set aside the duly entered Judgment in this matter as well as set aside the agreed upon settlement in this matter based on actions that D&S have taken and based on SUNRISE's own mistake. It is fundamentally unfair for QBE and SUNRISE to even suggest SIMONE lose his rights under the settlement agreement, and lose his rights arising from the duly entered Judgment in this matter, because of actions D&S have taken and/or because of SUNRISE's mistake. Additionally neither QBE nor SUNRISE have directed this Court to any authority that would justify stripping SIMONE of his rights under the settlement and/or the Judgment because of the actions of D&S and/or as a result of SUNRISE's mistake.

QBE chose to file a declaratory relief action against SIMONE and D&S in November 2020. D&S have answered that lawsuit and have made assertions against SUNRISE which SUNRISE disputes. There is no reason to disturb the settlement or Judgment in this matter based on allegations D&S have made which SUNRISE dispute. Such an action would work a horrible injustice against SIMONE who has done nothing but get sued by QBE in the declaratory relief action and who has answered the subject suit. To the extent SIMONE has made any assertions in the declaratory relief action that could even remotely be considered a violation of the settlement agreement SIMONE has immediately withdrawn and amended any such assertions and has stricken the same without any hesitation. There is therefore no cause to

disturb the settlement that took place over a year ago, nor the Judgment that was properly entered with notice to SUNRISE and the other parties a year ago.

CONCLUSION

For the foregoing reasons SUNRISE's motions should be denied.

DATED this 30th day of March, 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 St.

Las Vegas NV 89101

Fax No: 888-209-4199

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 30th day of March, 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.

EXHIBIT “1”

1 DAVID F. SAMPSON, ESQ.
2 Nevada Bar No. 6811
3 THE LAW OFFICE OF DAVID SAMPSON, LLC.
4 630 South 3rd Street
5 Las Vegas, NV 89101
6 Tel: (702) 605-1099
7 Fax: (888) 209-4199
8 david@davidsampsonlaw.com
9 *Attorneys for Defendant SIMONE RUSSO*

7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**

9 QBE INSURANCE CORPORATION
10

Case No. 2:20-cv-02104-RFB-EJY

11 Plaintiff,

12 vs.

13 SIMONE RUSSO, RICHARD DUSLAK and
14 JUSTIN SESMAN

15 Defendants.
16

17 **ERRATA TO MOTION TO COMPEL DISCOVERY RESPONSES (DOCUMENT**
18 **No. 55)**

19 COMES NOW Defendant Dr. SIMONE RUSSO, by and through his attorney of record,
20 THE LAW OFFICE OF DAVID SAMPSON, LLC., and provides this Errata to his motion to
21 compel (Document No. 55) and corrects the same by confirming that the sentence beginning on
22 page 26 line 16 should read as follows: "RUSSO also incorporates the factual allegations
23 related to the meet and confer, and the case law and other authority regarding discovery
24 obligations set forth in the motion to compel filed by Defendants DUSLAK and SESMAN
25 (Document No. 54) as if set forth herein. RUSSO does not incorporate any of the factual
26 allegations related to whether DUSLAK and/or SESMAN were employees or contractors, and
27 does not incorporate any allegations regarding whether QBE and/or SUNRISE committed
28

1 fraud.” The sentence that begins on Page 26 line 16 in the said motion is hereby removed and
2 replaced with the above-noted sentence in its place and stead.

3 DATED this 29th day of March, 2021.
4

5 LAW OFFICE OF DAVID SAMPSON, LLC.

6 BY: //ss// *David Sampson*

7 DAVID SAMPSON, ESQ.

8 Nevada Bar No.6811

9 LAW OFFICE OF DAVID SAMPSON

10 630 S. 3rd Street

11 Las Vegas, NV 89101

12 Fax No: 888-209-4199

13 Email:david@didsamsponlaw.com

14 Attorney for Defendant RUSSO
15
16
17
18
19
20
21
22
23
24
25
26
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28

CERTIFICATE OF SERVICE

I certify that I am an employee of THE LAW OFFICE OF DAVID SAMPSON, and that on this 29th day of March, 2021, I served a copy of the foregoing **ERRATA** through the Court's ECF filing system on all parties to this matter, including:

KIMBALL JONES, ESQ. Nevada Bar No.: 12982 BIGHORN LAW 2225 E. Flamingo Rd. Building 2, Suite 300 Las Vegas, Nevada 89119 Email: Kimball@BighornLaw.com Evans@BighornLaw.com Attorneys for Defendants/Counterclaimants/Third-Party Plaintiffs	WILLIAM C. REEVES [Bar No.8235] Email: wreeves@mfrlegal.com RAMIRO MORALES [Bar No.: 7101] Email: rmorales@mfrlegal.com MARC J. DEREWETZKY [Bar No. 6619] Email: mderewetzky@mfrlegal.com MORALES, FIERRO & REEVES 600 South Tonopah Drive, Suite 300 Las Vegas, Nevada 89106 Telephone: (702) 699-7822 Facsimile: (702) 699-9455 Attorneys for Plaintiffs/ Counterdefendants QBE INSURANCE CORPORATION
	SHANNON G. SPLAINE, ESQ. Nevada Bar No. 8241 LINCOLN, GUSTAFSON & CERCOS, LLP ATTORNEYS AT LAW 3960 Howard Hughes Parkway, Suite 200 Las Vegas, Nevada 89169 Telephone: (702) 257-1997 Facsimile: (702) 257-2203 ssplaine@lgclawoffice.com Attorneys for Third-Party Defendant, SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION

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

A-17-753606-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Negligence - Premises Liability

COURT MINUTES

March 31, 2021

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

March 31, 2021 8:00 AM Minute Order

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

COURT CLERK: Christopher Darling

JOURNAL ENTRIES

- After review and consideration of the points and authorities on file herein, and oral argument of counsel, the Court determined as follows:

In reliance on *Nalder v. Eighth Judicial District Court*, 135 Nev. Adv. Op. 24 (2020), wherein it was determined that it is a well-settled principle that intervention may not follow a final judgment, nor may intervention undermine the finality and preclusive effects of final judgments. Accordingly, Non-party QBE Insurance Corporation's Motion to Intervene to Enforce Settlement, based on the fact that a final judgment has been entered as to Defendant Richard Duslak and/or Justine Sesman, shall be **DENIED**. Additionally, Defendant Sunrise Villas IX HOA's Joinder and shall also be **DENIED**.

Counsel on behalf of Plaintiff, Simone Russo, shall prepare a Findings of Fact,

PRINT DATE: 03/31/2021

Page 1 of 2

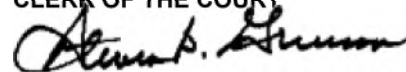
Minutes Date: March 31, 2021

A-17-753606-C

Conclusions of Law and Order based not only on the court's minute order but the pleadings on file herein, argument of counsel, and the entire record. Lastly, counsel is to circulate the order prior to submission to the Court to adverse counsel. If the counsel can't agree on the contents, the parties are to submit competing orders.

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
4/13/2021 12:18 PM
Steven D. Grierson
CLERK OF THE COURT



RFJN

LEONARD T. FINK, ESQ.

Nevada Bar No. 6296

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Attorneys for Defendant,

SUNRISE HOA 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 HOA 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
REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF THE PENDING
MOTIONS RE SETTING ASIDE THE
DEFAULT AND SETTLEMENT
AGREEMENT**

///

///

DEFENDANT, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THE PENDING MOTIONS RE SETTING ASIDE THE DEFAULT AND SETTLEMENT AGREEMENT

Defendant, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION ("SUNRISE"), by and through its counsel of record, the law firm of Springel & Fink LLP and the firm of Lincoln, Gustafson & Cercos, LLP, files this Request for Judicial Notice in Support of the Pending Motions to Set Aside the Default and Settlement Agreement,.

In QBE's March 20, 2021 Request for Judicial Notice, it attached Duslak & Sesman's ("D&S") Motion for Leave to File a Third Party Complaint against Amanda Davis, a former PW James employee, who provided an affidavit in support of SUNRISE's prior Motion for Summary Judgment that it was not responsible for D&S' work as independent contractors as Exhibit 26.

SUNRISE attaches D&S' Reply in Support of Their Motion as Exhibit 27. In their Reply, D&S argue on page 4, lines 20 – 23:

Duslak and Sesman's claims are not 'legally flawed' or 'futile.' Duslak and Sesman demonstrated the fraudulent actions taken by QBE, Sunrise, and Davis, and that it led the State Court to find against them to not be employees and to award default damages.

This statement is factually incorrect. While it is important to note that D&S have no evidence that SUNRISE engaged in any fraud in front of this or any other Court (or that Ms. Davis' affidavit is factually incorrect), this court never made any findings that D&S were not employees or anything else. Instead, Russo's counsel, on his own, offered to stipulate that they were independent contractors for "all purposes of this litigation."

Even more interesting, however, is that D&S recently provided discovery responses to Sunrise that they did not know of the judgment within 6 months of it being entered. Mr. Duslak's discovery response indicates he first learned of the Judgment on November 17, 2020 when he had a telephone conference with Mr. Sampson. Mr. Sesman responded that he first learned of the Judgment on November 29, 2020 from Mr. Duslak, who learned about it from Mr. Sampson. (See Discovery responses, true and correct copies attached hereto as Exhibits "A" and "B"). D&S have also plead in response to QBE's

motion to dismiss that they did not learn of the judgment until long after the deadline to contest the Judgement had passed. (See Opposition to the Motion to Dismiss, a true and correct copy attached as Exhibit “C”). Thus, despite Russo’s counsel’s representation to this Court that D&S’ counsel never moved to set aside the Default because they knew it would be a Rule 11 violation, they certainly could, and should have done so pursuant to NRCP 60(d) based on when they first learned about it, “long after” it was entered and after they were told about it by Russo’s counsel in November of 2020.

So, again, SUNRISE asks, “why wouldn’t D&S’ counsel have done everything he could do to have his clients avoid a \$25 million dollar judgment,” rather than just simply sue QBE and SUNRISE in Federal Court.

DATED this 13th day of April, 2021.

SPRINGEL & FINK LLP

/s/ Leonard T. Fink, Esq.

By:

LEONARD T. FINK, ESQ.
Nevada Bar No. 6296
RAVEN M. YIM, ESQ.
Nevada Bar No. 14972
9075 W. Diablo Drive, Suite 302
Las Vegas, NV 89148
Attorneys for Defendant,
*SUNRISE HOA VILLAS IX HOMEOWNERS
ASSOCIATION*

LINCOLN, GUSTAFSON & CERCOS LLP

/s/ Shannon G. Splaine, Esq.

By:

SHANNON G. SPLAINE, ESQ.
NEVADA BAR NO: 8241
3960 Howard Hughes Pkwy., Suite 200
Las Vegas, NV 89169
Attorneys for Defendant
*SUNRISE HOA 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 275, Las Vegas, Nevada, 89148.

On **April 13, 2021**, I served the document described as **DEFENDANT, SUNRISE VILLAS IX HOMEOWNERS ASSOCIATION'S ADDENDUM TO ITS JOINDER TO INTERVENOR QBE INSURANCE CORPORATION'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF THE PENDING MOTIONS RE SETTING ASIDE THE DEFAULT AND SETTLEMENT AGREEMENT** 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.

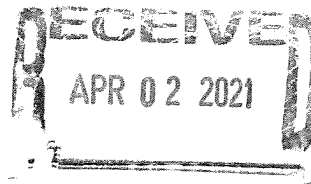
I declare under penalty of perjury that the foregoing is true and correct.

/s/ Alma Duarte

 An employee of Springel & Fink LLP

EXHIBIT A

Sgs



KIMBALL JONES, ESQ.
Nevada Bar No.: 12982
EVAN K. SIMONSEN, ESQ.
Nevada Bar No.: 13762
BIGHORN LAW
2225 E. Flamingo Rd.
Building 2, Suite 300
Las Vegas, Nevada 89119
Email: Kimball@BighornLaw.com
Evans@BighornLaw.com
Attorneys for Defendants/Counterclaimants

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

QBE INSURANCE CORPORATION,
individually,

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

Plaintiff,

vs.

SIMONE RUSSO, RICHARD DUSLAK and
JUSTIN SESMAN,

**THIRD-PARTY PLAINTIFF RICHARD
DUSLAK'S ANSWERS TO THIRD-PARTY
DEFENDANT SUNRISE VILLAS IX
HOMEOWNERS' ASSOCIATION'S FIRST
SET OF INTERROGATORIES**

Defendants.

RICHARD DUSLAK and JUSTIN SESMAN,

Counterclaimants,

vs.

QBE INSURANCE CORPORATION,

Counter-Defendants.

RICHARD DUSLAK and JUSTIN SESMAN,

Third-Party Plaintiffs,

vs.

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

Third-Party Defendants.

**THIRD-PARTY PLAINTIFF RICHARD DUSLAK'S ANSWERS TO THIRD-PARTY
DEFENDANT SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION'S FIRST SET OF
INTERROGATORIES**

Pursuant to F.R.C.P. 33, Third-Party Plaintiff RICHARD DUSLAK (hereinafter "Third-Party Plaintiff") hereby Answers Interrogatories served by Third-Party Defendant SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION (hereinafter "Third-Party Defendant"), as follows:

Third-Party Plaintiff has not yet completed his discovery and investigation for the preparation of this case for trial. Accordingly, the responses set forth herein are provided without prejudice to the Third-Party Plaintiff's right to produce any subsequent discovered facts or interpretations thereof and/or to add, modify or otherwise change or amend the responses herein. The information hereinafter set forth is true and correct to the best of the Third-Party Plaintiff's knowledge at this particular time, but it is subject to correction for inadvertent errors or omission, if any such error or omissions are found to exist.

GENERAL ANSWERS AND OBJECTIONS

The following terms, conditions, representations, and statements shall apply to all Answers contained herein:

1. The Answers given in this document are made in direct response to the interrogatories submitted by Third-Party Defendant to Third-Party Plaintiff (the "Interrogatories") and shall

1 not be construed or interpreted to respond to any discoverable matter outside the scope of the
2 Interrogatories.

3 2. Discovery is continuing. Third-Party Plaintiff reserves the right to supplement these Answers
4 at any time prior to trial.

5 3. Under no circumstances shall any Answer contained herein be construed as an exhaustive
6 response to the corresponding interrogatory. Third-Party Plaintiff is not omnipotent and all
7 knowing. Information and/or evidence outside of Third-Party Plaintiff's present scope of
8 knowledge may be available to further prove or supplement any Answer given herein.

9 4. These Answers are given by Third-Party Plaintiff and only reflect the current state of Third-
10 Party Plaintiff's knowledge of the matter(s) discussed. Third-Party Plaintiff makes no
11 representation, assertion, or statement as to the knowledge of other individuals, employees,
12 agents, contractors, vendors, stockholders, associates, or affiliates. In the event that the Third-
13 Party Defendant seeks information known to sue persons, then the Third-Party Defendant
14 must individually depose such persons.

15 5. The Third-Party Defendant's Interrogatories repeatedly use certain undefined terms that are
16 vague, ambiguous, or otherwise confusingly worded. Unable to effectively Answer the
17 Interrogatories containing such undefined terms, Third-Party Plaintiff objects to each and
18 every Interrogatory containing such terms and demands clarification from the Third-Party
19 Defendant.
20 Defendant.

21 **INTERROGATORY NO. 1:**

22 Please provide:

23 (a.) Your full name and all other names by which you have ever been known (including
24 nicknames);
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1 (b.) Your residential address and period of time at such residence from January 1, 2014 to
2 the present;

3 (c.) The names of all persons that reside(d) with you at each said residence;

4 (d.) Your Social Security Number;

5 (e.) Your date of birth;

6 (f.) Your Driver's license number;

7 (g.) Your Marital status; and, if applicable, name of your spouse or significant other.

8
9 **ANSWER:**

10 Objection: this Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
11 expansive, all in violation of the spirit and intent of F.R.C.P. 33 and not likely to lead to the discovery
12 of admissible evidence. Third-Party Plaintiff objects to this Interrogatory in that it is unduly
13 burdensome and oppressive and would more appropriately be addressed by way of deposition. Third-
14 Party Plaintiff objects to this Interrogatory as it is irrelevant, not appropriately time limited and
15 beyond the scope of discovery. This Interrogatory is sought for the sole purpose of harassing Third-
16 Party Plaintiff. Third-Party Plaintiff's social security number is privileged pursuant to the Social
17 Security Act and N.R.S. 239B.030. Further, Third-Party Plaintiff objects to this Request to the extent
18 that such information is readily available to Third-Party Defendant. If a moving party can get the
19 desired documents or information without resorting to discovery, good cause does not exist for
20 producing the same. Subject to and without waiving the foregoing objection(s), Richard Duslak; 2530
21 E. Flamingo Rd., Las Vegas, Nevada 89121; XXX-XX-5821; and born October 24, 1972.
22 Additionally, Third-Party Defendant is in possession of the requested information from Third-Party
23 Plaintiff's employment with Third-Party Defendant.
24
25
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1 **INTERROGATORY NO. 2:**

2 Please describe in detail the date, time and method in which you first learned the judgment
3 attached as Exhibit "A" was entered against you.

4 **ANSWER:**

5
6 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
7 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
8 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
9 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
10 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
11 Third-Party Plaintiff first learned of the judgment in the evening of November 17, 2020. Third-Party
12 Plaintiff had a telephone conversation with attorney David Sampson, who asked if Third-Party
13 Plaintiff knew that QBE insurance company had sued Third-Party Plaintiff regarding a judgment that
14 had been entered against Third-Party Plaintiff, as a result of landscaping Third-Party Plaintiff did for
15 Third-Party Defendant.
16

17 **INTERROGATORY NO. 3:**

18 Please describe the date, time, method, name, address, and phone number of anyone who
19 advised you that the judgment attached as Exhibit "A" was entered against you.
20

21 **ANSWER:**

22 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
23 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
24 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
25 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
26 harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Interrogatory as it seeks
27 information which is protected by the attorney-client privilege. Subject to and without waiving the
28

1 foregoing objection(s), please see Third-Party Plaintiff's answer to interrogatory number 2,
2 hereinabove.

3 **INTERROGATORY NO. 4:**

4 Please describe in detail what efforts you have undertaken, or had anyone undertake on your
5 behalf, to have the judgment attached as Exhibit "A" set aside since the date you learned of its
6 existence.
7

8 **ANSWER:**

9 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
10 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
11 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
12 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
13 harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Interrogatory as it seeks
14 information which is protected by the attorney-client privilege. Subject to and without waiving the
15 foregoing objection(s), by the time Third-Party Plaintiff was notified of the Judgment in the
16 underlying matter, the time to set aside the Judgment, pursuant to N.R.C.P. 60(c), had expired.
17 Additionally, Third-Party Plaintiff is not aware of any efforts made by Third-Party Defendant, nor
18 Plaintiff QBE, to have the Judgment set aside on Third-Party Plaintiff's behalf, within the timeframe
19 allowed by N.R.C.P. 60(c).
20
21

22 **INTERROGATORY NO. 5:**

23 Please identify anyone you have communicated with regarding the judgment attached as
24 Exhibit "A" including:
25

- 26 (a.) The person's name;
27 (b.) The person's address;
28 (c.) The person's phone number;

1 (d.) The substance of such communications; and

2 (e.) The date and times of such communications.

3 **ANSWER:**

4 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
5 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
6 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
7 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
8 harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Interrogatory as it seeks
9 information which is protected by the attorney-client privilege. Subject to and without waiving the
10 foregoing objection(s), and other than Third-Party Plaintiff's Counsel in this matter, please see Third-
11 Party Plaintiff's answer to interrogatory number 2, hereinabove.
12

13
14 **INTERROGATORY NO. 6:**

15 Please describe with specificity the mental pain and suffering and anguish you are alleging you
16 have suffered in this matter, including:

17 (a.) Each symptom you are alleging to have suffered;

18 (b.) The date each such symptom commenced,

19 (c.) The names of every treating doctor you have seen with regard to the symptoms;

20 (d.) The names of any medications, drugs, or other treatments you have undergone with
21 regard to the symptoms; and
22

23 (e.) The date such symptoms resolved.
24

25 **ANSWER:**

26 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
27 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
28 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more

1 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
2 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
3 Third-Party Plaintiff's mental pain, suffering and anguish was immediate upon learning Third-Party
4 Defendant, and Plaintiff QBE, schemed together in purposely allowing a \$25,000,000.00 Judgment
5 entered against Third-Party Plaintiff in the underlying matter, when Third-Party Defendant had a duty,
6 as Third-Party Plaintiff's employer, to defend Third-Party Plaintiff in the underlying matter. This
7 mental pain, suffering and anguish continues to date. Third-Party Plaintiff felt and continues to feel
8 helpless under the stress of the \$25,000,000.00 Judgment hanging over his head. Third-Party Plaintiff
9 is not currently treating with a medical physician for his mental pain, suffering and anguish. Discovery
10 is ongoing and Third-Party Plaintiff reserves the right to supplement this answer or Third-Party
11 Plaintiff's F.R.C.P. 26(a) disclosure.
12

13
14 **INTERROGATORY NO. 7:**

15 If you are alleging injuries of any kind whatsoever as a result of the claims asserted in your
16 counterclaim/third-party complaint, which you or your doctors are aware of or suspect, please list and
17 describe in specific detail:

- 18 (a.) All physical injuries which you suffered, giving the exact location within or upon your
19 body, whether or not they have now healed;
20 (b.) All permanent physical injuries or disabilities claimed;
21 (c.) All mental or emotional effects you suffered due to the incident in question referenced
22 in the counterclaim/third-party complaint, whether or not they have now resolved; and
23 (d.) All permanent mental or emotional effects claimed.
24

25 **ANSWER:**

26
27 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
28 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this

1 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
2 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
3 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
4 please see Third-Party Plaintiff's answer to interrogatory number 6, hereinabove.
5

6 **INTERROGATORY NO. 8:**

7 Have you suffered any pain before the subject incident in the same or similar parts of your
8 body in which you claim have been injured in your response to Interrogatory No. 7?
9

10 **ANSWER:**

11 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
12 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
13 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
14 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
15 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
16 no, no other employer of Third-Party Plaintiff has failed to protect Third-Party Plaintiff's interest in
17 allowing a \$25,000,000.00 Judgment to be entered against Third-Party Plaintiff.
18

19 **INTERROGATORY NO. 9:**

20 If your answer to Interrogatory No.8 is anything other than an unequivocal no, please identify
21 the location of the pain and when the pain started.
22

23 **ANSWER:**

24 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
25 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
26 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
27 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
28

1 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
2 please see Third-Party Plaintiff's answer to interrogatory number 8, hereinabove.

3 **INTERROGATORY NO. 10:**

4 If any injuries which you claim in Interrogatory No.7 are an aggravation of a preexisting
5 medical, physical and/or mental condition, please state: the nature of the preexisting condition, the
6 nature of the aggravation, identify each healthcare provider who examined and/or treated you for such
7 preexisting condition before the incident in question, and identify each healthcare provider by name
8 and address who determined that this incident aggravated said preexisting condition.
9

10 **ANSWER:**

11 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
12 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
13 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
14 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
15 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
16 please see Third-Party Plaintiff's answer to interrogatory number 7, hereinabove.
17

18 **INTERROGATORY NO. 11:**

19 Please describe with specificity the work that you performed at 4617 Madreperla Street, Las
20 Vegas, Nevada 89121, including the adjacent common areas and/or neighbor yards during the week
21 of August 21-27, 2016.
22

23 **ANSWER:**

24 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
25 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
26 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
27 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
28

1 harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Request to the extent that
2 such information is readily available to Third-Party Defendant. If a moving party can get the desired
3 documents or information without resorting to discovery, good cause does not exist for producing the
4 same. Subject to and without waiving the foregoing objection(s), as Third-Party Plaintiff was an
5 employee of Third-Party Defendant, Third-Party Defendant is already in possession of the
6 information sought. However, in general, Third-Party Plaintiff would mow lawns, handle gardening,
7 dig trenches for irrigation, perform maintenance around the community and maintain common areas,
8 as instructed by Third-Party Defendant, Third-Party Plaintiff's employer.
9

10 **INTERROGATORY NO. 12:**

11 Please describe with specificity the work that was performed by you at 4617 Madreperla Street,
12 Las Vegas, Nevada 89121, including the adjacent common areas and/or neighbor yards during the
13 week of August 28-September 3, 2016.
14

15 **ANSWER:**

16 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
17 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
18 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
19 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
20 harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Request to the extent that
21 such information is readily available to Third-Party Defendant. If a moving party can get the desired
22 documents or information without resorting to discovery, good cause does not exist for producing the
23 same. Subject to and without waiving the foregoing objection(s), please see Third-Party Plaintiff's
24 answer to interrogatory number 11, hereinabove.
25
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INTERROGATORY NO. 13:

Please describe in detail who you advised at Sunrise regarding service of the summons and amended complaint in the state court matter as alleged in paragraph 51 of your Answer/Counterclaim/Third-Party Complaint, attached hereto as Exhibit "B", including, but not limited to:

- (a.) The name of the person(s) at Sunrise you advised;
- (b.) The title of the person at Sunrise you advised;
- (c.) The date and time when you advised them of such service;
- (d.) The statements that were made by you and the person(s) identified in (a.) above; and
- (e.) The method of how such information of service was conveyed;

ANSWER:

Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Request to the extent that such information is readily available to Third-Party Defendant. If a moving party can get the desired documents or information without resorting to discovery, good cause does not exist for producing the same. Subject to and without waiving the foregoing objection(s), Third-Party Plaintiff advised Third-Party Defendant on or about February 14, 2018. Discovery is ongoing and Third-Party Plaintiff reserves the right to supplement this answer or Third-Party Plaintiff's F.R.C.P. 26(a) disclosure.

INTERROGATORY NO. 14:

Identify all individuals you expect to call as an expert witness, both retained and non-retained experts, at the time of trial in this case and include their name, profession, area of expertise, address,

1 telephone number, the date they were retained, and describe the information they were provided in
2 rendering their opinions and/or conclusions, please set forth their opinions and/or conclusions
3 including, but not limited to: the subject matter on which the expert is expected to testify, the
4 substance of the facts and opinions to which each expert is expected to testify, and a summary of the
5 grounds for each opinion by said expert.
6

7 **ANSWER:**

8 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
9 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
10 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
11 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
12 harassing Third-Party Plaintiff. Further, the information sought is premature as the expert deadline in
13 this matter has not passed. Subject to and without waiving the foregoing objection(s), discovery is
14 ongoing and Third-Party Plaintiff reserves the right to supplement this answer, Third-Party Plaintiff's
15 F.R.C.P. 26(a) disclosure, or Third-Party Plaintiff's Expert Designation.
16

17 DATED this 31st day of March, 2021.

18 **BIGHORN LAW**

19 By: /s/ Kimball Jones

20 **KIMBALL JONES, ESQ.**

21 Nevada Bar No.: 12982

22 2225 E. Flamingo Rd.

23 Building 2, Suite 300

24 Las Vegas, Nevada 89119

25 Attorneys for Defendants/Counterclaimants
26
27
28

RICHARD DUSLAK being first duly sworn deposes and says:

That I, RICHARD DUSLAK, am the Third-Party Plaintiff in the above-entitled action; that I have read the foregoing *ANSWERS TO INTERROGATORIES* and know the contents thereof; that the same is true of my own knowledge, except of those matters therein contained stated upon information and belief, and as to those matters, I believe it to be true.

DATED this ____ day of March, 2021.

RICHARD DUSLAK

CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5, I hereby certify that I am an employee of **BIGHORN LAW**, and on the 31st day of March, 2021, I served a copy of the foregoing ***THIRD-PARTY PLAINTIFF RICHARD DUSLAK'S ANSWERS TO THIRD-PARTY DEFENDANT SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION'S FIRST SET OF INTERROGATORIES*** 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:

Ramiro Morales, Esq.
William C. Reeves, Esq.
MORALES, FIERRO & REEVES
600 South Tonopah Drive, Suite 300
Las Vegas, Nevada 89106
Attorneys for Plaintiff/Counter-Defendant,
QBE INSURANCE CORPORATION

David F. Sampson, Esq.
THE LAW OFFICE OF DAVID SAMPSON, LLC
630 South 3rd Street
Las Vegas, Nevada 89101
Attorneys for Defendant,
SIMONE RUSSO

Shannon G. Splaine, Esq.
LINCOLN, GUSTAFSON & CERCOS, LLP
3960 Howard Hughes Pkwy., Suite 200
Las Vegas, Nevada 89169
Attorneys for Third-Party Defendant,
SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION

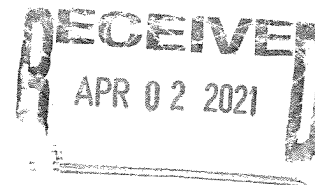
/s/ Erickson Finch

An employee of **BIGHORN LAW**

EXHIBIT B

sgs

1 KIMBALL JONES, ESQ.
 Nevada Bar No.: 12982
 2 EVAN K. SIMONSEN, ESQ.
 Nevada Bar No.: 13762
 3 **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.

**THIRD-PARTY PLAINTIFF JUSTIN
 SESMAN'S ANSWERS TO THIRD-PARTY
 DEFENDANT SUNRISE VILLAS IX
 HOMEOWNERS' ASSOCIATION'S FIRST
 SET OF INTERROGATORIES**

17 RICHARD DUSLAK and JUSTIN SESMAN,
 18

19 Counterclaimants,

20 vs.

21 QBE INSURANCE CORPORATION,
 22

23 Counter-Defendants.
 24
 25
 26
 27
 28

RICHARD DUSLAK and JUSTIN SESMAN,

Third-Party Plaintiffs,

vs.

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

Third-Party Defendants.

**THIRD-PARTY PLAINTIFF JUSTIN SESMAN'S ANSWERS TO THIRD-PARTY
DEFENDANT SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION'S FIRST SET OF
INTERROGATORIES**

Pursuant to F.R.C.P. 33, Third-Party Plaintiff JUSTIN SESMAN (hereinafter "Third-Party Plaintiff") hereby Answers Interrogatories served by Third-Party Defendant SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION (hereinafter "Third-Party Defendant"), as follows:

Third-Party Plaintiff has not yet completed his discovery and investigation for the preparation of this case for trial. Accordingly, the responses set forth herein are provided without prejudice to the Third-Party Plaintiff's right to produce any subsequent discovered facts or interpretations thereof and/or to add, modify or otherwise change or amend the responses herein. The information hereinafter set forth is true and correct to the best of the Third-Party Plaintiff's knowledge at this particular time, but it is subject to correction for inadvertent errors or omission, if any such error or omissions are found to exist.

GENERAL ANSWERS AND OBJECTIONS

The following terms, conditions, representations, and statements shall apply to all Answers contained herein:

1. The Answers given in this document are made in direct response to the interrogatories submitted by Third-Party Defendant to Third-Party Plaintiff (the "Interrogatories") and shall

1 not be construed or interpreted to respond to any discoverable matter outside the scope of the
2 Interrogatories.

3 2. Discovery is continuing. Third-Party Plaintiff reserves the right to supplement these Answers
4 at any time prior to trial.

5 3. Under no circumstances shall any Answer contained herein be construed as an exhaustive
6 response to the corresponding interrogatory. Third-Party Plaintiff is not omnipotent and all
7 knowing. Information and/or evidence outside of Third-Party Plaintiff's present scope of
8 knowledge may be available to further prove or supplement any Answer given herein.

9 4. These Answers are given by Third-Party Plaintiff and only reflect the current state of Third-
10 Party Plaintiff's knowledge of the matter(s) discussed. Third-Party Plaintiff makes no
11 representation, assertion, or statement as to the knowledge of other individuals, employees,
12 agents, contractors, vendors, stockholders, associates, or affiliates. In the event that the Third-
13 Party Defendant seeks information known to sue persons, then the Third-Party Defendant
14 must individually depose such persons.

15 5. The Third-Party Defendant's Interrogatories repeatedly use certain undefined terms that are
16 vague, ambiguous, or otherwise confusingly worded. Unable to effectively Answer the
17 Interrogatories containing such undefined terms, Third-Party Plaintiff objects to each and
18 every Interrogatory containing such terms and demands clarification from the Third-Party
19 Defendant.
20
21
22

23 **INTERROGATORY NO. 1:**

24 Please provide:

25 (a.) Your full name and all other names by which you have ever been known (including
26 nicknames);
27
28

1 (b.) Your residential address and period of time at such residence from January 1, 2014 to
2 the present;

3 (c.) The names of all persons that reside(d) with you at each said residence;

4 (d.) Your Social Security Number;

5 (e.) Your date of birth;

6 (f.) Your Driver's license number;

7 (g.) Your Marital status; and, if applicable, name of your spouse or significant other.

8
9 **ANSWER:**

10 Objection: this Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
11 expansive, all in violation of the spirit and intent of F.R.C.P. 33 and not likely to lead to the discovery
12 of admissible evidence. Third-Party Plaintiff objects to this Interrogatory in that it is unduly
13 burdensome and oppressive and would more appropriately be addressed by way of deposition. Third-
14 Party Plaintiff's social security number is privileged pursuant to the Social Security Act and N.R.S.
15 239B.030. Further, Third-Party Plaintiff objects to this Request to the extent that such information is
16 readily available to Third-Party Defendant. If a moving party can get the desired documents or
17 information without resorting to discovery, good cause does not exist for producing the same. Subject
18 to and without waiving the foregoing objection(s), Justin Sesman; 72 N. Cholla Street, Gilbert,
19 Arizona 85233; XXX-XX-4853; and born May 21, 1995. Additionally, Third-Party Defendant is in
20 possession of the requested information from Third-Party Plaintiff's employment with Third-Party
21 Defendant.
22
23

24 **INTERROGATORY NO. 2:**

25 Please describe in detail the date, time and method in which you first learned the judgment
26 attached as Exhibit "A" was entered against you.
27

28 ///

ANSWER:

Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s), Third-Party Plaintiff first learned of the judgment on November 29, 2020, from Co-Third-Party Plaintiff Richard Duslak, who advised of the judgment that had been entered against them.

INTERROGATORY NO. 3:

Please describe the date, time, method, name, address, and phone number of anyone who advised you that the judgment attached as Exhibit "A" was entered against you.

ANSWER:

Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Interrogatory as it seeks information which is protected by the attorney-client privilege. Subject to and without waiving the foregoing objection(s), please see Third-Party Plaintiff's answer to interrogatory number 2, hereinabove.

INTERROGATORY NO. 4:

Please describe in detail what efforts you have undertaken, or had anyone undertake on your behalf, to have the judgment attached as Exhibit "A" set aside since the date you learned of its existence.

ANSWER:

Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Interrogatory as it seeks information which is protected by the attorney-client privilege. Subject to and without waiving the foregoing objection(s), by the time Third-Party Plaintiff was notified of the Judgment in the underlying matter, the time to set aside the Judgment, pursuant to N.R.C.P. 60(c), had expired. Additionally, Third-Party Plaintiff is not aware of any efforts made by Third-Party Defendant, nor Plaintiff QBE, to have the Judgment set aside on Third-Party Plaintiff's behalf, within the timeframe allowed by N.R.C.P. 60(c).

INTERROGATORY NO. 5:

Please identify anyone you have communicated with regarding the judgment attached as Exhibit "A" including:

- (a.) The person's name;
- (b.) The person's address;
- (c.) The person's phone number;
- (d.) The substance of such communications; and
- (e.) The date and times of such communications.

ANSWER:

Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more

1 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
2 harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Interrogatory as it seeks
3 information which is protected by the attorney-client privilege. Subject to and without waiving the
4 foregoing objection(s), other than Third-Party Plaintiff's Counsel in this matter and the conversation
5 with Co-Third-Party Plaintiff Richard Duslak, Third-Party Plaintiff spoke with David Sampson, Esq.,
6 on November 29, 2020. Third-Party Plaintiff conversed with Mr. Sampson regarding the information
7 Third-Party Plaintiff learned from Co-Third-Party Plaintiff Richard Duslak.

9 **INTERROGATORY NO. 6:**

10 Please describe with specificity the mental pain and suffering and anguish you are alleging you
11 have suffered in this matter, including:

- 12 (a.) Each symptom you are alleging to have suffered;
13 (b.) The date each such symptom commenced,
14 (c.) The names of every treating doctor you have seen with regard to the symptoms;
15 (d.) The names of any medications, drugs, or other treatments you have undergone with
16 regard to the symptoms; and
17 (e.) The date such symptoms resolved.

18 **ANSWER:**

19 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
20 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
21 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
22 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
23 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
24 Third-Party Plaintiff's mental pain, suffering and anguish was immediate upon learning Third-Party
25 Defendant, and Plaintiff QBE, schemed together in purposely allowing a \$25,000,000.00 Judgment
26
27
28

1 entered against Third-Party Plaintiff in the underlying matter, when Third-Party Defendant had a duty,
2 as Third-Party Plaintiff's employer, to defend Third-Party Plaintiff in the underlying matter. This
3 mental pain, suffering and anguish continues to date and makes planning for the future seem
4 impossible. Third-Party Plaintiff is not currently treating with a medical physician for his mental pain,
5 suffering and anguish. Discovery is ongoing and Third-Party Plaintiff reserves the right to supplement
6 this answer or Third-Party Plaintiff's F.R.C.P. 26(a) disclosure.
7

8 **INTERROGATORY NO. 7:**

9 If you are alleging injuries of any kind whatsoever as a result of the claims asserted in your
10 counterclaim/third-party complaint, which you or your doctors are aware of or suspect, please list and
11 describe in specific detail:
12

- 13 (a.) All physical injuries which you suffered, giving the exact location within or upon your
14 body, whether or not they have now healed;
15 (b.) All permanent physical injuries or disabilities claimed;
16 (c.) All mental or emotional effects you suffered due to the incident in question referenced
17 in the counterclaim/third-party complaint, whether or not they have now resolved; and
18 (d.) All permanent mental or emotional effects claimed.
19

20 **ANSWER:**

21 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
22 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
23 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
24 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
25 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
26 please see Third-Party Plaintiff's answer to interrogatory number 6, hereinabove.
27

28 ///

1 **INTERROGATORY NO. 8:**

2 Have you suffered any pain before the subject incident in the same or similar parts of your
3 body in which you claim have been injured in your response to Interrogatory No. 7?

4 **ANSWER:**

5
6 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
7 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
8 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
9 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
10 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
11 no other employer of Third-Party Plaintiff has failed to protect Third-Party Plaintiff's interest in
12 allowing a \$25,000,000.00 Judgment to be entered against Third-Party Plaintiff.
13

14 **INTERROGATORY NO. 9:**

15 If your answer to Interrogatory No.8 is anything other than an unequivocal no, please identify
16 the location of the pain and when the pain started.

17 **ANSWER:**

18
19 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
20 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
21 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
22 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
23 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
24 please see Third-Party Plaintiff's answer to interrogatory number 8, hereinabove.
25

26 **INTERROGATORY NO. 10:**

27 If any injuries which you claim in Interrogatory No.7 are an aggravation of a preexisting
28 medical, physical and/or mental condition, please state: the nature of the preexisting condition, the

1 nature of the aggravation, identify each healthcare provider who examined and/or treated you for such
2 preexisting condition before the incident in question, and identify each healthcare provider by name
3 and address who determined that this incident aggravated said preexisting condition.

4 **ANSWER:**

5
6 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
7 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
8 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
9 appropriately be addressed by way of deposition. Further, this Interrogatory is sought for the sole
10 purpose of harassing Third-Party Plaintiff. Subject to and without waiving the foregoing objection(s),
11 please see Third-Party Plaintiff's answer to interrogatory number 7, hereinabove.

12
13 **INTERROGATORY NO. 11:**

14 Please describe with specificity the work that you performed at 4617 Madreperla Street, Las
15 Vegas, Nevada 89121, including the adjacent common areas and/or neighbor yards during the week
16 of August 21-27, 2016.

17 **ANSWER:**

18
19 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
20 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
21 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
22 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
23 harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Request to the extent that
24 such information is readily available to Third-Party Defendant. If a moving party can get the desired
25 documents or information without resorting to discovery, good cause does not exist for producing the
26 same. Subject to and without waiving the foregoing objection(s), as Third-Party Plaintiff was an
27 employee of Third-Party Defendant, Third-Party Defendant is already in possession of the
28

1 information sought. However, in general, Third-Party Plaintiff would mow lawns, handle gardening,
2 dig trenches for irrigation, perform maintenance around the community and maintain common areas,
3 as instructed by Third-Party Defendant, Third-Party Plaintiff's employer.

4 **INTERROGATORY NO. 12:**

5
6 Please describe with specificity the work that was performed by you at 4617 Madreperla Street,
7 Las Vegas, Nevada 89121, including the adjacent common areas and/or neighbor yards during the
8 week of August 28-September 3, 2016.

9 **ANSWER:**

10 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
11 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
12 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
13 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
14 harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Request to the extent that
15 such information is readily available to Third-Party Defendant. If a moving party can get the desired
16 documents or information without resorting to discovery, good cause does not exist for producing the
17 same. Subject to and without waiving the foregoing objection(s), please see Third-Party Plaintiff's
18 answer to interrogatory number 11, hereinabove.
19
20

21 **INTERROGATORY NO. 13:**

22 Please describe in detail who you advised at Sunrise regarding service of the summons and
23 amended complaint in the state court matter as alleged in paragraph 51 of your
24 Answer/Counterclaim/Third-Party Complaint, attached hereto as Exhibit "B", including, but not
25 limited to:
26

- 27 (a.) The name of the person(s) at Sunrise you advised;
28 (b.) The title of the person at Sunrise you advised;

1 (c.) The date and time when you advised them of such service;

2 (d.) The statements that were made by you and the person(s) identified in (a.) above; and

3 (e.) The method of how such information of service was conveyed;

4 **ANSWER:**

5
6 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
7 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
8 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
9 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
10 harassing Third-Party Plaintiff. Further, Third-Party Plaintiff objects to this Request to the extent that
11 such information is readily available to Third-Party Defendant. If a moving party can get the desired
12 documents or information without resorting to discovery, good cause does not exist for producing the
13 same. Subject to and without waiving the foregoing objection(s), discovery is ongoing and Third-
14 Party Plaintiff reserves the right to supplement this answer or Third-Party Plaintiff's F.R.C.P. 26(a)
15 disclosure.
16

17 **INTERROGATORY NO. 14:**

18
19 Identify all individuals you expect to call as an expert witness, both retained and non-retained
20 experts, at the time of trial in this case and include their name, profession, area of expertise, address,
21 telephone number, the date they were retained, and describe the information they were provided in
22 rendering their opinions and/or conclusions, please set forth their opinions and/or conclusions
23 including, but not limited to: the subject matter on which the expert is expected to testify, the
24 substance of the facts and opinions to which each expert is expected to testify, and a summary of the
25 grounds for each opinion by said expert.
26

27 ///

28 ///

1 **ANSWER:**

2 Objection: This Interrogatory is compound, vague, ambiguous, burdensome, vexatious and
3 expansive, all in violation of the spirit and intent of F.R.C.P. 33. Third-Party Plaintiff objects to this
4 Interrogatory in that it is unduly burdensome, calls for narrative and oppressive and would more
5 appropriately be addressed by way of deposition. This Interrogatory is sought for the sole purpose of
6 harassing Third-Party Plaintiff. Further, the information sought is premature as the expert deadline in
7 this matter has not passed. Subject to and without waiving the foregoing objection(s), discovery is
8 ongoing and Third-Party Plaintiff reserves the right to supplement this answer, Third-Party Plaintiff's
9 F.R.C.P. 26(a) disclosure, or Third-Party Plaintiff's Expert Designation.
10

11 DATED this 31st day of March, 2021.

12 **BIGHORN LAW**

13 By: /s/ Kimball Jones

14 **KIMBALL JONES, ESQ.**

15 Nevada Bar No.: 12982

16 2225 E. Flamingo Rd.

17 Building 2, Suite 300

18 Las Vegas, Nevada 89119

19 Attorneys for Defendants/Counterclaimants
20
21
22
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28

JUSTIN SESMAN being first duly sworn deposes and says:

That I, JUSTIN SESMAN, am the Third-Party Plaintiff in the above-entitled action; that I have read the foregoing *ANSWERS TO INTERROGATORIES* and know the contents thereof; that the same is true of my own knowledge, except of those matters therein contained stated upon information and belief, and as to those matters, I believe it to be true.

DATED this 31st day of March, 2021.



JUSTIN SESMAN

CERTIFICATE OF SERVICE

Pursuant to F.R.C.P. 5, I hereby certify that I am an employee of **BIGHORN LAW**, and on the 31st day of March, 2021, I served a copy of the foregoing ***THIRD-PARTY PLAINTIFF JUSTIN SESMAN'S ANSWERS TO THIRD-PARTY DEFENDANT SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION'S FIRST SET OF INTERROGATORIES*** 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:

Ramiro Morales, Esq.
William C. Reeves, Esq.
MORALES, FIERRO & REEVES
600 South Tonopah Drive, Suite 300
Las Vegas, Nevada 89106
Attorneys for Plaintiff/Counter-Defendant,
QBE INSURANCE CORPORATION

David F. Sampson, Esq.
THE LAW OFFICE OF DAVID SAMPSON, LLC
630 South 3rd Street
Las Vegas, Nevada 89101
Attorneys for Defendant,
SIMONE RUSSO

Shannon G. Splaine, Esq.
LINCOLN, GUSTAFSON & CERCOS, LLP
3960 Howard Hughes Pkwy., Suite 200
Las Vegas, Nevada 89169
Attorneys for Third-Party Defendant,
SUNRISE VILLAS IX HOMEOWNERS' ASSOCIATION

/s/ Erickson Finch
An employee of **BIGHORN LAW**

EXHIBIT C

1 KIMBALL JONES, ESQ.
Nevada Bar No.: 12982
2 EVAN K. SIMONSEN, ESQ.
Nevada Bar No.: 13762
3 **BIGHORN LAW**
4 2225 E. Flamingo Rd.
Building 2, Suite 300
5 Las Vegas, Nevada 89119
6 Email: Kimball@BighornLaw.com
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*

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF RELEVANT FACTS

A. Introduction

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

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

B. QBE’s Motion Fails as a Motion to Dismiss or as a Motion for Summary Judgment.

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

Since QBE relies on unverified “facts” outside of Duslak and Sesman’s Counterclaims, however, it may be viewed as 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*

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***
 11 ***I think it's improper for Sunrise to stand there while we're putting the settlement on***
 12 ***the record, and I say Sesman and Duslak are not released in any way, shape, or form.***
 13 ***They remain parties. We still have all rights to proceed against them, and that's all***
 14 ***fine and dandy while we're on the record, and then to come back later in the release***
 15 ***and say, except they're not. Because if they're employees they're out.*** I don't think
 16 they're employees either as I sit here right now. But I've not had a chance to find any of
 17 that stuff out. I have not -- I have no confirmation as to any of that.

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

19 Mr. Sampson then argued, "...what I proposed says specifically releasing each other as agreed
 20 on the record. No more, no less. I don't think anybody should require that my client do any more or
 21 any less for any of that . . . And my clients should not be -- my client should not be required to waive
 22 any right at all that he -- that he specifically -- especially when he specifically preserved them on the
 23 record when we -- when we resolved this thing and put the settlement on the record." *Id* at P. 22 L.
 24 15-18; P. 23 L. 3-8.

25 Mr. Sampson then concluded that the proposed release language attempting to release Duslak
 26 and Sesman, if employees, was not agreed to when he stated, "***And the term that I had an issue with***
 27 ***is this idea that if they're employees, then Sesman and Duslak are out. That was not agreed to.***" *Id*
 28 P. 23 L. 12-15. Mr. Sampson continued by noting that 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).

///

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
16 response while we were on the record from Mr. Fink and everybody else was that is
17 correct. *And we are in agreement.*

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

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

27 Mr. Sampson continued:

28 I'm a little concerned if he is so convinced they're not employees why this is a sticking
point. Because it shouldn't be. If he's convinced they're not employees, I don't know how
it would turn out, as he used the phrase, if they somehow would magically become
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.
7

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.
16

17 **d. Employment Status Has No Impact on the Underlying Judgment.**
18

19 It is ironic that QBE, who for years could not be bothered to support and protect their insured,
20 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.
27

28 ///

1 Case law is clear that labels, which an employer utilizes, have no significance in determining
2 whether an individual is an independent contractor or an employee. In determining whether an
3 individual is an employee under Federal Law, courts apply an “economic reality” test that evaluates
4 the circumstances of the relationship in question to determine whether the putative employee is
5 economically dependent upon the alleged employer. See *Rutherford Food Corp. v. McComb*, 331 U.S.
6 722, 730 (1947). See also *Saleem v. Corp. Transportation Grp., Ltd.*, 854 F.3d 131, 139 (2d Cir. 2017)
7 (*economic realities test is a “totality of the circumstances” test to determine “whether, as a matter of*
8 *economic reality, the workers depend upon someone else's business for the opportunity to render*
9 *service or are in business for themselves.”*); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370 (9th
10 Cir. 1981) (*economic reality test asks “whether, as a matter of economic reality, the individuals ‘are*
11 *dependent upon the business to which they render service.’”*) (quoting *Bartels v. Birmingham*, 332
12 U.S. 126, 130 (1947)).

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

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.

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.

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.

26 ///

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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.
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DATED this 8th day of February, 2021.

By: /s/ Kimball Jones

Attorneys for Defendants/Counterclaimants

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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/s/ Erickson Finch
An employee of **BIGHORN LAW**

EXHIBIT “A”

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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* * * * *

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SIMONE RUSSO,

)

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Plaintiff,

)

11

vs.

)

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COX COMMUNICATIONS LAS VEGAS,

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Defendant.

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REPORTER'S TRANSCRIPT
OF
MOTIONS

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BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

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DISTRICT COURT JUDGE

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DATED FRIDAY, OCTOBER 18, 2019

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

Peggy Isom, CCR 541, RMR

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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.

11

12

I do have some news for you. The case is settled. I
just want to let you know that. It has.

13

14

THE MARSHAL: It was like Christmas.

09:45:39 15

16

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

And there's no question a lot of things as you
can now see get done outside of your presence; right?

09:45:55 20

21

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

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

09:46:10 25

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 1

MS. FUNAI: Thank you, your Honor.

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(Proceedings were concluded.)

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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
PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE
TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID
STENOTYPE 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

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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* * * * *

9 SIMONE RUSSO,)

10 Plaintiff,)

11 vs.)

12 COX COMMUNICATIONS LAS VEGAS,)

13 Defendant.)

14

REPORTER'S TRANSCRIPT
OF
HEARING

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16

17 BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

18

DISTRICT COURT JUDGE

19

20 DATED THURSDAY, NOVEMBER 7, 2019

21

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23 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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10A.App.2249

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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