

IN THE SUPREME COURT OF THE STATE OF NEVADA

SUNRISE VILLAS IX HOMEOWNERS
ASSOCIATION,

Appellant,

vs.

SIMONE RUSSO,

Respondent.

Case No. 83115 Electronically Filed
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APPELLANT'S APPENDIX
VOLUME 17

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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 INC.,)

14 Defendant.)

15 REPORTER'S TRANSCRIPT
16 OF
17 MOTIONS

18 BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

19 DISTRICT COURT JUDGE

20

21 DATED WEDNESDAY, MARCH 3, 2021

22

23

24

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

MARCH 3, 2021

RUSSO V. COX COMMUNICATIONS

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1 LAS VEGAS, NEVADA, WEDNESDAY, MARCH 3, 2021

2 1:33 P.M.

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

4 * * * * *

01:33:02 5 THE COURT: Let's go ahead and place our
6 appearances on the record.

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

9 MR. FINK: Good afternoon, your Honor.
01:33:07 10 Leonard Fink and Shannon Splaine for Sunrise HOA.

11 MR. REEVES: Good afternoon, your Honor.
12 William Reaves on behalf of the intervenor QBE.

13 MS. FUNAI: Good afternoon, your Honor. Julie
14 Funai on behalf of Scarcelli.

01:33:27 15 MS. ARLEDGE: Good afternoon, your Honor.
16 Jennifer Arledge on behalf of Mr. Bushbaker.

17 THE COURT: All right. Once again, good
18 afternoon. And I see we have competing motions. We
19 have a motion to set aside and/or amend the judgment,
01:33:49 20 and we also have a motion, plaintiff's motion to
21 enforce settlement. Which one was filed first? Let me
22 see.

23 MS. SAMPSON: I was -- I'm certain plaintiff's
24 motion was the last one filed, I believe.

01:34:01 25 THE COURT: Okay. We'll go with the one that

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01:34:06 1 was filed first. It appears to me that the defendant's
2 motion was filed on January 21st, 2021, at 4:18 p.m.

3 And so we'll start from there, Mr. Fink.

4 MR. FINK: Your Honor, Leonard Fink --

01:34:19 5 MS. SAMPSON: Your Honor.

6 MR. FINK: -- for Sunrise.

7 Go ahead, David.

8 MS. SAMPSON: Sorry, your Honor. This is a
9 David Sampson. There's a matter from our prior

01:34:28 10 hearing. QBE has filed a motion to intervene. We had
11 a hearing on it. And the Court was going to take it
12 under advisement, issue an order. So I know Mr. Reeves
13 is on the line for QBE.

14 I guess my position right now is as the motion
01:34:44 15 to intervene has not been granted, then there shouldn't
16 be any standing for any argument from Mr. Reeves today.
17 Or if perhaps the Court had another way you wanted to
18 deal with the current motion to intervene that I've not
19 yet seen a ruling on.

01:35:01 20 THE COURT: All right. And it's my
21 understanding there was no joinder filed or anything by
22 him; is that correct?

23 MR. REEVES: Your Honor, this is William
24 Reeves for QBE.

01:35:18 25 (Multiple speaker cross-talk).

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01:35:19 1 MS. SAMPSON: I think there were joinders
2 filed.

3 THE COURT: Yes. I do have a joinder filed by
4 QBE. I get it. You're right.

01:35:30 5 MS. SAMPSON: Yeah. In fair --

6 THE COURT: Go ahead.

7 MS. SAMPSON: In fairness to QBE -- this is
8 David Sampson again. Yeah, I think they filed their
9 own motion to enforce.

01:35:40 10 THE COURT: Let me see.

11 MS. SAMPSON: That was filed --

12 THE COURT: Hold on.

13 Go ahead, Mr. Sampson. I'm just pulling up
14 the docket right now.

01:35:46 15 MS. SAMPSON: Sure. Contemporaneous, my
16 recollection and all, Mr. Reeves can correct me if I'm
17 wrong, but in fairness to QBE my recollection is QBE
18 filed a motion to intervene along with, in the same
19 motion, a motion to enforce.

01:36:00 20 We only heard the motion to intervene last
21 time. And so if -- obviously, if the motion to
22 intervene were to be denied then the motion to enforce
23 is a rogue document that would just be vacated. And
24 we'd only have Sunrise's motion and my motion.

01:36:16 25 If -- I guess, if the motion to intervene is

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01:36:19 1 granted, we would have the motion -- we'd have QBE's
2 motion to enforce as well as the motion to amend the
3 judgment from Sunrise and my motion to enforce.

4 MR. FINK: Your Honor, Leonard Fink for
01:36:32 5 Sunrise. In this very convoluted procedural case that
6 we find ourselves in, Sunrise joined in QBE's motion to
7 enforce, but I don't know that the arguments are really
8 any different than our own motion.

9 MR. REEVES: This is Bill Reeves for QBE, your
01:36:56 10 Honor. Counsel have articulated it correctly. The
11 logical starting point would be for defendant HOA to
12 start and address the issues. The intervention issue
13 aside, we're all here to address a settlement and the
14 judgment and the interplay between the two of them.
01:37:14 15 And so, obviously, deferring to this Court, a logical
16 starting point would be for the HOA to address its
17 motion.

18 THE COURT: All right. I mean, I get that.
19 It was the first one done. I don't want to have to
01:37:31 20 come back and argue again. Just as important too, I do
21 feel it's probably important to decide the motion to
22 intervene while I have everybody here. And let me
23 think about how to handle this.

24 As far as the intervenor is concerned, I mean,
01:37:51 25 there's nothing they're adding that, for example,

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01:37:54 1 Mr. Fink hasn't argued. That's my recollection, is
2 that correct?

3 MR. REEVES: William Reeves for QBE, your
4 Honor. Largely Yes. I mean, we have a different
01:38:02 5 perspective. But to be clear, we were the first to
6 file. We filed the motion to intervene to enforce the
7 settlement. Whether that's two motions --

8 THE COURT: I understand.

9 MR. REEVES: -- in one or what have you.

01:38:14 10 THE COURT: I understand.

11 MR. REEVES: But and the HOA joined in that.
12 And then the HOA filed a motion to set aside the
13 judgment. And QBE joined in that. So in large part,
14 yes, our interests are aligned. And certainly attorney
01:38:26 15 Fink is here to address those. But QBE did want a seat
16 at the table for the reasons that we discussed at the
17 last hearing. And to the extent this Court would
18 indulge, we would like to be permitted to comment on
19 things but would take a back seat, if you will, to
01:38:43 20 attorney Fink. If that's acceptable, then we can
21 proceed in that fashion. If this Court prefers
22 otherwise, then obviously we'll defer to that.

23 THE COURT: Mr. Sampson.

24 MS. SAMPSON: Well, again, given the pretty
01:38:59 25 clear case law that we talked about last time that

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01:39:04 1 intervention in all cases must be made before judgment.
2 And that's all cases, not all parties. Or, I mean, so,
3 yes, it's a simple question.

4 THE COURT: I understand.

01:39:12 5 MS. SAMPSON: Has judgment been entered in
6 this case? Yes, it has. So I think the motion needs
7 to be denied. And then we can move forward with the
8 actual parties as the only ones arguing and presenting
9 their arguments. And anything that was filed
01:39:24 10 inappropriate or, you know, without -- without leave of
11 court because intervention wasn't granted would just be
12 stricken.

13 MR. REEVES: Your Honor, I didn't realize we
14 were arguing merits. So --

01:39:35 15 THE COURT: Yeah.

16 MR. REEVES: -- do as the Court wishes.

17 THE COURT: This is what we'll do. I mean, we
18 can handle this one of two ways. And I'm thinking
19 we're going to have to handle this one way.

01:39:44 20 And I do want to get the motions to set aside
21 and/or amend or the motion to enforce or resolve very
22 quickly because it's my understanding we have a
23 companion case in federal court; is that correct?

24 MS. SAMPSON: That's correct.

01:40:04 25 MR. REEVES: QBE; yes, your Honor.

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01:40:05 1 MS. SPLAINE: That is correct, your Honor.
2 And Shannon Splaine. There are looming deadlines that
3 the federal judge just issued earlier this week, so
4 time is of the essence.

01:40:14 5 THE COURT: And when you say "looming",
6 looming in what respect, Ms. Splaine?

7 MS. SPLAINE: Certainly, your Honor. Shannon
8 Splaine.

9 The -- Dr. Russo and then Mr. Duslak and
01:40:28 10 Mr. Sesman have proposed discovery deadlines in the
11 federal court case keeping it to 180 days. QBE's
12 counsel had sought more time. The Sunrise HOA only
13 appeared in the federal court case on February 3rd, so
14 I had indicated that we might need more time. But the
01:40:46 15 judge, without prejudice, elected to go with the
16 earlier dates.

17 So expert reports are due in -- on April 21st,
18 I believe. And so there are depositions and discovery
19 that's pending. Some of which may be tied to whatever
01:41:03 20 happens in this case.

21 THE COURT: I understand. Anything else I
22 need to know in that regard?

23 MR. REEVES: William Reaves for QBE. Attorney
24 Splaine articulated it in the sense that we have a GM
01:41:23 25 close of discovery. The 180 days ran from December or

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01:41:26 1 sometime there.

2 So, you know, we are under a certain amount of
3 pressure. And, but the Court is monitoring what goes
4 on here. And so there is some effort to coordinate.

01:41:39 5 But the Court felt constrained relative to
6 circumstance. The hearing that attorney Splaine,
7 attorney Sampson, and myself appeared on was on Monday.
8 And the Court indicated it set that out because it had
9 hoped that we would get a ruling relative to what's
01:41:56 10 going on here. The issues that play in the federal
11 court case are derivative of what goes on here.

12 So in a sense we need clarity here to know in
13 a sense if we have anything to litigate from the
14 federal court case.

01:42:12 15 THE COURT: How about this, does this make
16 sense? Because I just don't want to side step
17 procedural issues because I just feel you have to
18 follow the rules in that regard.

19 I don't know what your calendars are like, but
01:42:24 20 is everyone free tomorrow afternoon?

21 MS. SAMPSON: I am not, Judge.

22 THE COURT: Okay.

23 MS. SAMPSON: I have, yeah. I've got
24 depositions from 1:00 to 5:00 o'clock.

01:42:41 25 THE COURT: All right. Well, I don't want to

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01:42:45 1 do this, but Friday morning?

2 MR. FINK: Well, your Honor, Leonard Fink. I
3 have a deposition at 9:00 a.m. on Friday morning. I
4 might be able to do Friday afternoon. Although it's
01:43:00 5 the deposition of a plaintiff in a big case, so I'm not
6 sure how long it's going to go.

7 THE COURT: Yeah. I mean, I'm actually doing
8 a trial on Monday. That's the reason why I -- actually
9 a zoom trial, bench trial on Monday.

01:43:16 10 MR. REEVES: Your Honor, this is William
11 Reeves. If we withdraw our joinder to the HOA motion
12 will this Court proceed now to adjudicate that motion?

13 THE COURT: I would. Is that fine?

14 MR. REEVES: Yes. I feel our hands are --
01:43:34 15 unfortunately, circumstances dictate. So, yeah, we'll
16 withdraw our joinder. We stand alone on our motion --
17 separate motion that could be adjudicated separately.

18 Please, we'd like to proceed with the HOA
19 motion.

01:43:46 20 THE COURT: All right. Okay.

21 Everybody's noted their appearance for the
22 record; is that correct?

23 MS. SPLAINE: Yes, your Honor.

24 THE COURT: All right. Mr. Fink.

01:43:59 25 MR. FINK: Yes, your Honor. Leonard Fink for

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01:44:00 1 Sunrise. And I was thinking a lot about how to argue
2 these motions because they're so intertwined. And my
3 thought was to try to -- I mean, to some degree to take
4 a more holistic approach. And kind of -- because I
01:44:14 5 don't think you can really argue one without the other.
6 So I'll do my best to confine the default to our
7 motion, but it's going to end up -- and knowing the
8 Court as well as I do, you're going to hear everybody
9 out. So I'm a little bit less concerned with my motion
01:44:29 10 and your opposition and my reply, that kind of thing.
11 But I'll start with the default.

12 So first I want to note that we've had, I
13 don't know, four oppositions I think from Mr. Sampson.
14 We've filed two replies. The first was to
01:44:49 15 Mr. Sampson's first, I was going to say, regular
16 opposition first and second supplements. Maybe even
17 been five. And then five oppositions. Then our second
18 reply was to the third and fourth. And hopefully you
19 got that. We filed that yesterday.

01:45:01 20 So I don't know if you've had a chance to get
21 that and read that.

22 THE COURT: I have them.

23 MR. FINK: Okay. You have? I'm sorry. Did
24 you say "you have"? I'm having a hard time hearing,
01:45:12 25 Judge.

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01:45:12 1 THE COURT: I have, sir.

2 MR. FINK: You have seen that one --

3 THE COURT: Yes.

4 MR. FINK: -- from yesterday?

01:45:16 5 THE COURT: Yes, I have.

6 MR. FINK: So, obviously, we'd like the Court

7 to strike the -- anything beyond the first opposition.

8 But again, knowing, knowing this department, you want

9 to make sure you get everything out on the record. So

01:45:26 10 I'm prepared to go forward on all the ...

11 First, I'd like the -- Sunrise absolutely has

12 an issue in setting aside the default. Right now we've

13 got two issues that the Court has got to decide. One

14 is whether and how to enforce the settlement, if at

01:45:45 15 all.

16 And then two is whether to amend the default

17 judgment or set it aside.

18 And either Mr. Sampson came up with this whole

19 idea where he can say with a straight face that, yeah,

01:46:02 20 no. I'm just limiting -- limiting my judgment against

21 Duslak and Sesman as individuals, or even as

22 independent contractors knowing that in the federal

23 action they have turned around and sued the HOA, and I

24 believe they sued QBE saying no, no, no, we're

01:46:21 25 employees, so that they get to do the heavy lifting and

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01:46:24 1 he just gets the -- if they win on that, then he's
2 going to have a pot to collect his \$25 million judgment
3 from. Or he's just the beneficiary of it, of the fact
4 that it worked out this way.

01:46:36 5 But either way, that's kind of -- that's the
6 problem. And I think that it should say a lot, to not
7 just the Court but everybody on this phone call, as to
8 the fact that Duslak and Sesman's counsel hasn't
9 appeared in this case to at least ask the Court to set
01:46:53 10 aside the default.

11 If they had truly had an interest in defending
12 themselves and setting this aside, they would have, at
13 the very least, joined Sunrise's motion.

14 But the fact they didn't, I think, says a lot.
01:47:10 15 In fact, and I know the Court looks at -- will look at
16 that and says it a lot, but they just want to -- I'm
17 not involved in the federal action, but their claim of
18 damages against the HOA is something like \$1.2 million
19 or something if I'm not mistaken. So that's where
01:47:21 20 their interests lie.

21 So because of that, that leaves Sunrise as the
22 only interested party to set aside the default for
23 whatever reason. And Sunrise has an interest in doing
24 so because Sunrise is really the real party in
01:47:33 25 interest. Because with their third-party complaint

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01:47:36 1 against Sunrise, they're claiming, Hey, we're
2 employees, and you need to cover this whole thing.

3 Our original motion focused on NRCP 60, I
4 think, (b)(1) and (2), which, as Mr. Sampson pointed
01:47:52 5 out, have deadlines in which to file motions.

6 I think under NRCP 59 where a Court has the
7 ability to toll statute of limitations and time frames
8 when there's an equitable reason to do so, excusable
9 delay. Here there is no question that we had no idea
01:48:12 10 that we even needed to step in and deal with the
11 default judgment until all this stuff came up
12 afterwards.

13 And the fact that -- I don't remember the
14 exact date that Duslak and Sesman filed the third-party
01:48:24 15 complaint, but I do remember they served it on the HOA
16 in January 21st, which is the same day we filed this
17 motion. So hard to say that we didn't move any more
18 quickly than that.

19 So for that reason -- under those -- under
01:48:36 20 NRCP 60, like I said I think it's (b)(1) and (2). I
21 don't think the Court has the power and the inherent
22 power to allow us to file the motions now. Outside of
23 that, however, judge, we've got -- and I really kind of
24 touched more in the reply on, I think, our first reply
01:48:51 25 on this, under NRCP 60(b)(4) or (6). And (6) is the

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01:48:54 1 one I think is the most important is that for other
2 justifiable reasons.

3 And all that requires is that we file the
4 motion within a reasonable time frame, which we did.

01:49:04 5 And, again, we filed it the day that they -- that they
6 served the third-party complaint on the HOA.

7 And the other justifiable reasons kind of come
8 from the motions, like I said in the reply, to our
9 oppositions to the motion to enforce the settlement
01:49:19 10 which would -- an issue with the settlement agreement
11 itself, obviously, and because the federal action that
12 Duslak and Sesman filed against Sunrise. And those
13 would be the justifiable reasons for the Court to kind
14 of get back into this can of worms and really set
01:49:32 15 everything -- set everything aside.

16 At the very -- either amend the judgment. We
17 have no idea what went into the judgment. I think
18 we've said that multiple times. We have no idea
19 because there's not a record.

01:49:43 20 So we don't know what Mr. Sampson argued. We
21 don't know what evidence he put on. We have no idea
22 which witnesses he put on. We don't know. So it might
23 be more difficult to alter it than to just simply set
24 it aside because now with the real party in interest,
01:49:57 25 we think everything we've seen now since then justifies

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01:50:01 1 it under NRCP 60(b)(6).

2 Another issue that came up in one of, I think
3 it was No. 3 that was Ms. Splaine in the federal action
4 produced documents which is secured from this

01:50:17 5 Advanstaff HR --

6 And, Peggy, that's A-D-V-A-N-S-T-A-F-F HR.

7 -- which appears to show, and there's no -- as
8 I understand, there's been no discovery on this. It

9 was just documents that Ms. Splaine was able to get

01:50:32 10 from them, that appears to show that Mr. Duslak and

11 Sesman were Advanstaff employees. Which certainly

12 supports -- now this kind of goes back again to the

13 settlement agreement part of it. But certainly

14 supports everything that Sunrise has been saying that

01:50:47 15 they were not Sunrise employees.

16 However, the way that I understand now, and I
17 never heard of this before, but I don't know --

18 (Reporter clarification)

19 MR. FINK: I'm sorry. That Advanstaff HR is a

01:51:06 20 professional employer organization. As I've never

21 heard of one that heard that before this issue came up.

22 I did some research. And apparently, and it makes

23 sense that you've got these professional employer

24 organizations that take smaller companies and they take

01:51:21 25 on the employees of the small companies. So they

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01:51:24 1 become the employees of this larger company. And
2 they're able to give better benefits and that kind of
3 thing because they're a larger company.

4 So from a legal standpoint, whether that means
01:51:36 5 that Duslak and Sesman were Advanstaff's employees or
6 were co-employees of both Advanstaff and PW James I
7 don't know. And that's something they're going to have
8 to flesh out in the federal action.

9 But I want to be clear that we've never
01:51:53 10 misrepresented. In any event I don't think Mr. Sampson
11 quite believes I've misrepresented anything. But the
12 only evidence that the Court has ever seen related to
13 the employment from Mr. Seslak and -- Mr. Duslak and
14 Mr. Sampson -- Okay, Mr. Duslak and Mr. Sesman, pardon
01:52:10 15 me, are there's an affidavit from the former property
16 manager PW James that they're independent contractors.

17 There was -- and I don't remember if it was in
18 Mr. Sampson's opposition to this motion or one of the
19 other motions, but there was an interrogatory response
01:52:30 20 that we had done on Sunrise's behalf, responded to four
21 months before we did our motion for summary judgment,
22 where I used the poor choice of words and said that
23 they were "employed by". And employed can mean all
24 sorts of different things. And employed in that sense
01:52:43 25 didn't mean they're legal employees. They were

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01:52:46 1 employed by the HOA to do the gardening and that kind
2 of thing. And I explained that in the papers.

3 Importantly, again, plaintiff never asserted
4 that Duslak and Sesman were employees. And when we
01:53:03 5 were on the phone with the Court last time, Mr. Sampson
6 made a comment that it would be unusual for him in a
7 complaint not to allege that what was some
8 employment -- employment background or that they were
9 doing work with subject to in the course and scope of
01:53:17 10 their employment. We went back and checked his first
11 amended complaint, and that language isn't in there.
12 There has never been a disclosure from Mr. Sampson
13 asserting that they were employees.

14 So the only thing we ever had was the
01:53:28 15 affidavit from -- and I can't remember the lady's name
16 from PW James that was attached to our motion for
17 summary judgment. And then in this case -- in one of
18 his oppositions or replies there's this self serving
19 affidavit from, I think, Mr. Duslak saying, well, we
01:53:43 20 were employees. Well, of course, he's going to say
21 that. He's suing for \$118 million. So what else is he
22 going to say?

23 THE COURT: Okay.

24 MR. FINK: The fact of the matter is, Judge,
01:53:51 25 that going back to -- and I appreciate you hearing me

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01:53:55 1 out on this. And, again, there is so much intertwining
2 between the two motions that it's hard for me to kind
3 of -- kind of set it set aside, is that Sunrise is the
4 only party that appears to want to assert an interest
01:54:06 5 in this default judgment. Because Duslak and Sesman,
6 for whatever reason, aren't doing it themselves.

7 And finally, on the -- on the fourth --
8 Mr. Sampson's fourth supplement to his opposition he
9 cited to the Doe vs. de la -- I think, Del Fuente case,
01:54:24 10 or Fuente case without the dancers from Cheetahs.
11 Which I, again, I thought was interesting that Duslak
12 and Sesman's counsel Richard Kimball [sic] was the
13 attorney for the appellant in that case, which is the
14 only appearance he's made in this case, is through
01:54:39 15 that -- is through the decision from the Supreme Court.

16 And if the Court has had an opportunity to
17 read that decision, it's very limited. Nothing to do
18 with this case. It's dealing with minimum wage statute
19 and whether or not somebody who agrees early on that
01:54:51 20 they're not an employee with respect to the employer,
21 later on to claim they're employees. And I think the
22 Court has opted the federal reasonable test or whatever
23 it was.

24 But you can read that and see it's got
01:55:05 25 absolutely nothing to do with the situation we have got

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01:55:06 1 here where we've got a clear agreement by Dr. Russo,
2 the plaintiff, that he's going to pursue and was going
3 to pursue Mr. Duslak and Mr. Sesman for all purposes of
4 this litigation as independent contractors. And all
01:55:19 5 purposes would include settlement and include the
6 default judgment and should include everything that
7 goes along with the litigation.

8 So unless the Court has any questions
9 specifically, I'll pass to Mr. Sampson.

01:55:31 10 THE COURT: I just have one question on that.
11 What's the impact of that representation?

12 MR. FINK: In the representation of what,
13 Judge? Of Mr. -- of -- I'm sorry. Go ahead.

14 THE COURT: In the capacity -- pursument --
01:55:44 15 pursuing any capacity of independent contractors.

16 MR. FINK: Well, it's interesting. That's why
17 I said at the beginning that either Mr. Sampson kind of
18 came up with this whole scenario, or is just a
19 beneficiary within that. Arguably he can come in and
01:56:00 20 say, yeah, no. I'm sticking by it. They're
21 independent contractors. They're independent
22 contractors.

23 And then the federal action if Duslak and
24 Sesman are -- prevail that they're employees, now
01:56:11 25 they've got money to fund some or all of that

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01:56:14 1 \$25,000,000 judgment that Mr. Sampson has.

2 So that's -- that's kind of the practical --
3 the practical effect of it. But as we argue in the
4 motion to enforce settlement, which is why that you
01:56:29 5 can't really divide these two up. Which is why I was
6 thinking take a more holistic approach to it it's --
7 the fact that he agrees that he was just going to
8 pursue them as independent contractors means that
9 they're released for any other role.

01:56:41 10 So I think if you look at both things
11 together, the practical impact is that he should -- if
12 it turns out that they win in the federal action,
13 federal case that they're employees, then the
14 settlement agreement bars his claims.

01:56:56 15 So I think -- I think that's the practical
16 application when you look at both together. I don't
17 think you can -- I don't think you can separate them
18 out. And that's probably the biggest reason that the
19 Court should just set aside the default judgment. And
01:57:10 20 either let Duslak and Sesman defend themselves in the
21 case. And then -- or perhaps Sunrise defend them. Or
22 perhaps PW James. I don't know.

23 But I think if we're going to do what's right
24 and, I don't want to say "fix", that's the wrong word,
01:57:28 25 but deal with the situation we have, that's probably

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01:57:30 1 going to be the best thing to do.

2 THE COURT: Okay. Thank you, sir.

3 We'll hear from Mr. Sampson.

4 MS. SAMPSON: Thank you, your Honor. So let
01:57:42 5 me -- let me start with the Court's question. What is
6 the impact of the -- of the agreement that they're
7 independent contractors. And it's an interesting
8 question because it's got a couple different answers.

9 One, yes, as long as my judgment is against
01:58:03 10 them as individuals, and that's one of the problems we
11 have, your Honor, is -- is, you know, Sunrise keeps
12 saying Mr. Sampson will go after them as independent
13 contractors, the judgment would be against them as
14 independent contractors. That's not possible.
01:58:17 15 Judgments are not conditional.

16 I take a judgment against either a person or
17 an entity. And there is no, well, the judgment is
18 against Richard Duslak if he's an independent
19 contractor. But if the judgment -- if he's not -- if
01:58:33 20 he's an employee then the judgment is not against him.

21 It's either against Richard Duslak and Justin
22 Sesman is the other one. Or it's not. And so they
23 want to draw this artificial distinction that just
24 doesn't exist. And that's one of the problems that
01:58:47 25 they have is you can't do that.

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01:58:49 1 Now the other part of your Honor's question
2 that I think is very interesting, what is the impact of
3 that representation? Well, according to the settlement
4 agreements, and let me read from page -- bottom of
01:59:00 5 page 4 is the settlement agreement makes it -- first of
6 all, makes it very clear in subsection 4(i) that if
7 defendants Duslak and Sesman are employees of anyone,
8 then they're not released.

9 And so I don't understand how Sunrise can
01:59:18 10 stand here today, and say, well, if they're -- if he
11 agrees to go after them as independent contractors that
12 means they're released for all other purposes when the
13 agreement says, no, they're not released as employees.

14 In fact on page 1, it says that Sunrise is
01:59:33 15 released, excluding Duslak and Sesman. It's in all
16 bold and all capital letters. Couldn't have made it
17 any more plain. So they're fairly --

18 THE COURT: And I don't want to cut you off,
19 but what provision, again, are you referring to in the
01:59:46 20 settlement agreement?

21 MS. SAMPSON: That is -- now I'm looking at
22 page 1 paragraph 2. And it's where each of the parties
23 are identified. So Dr. Russo is identified as the
24 plaintiff. And then Sunrise is identified including
02:00:00 25 its, you know, managers, agents, directors. And then

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02:00:03 1 in all bold letters it says "excluding Richard Duslak
2 or Justin Sesman".

3 And interesting, and we noted this in I think
4 one of our supplements that we mention in paragraphs 3,
02:00:16 5 4, 5, the other entity defendants. And it mentions
6 that their employees are also released.

7 In paragraph 2 with Sunrise, the description
8 of Sunrise does not include their employees at all. So
9 no Sunrise employees were released from this agreement.
02:00:33 10 And specifically it says it excludes Duslak and Sesman.

11 Then we turn to page 4 paragraph 1 or "i", and
12 it talks about releasing defendant's employees. And it
13 says that the employees are released, and then again in
14 all capital all bold letters EXCLUDING RICHARD DUSLAK
02:00:57 15 AND JUSTIN SESMAN.

16 So, again, when it was the idea that they were
17 released as employees that was envisioned in this
18 agreement. And all the parties agreed they were not
19 going to be released as employees.

02:01:09 20 And then finally in paragraph on page 4
21 paragraph 4ii, 4-i-i, it starts right out saying,
22 "Nothing in this release shall release, discharge, or
23 in any way impact plaintiff's rights against Richard
24 Duslak and Justin Sesman."

02:01:27 25 That was the main part of the agreement. And

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02:01:30 1 I'll talk in a little bit about some of the hearings.
2 The number one thing I was interested in in reaching
3 this agreement was that this settlement will not affect
4 my client's rights against Mr. Duslak and Mr. Sesman.
02:01:40 5 And Sunrise, and QBE, and every other defendant agreed
6 that that would be the case.

7 So it says nothing in the release shall
8 discharge in any way or in any way impact my client's
9 rights against these gentlemen. It then later says in
02:01:55 10 that same paragraph, "Plaintiff shall retain all rights
11 to pursue any claims against Richard Duslak and/or
12 Justin Sesman."

13 And to the extent that wasn't clear enough
14 that, hey, listen defendants, he's not relinquishing
02:02:09 15 any rights against these gentlemen, whatever they
16 happened to be, you want to agree they're contractors
17 or whatever else, fine, but he's not releasing any
18 rights against them whatsoever.

19 And the final clincher, this gets back to your
02:02:19 20 Honor's question, is where it says "Any language in
21 this release or and/or any language at all that would
22 be read to in any way impact plaintiff's rights against
23 Richard Duslak and/or Justin Sesman shall be deemed
24 null and void."

02:02:37 25 And so then when you answer -- when your Honor

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02:02:39 1 asked, Well, what is the impact of the independent
2 counsel representation, I think the answer is this:
3 The minute that QBE, and they did it first, and then
4 subsequently Sunrise came in and claimed that that
02:02:52 5 independent contractors language somehow impacts, and
6 they say it releases Dr. Russo's rights against these
7 gentlemen, the minute they made that assertion and
8 argued that that language can be read to impact
9 Dr. Russo's claims, then this language of independent
02:03:07 10 contractor was thereby rendered null and void by their
11 own comments.
12 And that was something, again, I insisted
13 even -- we can call them whatever you want to call
14 them, but whatever they are, my client retains all
02:03:20 15 rights against them. And if you later come down and
16 say that there's something about what we called them
17 that means your client no longer has rights against
18 them or even has in any way impacted those rights, then
19 that language is null and void. So my client's rights
02:03:33 20 survive.
21 And, Judge, they signed this. They agreed to
22 this. They read this. And that language also that
23 says any language that could even be read to in any way
24 impact my client's rights against these gentlemen is
02:03:44 25 null and void is all capitalized.

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02:03:46 1 We made it abundantly clear my client is
2 retaining all rights. They want to call it something,
3 they can call it.

02:03:54 4 So I think the impact of that representation
5 is that pursuant to the agreement that Sunrise signed
6 off on -- and, by the way, this representation about
7 they're independent contractors is incorporated by
8 reference document in the agreement. And so when that
9 agreement -- so as part of the agreement, and when the
02:04:09 10 agreement says if it impacts Dr. Russo's rights against
11 these gentlemen it's null and void, then that language
12 in that exhibit is, therefore, null and void.

13 And then we've also got, again, for your
14 Honor's -- on paragraph 15 on page 7, there's a
02:04:27 15 severance clause that says, "If there's some provision
16 in the agreement that's determined to be null and void
17 or unenforceable, then it's deleted", just that, those
18 words. "And the remainder of the agreement remains in
19 full force and effect."

02:04:41 20 So it sounds to me like, as I gather from the
21 arguments from QBE and Sunrise, the words "as
22 independent contractors" in the exhibit is what --
23 that's the only language they're hanging their hat on.
24 There's certainly no language anywhere else that
02:04:57 25 releases or otherwise would have any impact on

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02:04:59 1 Dr. Russo's rights against these gentlemen.

2 And we only signed the "as independent
3 contractor" language because they promised us it's not
4 going to have any impact on your rights against them.

02:05:07 5 And if sometime down the road we argue it does have
6 rights against him, or it does impact your client's
7 rights against these gentlemen, we agree it's null and
8 void.

9 So those three words, "as independent
02:05:18 10 contractors" need to be declared null and void. And
11 then we move forward. And that is the impact of the
12 independent counsel representation is that it's of no
13 impact because it's null and void now that they're
14 claiming that it somehow affects my client's rights.
02:05:30 15 Because they said, If it does that, it's null and void.

16 And I agree with Mr. Fink. These motions are
17 so intertwined. And in answering the Court's question
18 that goes more to the motion to enforce and the motion
19 to amend the judgment, which I just want to get to as
02:05:48 20 well.

21 THE COURT: Yeah. And they are intertwined.
22 But okay. We'll take it another step. What impact
23 does that have on the settlement?

24 MS. SAMPSON: Nothing. It's -- it's --

02:05:54 25 THE COURT: And I --

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02:05:55 1 MS. SAMPSON: It's concluded. The
2 settlement -- the settlement under the severance
3 agreement, the only impact is the words "as independent
4 contractor" is stricken from the agreement.

02:06:04 5 And then the agreement survives without it.
6 So then now there are -- there's no language that even
7 now they're claiming could be read to impact my
8 client's rights against these gentlemen.

9 And my client, as we always agreed from the
02:06:17 10 very beginning, proceeds with maintaining all of his
11 rights against these gentlemen as he always had, which
12 is what they agreed we would do. They agreed on the
13 record and multiple hearings and also in the settlement
14 agreement.

02:06:30 15 And so the impact is that, again, pursuant to
16 the severance clause that language is withdrawn. The
17 judgment stands. The settlement with the other parties
18 stands. And none of my client's rights against Duslak
19 and/or Sesman or impacted in any way. Which is exactly
02:06:46 20 what we agreed to, again in all capital letters, and
21 multiple times on the record.

22 Now --

23 THE COURT: But here's my next question. Does
24 that go to the essence of the settlement? Because I
02:06:57 25 remember having multiple discussions in open court as

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02:07:01 1 to why Sunrise was settling this matter.

2 And there -- and one of the key provisions
3 they were relying upon that the two individuals Duslak
4 and Sesman were independent contractors. So if you
02:07:18 5 sever that out, what impact does that have on the
6 settlement?

7 MS. SAMPSON: Well, and actually, Judge, that
8 only came up later. That actually wasn't one of their
9 concerns at all.

02:07:27 10 And if you look at the transcript from
11 October 18th, 2019, when this agreement was put
12 together, it was never brought up. Whether they're
13 employees, whether they're contractors, that was never
14 discussed. That was not a key provision of this
02:07:45 15 agreement.

16 In fact, they -- we put the agreement on the
17 record on October 18, 2019, without that ever being a
18 concern whatsoever of Sunrise or QBE or anyone else.

19 And that's why part of my motion is to enforce
02:08:02 20 the agreement as placed on the record on October 18.
21 Because this all -- this whole idea that wait, wait,
22 what if they're contractors? Or what if they're
23 employers -- or what if they're employees was never
24 brought up at all until the November 7th hearing.

02:08:16 25 And it was on the November 7th hearing after

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02:08:18 1 we already excused the venire panel and concluded the
2 settlement entirely that they first brought this up.

3 And that's the problem that I have, Judge,
4 because at the October hearing, October 18, 2019, it
02:08:30 5 was very clear. And I said multiple times in that
6 hearing, This settlement does not affect my client's
7 rights against these gentleman at all. And Mr. Fink
8 agreed. Even in the November 7th hearing he agreed
9 that he confirmed that in October.

02:08:49 10 And so I said, all right, then. As long as
11 I'm settling with you people, but my rights against
12 these individuals are in no way affected, at all, then
13 we can go ahead and have a settlement.

14 And they all agreed. And then it was
02:09:01 15 discussed, well, what about reducing it to writing.
16 And I said, we can reduce it to writing. That's fine.
17 But any -- and I've got it right here. I said -- there
18 will be -- this is at page 10 of the -- I'm starting at
19 line 24 of the October 18 hearing.

02:09:17 20 And I said, "There will be no new terms in
21 whatever writings we have." And then I have this
22 quote. "Most of all, nothing in any of these releases
23 or any of the settlement affects any rights Dr. Russo
24 may have against any person or entity related to the
02:09:35 25 claims of the two individuals that have been

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02:09:38 1 defaulted."

2 And I said, "So long as we're clear on all of
3 that."

4 And Mr. Fink agreed. And again, up to this
02:09:44 5 point there -- and even to the closing of this hearing,
6 there was never any discussion anywhere about, Well,
7 what if they're employees? What if they're
8 contractors? That had never ever been discussed.

9 And I can tell you as an officer of the Court,
02:09:59 10 it was never discussed behind the scenes in the
11 discussions we had earlier that day. It was never
12 brought up at all. And we placed the settlement on the
13 record. It was not a term that they used and that they
14 were concerned about in the least. It was simply,
02:10:15 15 we're settling with you, defendants. But these two
16 gentlemen, my client reserves all rights.

17 And that's the issue that I've got, Judge, is
18 there's a principle that I was taught at a young age
19 that the deal you make when your eyes are wet is the
02:10:28 20 deal you have to keep when once your eyes have dried.

21 And in this case we could relate it to the
22 deal that the parties made when the venire panel was
23 out in the hallway and we could have continued trial is
24 the deal the parties have to keep after the venire
02:10:43 25 panel was dismissed.

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02:10:45 1 And when we put that, this agreement on the
2 record on October 18, 2019, there was no What about if
3 they're employees? What about if they're contractors?
4 It was just we're releasing these defendants, but the
02:10:58 5 settlement in no way, shape, or form affects my
6 client's rights against these gentlemen.

7 And if Mr. Fink and Sunrise wanted the
8 settlement to have, Well, what if they're employees, it
9 would impact them then, wouldn't it, then that was the
02:11:14 10 time to bring it up while the venire panel is in the
11 hallway. And if they'd have said, Well, we want them
12 released if they're found to be employees, then I would
13 have said then we don't have a settlement. We'll just
14 bring the venire panel back in. Let's move on with
02:11:29 15 trial. But that's not what they said. And there's
16 absolutely agreed, and, in fact, at the November 7th
17 hearing, let me find that really quickly.

18 When we got -- well, yeah. Let me go -- let
19 me do it this way.

02:11:48 20 So before there was any settlement, even talk
21 about settlement, my client had certain rights about --
22 against Duslak and Sesman. And as we started to work
23 out a settlement, but one thing I insisted on was no
24 matter what goes on, whatever agreement we put
02:12:05 25 together, whatever form it takes, my client will

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02:12:08 1 reserve all rights against Duslak and Sesman.

2 And the defendants all agree to that. The
3 same rights he had before we even started talking about
4 settlement are going to be the same rights he has after
02:12:20 5 the settlement.

6 And bear in mind, Judge, the rights that my
7 client has against Duslak and Sesman, they don't come
8 from a settlement. They come from the fact that we
9 sued them. They never answered. We took a default
02:12:34 10 against them. They still never answered. And we took
11 a default judgment.

12 And so that's where our rights come from. And
13 one thing, again, I absolutely insisted on was those
14 rights will not be affected in any way, shape, or form
02:12:47 15 by this settlement.

16 And then I even said as long as we're clear on
17 that. I used the word "clear". As long as we're clear
18 whatever we put in writing later, we're putting this on
19 the record now on 10/18, nothing in this release or
02:13:00 20 anything we're doing in this settlement will have any
21 effect on my client's rights against Duslak and Sesman.

22 Again, the idea was that I insisted on the
23 same rights Dr. Russo had against Duslak and Sesman
24 before settlement was ever discussed are the same
02:13:15 25 rights he will have after the settlement is done. And,

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02:13:17 1 Judge, on 10/18 everyone agreed to that.

2 And there was no request about what if they're
3 employees or contractors or whatever else. They just
4 simply agreed my client retains all of his rights.

02:13:30 5 Then we go to the November 7th hearing of
6 2019. And this was the very first time. This is after
7 the venire panel has been dismissed and everyone of has
8 had a chance to now dry their eyes. And Sunrise asked
9 to change the agreement.

02:13:44 10 And Mr. Fink, you can see in the 11/7 hearing.
11 He's pretty adamant. He says I'd like to have
12 Sunrise -- I'd like to have these gentlemen included as
13 releasees if it turns out they're employees.

14 And I'm very adamant and I say. "No, I don't
02:13:59 15 degree to that." And I put it right in the release.
16 Let me find the one page 23 of the 11/7 hearing. I
17 say, "Judge, that was never agreed to. That was never
18 part of this, and I don't agree to it."

19 And then I referenced -- I directed your Honor
02:14:18 20 back to the 10/18/19 hearing. And I said, you know, at
21 that hearing, this is -- I'm quoting now from the
22 November 7th hearing. I said, "We put on the record
23 we're not waiving, releasing, or otherwise affecting
24 anything against Sesman or Duslak."

02:14:35 25 I don't think anyone would dispute that. It

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02:14:37 1 was a pretty significant point that day. And then your
2 Honor asked, Does anyone dispute that? No one piped
3 up.

4 And then you asked Mr. Fink specifically.
02:14:45 5 This is the Court talking now: "Mr. Fink, are we
6 disputing that?"

7 And Mr. Fink's answer, now listen to his
8 answer. It's from the November 7th hearing. Mr. Fink
9 talking. "My best recollection is that what
02:14:59 10 Mr. Sampson said he was specifically retaining his
11 rights to go against Mr. Sesman and Mr. Duslak, we all
12 agreed to that." Close quote.

13 And again, there was never any discussion in
14 October when the venire panel is in the hallway.
02:15:13 15 Again, you make the deal when the panel is in the
16 hallway, you got to stick to that deal after the panel
17 has released and dismissed.

18 And Mr. Fink was saying, Well, what if there's
19 issues with them being employees. I've got some
02:15:25 20 concerns here. And then your Honor actually -- because
21 it came out that, well, if they're employees, they
22 should have been defended. That's -- that's just
23 Sunrise. If they made a mistake and didn't defend
24 them, that's not on -- that can't be blamed on
02:15:38 25 Dr. Russo. He just wants to retain all of his rights.

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02:15:40 1 And so your Honor said this. And this is
2 page 57. "Because when you look at it from this
3 perspective, if there truly was evidence -- I mean,
4 this makes perfect sense. If there was evidence that
02:15:51 5 they were employees, there would not have been a
6 default judgment entered against them. There would
7 have been motions to set aside answers and the like.
8 And that's pretty much the status of the case because I
9 can't, I can't foresee either Mr. Lemkul or Mr. Fink
02:16:05 10 permitting an employee to be defaulted; right?"

11 And then upon further discussion I finally,
12 say, "Well, hold on." I suggested excepted Sunrise's
13 representations and agreeing, okay, what if we agree
14 they're not employees. But I also said, and this is
02:16:21 15 what everyone -- this is what QBE and Sunrise want to
16 ignore. Because I didn't just say, let's make them
17 employees. And that's it. I also added to that. And
18 this is at page 40 of the November transcript. I also
19 said that we can agree they're not employees, and we
02:16:36 20 can call them whatever you want to call them, but --
21 and this is a quote now, "Along the lines of Sesman and
22 Duslak, all rights against them, all of those are
23 preserved. They're not affected. I would like to make
24 sure that is crystal clear in whatever iteration we
02:16:53 25 come up with that -- or we end you with." Close quote.

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02:16:56 1 And so again on November 7th, I insisted. You
2 want to tell me they're not employees, okay, fine. But
3 I'm reserving all of my rights against them no matter
4 what. And I made that very clear. That we're
02:17:08 5 retaining all the rights, period, of the same rights
6 Dr. Russo had, again, against them before the
7 settlement was ever discussed by virtue of defaulting
8 them, are the same rights he's going to have
9 afterwards. Because in 21 months they never -- no one
02:17:21 10 ever defended them, and we got our -- the judgment
11 against them.

12 And then we put it in the agreement, again,
13 that I just read to you. And that was what was going
14 on is they were saying, We wanted it indicated that
02:17:32 15 they were independent contractors. And I say, That's
16 fine. So long as we're all in agreement if that by
17 making that agreement it's not going to affect any of
18 my client's rights against them.

19 And I said, Even if -- if you come in later
02:17:46 20 and try to say this independent contractor language
21 somehow affects my client's rights, then this
22 independent contractors language is deemed null and
23 void. And they all said, Fine.

24 You know, and now I feel a little bit like,
02:17:58 25 you know, the nursery rhyme to:

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02:18:00 1 "come into my parlour, said the Spider to
2 the Fly."
3 Because I said, I don't want my client's
4 rights against these gentlemen affected by this
02:18:08 5 settlement at all. And Sunrise said, Sure, no problem.
6 Come on into my parlor. It's no big deal. This isn't
7 going to effect their rights. In fact, we'll put it in
8 the agreement that if Sunrise is dismissed that
9 excludes Duslak and Sesman.

02:18:21 10 We'll put in the agreement that when you
11 dismiss employees that doesn't include Duslak or Sesman
12 for any of the defendant's employees. In fact, we'll
13 put in the agreement, Nothing in this release will in
14 any way impact your client's rights against Duslak and
02:18:35 15 Sesman. We'll add that your client retains all the
16 rights to pursue any claims against these gentlemen.
17 And we'll even add that if there's some language some
18 place in the agreement that indicates -- that could
19 even be read to argue that Duslak and Sesman's rights
02:18:50 20 have been affected by the settlement, we'll agree that
21 language is null and void.

22 And that was how they got me into the parlor.
23 And now a year later they're saying, Oh, wait. Except
24 your client's rights against these gentlemen were, in
02:19:02 25 fact, affected. In fact, they're gutted. And you

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02:19:05 1 don't have any rights against these gentlemen anymore.

2 And they can't do that. So by agreement, the

3 rights my client had against Duslak and Sesman before

4 the settlement are the same rights that he has after

02:19:16 5 the settlement. Whatever this agreement does, the one

6 thing it absolutely does not do is in any way release

7 or even impact any of Dr. Russo's rights against Duslak

8 and Sesman.

9 I made sure that's exactly what the agreement

02:19:30 10 said. And you can't tell me when we put the agreement

11 together that you're not at fault because these guys

12 are not your employees. And then tell me a year later

13 that the purpose of the agreement was to release them

14 as your employees. That's ridiculous, Judge. And we

02:19:44 15 would not have settled with Sunrise had Sunrise told us

16 what we're now finding out through the declaratory

17 relief action that these gentlemen were their

18 employees.

19 Because what happened in the case is initially

02:19:57 20 it appeared Cox had dug this trench. And I know your

21 Honor has seen the photographs and know what we're

22 talking about. There was dead dirt where there was no

23 grass growing as a result of a recent trench that had

24 been dug. And this cable was exposed.

02:20:12 25 And in the case Cox came out and provided

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02:20:15 1 evidence that it had not dug that trench. That it had
2 laid the wire back in, like, 2013. Like, years before.

3 And so once that evidence came out, it was
4 obvious then the only person or entity that would have
02:20:26 5 ever dug the trench would have been the gardeners. And
6 they were our main defendants at that point. And we
7 pursued them. And we had the default against them.

8 And we would not have released -- that's one of the
9 reasons we're releasing Sunrise because they're saying,
02:20:41 10 Don't worry. They're not our employees. You can still
11 go after them. You maintain all rights. Don't worry
12 about it.

13 And so we released Sunrise, excluding Duslak
14 and Sesman, because we knew these -- if they'd have
02:20:51 15 said they are our employees, we wouldn't have released
16 them because they settled for a fraction of what the
17 case was actually worth when you look at the ultimate
18 judgment.

19 And, so, you know, that's the problem that I
02:21:01 20 have, your Honor, is when -- when you tell me in the
21 settlement agreement your client's retaining all rights
22 against these gentlemen, and then you come back a year
23 later, and say, Well, when we say he's retaining all
24 rights, we don't mean all rights. We mean only some of
02:21:19 25 his rights.

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02:21:20 1 But that is not what they said. And they
2 certainly never said it in October. And even we put
3 the agreement together, again, that's not what the deal
4 was. The deal was my client retains all of his rights.
02:21:30 5 And so if you're going to enforce the contract, you
6 have to enforce it by declaring the independent
7 contract language null and void, since they're now
8 claiming that affects my client's rights. And then the
9 settlement stands.

02:21:42 10 And it was not actually a pivotal point for,
11 for Sunrise that they were employees until almost a
12 month after the deal was already done and placed on the
13 record and the jury venire had been sent home.

14 And so then we took the judgment against
02:22:03 15 Duslak and Sesman as individuals. I mean, I didn't --
16 I've done exactly what I said I was going to do. And
17 Sunrise has been aware every step of the way. And the
18 judgment doesn't say, and it can't say that these
19 gentlemen are Sunrise employees. So there's nothing --
02:22:16 20 they want -- they want to enforce the settlement or
21 enforce -- put some kind of enforcement. There is
22 nothing to enforce.

23 The judgment doesn't indicate that they're
24 Sunrise employees. It just says it's against them as
02:22:27 25 individuals. And, again, I can't make it conditional.

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02:22:29 1 I just -- it's not something you can do.

2 Now, there has been a lot of aspersions cast
3 my way over the course of these motions. And, your
4 Honor, they're not -- they're not justified.

02:22:44 5 In this case Sunrise has no one but itself to
6 blame for what went on here. The evidence is coming
7 out, and that's some of the records we showed you, they
8 knew back in 2016, 2015 and 2016 actually, that Sunrise
9 was paying these gentlemen pursuant to their social
02:22:59 10 security numbers.

11 We anticipate we're going to get W-2s here
12 before too long. The records we have right now shows
13 they paid their Medicare, Medicaid, FICA. They paid
14 unemployment. You don't pay unemployment benefits to
02:23:14 15 independent contractors. You pay unemployment benefits
16 to employees.

17 They knew that Sunrise owned the equipment
18 that Duslak uses and Sesman used to -- with the golf
19 cart and the lawn mower and all the other equipment
02:23:26 20 that was going on, that they were using. They knew
21 they had micromanaged Duslak and Sesman. I think
22 Mr. Morales apparently was pretty adamant telling these
23 guys exactly what to do and when to do it. They knew
24 that they had to work for Sunrise only. They knew all
02:23:38 25 of this. And yet, they still took no steps to defend

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02:23:42 1 them.

2 And certainly, you know, I hope they're not
3 blaming me for the fact that they didn't defend them
4 from, I think, it was November of 2017 when it first
02:23:52 5 came to light that they said, No, it's -- initially we
6 sued a different -- a different lawn maintenance
7 company. Because that's who Sunrise initially told us
8 was their lawn care company, J and G. And then they
9 switched. Like November of 2015 it came to light,
02:24:07 10 Wait, it's actually these other gentlemen.

11 They had all that time. 21 months before we
12 even went to trial to, if they wanted to file a dec
13 action or take some steps to see, Hold on, what are
14 these? Investigate. They had all that time to do
02:24:21 15 that.

16 And, apparently, I mean, I assume they've
17 never done it or else they did it and tried to hide it.
18 Mr. Fink is correct. I'm not accusing him of any
19 improper conduct at all. I have no doubt that when he
02:24:31 20 told us -- obviously, what he told us was incorrect.
21 When he had said there's no evidence these gentlemen
22 were employees. There is ample evidence. It's coming
23 out now in the declaratory relief action. But I have
24 no doubt Mr. Fink was telling us exactly what his
02:24:43 25 clients told him. I don't accuse him of any nefarious

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02:24:46 1 conduct whatsoever.

2 But all I ever said in this case was no one
3 has ever -- no one has ever defended these guys. We
4 have defaults against them when we reached a
02:24:57 5 settlement. And I'm not releasing them in any way,
6 shape, or form. And Sunrise says it didn't defend them
7 because they're not employees. Okay, fine. Nobody
8 defended them. My client's not releasing them.

9 And unfortunately, you know, I guess, the
02:25:10 10 timing of this, and they want to -- in one of the
11 motions they try to blame me for the timing. In fact,
12 I think they said I laid in wait. I didn't lie in
13 wait. This has all come to light now because QBE filed
14 its dec action in November of last year.

02:25:26 15 Then in answering that dec action, Duslak and
16 Sesman came in and said, Whoa, hold on. Why is there a
17 judgment against us as individuals? We should have
18 been defended. We're employees.

19 And only then now apparently Sunrise finally
02:25:41 20 looked at the actual evidence and, Oh, the things we
21 said about their employees and they're -- they're --
22 they're not -- they're independent -- or they're not
23 employees is actually inaccurate.

24 And I think it's inappropriate for Sunrise
02:25:54 25 to -- and, again, I don't want -- I don't want to

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02:25:56 1 accuse Mr. Fink of anything. But to tell me and your
2 Honor for two plus years they're independent
3 contractors, they're independent contractors, and then
4 entice me into a settlement where Sunrise gets out
02:26:06 5 cheap with the understanding that my client can sue and
6 pursue Duslak and Sesman and retains all rights against
7 them, and then come back a year later, and say, Oh,
8 except you can't. Because my client clearly retained
9 all rights.

02:26:20 10 Now, there's a question that's brought up in
11 the reply that was filed yesterday saying -- and
12 Mr. Fink mentioned it a little bit today -- where is
13 Duslak and where is Sesman? And they -- they invite
14 the Court to speculate and, I guess, imagine some kind
02:26:36 15 of -- suggested in the pleading yesterday that there's
16 some conspiracy with some evil scheme going on. Yet,
17 but we know exactly why Duslak and Sesman have not
18 joined the motion to set aside or amend the judgment
19 because Duslak and Sesman's counsel have said so in the
02:26:53 20 federal court case.

21 In the federal court case QBE filed the dec
22 relief and filed a motion to dismiss Duslak and
23 Sesman's counterclaim. And in response, Duslak and
24 Sesman's counsel filed an opposition where they said,
02:27:07 25 we're not asking to set it aside because there are no

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02:27:11 1 grounds to amend or set it aside. It's gone so far
2 beyond the deadlines under the rules, that I cannot in
3 good conscience under Rule 11 file a motion to set
4 those things aside. And I think it's disingenuous at
02:27:23 5 best for Sunrise to tell your Honor, Hey, look at the
6 fact, and wonder about why Duslak and Sesman aren't in
7 the case and never bothered to tell, your Honor, we
8 know exactly why they're not in the case.

9 Their counsel has said the motion is
02:27:38 10 meritless. And it absolutely -- it is meritless. And
11 it's interesting. Initially Sunrise's motion seemed
12 to -- they seemed to mask what was really going on.
13 Because what's going on here is Sunrise made a mistake.
14 And the mistake they made they assumed, with apparently
02:27:58 15 not even looking at the evidence in their own records
16 that Duslak and Sesman were not employees. Despite all
17 they knew, which I talked about a little bit ago.

18 And so they didn't defend these guys. They
19 just ignored whatever evidence was there. Didn't
02:28:10 20 appreciate it. Never defended them. And the insurance
21 company waited until a year after judgment was entered
22 to finally file a dec relief action.

23 And now that they filed the dec relief action,
24 the gentlemen have come in and said, wait, we are
02:28:23 25 employees. Now they want to say, Okay, well, hold on.

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02:28:25 1 Since these gentlemen are now claiming even though --
2 again, Dr. Russo, in my office, we've done everything
3 we said we would do. We took a -- we took -- we got a
4 judgment against these gentlemen as individuals. Not
02:28:39 5 against Sunrise. Just as them as individuals. And
6 we're asking them as individuals to pay it.

7 And now Sunrise comes in and says, Wait, since
8 they're in the dec action saying that they're
9 employees, we want to start all over again, and we want
02:28:53 10 to defend them this time.

11 And they -- and they want the Court to, I
12 guess, amend the judgment or set it aside and rectify
13 the mistake they've made. And they're not permitted to
14 do it. Because under NRCP 60(b)(1), you can set aside
02:29:06 15 a judgment for mistake, inadvertence, surprise, neglect
16 or under (2) even newly discovered evidence. But you
17 have to bring that motion within six months. And
18 they've never done that.

19 It sounds like Mr. Fink today mentioned
02:29:17 20 that -- I guess he's admitting they are asking for
21 leave under 60(b)(1) and (2). But they can't have it.
22 It's beyond the sixth-month timeframe, and it's no
23 longer something that's permitted.

24 And there are no rules that say that those --
02:29:34 25 Judge, that those deadlines are tolled. In fact, the

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02:29:37 1 chief judge mentioned in her COVID order that rules
2 such as 60(b)(1) through (3), that Rule 60 says cannot
3 be tolled are not even affected by her COVID order.

4 And so there is no tolling. They're in here
02:29:53 5 asking a year later after judgment was entered for
6 something they have to ask for within the first six
7 months.

8 Now, I want to go through the chronology
9 because now the complaint was filed, and the
02:30:09 10 complaint -- I'm sorry, the amended complaint was filed
11 in late 2017, early 2018. And it says that these
12 individuals acted through employment. It mentioned the
13 defendants and each of them, and talks about employment
14 and employees. But for whatever reason, from November
02:30:27 15 of 2017 when it first came to light these gentlemen
16 were the actual landscapers through November 2019 when
17 the settlement was put together, Sunrise and its
18 carrier never defended these gentlemen.

19 Then we reach an agreement on November of --
02:30:42 20 well, we reached an agreement October 18, 2019, or
21 20- -- yeah, 2019. We put it on the record with no
22 discussion whatsoever about employee, employee
23 contract, or anything. And then between October and
24 November we ended up putting the agreement together.
02:31:00 25 And on October 31st of 2019, we provided Sunrise with

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02:31:06 1 the application for the default judgment. And Sunrise
2 didn't oppose it. Nobody opposed it.

3 And your Honor may remember. We took
4 painstaking steps. I mean, we dotted every i and
02:31:17 5 crossed every t to make sure everyone had due process
6 and the judgment was properly entered.

7 I don't know if the Court recalls, but when
8 the settlement was put in place, one of the comments I
9 made was, Your Honor -- and this was on October 18. I
02:31:32 10 said, You've -- we've reached a settlement after I
11 concluded my voir dire.

12 And I said, Judge, you've already got the
13 exhibit binders. We have submitted them to you. And I
14 know you have time available next week because trial is
02:31:46 15 not going forward anymore. So if you have time and you
16 have the evidence, we just come in next week and prove
17 this all up. And your Honor very politely reminded me
18 that, no, we have got to take the steps in turn
19 appropriately to properly give notice and due process
02:32:00 20 to everyone involved.

21 And so we did that. And October 31st, 2019,
22 we put the application for default judgment together,
23 and we served it on everybody, all the active parties.
24 We even mailed it to Duslak and Sesman. So Sunrise and
02:32:15 25 everyone else knew what we were doing.

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02:32:17 1 They knew we were asserting Duslak and Sesman
2 were at fault. Be in default. They knew we were
3 asking for \$25 million to compensate Dr. Russo. They
4 knew we were asking for judgment against Duslak and
02:32:27 5 Sesman as individuals. I mean, they were given notice
6 of everything we were looking to do.

7 And if Sunrise or anyone else wanted the
8 judgment to say something different, like they claim
9 now they want to do, or not say something, then the
02:32:41 10 time to request that from the Court was in November and
11 December of 2019 when everyone got the application and
12 saw exactly what we were asking for.

13 But they didn't object. They didn't do
14 anything. You know, nobody did. And then we advised
02:32:54 15 Sunrise and everyone else of the hearing date. Sent
16 notice out that this is the hearing date by which
17 Dr. Russo will come in and testify.

18 And, again, if they wanted to come in and
19 argue, well, hold on or request a transcript now that
02:33:09 20 they seem to be upset that there's no transcript.
21 Mr. Fink made the comment that we have no idea what
22 went into the judgment. They knew exactly what went
23 into the judgment. They received the application.
24 They knew exactly what we were submitting. In fact,
02:33:21 25 they had the exhibits that we submitted at trial.

02:33:23 1 They knew what was going on here. They didn't
2 care. It didn't -- they weren't bothered with it
3 because they hadn't apparently done their due diligence
4 and found out that perhaps these gentlemen were
02:33:33 5 employees. But they let us preserve all of our rights
6 against them. And that's exactly what we did.

7 And so they didn't come to the hearing. They
8 didn't make any, any issue at the hearing that -- and
9 they can't come in now a year later, and say, Well, we
02:33:47 10 wanted to be heard on this back then in December of
11 2019, but we didn't do anything. So now hear us a year
12 late. The rules just do not permit that.

13 So then after not defending these gentlemen
14 for over two years, not opposing our application for
02:34:03 15 default judgment, not appearing at the prove up
16 hearing, Sunrise was then given notice of the default
17 of the entry of judgment in December of 2019.

18 And under the rules, and I don't see a tolling
19 statute actually in 59(e), but we've got a rule that
02:34:21 20 the only purpose of 59(e) is to say a motion to alter
21 or amend the judgment must be filed no later than 28
22 days after written notice of entry of judgment.

23 So even in December of 2019 if they -- when
24 they got the judgment and they received it, they had
02:34:39 25 notice. They had due process. They had 28 days if

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02:34:43 1 they thought, Wait, this says something we don't want
2 it to say and this does something we don't want it to
3 do. They had 28 days to come in and ask to change it,
4 and they didn't do that. Again, no one did.

02:34:52 5 And if this is so horribly worded and clearly
6 as wrong as they say it is now, why didn't they do
7 something within the 28 days. And it's because, again,
8 this is based on their mistake, their neglect, their
9 inadvertence --

02:35:04 10 MR. FINK: Your Honor, I'd like to -- your
11 Honor, I'd like to object to all this. None of this is
12 in the papers as far as when this was served and all
13 that stuff. None of this is in the papers as to when
14 Mr. Sampson claims that the defendants were served with
02:35:16 15 the papers.

16 And I think it's improper to be bringing it up
17 for the first time in oral argument.

18 MS. SAMPSON: No. We absolutely argued in
19 opposition to the motion to set aside that they're way
02:35:29 20 past the deadline because notice of entry went out in
21 December of 2019. That was -- that was a clear
22 argument --

23 MR. FINK: No, no. I agree. I agree he
24 argued that. But he never once in his opposition or in
02:35:40 25 any of his pleadings argued that we received notice

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02:35:43 1 that the default judgment hearing was taking place as
2 well as the exhibits he was using.

3 And, in fact, I'm looking through my computer
4 right now. I don't see it. So I'm not -- certainly
02:35:53 5 not saying that it would not be beyond my office for
6 making a mistake and not filing something properly.
7 But, one, I'm not seeing it. And, two, that wasn't in
8 the papers.

9 MS. SAMPSON: Notice of hearing. We can pull
02:36:10 10 it up. But, I mean, this -- the Court stayed on top of
11 this, I mean, as we put this together and made sure we
12 did everything we were supposed to do to make sure
13 everyone got notice of everything we did.

14 And then there was no -- due process was given
02:36:30 15 right down the line. And if they're going to claim
16 that they didn't get notice of something, I mean, I'd
17 like to see proof of that because it's just -- it's
18 just not -- not accurate.

19 MR. FINK: Well --

03:07:54 20 (Multiple speaker cross-talk)

21 MR. FINK: I'm sorry, Peggy.

22 I can't prove something I don't have. So I'm
23 telling you right now on the record I'm looking at my
24 database. I don't have it. Again, my office has been
02:36:57 25 known --

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02:36:58 1 THE COURT: And when you're saying --

2 (Multiple speaker cross-talk)

3 THE COURT: When you're saying --

4 MR. FINK: More importantly --

02:37:03 5 THE COURT: -- "I don't have it," are you

6 saying you don't have notice of the default judgment

7 prove up hearing; is that it?

8 MR. FINK: I'm saying -- I'm saying two

9 things, Judge.

02:37:11 10 One is that Mr. Sampson never talked about

11 this particular issue in any of his papers as far as

12 serving the defendants or serving my client with the

13 notice of the proceedings, number one.

14 And then number two, is I'm looking right now,

02:37:22 15 and I don't see that I have it. Again, that I have --

16 that I do have the actual notice. So I'm talking about

17 two things.

18 Had he addressed that in his papers we would

19 have -- I would have tried to find and see if we did

02:37:33 20 have it somewhere and it's just misfiled.

21 But as I'm looking at my Russo database, it's

22 not there. I have the notice of entry of order. That

23 I have. But I'm not seeing that I have the --

24 MS. SAMPSON: It was issued by the Court. It

02:37:48 25 was issued by the Court pursuant to what the Court does

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02:37:52 1 now in notices of hearing. Went out on October 31st,
2 2019, at 4:17 p.m. from the Court from the clerk.

3 Notice of hearing. Please be advised
4 plaintiff's application for judgment by default has
02:38:05 5 been set for hearing on December 17, 2019, 9 a.m., RJC,
6 Room 3H. And then it gives the address the Regional
7 Justice Center.

8 So, I mean, it's right in the court records.
9 They had notice of the hearing --

02:38:17 10 MR. FINK: Okay.

11 MS. SAMPSON: -- of the hearing.

12 MR. FINK: Thank you. Actually, I do have
13 that. So thank you, David. I appreciate that.

14 But more important, Judge, this wasn't argued
02:38:25 15 in the papers. But I'll -- I'll apologize for
16 interrupting, and I'll stop talking.

17 MS. SAMPSON: Okay. Well, at this point the
18 issue they have is that their request to set it aside
19 for mistake, inadvertence, or newly discovered evidence
02:38:42 20 was not brought within six months of them getting
21 notice of entry. I assume there is no objection, no
22 issue, no question they received notice of entry of the
23 judgment. And they saw how it was worded, and they saw
24 what it was, and they saw it was against these
02:38:55 25 gentlemen as individuals on December 19, I'm sorry,

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02:38:58 1 December 17, 2019.

2 And they've never received -- (telephonic
3 audio glitch) -- so they had it and, unfortunately, for
4 Sunrise is you have 60(c)(1) that says you can't bring
02:39:12 5 a motion to set aside or amend the judgment or for
6 relief from a judgment more than six -- from a stay for
7 neglect or anything like that, unless it's withing six
8 months of them getting notice of entry. And they just
9 never did that.

02:39:25 10 And so they come in, and they say, Well, I
11 guess, set it aside for clerical error. Well, there is
12 no clerical error. The judgment is entered against
13 Duslak and Sesman exactly as requested in the
14 application for default judgment. Sunrise did not
02:39:42 15 oppose. So I -- I can understand if it said this
16 judgment is against Duslak and Sesman as employees of
17 Sunrise. They would have some reason to complain and
18 issue and say, Well, hold on. There is a clerical
19 issue here. But it doesn't say that. We say we're
02:39:58 20 taking our judgment against these gentlemen. We
21 reserve all rights against these gentlemen. And our
22 judgment is against these gentlemen.

23 So then they mention in the motion, they say,
24 Well, the motion -- the judgment is void. But they
02:40:11 25 don't indicate how it's void. And we have case law

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02:40:15 1 from the Nevada Supreme Court misty Management versus
2 District Court that says it's void if the Court didn't
3 have jurisdiction over the individuals or over the
4 subject matter which is clearly not the case.

02:40:27 5 And, I mean, the Court had jurisdiction.
6 These were all Clark County residents at the time the
7 incident took place. And it involves a negligence
8 premises liability. The Court has jurisdiction over
9 the people and the subject matter. And they don't even
02:40:41 10 argue that it's -- that it's somehow -- that there's an
11 issue with jurisdiction. So it's clearly not the case.

12 Then, I think 60(b)(4) -- (5) says, well, if
13 it's been satisfied or released. Well, certainly
14 that's not -- certainly -- definitely not been
02:40:57 15 satisfied. That's for sure. And it hasn't been
16 released either. Because, again, as I mentioned
17 before, the agreement even says if there's anything in
18 here that impacts or releases at all any of Dr. Russo's
19 claims against these gentlemen, it's null and void.

02:41:11 20 And so now they've turned to this catchall.
21 But under the catchall, it has to be some grounds
22 that's different than what's already enumerated. You
23 can't say we made a mistake, and we didn't bring it
24 within six months. So now that we're more than six
02:41:27 25 months out, we want to come in under -- under, what is

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02:41:31 1 it, 60 -- 60(b)(6) or, yeah, (6) I think. No. It's
2 got to be something different. And there is nothing
3 different.

4 This is just a simple issue of Sunrise
02:41:40 5 apparently didn't view the evidence, didn't realize
6 that these gentlemen, in fact, were their employees, so
7 they never defended them. And as a result, default
8 judgment got entered.

9 They could have within the first six months
02:41:52 10 come in and said, Hey, we want to undo it. The Court
11 could have heard that.

12 But you can't come in a year later. I mean,
13 60(d)(3) -- not 60(d)(3) -- 60(c) -- 60(c)(1) makes it
14 very clear you can't bring this motion this late.

02:42:10 15 And so, you know, at this point in time, I
16 think Sunrise has tried to claim now, Well, this was an
17 important fact in the settlement that these guys were
18 not employees, but they didn't even bring it up when we
19 put the settlement on the record. They didn't even --
02:42:28 20 show me at any point in time before the venire panel
21 was dismissed where they said, We want -- we have an
22 issue with whether they're employees or employers or
23 not. They didn't say any of that.

24 Instead, what they said was that they agreed
02:42:42 25 with me when I said this settlement will not affect my

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02:42:45 1 client's rights against these gentlemen in any way,
2 shape, or form. And the settlement won't affect my
3 client's rights against in any way, shape, or form.
4 And they agreed, Judge. That's the deal they made with
02:42:55 5 the venire panel in the hallway. That's the deal they
6 now need to stay, stick to now that they see -- now
7 that the jury has been dismissed.

8 And so there's just -- there's no grounds
9 anywhere. And if they want to argue in the federal
02:43:10 10 court case that they're Advanced -- these guys are
11 Advanstaff employees, or they want to argue some other
12 justification for what they've done, they can raise all
13 that in the federal case.

14 But in this case, when we reached a
02:43:22 15 settlement. I made it clear from October 18th, 2019,
16 this settlement does not affect my client's rights
17 against these gentlemen. And Sunrise agreed.

18 And so I don't know any additional questions
19 the Court has. But we also did raise the Doe versus La
02:43:39 20 Fuentes case that -- and that is something also that
21 Mr. Fink agreed in the November 7 hearing. He said,
22 Look, even though they're independent contractors, they
23 still may have rights to coverage.

24 And that's all we've asserted in the dec
02:43:54 25 action, Judge. And there is two grounds under which

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02:43:56 1 even someone with -- and that is with the Doe versus
2 La Fuentes. You can have the contractual label of
3 independent contractors and yet still qualify for
4 coverage as an employee.

02:44:09 5 And there's two ways they do that. One is
6 under the plain language of the insurance policy
7 itself. I mean, the QBE policy flat out says that the
8 covered employees includes any natural person in the
9 service of Sunrise, who Sunrise compensates and whom
02:44:27 10 Sunrises directs what they've done.

11 And that was what our counterclaim said was
12 under the plain language of the insurance policy,
13 because I know -- I know QBE raised some issues. Set
14 this aside because of claims we were making in the dec
02:44:40 15 action.

16 We're not making those claims by the way. The
17 initial counterclaim said that they qualify under the
18 policy, under the definition of the policy, and then
19 made some references to employee.

02:44:51 20 And then we also have again from Doe vs.
21 La Fuentes that the economic realities test sets out --
22 and in the counterclaim set out various details in the
23 economic realities test. Said these are the factors.
24 And here's how it falls in favor of them qualifying as
02:45:09 25 employees under the economic realities test.

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02:45:11 1 But the issue now is moot because when Sunrise
2 brought -- or I'm sorry. When QBE brought up it to my
3 attention and said, Hold on. These -- you've mentioned
4 in here you called them employees.

02:45:23 5 I said, You know what, I'll just withdraw
6 that. I think it was eight days after we filed it, and
7 this was over the Christmas holiday even. We withdrew
8 the allegation that they were employees. And then
9 within 20 days we withdrew the whole counterclaim.

02:45:34 10 So at that point, you know, it's -- my client
11 is not going to claim they're employees. They'll say,
12 Look, we got a judgment against them as individuals
13 because Sunrise told us they were independent
14 contractors.

02:45:45 15 And now, in the dec action we can determine,
16 and the Court can determine, whether that was an
17 appropriate thing or whether under Century Surety vs.
18 Andrew the carrier has breached its duty to defend and
19 now is responsible for paying that judgment.

02:45:59 20 And so I know your Honor asked the question
21 how does it impact the settlement. I think it just
22 leaves us back on October 18th doing the settlement we
23 placed on the record. Which was my client reserves all
24 rights against these gentleman. And there was no
02:46:14 25 discussion and there is no discussion about employees

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02:46:16 1 or contractors or anything like that.

2 I don't think they have a right to ask for
3 anything that wasn't on the record before the jury
4 venire was dismissed. So I don't know if the Court has
02:46:27 5 additional questions, I'd be happy to answer.

6 THE COURT: I don't have any questions,
7 Mr. Sampson. I don't have any additional questions at
8 this time.

9 Mr. Fink.

02:46:44 10 MR. FINK: Thank you, Judge. I got a lot to
11 unpack through that. I'm going to try to get through
12 this as quickly as I can.

13 One, I'm amazed that the plaintiff's counsel
14 is not putting this entire thing on us. As the Court
02:46:59 15 is no doubt aware from reviewing the transcripts, and
16 perhaps your memory is better than mine, is that it was
17 Mr. Sampson who was the one that proposed the language
18 that limited his claim to them being independent
19 contractors. It wasn't me that proposed it.

02:47:14 20 So when he says that we enticed his client to
21 sign this agreement, it's a -- it's a convenient memory
22 as to how things happened. It's a convenient way to
23 put it.

24 Mr. Sampson also talks about a number of, what
02:47:27 25 he called, facts that have arisen after the settlement.

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02:47:31 1 I'm not in the federal action, but from what I
2 understand it's a very charitable review of what's been
3 going on.

4 And the only evidence that that has come up
02:47:43 5 that this Court has seen that I'm aware of that's been
6 disclosed in the federal action and where the records
7 from this -- from that company, the PEO company which I
8 don't have the names in front of me, that was the
9 subject of Mr. Sampson's third supplemental -- or
02:48:02 10 second supplemental opposition to our motion to set
11 aside.

12 And as the Court can see from reading that,
13 it's pretty clear that if that document is accurate,
14 Sunrise didn't pay Mr. Duslak and Sesman. That
02:48:18 15 Advanstaff company that -- the Advanstaff company did
16 on behalf of PW James.

17 So Sunrise -- the name Sunrise is on that
18 document, but it's pretty clear what it says. And so
19 it's -- and I understand why Mr. Sampson would want to
02:48:30 20 read it the way he does, but that's not the way you
21 read it. And I think the Court can see that too.

22 We talked about the fact that our motion
23 really is based on I think for the Rule 60 -- 60(b)(6).
24 Any other reason that justifies release. And
02:48:48 25 Mr. Sampson says that, well, that's going to mean

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02:48:51 1 something different than the grounds that might be
2 discussed in (1), (2), (3), and (4), or
3 (b)(1)(2)(3)(4), but I don't know if there's any law
4 that says that.

02:49:00 5 But if you're looking for, quote, "any other
6 reasons that justifies relief," all you got to do is
7 read the record that Mr. Sampson just made in the last
8 45 minutes as to why it justifies relief that be set
9 aside.

02:49:14 10 I found it interesting that he said that in
11 the -- in the pleadings that, I haven't seen these, but
12 the pleadings that Duslak and Sesman's counsel did in
13 the federal action said that, well, they didn't think
14 they can put it aside because it would be a Rule 11
02:49:27 15 violation.

16 Again, the Court needs to see that for what it
17 is. I know the Court does see it for what it is. And
18 it's a more -- I'm more convinced by that statement
19 that this whole thing was set up as opposed to just a
02:49:38 20 happy coincidence.

21 I can tell you that if somebody had a default
22 judgment against me under any circumstances for
23 25 million you can bet I'd be doing everything I could
24 to get that set aside. Well, and on the other side of
02:49:52 25 it, I'd be trying to get somebody else to pay it.

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02:49:55 1 So they've certainly done number two, but they
2 haven't done number one. And that absence says
3 everything that this Court needs to do. And that
4 certainly, again, supports why under Rule 60(b)(6) any
02:50:07 5 other reason that justifies relief.

6 Mr. Sampson talked a lot about the settlement
7 agreement. Again, it's just so intertwined. He wants
8 the Court to completely ignore the stipulation that he
9 proposed, and then we signed, that they were
02:50:26 10 independent contractors. That for the purposes of this
11 litigation, for all purposes of this litigation. All.
12 Under the Black's Law Dictionary tells us what "all"
13 means. For all purposes they're independent
14 contractors.

02:50:39 15 So if we go through everything he's saying
16 including the severance clause that says sever out the
17 illegal, invalid, or unenforceable provisions, which
18 this stipulation is none of those three. But it points
19 to other language and says that -- basically says that
02:50:54 20 it's voided.

21 All it says to me, Judge, is that he never had
22 any intention of complying with this stipulation that
23 he proposed himself, never had any intention of
24 complying with it.

02:51:11 25 He goes through a lot of the records, at

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02:51:15 1 least -- at least the parts that benefit him, from the
2 October 18 hearing and I think the November 7th
3 hearing.

4 I'll point out again, this is part of the
02:51:24 5 other motion, but I think it's Rule 750 as far as to
6 enforce the settlement. I was pretty clear I didn't
7 have my client's consent on any terms. We had the
8 amount that we all agreed to. And it was Mr. Turtzo
9 who was representing Cox.

02:51:41 10 THE COURT: I mean --

11 MR. FINK: Who said --

12 THE COURT: Mr. Fink, I don't want to cut you
13 off. We're going to take a break right now for just 15
14 minutes.

02:51:47 15 MR. FINK: Sure.

16 -o0o-
(Recess)
17 -o0o-

18 THE COURT: All right. I guess, we can go
19 back on the record. Is everyone here that's noted
03:07:23 20 their appearance? I just want to make sure. Are we
21 ready to go?

22 Mr. Fink.

23 MR. FINK: I'm ready.

24 MS. FUNAI: Julie Funai for Mr. Scarcelli,
03:07:36 25 yes, your Honor.

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03:07:37 1 MR. FINK: All right, your Honor. Thank you.

2 I want to go back and talk real briefly again

3 about Rule 60. So Rule 60(b)(6), again, has any other

4 reason that justifies relief, getting relief from a

03:07:50 5 judgment or order. And the timing of that motion under

6 Rule (c)(1) has to be made within a reasonable time.

7 And, again, as I pointed out that we were

8 served. The HOA was served with Duslak and Sesman's

9 third-party complaint in the federal action on

03:08:06 10 January 21st, which is the same day that this motion

11 was filed. So, again, hard to be any faster than that.

12 But more important, under Rule 60(d) or just

13 as important says other powers to grant relief. This

14 Rule, Rule 60 does not affect the judgment's finality.

03:08:23 15 I'm sorry. That's the wrong one. Under (d), Other

16 Powers To Grant Relief. This rule does not limit a

17 Court's power to, One, entertain an independent action

18 to relieve a party from a judgment, order, or

19 proceeding.

03:08:37 20 So Rule 60, despite there being timeframes to

21 bring motions under (b)(1), (2), and (3), which is

22 mistake, inadvertence, surprise, excusable neglect,

23 newly discovered evidence or fraud. Those time

24 limitations do not apply to Rule 60(b)(6).

03:09:01 25 And this Court has broad discretion. And then

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03:09:07 1 has broad discretion -- and I'm paraphrasing here -- to
2 right a wrong. And the wrong is, again, everything
3 you've heard so far related to the settlement
4 agreement.

03:09:19 5 Going back to some of the things that
6 Mr. Sampson discussed.

7 He mentioned, if I heard him right, that he
8 said that there are W-2s in the federal action that are
9 going -- that are going to support the fact that Duslak
03:09:32 10 and Sesman are Sunrise employees. I think that's what
11 he said.

12 It's my understanding that despite Duslak and
13 Sesman's claim that they have W-2s, they have not
14 produced those at any point. And may not produce them
03:09:48 15 because -- maybe because they don't exist.

16 Especially since the Court --

17 (Multiple speaker cross-talk)

18 MR. FINK: Go ahead.

19 MS. SAMPSON: My comment earlier was we
03:09:56 20 anticipate there would be W-2s produced.

21 MR. FINK: Thank you. So I want to thank you
22 for correcting me, Dave.

23 But as I understand it though, Duslak and
24 Sesman's counsel have been claiming and asserting that
03:10:09 25 they have W-2s. And it's my understanding that they

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03:10:12 1 have yet to produce those W-2s. And what I'm telling
2 the Court, it's my understanding that from the things
3 that have been done after this case that those --
4 there's not going to be a W-2 from Sunrise to them that
03:10:25 5 exists.

6 And it's, again, important to point out, and
7 I've said this a couple times, but I want to be clear
8 on this since we're going through it in a progression
9 that there was never a claim made in this case by
03:10:38 10 plaintiff that Duslak and Sesman were Sunrise's
11 employees.

12 And Mr. Sampson rather briefly pointed to his
13 amended complaint. And I want to read the language in
14 there what it actually says. The only language that
03:10:56 15 even comes close to asserting that they were employees
16 or that anyone was an employee is paragraph 20 that
17 says --

18 I'll go slow as I can, Peggy.

19 "At all times herein concerned or relevant
03:11:15 20 to this action the defendants, and each of
21 them, acted by and through their duly
22 authorized agents, service -- servants, workman
23 and/or employees then and there acting within
24 the course and scope of their employment and
03:11:33 25 scope of their authority for the defendants and

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03:11:35 1

each of them."

2

So what that was saying is that the defendants

3

that were named which were Cox, IES, Sunrise, Kevin

4

Bushbaker, PW James, Chris Scarcelli,

03:11:53 5

S-C-A-R-C-E-L-L-I, Richard Duslak, Justin Sesman and

6

J&G Lawn Maintenance were acting through their

7

employees, agents, servants, et cetera. So that's the

8

only thing in the complaint even mentions it other than

9

talking about Does.

03:12:11 10

So again, consistent with what I've been

11

saying all along. There was never an allegation that

12

Mr. Duslak and Sesman were Sunrise employees. So there

13

was never any investigations done on that, again, other

14

than to support the motion for summary judgment that

03:12:29 15

Sunrise filed that they were not responsible for the

16

alleged negligence of their independent contractors

17

which are Duslak and Sesman.

18

And as I pointed out several times before that

19

plaintiff, even in response to that motion, never said,

03:12:48 20

no, no, wait a minute. These guys are your employees.

21

So, of course, you're responsible for them.

22

So even under EDCR 2.20, I would say that's

23

waived too, but we don't even need to get this because

24

we have an agreement.

03:13:02 25

And plaintiff keeps talking about, Well, we

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Pursuant to NRS 239.053, illegal to copy without payment.

03:13:05 1 have this October 18th hearing, October 19th hearing.
2 There's four of them. October 18, October 19,
3 November 7, November 8th.

4 What's important is that pervasive throughout
03:13:16 5 these hearings is the Court saying, Look, you don't
6 want me, Mr. Sampson, to go and enforce a settlement
7 that you think was put on the record on October 18
8 because that's got all sorts of problems potentially.
9 You're better off with finality and you're better off
03:13:36 10 with having a written agreement. Well, that's what we
11 did.

12 We have a written agreement. So all of
13 Mr. Sampson's arguments related to what was or was not
14 said on this October 18 hearing are irrelevant because
03:13:51 15 we have a written agreement. That's the settlement.
16 Not October 18th. Not October 19th. Not November 7.
17 Not November 8.

18 But more important, as I've said in the papers
19 that the hearings on October 18 and 19 are enforceable
03:14:06 20 under Rule 7.50. There is no indication that they
21 weren't reduced to a minute order. There's nothing in
22 writing signed by the parties.

23 I certainly said, and I was very clear that I
24 did not have my client's consent on the terms said on
03:14:27 25 the amount. And that's the only thing we agreed on,

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03:14:28 1 everybody agreed on was the amount on the 18th.

2 And I don't want to put words in either
3 Mr. Scarcelli's or Bushbaker's counsel, but one or both
4 of them said the same thing. They need to talk to
03:14:39 5 their client.

6 And again, Mr. Turtzo on one of the hearings,
7 early hearings, and we cited this -- I think it was
8 October 18 -- that this will all be reduced to writing.

9 So there's really -- it's amazing to me the
03:14:51 10 amount of paper and air we've wasted talking about what
11 was agreed or not agreed to during the hearings when
12 the settlement that we should be talking about is in
13 the written agreement.

14 So with respect to the written agreement,
03:15:09 15 again, I find it absurd that Mr. Sampson says that,
16 Well, the HOA enticed him to sign this agreement
17 knowing that we were always going to argue that
18 regardless of what the language says in there that,
19 hey, these guys are released; right?

03:15:32 20 Again, I'll point out that it was Mr. Sampson
21 that suggested the language that's in the addendum
22 written in the supplement. And there was a little
23 soliloquy on that in the Court. Mr. Sampson read the
24 settlement, not all of it, in the November 7 hearing.
03:15:49 25 So I want to read the rest of it because I think it's

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03:15:51 1 important.

2 So he talked about -- so I said -- after he
3 brought up the whole issue with getting into the
4 stipulation on page 40. I said, "Mr. Sampson made an
03:16:07 5 interesting suggestion." This is page 40 lines 4,
6 starting line 4. "Mr. Sampson made an interesting
7 suggestion that I'd like to think about and that may
8 work. That if we state for the purposes of this
9 litigation they weren't employees, that may take care
03:16:20 10 of all this. I would just need to run that by my
11 people, but that may take care of all of our concerns
12 at that point. Then we can -- we can be done.

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

14 "MR. SAMPSON: It was my suggestion, so I
03:16:35 15 still totally agree with it."

16 Mr. Sampson goes on to say: "I would ask -- I
17 would ask just Mr. Fink has made a couple of comments
18 today, and I think the Court also echoed them, along
19 the lines of Duslak and Sesman, all rights against
03:16:48 20 them, anybody who insures them, you know, all of those
21 are preserved. They're not affected."

22 And Mr. Sampson read that -- read that when he
23 was making his claim.

24 But here's the important part. You go down to
03:16:59 25 page 41. And this is what the Court said. Page 41

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03:17:02 1 line 3.

2 "And I think he has no problem with that
3 because that was his idea. You know, so regarding the
4 fact that if they're independent contractors there's no
03:17:11 5 waiver of the right to seek coverage for this case. I
6 mean, I get that based on the insurance policy, and no
7 big there."

8 That's the issue. And when I kept saying
9 that, Hey, if he can get coverage under the QBE policy
03:17:28 10 or any other policy or them being independent
11 contractors, good for him. And I might have even said
12 "good for him" on somewhere on one of the transcripts.

13 So that was what leads to this stipulation
14 that's part of the settlement agreement that
03:17:44 15 Mr. Sampson wants to just ignore. And he points to
16 other language in there.

17 So all that says to me is either he agrees
18 that the stipulation was what we agreed to. And he's
19 saying that for all purposes of this litigation they're
03:17:58 20 independent contractors which means they're exclusively
21 not anything else.

22 We have a problem. And so when we talk about
23 it again, this is part of the motion work on the
24 settlement agreement, but we have an issue. And I
03:18:14 25 would say all -- based on that I would say all the

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03:18:17 1 representations that Mr. Sampson made when we were
2 trying to get the settlement agreement done baseless.

3 So under a contract interpretation, either my
4 client was induced by fraud to sign this agreement
03:18:31 5 because Mr. Sampson had no intention of ever complying
6 with the stipulation that he himself suggested.

7 Or it's unilateral mistake that my client
8 entered into this contract based upon mistake as to
9 what we thought Mr. Sampson was proposing and stating
03:18:49 10 to, or it's a mutual mistake -- mutual mistake. Pardon
11 me.

12 Either way, under contract principle that says
13 this settlement agreement has got to be set aside, and
14 not just for the HOA, everybody. Because this
03:19:00 15 settlement was based upon these core issues.

16 And Mr. Sampson has an interesting
17 recollection as to everybody's fault, at least what he
18 asserted was everybody's fault related to this
19 incidence, this alleged incident. That it was really
03:19:23 20 Duslak and Sesman who created this problem. And that's
21 why he took a little bit from the HOA. Well, that
22 wasn't exactly the way it played out as to why Cox paid
23 more. But the fact of the matter is everybody's
24 settlement was based upon the terms of this agreement.

03:19:40 25 And if Mr. Sampson is now going to invalidate

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03:19:43 1 any of the terms of the agreement, again, based on
2 other fraud or unilateral mistake or mutual mistake,
3 it's got to be set aside too.

4 But at the very least, what it shows you is
03:19:56 5 that the basis for him being able to continue on with
6 this case against Duslak and Sesman -- against
7 Mr. Duslak and Mr. Sesman was based upon the settlement
8 agreement.

9 So I'd say at the very least, this Court has
03:20:26 10 ample reason under Rule 60 to set aside the judgment,
11 which would make Mr. Duslak and Mr. Sesman thrilled.
12 Because now they don't have a worry about a \$25 million
13 judgment. And I'd love to hear their counsel come in
14 and say, yeah, that would be great. That would be the
03:20:43 15 best thing for us. But no. We're not -- I was
16 corrected by Ms. Splaine. I think I said that they're
17 asking for \$118 million. They're asking for
18 180 million from the HOA, which is why the HOA has an
19 interest in this entire thing.

03:20:59 20 So if the Court at the very least sets aside
21 this default judgment, which again the HOA is
22 apparently the only party that cares about it, then
23 Duslak and Sesman can defend themselves against these
24 allegations. And then they can deal with what's --
03:21:14 25 what's covered or not after the fact.

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03:21:17 1 Unless the Court has any other questions of me
2 on this particular issue I've got nothing left to add.

3 THE COURT: For the record, sir, I don't have
4 any additional questions for you on this issue.

03:21:34 5 MR. FINK: Thank you, Judge.

6 THE COURT: Yes.

7 MS. SAMPSON: Your Honor, your Honor, again --

8 THE COURT: Yes.

9 MS. SAMPSON: -- it was our motion to compel,
03:21:38 10 so I believe we ought to get a reply, an opportunity to
11 reply on that with all these things that have been
12 said.

13 THE COURT: And you can. And I just want to
14 be really clear on this because I realize that these
03:21:52 15 are really big issues for all the parties involved in
16 this litigation. I get it.

17 And before I render a decision, I'm going to
18 go back, review all the points and authorities, all the
19 supplements, everything.

03:22:05 20 Just as important too, and I think this is out
21 of fundamental fairness, and I'm also -- before
22 entering a decision in this case, I will deal
23 specifically with the motion to intervene. And I don't
24 mind saying, but my mind is pretty much open on that.
03:22:23 25 I'll issue a decision. If I issue a decision there

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03:22:26 1 where I hypothetically granted the intervention, I
2 would give counsel an opportunity to comment as far as
3 his joinder is concerned, and we'd come back.

4 I realize time is of the essence, and we'll
03:22:38 5 get this done very quickly.

6 And here's my point. And I think it's been
7 difficult for all of us over the last year or so to
8 function at the level you're used to, you know, because
9 we've had COVID. And it's impacted us all in many
03:22:53 10 different ways.

11 From a personal perspective, next week will be
12 the first time I will be in chambers regularly for
13 almost a year. And I don't mind saying that. And the
14 reason why that's important from my perspective, I can
03:23:06 15 tell you this, when I go back and review this, start
16 reviewing the points and authorities in this case, I'm
17 going to read the cases that have been suggested by
18 counsel. Just as important too, I'll take -- do a
19 little research on Rule 60 and so on.

03:23:22 20 And remember this too. If I have a question,
21 I'm not going to make a decision based upon a case that
22 has not been discussed. I'm not. But if I have a
23 question for you on that, I'll ask for additional
24 supplementation on that issue.

03:23:36 25 And so I just want everyone to know

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03:23:40 1 specifically what I'm going to do. Because I don't
2 want to cut anyone off.

3 And, Mr. Sampson, if you want to comment, of
4 course, you can, sir. It's a big case. It's a big
03:23:48 5 issue right now. I get that. And I get the importance
6 of it for everyone. And so I just wanted to tell you
7 what I'm going to do.

8 And with that in mind, Mr. Sampson, anything
9 else you want to add, sir? I know you wanted to -- you
03:24:01 10 had a few additional comments based upon what Mr. Fink
11 had set forth on the record, sir.

12 MS. SAMPSON: Yes, your Honor. Thank you.

13 So first of all, this idea that I was the one
14 that brought up that it was somehow an important
03:24:18 15 distinction as to whether they were employees or
16 contractors, that's absolutely not true. It wasn't
17 discussed at all, again, in the October 18, 2019,
18 hearing when we put the deal -- when we put it on the
19 record.

03:24:31 20 And Mr. Fink has made the comment and, again,
21 the aspersions -- Mr. Fink and I have gotten along
22 pretty well. Lately I got ratcheted up a little bit in
23 this last little comment by Mr. Fink. I'm going to try
24 not to respond in common. When Mr. Fink says that in
03:24:50 25 the October 18, 2019, hearing he made it clear he

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03:24:53 1 didn't have authority, Judge, that is not true. And I
2 urge you to read the October 18, 2019, transcript
3 because you'll see bottom of page 5 starting at line
4 24. This is Mr. Fink talking. "Your Honor, we have as
03:25:08 5 of last night about 4:30, 4:45 we have a global
6 settlement involving all the parties that are
7 involved."

8 He didn't say I don't have authority. He
9 didn't say I got to check with my client. In fact, I
03:25:21 10 ran, since we had the 15 minutes, in the break I went
11 to the index and looked to see if the word
12 "authority" -- well, first of all, I read through the
13 entire transcript and didn't see where he says anything
14 about I don't have authority. I got to check this out
03:25:34 15 with my client first in order to approve these terms.
16 I didn't see that anywhere. I don't think the Court
17 will see that anywhere.

18 And then for completeness sake I went to the
19 index. Looked up the word "authority" to see if -- or
03:25:44 20 "checked with my client" and I didn't see that
21 anywhere.

22 So when he says that somehow this
23 discussion -- and just think about it, your Honor, I'm
24 not about to let the jury leave, let the venire panel
03:26:01 25 go home unless we've got a deal. I'm not going to have

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03:26:04 1 it, well, maybe we have a settlement and maybe we
2 don't. If -- I'm not going to do that. And I would
3 never do that. And I didn't do that in this case.

4 We had an agreement. And that's where
03:26:16 5 Mr. Fink says at the bottom of, it was page 4, we
6 got -- we got a global settlement.

7 Was no -- the only thing that was up in the
8 air at all looking at the bottom of page 5 was the
9 parties did indicate that Sunrise would be seeking a
03:26:30 10 motion for a good-faith determination. But that was
11 it.

12 There was no we got to check on the terms.
13 And I'm not sure if my client will agree. And if they
14 said anything remotely like that, I would have said
03:26:41 15 bring the venire panel back in then. Because it's
16 either done or it's not. I'm not having it fall apart
17 later.

18 And so, no. This idea that there ought to be
19 an employee, that I somehow proposed the employee
03:26:51 20 distinction didn't come up at all in October. Then on
21 November 7th; Mr. Fink brought up the issue. He said I
22 want them released if they're employees. That was the
23 very first time he said anything. This is like a
24 month, three-some weeks plus after we had done the deal
03:27:06 25 and placed the terms on the record.

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03:27:08 1 Mr. Fink is now saying, Wait, I want -- I want
2 some issue if they're employees or independent
3 contractors. Never been discussed before.

4 And so he was the one that brought it up. I
03:27:17 5 was trying to propose a solution. And I didn't know if
6 Sunrise would agree to it or not. But as I was
7 standing there at the hearing, I said I have an idea.
8 My idea is, what if we agree they're not employees
9 or -- I'm sorry, yeah. What if we agree they're not
03:27:34 10 employees so long as my client still retains all rights
11 against them. That's what they want to keep ignoring.
12 They want to pretend like I never said that, and I
13 absolutely did every time it came up.

14 They keep wanting to say we said -- we agreed
03:27:49 15 they're employees, period. No. I didn't say they're
16 not employees, period. I proposed let's agree. And
17 Mr. Fink just read part of it. We'll agree they are
18 not employees, but, again, so long as my clients
19 preserves all rights against them no matter what.

03:28:02 20 That's what I proposed. And that's -- and
21 they can even agree to it on the 7th. They said --
22 Mr. Fink said, Let me think about that. I want to
23 consider it. That's the portion Mr. Fink just read to
24 you. And then when we put the agreement together, if
03:28:16 25 you'll read in the agreement, again, the bottom of

03:28:18 1 page 4 paragraph 4 subsection (2) in all capital
2 letters that if there's any language anywhere that is
3 contrary -- I'm sorry. If there's any language
4 anywhere that could be read to in any way impact
03:28:32 5 plaintiff's rights against Duslak and Sesman that's
6 deemed null and void.

7 And Mr. Fink for all the comments he just made
8 didn't even discuss that. All he said was, well, the
9 fact that he said it's deemed null and void indicates
03:28:45 10 to me that maybe there was some fraud working from the
11 very beginning. Well, there is no fraud, Judge.

12 I'm not violating this agreement. Even now
13 I'm not claiming they're employees. I've not claimed
14 they're employee. I discussed how they would qualify
03:28:57 15 for employment status under the contract, which is
16 exactly what Mr. Fink and I and your Honor discussed.
17 And so I discussed that. And I discussed how they
18 would qualify as employees for coverage, for purposes
19 of coverage under the economic realities test. But I
03:29:12 20 have never called them Sunrise employees. Again,
21 outside of that pleading where I'm discussing it under
22 the contract and under the economic realities test.
23 And to the extent that was pled at some point
24 and the alternative upon information and belief, it's
03:29:27 25 been withdrawn. It's gone. It's not something I'm

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03:29:30 1 doing. So for them to come in and say I've got some
2 plan to violate anything, I've withdrawn that. I've
3 taken that back. I'm not -- I'm not making any
4 allegations of them being employees at this point in
03:29:41 5 time. And I don't intend to.

6 The Court is going to look at the factors and
7 make a decision based on whatever evidence is
8 presented. And they're going to do that. But I've not
9 done that.

03:29:51 10 In terms of Mr. Fink's argument regarding
11 60(b)(6), he said, Well -- you know, seems to think
12 that you can use -- my comment was you can't use
13 60(b)(6) to try to get around to make an end run around
14 deadlines that are set forth in 60(b)(1) through (3).
03:30:07 15 And Mr. Fink's comment was, Well, I don't think that
16 I've seen any authority about that.

17 Well, the authority is the statute. You
18 cannot bring relief under -- from mistake, neglect.
19 And that's all this is. This is Sunrise made a
03:30:19 20 mistake. They thought these guys were not employees,
21 and it turns out they were. They want it set aside
22 because of that mistake and nothing else.

23 It's nothing I've done. It's nothing anybody
24 in the -- the Cox or IES or Bushbaker or anyone else
03:30:33 25 has done. This is Sunrise's mistake that they've made

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03:30:36 1 apparently.

2 And they can't set it aside for these reasons
3 a year after the judgment was entered. I didn't hear
4 any justification from Mr. Fink in his comments just
03:30:46 5 now as to why didn't you bring this up when you saw the
6 application? You saw the judgment was going to be
7 entered against these gentlemen as individuals. You
8 didn't take any steps to stop that. You've got the
9 notice of entry that said it was against these
03:31:00 10 gentlemen as individuals.

11 You didn't ask in the first 28 days under
12 59(e) to amend that. You didn't ask in the first six
13 months to set it aside. He was fine with that
14 language. And everybody -- nobody had any issue at all
03:31:13 15 with the agreement or the language until Mr. Duslak and
16 Mr. Bushbaker -- or Mr. Sesman answered the dec action
17 that QBE chose to wait until November 2020 to file.
18 And then when they said We believe we're employees, and
19 all of a sudden Sunrise's mistake came to light.

03:31:32 20 That's why we had the delay here. It took
21 them that long to realize the error. And now they're
22 asking for relief under 60(b)(1) well beyond the
23 six-month deadline, which they're not allowed to do.

24 And I think it's -- it's highly inappropriate
03:31:45 25 for Mr. Fink to make allegations against me where he's

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03:31:48 1 saying there is some kind of set up or conspiracy. I
2 can tell you right now I never met and never ever
3 talked to Mr. Duslak and Sesman -- or Mr. Sesman or any
4 counsel or anyone like that related to them until after
03:32:05 5 the dec action was filed.

6 So they want to put this thing together that
7 somehow we were all laying in the weeds or something.
8 It's ridiculous. I can tell you that did not happen.

9 QBE chose to file its dec action when it did,
03:32:18 10 and these actions have taken place as a result. And I
11 resent this allegation of setting something up or fraud
12 that was finally came out of Mr. Fink's mouth.

13 I absolutely resent that because it's not at
14 all anything I've done. Especially when I've come in
03:32:34 15 in the dec action and said, You know what, to the
16 extent I referred to them as employees, I take it back.
17 I withdraw it. I'm doing everything I can to abide by
18 the agreement.

19 I'm not claiming they're employees. It's not
03:32:45 20 my allegation. I've not changed anything at all. Now,
21 in terms of the -- if you look -- again, take a hard
22 look at that October 18, 2019, hearing because I
23 believe under 7.5 it is enforceable when it's placed on
24 the record. That it says specifically these are the
03:33:04 25 terms.

03:33:05 1 And I'm -- I'd like Mr. Fink to point us if he
2 can to the transcript where he says I don't have
3 authority. This thing isn't done yet. In fact, your
4 Honor even makes the comment that, Once Mr. Fink says
03:33:19 5 we have a global settlement, your Honor, says, All
6 right. That makes it moot, right?

7 And then the Court says -- I'm sorry. This is
8 Mr. Fink's comments: Well, we still need to have the
9 Court determine the settlement is in good faith.
03:33:32 10 That's all he says.

11 He doesn't say, Hold on. My client hasn't
12 approved it. Hold on. I don't have authority. Wait,
13 there's some terms that still need to be sorted out.
14 Doesn't say anything of that.

03:33:43 15 Your Honor asked, This is going to make the
16 trial moot, right? And he says, well, we still need to
17 have the good-faith -- the Court determine the
18 settlement is in good faith because of the further
19 actions Mr. Sampson is going to take against the
03:33:52 20 defaulted parties. And that's Duslak and Sesman.
21 That's it.

22 There was no, I don't have authority. There
23 was none of that.

24 And then I indicated, Yes, I agree. And as
03:34:01 25 long as the settlement does not impact my client's

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03:34:04 1 rights against these gentlemen in any way, shape, or
2 form, we have a settlement. And everyone agreed to
3 that. Now they want to turn around and say, no, it
4 doesn't.

03:34:10 5 Now what -- and they accuse me of ignoring the
6 referenced stipulation that says these gentlemen are,
7 worked as independent contractors. And I'm not
8 ignoring it. I'm abiding by it. My judgment doesn't
9 say they're employees. My judgment is against them as
03:34:27 10 individuals. My judgment can't say -- cannot say it's
11 against them as independent contractors.

12 They're, I guess, if they had DS, as Mr. Fink
13 put it, DS Lawn Service, I could have taken a judgment
14 against that company. But there is no such company.

03:34:41 15 It's just these -- and we didn't sue any
16 company. We sued -- as far as Duslak and Sesman, we
17 sued Duslak and Sesman as individuals. And our
18 judgment is against them as individuals, and it stands.
19 There is no cause whatsoever to set it aside.

03:34:55 20 Now what Sunrise wants to ignore, and I'm
21 waiting to hear from Mr. Fink what about this language
22 that says, I mean, Mr. Fink is claiming, as I
23 understand it, that this language of "as independent
24 contractors" limits my client's rights against Duslak
03:35:13 25 and Sesman.

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03:35:13 1 And then how do you explain then why you
2 signed an agreement that in all capital letters that
3 says if there's any language that could at all be read
4 to impact Dr. Russo's rights against these gentlemen,
03:35:23 5 it's null and void? How do you consider that
6 independent contractor language anything other than
7 null and void.

8 And then under the severance clause, the
9 remainder of the contract survives. There's no other
03:35:33 10 way to read it. There's no other way to look at it,
11 especially when we put in all capital letters. I
12 didn't try to -- again, if I'm trying to set somebody
13 up, I'm doing a pretty horrible job because I came
14 right out saying, it's in all capital letters right
03:35:46 15 there in the agreement. We can call them whatever you
16 want to call them, but my client maintains all rights
17 against them. And if whatever we call them somehow
18 impacts my client's rights, then it's null and void.
19 And they didn't argue with me about it. They didn't
03:35:57 20 fight me on it. They agreed to it. Signed off on it.

21 And that's what needs to stand that that
22 language that they're claiming it effects my client's
23 rights is null and void. And most of all, it's that my
24 client retains and still retains all of his rights
03:36:10 25 against these gentlemen.

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03:36:15 1 It's interesting the comment about setting the
2 settlement aside. If the settlement agreement is set
3 aside -- I mean, it could be set aside I suppose. I
4 don't think there is grounds for it. I'll talk about
03:36:26 5 in some of the case law in a second regarding that, but
6 setting the settlement agreement aside does not mandate
7 setting the judgment aside. The judgment stands.

8 We sent notice out. We let -- the Court let
9 us -- and, I guess, I did misspeak before. I didn't
03:36:40 10 notify them of the hearing date. The Court notified
11 Sunrise of the hearing date. They knew about the
12 hearing date. They knew judgment was entered. They
13 knew these deadlines are out there. They didn't act in
14 the timely fashion pursuant to 60(b) to set these
03:36:53 15 matters aside.

16 And Mr. Fink all but admitted now, there is no
17 reason outside of 60(b)(1), (2), or (3) to set this
18 aside. There is no I learned a year later I was wrong
19 about something, so now I want to fix it. In fact,
03:37:05 20 that would seem to go to a textbook definition of
21 60(b)(2) that says a newly discovered evidence.

22 I guess, we can query about whether or not --
23 it just says newly discovered evidence that couldn't
24 have been discovered in the ordinary course with
03:37:19 25 reasonable diligence. So we can wonder whether that

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03:37:22 1 would apply. Whether it applies or not, even if you
2 bring some -- a motion, which this is, for newly
3 discovery evidence, let's set this aside because of
4 newly discovered evidence, you have to do it within six
03:37:31 5 months of notice of entry. And they didn't do it.

6 And you can't use -- doesn't make any sense if
7 we -- if you adopt Sunrise's interpretation of
8 60(b)(6), then we might as well take an eraser to
9 60(c)(1). Because when 60(c)(1) says you can't bring a
03:37:46 10 motion under 60(b)(1), (2), or (3) after six months,
11 your Honor, holding the way they want you to hold you
12 say, Well except you can't. We don't really mean that.
13 We can just erase it. Because you just go under
14 60(b)(6) I want relief under 60(b)(1). You can't do
03:38:01 15 that. It's got to be some other issue.

16 They also reference 60(d)(1). Judge, this is
17 not an independent action. This is the same case. So
18 60(d)(1) is completely inapplicable. They haven't
19 filed some independent action. I don't know that they
03:38:15 20 even have any grounds to file an independent action.
21 Who knows? But no, you can't set the judgment aside in
22 this action under any of the rules that are set forth
23 by the Court.

24 But again, even if you set the settlement
03:38:30 25 aside, the judgment still stands.

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03:38:32 1 And I think if your Honor were to say, Well,
2 I'm not going to set the judgment aside because, again,
3 it's beyond the six-month period. You didn't ask to
4 amend it within 28 days. You didn't ask to set it
03:38:44 5 aside in the first six months. I'm not going to set
6 the judgment aside. I don't think they really want the
7 settlement set aside because even they don't get
8 protections.

9 I mean, I know none of the other defendants --
03:38:52 10 I haven't heard any of the other defendants say they
11 want to set it aside.

12 That's another interesting point too. You
13 don't hear any of the other defendants coming in here
14 and saying, Gosh, you know what. This was confusing.
03:39:01 15 Or, you know what, yeah, Mr. Sampson is doing something
16 improper. You don't hear them coming in saying there
17 was no meeting of the minds. Everyone understood. And
18 everyone else signed off on this same language. "My
19 client retains all rights against these gentlemen no
03:39:16 20 matter what they are."

21 And then when Mr. Fink says one of the things
22 that was pervasive, well, the only thing that was
23 pervasive, in each one of the hearings was me saying
24 over and over -- in fact, I felt a little bad because I
03:39:28 25 got so redundant in the motion papers because I did

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03:39:31 1 mention it so many different times -- that this
2 settlement will have no effect on any of my client's
3 rights against these gentlemen.

4 That was the one thing I absolutely insisted
03:39:42 5 on from the very beginning all the way through the
6 written agreement that says, My client retains all
7 rights. And if there's something that says he doesn't
8 retain all rights, it's null and void.

9 I made that -- I made that very, very clear.
03:39:55 10 We were retaining every single right my client had
11 before this judgment, before the settlement took place.
12 We're going to continue to have those after. And
13 everybody agreed. And they can't come back now a year
14 later, and say, well, we didn't want to agree, so let's
03:40:09 15 start all over again. You got to bring those motions
16 within the right amount of time.

17 Now, Mr. Fink again pointed to the November 7
18 hearing where, yes, after Mr. Fink raised the idea of
19 there's an issue if they're employees, and I say, Well,
03:40:25 20 then can we resolve it if we just agree they're not
21 employees as long as my client retains all rights
22 against them.

23 Mr. Fink said he wanted to think about it.
24 And then later we codified in the agreement. We called
03:40:34 25 them independent contractors. So long as we understand

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03:40:36 1 that language does not affect my client's rights
2 against them, and if it does, then that language is
3 null and void.

4 Again, I'm not -- the judgment does not call
03:40:45 5 them employees. It doesn't involve Sunrise. It's not
6 against Sunrise. It's just we did exactly what I said
7 we were going to do. And even Mr. Fink in the -- in
8 the 10/18 hearing talks about these are further actions
9 Mr. Sampson is going to take against these defaulted
03:41:01 10 parties. He knew exactly what I was going to do.

11 I'm going to get a judgment against these
12 gentlemen as individuals. We've sued them as
13 individuals. And I have my judgment against them as
14 individuals. Not against them as contractors. It's
03:41:13 15 against them as individuals. Not against them as
16 employees. Just against them as individuals which I'm
17 absolutely -- we agree that's what I could do, and
18 that's exactly what I've done here. I've not
19 overstepped that in the least.

03:41:26 20 And I don't understand why they would come in,
21 again, a year after the fact knowing all along that
22 they saw the application, they saw the hearing, they
23 saw everything, they knew we were going to take this
24 judgment against them.

03:41:36 25 And we do it. And now they come back and go,

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03:41:39 1 yeah, but except you released them. And it just -- it
2 makes no sense. Mr. Fink's argument of, Well, if you
3 agree they're independent contractors then you somehow
4 agreed to release them as employees.

03:41:51 5 It's -- it's nonsensical. And I can -- I can
6 demonstrate it by if I just change the subject and the
7 verb, you see how ridiculous it is. If I tell you I
8 have a piece of fruit in my hand -- instead saying a
9 person, I've got a piece of fruit. And instead of
03:42:07 10 releasing it, we talk about not eating it, so I say
11 I've got a piece of fruit in my hand. We agree it's
12 not an apple. We also agree I'm not eating it.

13 Just like saying they're not employees, and
14 we're not releasing them, I say, It's not an apple, and
03:42:20 15 I'm not eating it. Mr. Fink would have you believe
16 that I've somehow impliedly told you I ate an apple.

17 And he can no more say that I released these
18 gentlemen as employees when I agreed they're not
19 employees, and I'm not releasing them for any purpose,
03:42:32 20 than you could say I agreed I ate an apple when I said
21 this thing is not an apple. I'm not eating. I mean,
22 it makes no sense. It falls flat.

23 So the one -- the last area he mentioned was
24 this mutual mistake. I want to address that because
03:42:44 25 there is case law directly on point. The Anderson vs.

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03:42:48 1 Sanchez decision which came out in the Nevada Supreme
2 Court in 2016. Doctrine of mutual mistake is not
3 grounds for rescission of a contract when a party bears
4 the risk of the mistake.

03:43:01 5 And the party bears the risk of the mistake if
6 the party is aware at the time of the formation of the
7 contract that they only have limited knowledge of the
8 facts to which the mistake relates but treats that
9 knowledge as insufficient. It's as if this was written
03:43:15 10 for this case.

11 Sunrise, you can't come in later and claim
12 mutual mistake when you were aware at the time you only
13 have limited knowledge and you treat that knowledge as
14 sufficient.

03:43:27 15 Additionally, in Homesavers vs. United SEC it
16 says unilateral mistake will allow a party relief but
17 only occurs when the party makes a mistake as to a
18 basic assumption and they did not bear the risk of the
19 mistake, or they're not the person who caused it. They
03:43:46 20 caused this mistake. They're the ones that came in
21 here saying they're not employees. I never said -- how
22 would I know? I would have no information as to what
23 these gentlemen were.

24 I can only make allegations. And, by the way,
03:43:59 25 Mr. Fink didn't want to read from paragraph 19 of the

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03:44:01 1 complaint that talks about them acting through their
2 employees and doing, all the defendants and each of
3 them as employees and acting through their employees.
4 But, but how am I supposed to know what they are? I'm
03:44:11 5 perfectly -- I'm relying 100 percent on what Sunrise
6 has told us. And Sunrise told us, apparently
7 incorrectly, that they were not employees. And that's
8 not my error.

9 Finally, in In Re Irrevocable Trust Agreement
03:44:27 10 of 1979 and also the Garmon vs. Garmon out of the
11 Supreme Court of Nevada. It says in Nevada a defense
12 of mutual mistake is available where, and it says,
13 mistake is made by both parties, mistake materially or
14 adversely alters the contract, but number 3, conscious
03:44:45 15 ignorance cannot support a mutual mistake defense.

16 You can't have records in your payroll that
17 say you've taken unemployment out of these gentleman's
18 paychecks and then come back later and go, Oh well,
19 it's my mistake, so I want it undone. No. The
03:45:03 20 information you had is sufficient. There's certainly
21 no other party in the case that would have known the
22 truth other than Sunrise.

23 And so the idea that this was a mistake, they
24 want this out is not permitted. Your Honor did mention
03:45:16 25 COVID. I'll again remind the Court under the chief

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03:45:19 1 judge's Administrative Order 20.17 at page 18. It says
2 the time exclusions that do not apply to time deadlines
3 that must not be extended under NRCP 62. And 60(b)
4 specifically says these deadlines cannot be extended
03:45:36 5 under 60(b)(2). And actually the order specifically
6 mentions 60(b) as one of the statutes in which we
7 cannot do any extension of any time as a result of
8 COVID.

9 And again, they had this information. They
03:45:50 10 knew about it all along. They didn't take the steps to
11 set this aside until apparently their mistake was
12 realized way too late. And that is not on anybody
13 except for Sunrise when the information is in their own
14 records.

03:46:03 15 And so I don't know if the Court has any
16 additional questions at this time, but the state of the
17 settlement is: We have an agreement; that we settled
18 with Sunrise; we settled with the other parties for the
19 monies they paid us. That, again, on page 1, settling
03:46:18 20 with Sunrise excludes Duslak and Sesman. And page 4,
21 settling with the defendant's employees excludes as
22 employees Duslak and Sesman. And that the release does
23 not discharge in any way impact my client's rights
24 against Duslak and Sesman.

03:46:32 25 My client retains all rights against them.

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03:46:34 1 And if there's any language anywhere, anywhere else
2 that says he doesn't, like when they're claiming this
3 independent contractors language does, it's null and
4 void. And that language is -- is then severed and the
03:46:47 5 agreement stands without it.

6 And so, again, if this was such a big deal for
7 Sunrise, it should have been brought up on October 18
8 when the jury was right there.

9 As or as Mr. Fink now wants to say, he should
03:46:59 10 have said, Hold on. I don't have full authority yet.
11 We still got to work some stuff out. But that is not
12 what he said. We have a global deal. It makes this
13 trial moot. And the only thing left is finding good
14 faith. Next moving forward is exactly what we did.

03:47:17 15 MR. FINK: Your Honor.

16 MS. SAMPSON: Thank you, your Honor.

17 THE COURT: Are you done, Mr. Sampson? Okay.
18 I just want to make sure.

19 MS. SAMPSON: I am. Thank you, Judge.

03:47:23 20 THE COURT: Mr. Fink.

21 MR. FINK: Couple things. One is I'm
22 objecting to any discussion of this case law related to
23 mutual mistake under contract. Wasn't briefed. And
24 this issue was certainly not there. And Mr. Sampson
03:47:37 25 had no problem filing numerous, numerous pleadings. So

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03:47:43 1 I'm not prepared to discuss those issues.

2 As far as he said all along that, Hey, Sunrise
3 made a mistake. Sunrise made a mistake. And, again,
4 I'll point to the fact that there is nothing in that
03:47:55 5 first amended complaint that ever -- that ever asserts
6 that these guys were Sunrise's employees.

7 The Court certainly can feel free to read the
8 first amended complaint. You can see what I'm talking
9 about.

03:48:06 10 As far as what was and was not discussed in
11 the -- in the hearings, those speak for themselves too.

12 I can certainly tell you I've been -- as I'm
13 trying to half listen, I was listening to Mr. Sampson,
14 so I don't want to -- you know, I wasn't trying to go
03:48:22 15 through chapter and verse of those transcripts. So I
16 don't know at what point. Whether it was those two
17 days, November 7 hearing or what have you. But that
18 issue was discussed. And I can certainly tell you that
19 the -- when we talked about settlement on October 15 or
03:48:39 20 18th, the first day, it was related to the amounts not
21 the terms.

22 Also point out that to the extent it even
23 matters at all is that Mr. Sampson may have forgotten
24 this, but one of the issues we had at the time we
03:48:52 25 settled the case is we were about to file or actually

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03:48:55 1 request another -- I think if the Court remembers we
2 had a first jury. We had a mistrial because one of the
3 jurors said some silly things. We had a mistrial.

4 We were about to have another mistrial, and it
03:49:07 5 was a question that Mr. Sampson had of one of the
6 jurors. Didn't think that it was anything that he did
7 on purpose, obviously, but it was something that came
8 up. And we were all faced with whether we were going
9 to file that motion.

03:49:19 10 So regardless of whether we had a settlement
11 at that point, that motion was coming anyway. And
12 maybe Mr. Sampson doesn't remember, but that was
13 certainly one of the reasons for going ahead and
14 dismissing the jury. In addition to the fact that,
03:49:30 15 obviously, we had a deal in principle.

16 We talk about Mr. Sampson took exception to,
17 he said that I -- that it was fraud. First of all,
18 I -- what I said was it was either. Those are grounds
19 to set aside a contract. Either fraud in the
03:49:45 20 inducement, unilateral mistake, or mutual mistake. And
21 I went through what in the agreement could be
22 considered any of those.

23 Interestingly enough, and again, I'm not part
24 of the federal action, and I don't know what impact
03:49:59 25 this has on anything, but there was a privilege log

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03:50:01 1 that was recently, I think, produced there that there
2 was communications between Mr. Sampson, at least
3 Mr. Duslak. This was in December 2020. So this was
4 after all this stuff happened. But there's
03:50:14 5 communications in the privilege log said to -- email
6 from attorney David Sampson to Richard Duslak regarding
7 options for litigation. I have no idea what that
8 means. I don't know if it has anything to do with
9 anything. But there is at least some communication
03:50:25 10 after the fact as to what the options are.

11 So when I said in the beginning that this is
12 either a scheme to say, Hey, look these guys absolutely
13 they're individuals. But let -- Duslak and Sesman
14 they're employees and be able to, if they're
03:50:42 15 successful, get coverage under QBE, or it was just a
16 happy coincidence. Either way, that is certainly to
17 Dr. Russo's benefit.

18 So, you know, and, again, the fact that Duslak
19 and Sesman aren't here themselves saying why this thing
03:51:00 20 should be set aside is still beyond me.

21 I don't want to go back through the whole
22 thing with NRCP 60, but as I said before, NRCP 60 gives
23 the Court pretty broad powers. On 60(b), and 60(b)
24 gives the Court pretty broad powers as to when judgment
03:51:21 25 can be set aside.

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03:51:23 1 And we've gone through that. And I think the
2 Court has heard enough as to why there's more than
3 enough reason to set that default aside. Even though,
4 maybe Duslak and Sesman don't want it themselves for
03:51:33 5 whatever their reasons.

6 Again, Mr. Sampson says that, Well, Sunrise
7 made a mistake. And I'll start off. It's important.
8 Sunrise didn't make a mistake. There's no mistake made
9 here.

03:51:50 10 The terms are the terms. And as much as
11 Mr. Sampson keep -- wants to keep pointing out to, I
12 think, it's paragraph or page 4 that says that because
13 of the language that's contrary to the addendum that
14 the Court shouldn't consider the addendum. That is
03:52:05 15 kind of the problem. Because if I don't give -- the
16 addendum should be the thing that frames the entire
17 dispute.

18 Because that was signed after the fact. That
19 was Sunrise didn't sign as a clarification, if you
03:52:21 20 will, as to what we're really talking about.

21 The other thing I do want to say that I'd
22 forgotten before was that in the third or fourth
23 supplement, he attached an email exchange from he and I
24 from April 2020 related to whether or not they were PW
03:52:38 25 James' employees.

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03:52:40 1 I'll point out again for the Court that the
2 settlement agreement was signed by Dr. Russo November
3 2019. So that really has no impact on anything. But
4 again, the Court certainly heard enough as to why in
03:52:56 5 the best interests of justice and everyone involved,
6 most importantly, Mr. Duslak and Mr. Sesman, that the
7 default really does need to be set aside.

8 MS. ARLEDGE: Your Honor, this is Jennifer
9 Arledge for Mr. Bushbaker. If I could just have a
03:53:17 10 couple of minutes to weigh in on this, I would much
11 appreciate it.

12 THE COURT: Okay. Ma'am, what do you have to
13 add?

14 MS. ARLEDGE: Your Honor, what I have to add,
03:53:27 15 you know, should be obvious. But I would like it to be
16 on the record. It's been a year and four months since
17 Mr. Bushbaker signed a settlement agreement and thought
18 he was finished with this case.

19 There are a couple of issues I would like to
03:53:39 20 suggest. The first is I'm curious why no one
21 representing IES and Cox appears to be on the phone.
22 And if they are, I apologize. I missed them.

23 They were also settling defendants who paid a
24 portion of the funds that went to the Russo.

03:53:59 25 If this settlement is going to be set aside, I

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03:54:04 1 can't explain why they're not here. I can explain why
2 I was almost not here. I did not get notice served
3 with a copy of the motion because apparently someone in
4 my office had taken us off the service list. Which I
03:54:16 5 think is entirely reasonable a year and four months
6 after a settlement has been reached.

7 But for seeing some email traffic from
8 Mr. Sampson and Mr. Fink, Mr. Bushbaker would not be
9 appearing at this hearing through my office. And I'm
03:54:33 10 curious if the same or similar thing happened to the
11 Cox attorneys first.

12 That aside, we've talked about the severance
13 provision in paragraph 15 of the settlement agreement
14 that allows the Court to deem portions severed and
03:54:48 15 deleted. And we would suggest on behalf of
16 Mr. Bushbaker, who, by the way, he did not pay money
17 towards the settlement. The global settlement involved
18 money from the HOA and from Cox. But Mr. Bushbaker and
19 Mr. Scarcelli were both dismissed. And part of the
03:55:11 20 settlement was not paying any funds.

21 It's possible for the Court if the Court is
22 inclined to find the settlement needs to be set aside
23 or it was entered into with a mistake, that the
24 provision with respect to the HOA settling could be
03:55:28 25 stricken, the provision that Cox, Bushbaker, and

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03:55:33 1 Scarcelli settled could remain in place, and
2 Mr. Bushbaker would not be dragged back into this
3 litigation where it is not even his issue, yet he has
4 to attend these hearings and defend himself.

03:55:45 5 So we would just ask the Court in considering
6 everything to look at the severance provision in the
7 context of severing part of paragraph 1 rather than all
8 of the defendants and undoing this entire settlement to
9 the detriment of, I hate to say innocent bystanders,
03:56:01 10 but parties who really don't have an issue with respect
11 to this motion.

12 And that's all I have. Thank you, your Honor.

13 MR. FINK: Your Honor, if I could. Leonard
14 Fink just real quick. I'm sorry. I apologize.

03:56:15 15 I had talked with Mr. Turtzo who I think -- I
16 think he was at the last hearing. I think Mr. Arledge
17 is right. I perhaps didn't -- didn't give notice of
18 the -- we changed the hearing date on this. So I have
19 talked to Mr. Turtzo. And I can tell you that
03:56:29 20 Mr. Turtzo's, at least position to me was to the extent
21 the Court matters, fine by him. Set aside the
22 settlement.

23 So, but if we need to have Mr. Turtzo weigh in
24 on that, I'm sure he'd be happy to do it. But I do
03:56:42 25 appreciate that perhaps we didn't give notice out to

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03:56:44 1 him.

2 THE COURT: Okay. Does that cover all issues?

3 MR. FINK: Yes.

4 MS. SAMPSON: Well, except -- yeah. This is
03:56:51 5 David Sampson.

6 In terms of severing and setting this aside, I
7 mean, this is a case with joint and several
8 liability -- I'm sorry with several liability because
9 of the trip and fall. You know, I'm not going to have
03:57:02 10 my client have to go to trial against the HOA and them
11 blame empty chairs. Because this is -- this is not my
12 fault. And I haven't -- what's gone on here is we
13 reached the agreement. Everybody was fine. My client
14 retains all rights.

03:57:14 15 And then QBE a year after the judgment's
16 entered files a dec action. These gentlemen come into
17 the dec action and say, Hold on. The truth is we're
18 actually employees. And then somehow my client's
19 losing rights and my client is having settlements
03:57:28 20 undone. And my client is now not only against Sunrise,
21 I guess, but against everybody else. If we severed
22 things.

23 That would be ridiculously unjust. So, again,
24 my client is just doing exactly what we've always said.
03:57:40 25 We're going to get a judgment against these gentlemen

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03:57:42 1 as individuals. That's what we've done.

2 Now there were just two comments Mr. Fink made
3 I just need to correct. He said in terms of the case
4 law I cited as to mistake, that it was not in the
03:57:51 5 briefs and your Honor should ignore it. Well, it is in
6 the briefs and your Honor should not ignore it.

7 On page -- let me look here. Page 8 of my
8 reply on the opposition to the motion to enforce
9 settlement I mentioned Anderson v Sanchez. That says
03:58:05 10 if you bare the risk, you have limited knowledge, then
11 you can't come back later and try to claim mutual
12 mistake when you've acted on the knowledge that you
13 have.

14 On page 9 I quote In Re Irrevocable Trust
03:58:16 15 agreement in Garmong vs. Garmong it says: Conscious
16 ignorance cannot support mutual mistake. So Mr. Fink
17 is just incorrect. It's absolutely in the briefs. We
18 briefed it. And that's why I mentioned it today. I'm
19 not trying to bring something in for the first time.
03:58:29 20 And I don't appreciate being accused of that when it's
21 in black and white right in my reply.

22 Finally, Mr. Fink for the first time in his
23 comments just now argued that the addendum is somehow
24 primary and takes -- it's more important than the
03:58:43 25 agreement. And that is the exact opposite of what the

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03:58:44 1 agreement says. Again, on page 4 line 2 I left this
2 out for -- to try -- I know it doesn't sound like I've
3 shortened things, but I've tried to shorten things.

4 But the actual -- when it talks about if there
03:58:56 5 is any language that impacts Duslak or -- or Russo's
6 rights against Duslak and Sesman it is null and void,
7 what it actually says in full is -- and it's all
8 capitals, all of this that I'm going to read. "Any
9 language in this release that is contrary to the
03:59:09 10 language of this specific paragraph and/or any language
11 that would be read to in any way impact plaintiff's
12 rights against Richard Duslak and Justin Sesman is and
13 shall be deemed null and void."

14 And so the idea that that, Wait, they were
03:59:25 15 under the impression that the stipulation would take
16 precedence over the release, that's not what the
17 release says. It's in all capital letters that they
18 signed off. This paragraph takes precedence over any
19 other language anywhere we have. That these -- my
03:59:39 20 client's rights against these gentlemen are not
21 impacted. And if any language would impact it, it's
22 null and void.

23 And so with that, I just want to make sure
24 we -- I touched on those two things that were brought
03:59:50 25 up for the first time by Mr. Fink.

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03:59:54 1 MR. FINK: Your Honor, Leonard Fink. I'd
2 like -- let me apologize to Mr. Sampson for that if
3 that was in the papers. There's a lot of stuff to read
4 and I apparently forget it was in there.

04:00:03 5 THE COURT: And there is lot to read.

6 MS. FUNAI: Your Honor, Julie Funai. I would
7 like to briefly -- I would like to join in counsel for
8 Bushbaker's suggestion to sever. In conjunction, our
9 client passed away over a year ago. We can --

04:00:27 10 (telephonic audio glitch) -- that the Court may recall
11 we contributed nothing to the settlement, and we were
12 dismissed from the matter.

13 THE COURT: I understand, ma'am. I do.

14 All right.

04:00:39 15 MS. SAMPSON: Your Honor, Mr. Sampson. Quite
16 frankly, that's a big part of why we have these rules
17 that say you can't do this a year after the fact. They
18 say you've got to take steps in time and appropriately
19 so that we're not in a situation where we're a year and
04:00:51 20 four months -- I guess, as counsel Bushbaker said --
21 out later and someone is trying to undo it all.

22 If you want to undo -- because people pass
23 away or whatever else goes on, if you want to undo it,
24 you got to come in in time to do it. And this as an
04:01:04 25 example of why we have the rules that we have.

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04:01:10 1 THE COURT: Position noted, Mr. Sampson. All
2 right. I guess, we're done.

3 And anyway, like I pointed out, I think it was
4 probably about 40 minutes ago, I'm going to go back and
04:01:25 5 review all the pleadings. I'm going to take a look at
6 some of the cases. Just as important too, as far as
7 the motion to intervene I'm going to decide that first.

8 If I feel for -- and this is out of
9 fundamental fairness. Hypothetically, if I granted the
04:01:40 10 motion and counsel -- I'd give counsel a chance to add
11 his comments as a result of the insurance carrier. But
12 we're not there yet, so I just wanted to make sure
13 that's really clear.

14 I do understand the importance of this case
04:01:52 15 for everyone. I just want to also emphasize that.

16 And so in light of that, I'm going to let
17 everyone go. And enjoy your day. And we'll try to get
18 something out well before the deadlines that are
19 impacted. Or I should say that are set forth in the
04:02:09 20 federal action.

21 IN UNISON: Thank you, your Honor.

22

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25 (Proceedings were concluded.)

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REPORTER'S CERTIFICATE

STATE OF NEVADA)

:SS

COUNTY OF CLARK)

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

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

PEGGY ISOM, RMR, CCR 541

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(17) point... - rectify

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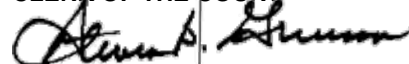
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Attorney for Plaintiff

**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

HEARING REQUESTED

Date of Hearing: 11/7/19

Time of Hearing: 9:30am

DEPARTMENT XVI

NOTICE OF HEARING

DATE 11/7/19 TIME 9:30am

APPROVED BY: **PLAINTIFF'S MOTION TO COMPEL SETTLEMENT ON ORDER SHORTENING
TIME**

COMES NOW Plaintiff, SIMONE RUSSO, by and through his attorneys of record and hereby moves this Court to compel the settlement reached in this matter on October 16, 2019 pursuant to the terms agreed upon in Court on that date.

///

1 **AFFIDAVIT IN SUPPORT OF ORDER SHORTENING TIME**

2 STATE OF NEVADA)
3) SS.
4 COUNTY OF CLARK)

5 DAVID SAMPSON, ESQ., having been duly sworn states as follows:

- 6 1. I am an attorney duly licensed to practice law in the State of Nevada and an attorney
7 with the law firm of The Law Office of David Sampson, LLC.
- 8 2. I am personally familiar with the facts and circumstances surrounding this matter and am
9 competent to testify hereto.
- 10 3. That the case of Russo v. COX, et al., reached a settlement with the Answering
11 Defendants in this matter on October 16, 2019. On that date the parties placed the terms
12 of the settlement on the record. Counsel for Defendants BUSHBAKER and SCARCELI
13 advised they did not have confirmation at that time as to whether their clients would
14 agree to the settlement. The settling Defendants indicated they would file a motion for
15 good faith determination, which the Court subsequently set for October 18, 2019.
- 16 4. On October 18, 2019 Counsel for Defendants BUSHBAKER and SCARCELI advised the
17 Court that their clients agreed to the settlement.
- 18 5. During the discussion of the terms of the settlement, Defendants stated they wanted Dr.
19 Russo to sign a release. Dr. Russo agreed to sign a release so long as it did not include
20 any terms that were not expressly agreed to on the record when the settlement terms
21 were placed on the record. All parties agreed that such would be the case.
- 22 6. Defendants also advised that the settlement checks would be delivered to my office
23 within two weeks of Dr. Russo signing the agreed upon release. I advised that such was
24 acceptable, so long as there was no delay in Defendants providing me with a release. I
25 acceptable, so long as there was no delay in Defendants providing me with a release. I
26 acceptable, so long as there was no delay in Defendants providing me with a release. I
27 acceptable, so long as there was no delay in Defendants providing me with a release. I
28 acceptable, so long as there was no delay in Defendants providing me with a release. I

specifically cautioned that I did not want the Defendants to take two weeks to get a release to me for Dr. Russo to sign, and then wait an additional two weeks to make payment. Defendants all agreed to provide me with a release in short order.

7. The terms of the settlement included the fact that defaulted parties Duslak and Sessman were not a part of the settlement, that Dr. Russo would retain all rights to pursue Duslak and Sessman to the full extent, and that nothing about the settlement would impact Dr. Russo's rights to pursue and collect against Duslak and Sessman would be impeded in any fashion. Defendants all agreed to this provision.

8. As of the filing of this motion, October 31, 2019, over two weeks after settlement was reached, **Defendants have still not provided me with an agreed upon release to conclude this matter.** Counsel for SUNRISE HOA provided a proposed release on Monday October 21, 2019, but stated that his client had NOT yet agreed to the terms of the release. *See* Exhibit "1" at P. 7.

9. On October 21, 2019 I provided the Defendants with proposed revisions to the terms of the release so it would match what was agreed to in open Court. *See*, Exhibit "1" at P. 7. Counsel for Defendant BUSHBAKER provided additional revisions. *Id* at P. 5-6. None of the other Defendants provided any comment on the proposed release or the proposed revisions.

10. On Monday October 28, 2019 I advised that, since I had not heard from anyone in a week regarding my proposed revisions, I would print the release with the proposed revisions from Dr. Russo and Mr. Bushbaker, have Dr. Russo sign the same, and expected the settlement checks within two weeks. My October 28, 2019 message stated:

A week ago Mr. Fink provided a proposed settlement release as required by the Court. As you surely recall, Plaintiff insisted, and the

1 Court agreed, that there should not be any undue delay in Defendants
2 providing the release (final, not proposed) to Plaintiff. The same day Mr.
3 Fink provided the proposed release I responded with proposed changes.
4 Mr. Meloro also provided comments. Having not heard from anyone else
5 in the last week regarding the proposed release nor the proposed changes
6 or comments, I have finalized the release which includes my
7 proposed changes and addresses Mr. Meloro's comments. I have attached
8 the same hereto for your convenience. Be advised Dr. Russo will sign the
9 same today and that, therefore, the checks need to be delivered to my
10 office within 14 days as agreed.

11 *Id* at P. 4.

12 11. After not having responded to my communications in a week, Counsel for SUNRISE
13 responded to my October 28, 2019 email in 16 minutes, saying "Dave, thanks, but I did
14 say that my client had not yet approved the agreement when I sent it out. Although I
15 don't foresee an issue, I need to be clear on that. I also have the settlement check here, so
16 once we get this done and done I can get it to you." *Id* at P. 3-4.

17 12. I wrote back on October 28, 2019 I wrote to Defendants advising "I patiently waited a
18 week for any "approval" on proposed amendments. Having heard nothing from either of
19 you (COX and SUNRISE) it is time to move forward. There will be no further delay."
20 *Id* at P. 3.

21 13. Counsel for SUNRISE responded two minutes later, saying "Well, no. I drafted the
22 agreement as I said I would, last weekend and had asked for any input on the agreement
23 and made it clear that my client had not approved the language. So, if there are no
24 further changes, I'll ask my client if they are okay with it." *Id* at P. 3.

25 14. Counsel for COX also contacted my office on October 28, 2019 stating "We are in the
26 same position [as SUNRISE] regarding approval of the release. I will follow up shortly
27 on status. *See* Exhibit "2".

28 15. Counsel for COX sent another email on October 28, 2019 which stated

1 Minor redlines on behalf of IES and Cox are attached. I do not think these
2 materially affect the prior version. As I indicated earlier this morning, we
3 also do not have client approval on the release language yet. Also, my
4 recollection from the hearings placing the terms on the record is that *a*
5 *definite payment deadline was not agreed upon*; instead, the parties
6 agreed that time was of the essence. Nonetheless, we are working to obtain
7 our client's share of the funds as quickly as possible.

8 *See*, Exhibit "1" at P. 2 (emphasis added).

9 16. I wrote back to Defendants on October 28, 2019 and advised,

10 I have incorporated Mr. Turtzo's proposed changes, and have added
11 language clarifying that Plaintiff retains all rights to pursue any and all
12 actions both against, and on behalf of the non-settling defendants (see
13 attached). I will have Dr. Russo execute the attached release and look
14 forward to exchanging the same for the settlement check within 14 days as
15 agreed.

16 *Id* at P. 2.

17 17. On October 29, 2019 Counsel for SUNRISE sent a revised release to my office that
18 specifically prevented Dr. Russo from pursuing his claims against Duslak and Sessman.

19 *Id* at P. 1. While the revised language permits the claim to proceed, it prevents Dr.
20 Russo from collection efforts against the remaining Defendants. *Id*. Even though
21 counsel for SUNRISE sent the revised release to my office, counsel made it clear that
22 *SUNRISE had not yet agreed to any release language. Id.*

23 18. I wrote Defendants on October 29, 2019 stating "my client is not releasing any rights
24 that were not discussed in Court. We never discussed releasing rights against that [arise]
25 from Duslak and Sessman." *Id* at P. 1.

26 19. Counsel for SUNRISE wrote back saying "Dave, I completely understand that. You did
27 not release those claims. I just need to get my carrier to sign off on the language." *Id* at
28 P. 1.

20. Counsel for SCARCELLI has not provided any response to the proposed release or the proposed revisions and has instead remained completely silent on the matter.

21. As of the filing of this motion *none of the Defendants, with the exception of Mr. Bushbaker, have provided my office with a release they are prepared to exchange for the settlement checks.* Additionally, as SUNRISE is now insisting on language that would impact Dr. Russo's claims against Duslak and Sessman, it is clear the Court needs to intervene in this matter to make sure it is concluded timely and according to the terms placed on the record on October 16, 2019.

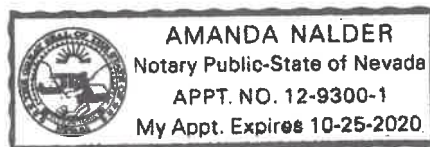
22. As the parties agreed to resolve this matter in short order, and as the Defendants, with the exception of Mr. Bushbaker, are not acting to resolve this matter in short order, this matter needs to be heard on an order shortening time.

DATED this 31st day of Octob, 2019.

DAVID F. SAMPSON, ESQ.

SUBSCRIBED AND SWORN TO before me
this 31 day of October, 2019.

Notary Public in and for said County and State.



ORDER SHORTENITNG TIME

Good cause appearing, it is hereby ordered that the foregoing PLAINTIFF'S MOTION TO COMPEL SETTLEMENT will be set for hearing before the above-captioned Court and Department on the 7th day of November, 2019 at 9:30 (am)pm, or as soon thereafter as the matter may be heard..

Dated this 1st day of NOV. ~~October~~, 2019


DISTRICT COURT JUDGE 

Submitted by:

LAW OFFICE OF DAVID SAMPSON, LLC.

BY: /s/ David Sampson 
DAVID F. SAMPSON, ESQ.
Nevada Bar No.6811
LAW OFFICE OF DAVID SAMPSON, LLC.
630 S. 3rd Street
Las Vegas, NV 89101
Fax No: 888-209-4199
Email:david@davidsamsponlaw.com
Attorney for Plaintiff

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The Court is well aware of the facts of this matter and in fact was present when the terms
3 of the settlement were placed on the record. Dr. Russo incorporates by reference the affidavit of
4 David Sampson, Esq., above. Dr. Russo seeks only to conclude this matter as agreed on the
5 record October 16, 2019 and again on October 18, 2019. The parties agreed that the Answering
6 Defendants would be released, in addition to PW JAMES, that the settlement would in no way
7 impact Dr. Russo's rights against Duslak and Sessman, or his ability to collect against them, and
8 that the settlement would be resolved in short order. Indeed Defendants stated that the checks
9 would be delivered within two weeks of the release being signed Mr. Sampson specifically
10 stated that he did not want the Defendants to take two weeks, or longer, to provide a release for
11 Dr. Russo to sign. As of the filing of this motion more than two weeks have passed and
12 Defendants have still not provided a release Dr. Russo can sign to exchange for the settlement
13 checks.
14

15
16 This matter settled pursuant to the terms placed on the record on October 16, 2019 and
17 October 18, 2019. When the Defendants required a release, Dr. Russo asked that the terms
18 placed on the record, and only those terms, be codified in a release. As Defendants, with the
19 apparent exception of Mr. Bushbaker, have not agreed to ANY release as of yet, and as
20 SUNRISE is now seeking to have the release include Duslak and Sessman, this Court should
21 enter an Order compelling Defendants to complete the settlement of this matter, tender the full
22 funds to Dr. Russo immediately, and that any release, if any, be strictly limited to what was
23 discussed on the record on October 16, 2019 and October 18, 2019, including the fact that Dr.
24 Russo's claims and rights against Duslak and Sessman not be impeded in any manner.
25
26
27
28

1 When the settlement terms were placed on the record, and the Defendants said they
2 would tender payment within 14 days of Dr. Russo signing the check, counsel for Dr. Russo
3 specifically noted that he did not want Defendants to drag their feet and wait two weeks or more
4 to provide Dr. Russo with a release he could sign, and then wait an additional two weeks before
5 tendering payment. Defense counsel scoffed at Dr. Russo's counsel's suggestion that the
6 release would take two weeks to complete. Yet as of the filing of this motion it has been two
7 weeks and Defendants have still not provided a release their own clients would agree to
8 exchange for the settlement checks. SUNRISE's latest efforts to submarine Dr. Russo's claim
9 against Duslak and Sessman mandate that the Court simply enforce the settlement and require
10 Defendants to immediately tender payment.
11
12

13 **CONCLUSION**

14 For the foregoing reasons Plaintiff requests this Court enforce the agreed upon
15 settlement in this matter.
16

17 DATED THIS 31st day of October, 2019

18 LAW OFFICE OF DAVID SAMPSON, LLC.

19
20 BY: /s/ David Sampson 
21 DAVID F. SAMPSON, ESQ.
22 Nevada Bar No.6811
23 LAW OFFICE OF DAVID SAMPSON, LLC.
24 630 S. 3rd Street
25 Las Vegas, NV 89101
26 Fax No: 888-209-4199
27 Email:david@davidsamsonlaw.com
28 Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I certify that I am an employee of THE LAW OFFICE OF DAVID SAMPSON, and that
on this 31st day of October, 2019, I served a copy of the foregoing **MOTION** as follows:

X Electronic Service through the Court's online filing system.

ANTHONY SGRO, ESQ.
720 S. Seventh St. 3rd Floor
Las Vegas NV 89101
Attorney for Defendant
BUSHBAKER

WILL LEMKUL, ESQ.
CHRISTOPHER A. TURTZO, ESQ.
3770 Howard Hughes, Pkwy Suite 170
Las Vegas NV 89169
Attorney for Defendant
IES RESIDENTIAL INC. and
COX COMMUNICATIONS

LEONARD FINK, ESQ.
SPRINGEL & FINK, LLP
10655 Park Run Drive, Suite 275
Las Vegas, Nevada 89144
Attorney for Defendant
SUNRISE VILLAS IX HOA

DAVID A. CLARK, ESQ.
9900 Covington Cross Dr. Suite 120
Las Vegas NV 89144
Attorney for Defendant
CHRIS SCARCELLI

/s/ Amanda Nalder

An Employee of The LAW OFFICE OF DAVID SAMPSON, LLC.

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EXHIBIT “1”





David Sampson <davidsampsonlaw@gmail.com>

RE: Russo - proposed settlement agreement

1 message

Leonard Fink <lfink@springelfink.com>

Tue, Oct 29, 2019 at 11:26 AM

To: David Sampson <davidsampsonlaw@gmail.com>

Cc: "Christopher A. Turtzo" <turtzo@morrisullivanlaw.com>, David Clark <DClark@lipsonneilson.com>, Joseph Meloro <jmeloro@sgroandroger.com>, Julie Funai <JFunai@lipsonneilson.com>, "Thomas G. Levine" <tlevine@springelfink.com>, Will Lemkul <Lemkul@morrisullivanlaw.com>

Dave, I completely understand that. you did not release those claims. I just need to get my carrier to sign off on the language.

From: David Sampson <davidsampsonlaw@gmail.com>**Sent:** Tuesday, October 29, 2019 10:50 AM**To:** Leonard Fink <lfink@springelfink.com>**Cc:** Christopher A. Turtzo <turtzo@morrisullivanlaw.com>; David Clark <DClark@lipsonneilson.com>; Joseph Meloro <jmeloro@sgroandroger.com>; Julie Funai <JFunai@lipsonneilson.com>; Thomas G. Levine <tlevine@springelfink.com>; Will Lemkul <Lemkul@morrisullivanlaw.com>**Subject:** Re: Russo - proposed settlement agreement

I will look this over when I get a chance, but my client is not releasing any rights that were not discussed in Court. We never discussed releasing any rights against anyone that aspire from Duskak and Sessman.

On Tue, Oct 29, 2019 at 10:41 AM Leonard Fink <lfink@springelfink.com> wrote:

Here is another draft of the agreement that includes my carriers' specific names (per their request) and at least tries to make it clear that while Plaintiff is reserving all rights to proceed against Duskak and Sessman, that it does not impact any of the settling parties or their insurers, at least as it relates to the settled parties.

I also need to have my insurer sign off on the language in section 4 ii. That wasn't in the original draft and I'm sure that you can understand that I don't want to get hung up on a malpractice claim when you get your judgment against them and then try to assert Gallegos.

Lenny

From: David Sampson <davidsampsonlaw@gmail.com>**Sent:** Monday, October 28, 2019 2:25 PM**To:** Christopher A. Turtzo <turtzo@morrisullivanlaw.com>**Cc:** Leonard Fink <lfink@springelfink.com>; David Clark <DClark@lipsonneilson.com>; Joseph Meloro <jmeloro@sgroandroger.com>; Julie Funai <JFunai@lipsonneilson.com>; Thomas G. Levine

<tlevine@springelfink.com>; Will Lemkul <Lemkul@morrissullivanlaw.com>

Subject: Re: Russo - proposed settlement agreement

I have incorporated Mr. Turtzo's proposed changes, and have added language clarifying that Plaintiff retains all rights to pursue any and all actions both against, and on behalf of the non-settling defendants (see attached). I will have Dr. Russo execute the attached release and look forward to exchanging the same for the settlement check within 14 days as agreed.

Thank you,

On Mon, Oct 28, 2019 at 1:06 PM Christopher A. Turtzo <turtzo@morrissullivanlaw.com> wrote:

Minor redlines on behalf of IES and Cox are attached. I do not think these materially affect the prior version. As I indicated earlier this morning, **we also do not have client approval on the release language yet.** Also, my recollection from the hearings placing the terms on the record is that **a definite payment deadline was not agreed upon;** instead, the parties agreed that time was of the essence. Nonetheless, we are working to obtain our client's share of the funds as quickly as possible.

-Chris.

Christopher A. Turtzo

Partner



MORRIS ▪ SULLIVAN ▪ LEMKUL

Nevada Office

Please note new address for NV Office

3960 Howard Hughes Parkway, Suite 420

Las Vegas, NV 89169

Telephone: (702) 405-8100

Telecopier: (702) 405-8101

California Office

9915 Mira Mesa Blvd, Suite 300

San Diego, CA 92131

Telephone: (858) 566-7600

Telecopier: (858) 566-6602

www.morrissullivanlaw.com

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From: Leonard Fink <lfink@springelfink.com>
Sent: Monday, October 28, 2019 11:29 AM
To: David Sampson <davidsampsonlaw@gmail.com>
Cc: Christopher A. Turtzo <turtzo@morrisullivanlaw.com>; David Clark <DClark@lipsonneilson.com>; Joseph Meloro <jmeloro@sgroandroger.com>; Julie Funai <JFunai@lipsonneilson.com>; Thomas G. Levine <tlevine@springelfink.com>; Will Lemkul <Lemkul@morrisullivanlaw.com>
Subject: RE: Russo - proposed settlement agreement

I'm with you on that part of it. we can conference the judge if necessary

From: David Sampson <davidsampsonlaw@gmail.com>
Sent: Monday, October 28, 2019 11:26 AM
To: Leonard Fink <lfink@springelfink.com>
Cc: Christopher com> <turtzo@morrisullivanlaw.com>; David Clark <DClark@lipsonneilson.com>; Joseph Meloro <jmeloro@sgroandroger.com>; Julie Funai <JFunai@lipsonneilson.com>; Thomas G. Levine <tlevine@springelfink.com>; William Lemkul <Lemkul@morrisullivanlaw.com>
Subject: Re: Russo - proposed settlement agreement

I waited a week and received no comments. There will be no further delay. I'm happy to conference with the judge on this if you like.

On Mon, Oct 28, 2019 at 11:17 AM Leonard Fink <lfink@springelfink.com> wrote:

Well, no. I drafted the agreement as I said I would, last weekend and had asked for any input on the agreement and made it clear that my client had not approved the language. So, if there are no further changes, I'll ask my client if they are okay with it.

From: David Sampson <davidsampsonlaw@gmail.com>
Sent: Monday, October 28, 2019 11:15 AM
To: Leonard Fink <lfink@springelfink.com>
Cc: Christopher com> <turtzo@morrisullivanlaw.com>; David Clark <DClark@lipsonneilson.com>; Joseph Meloro <jmeloro@sgroandroger.com>; Julie Funai <JFunai@lipsonneilson.com>; Thomas G. Levine <tlevine@springelfink.com>; William Lemkul <Lemkul@morrisullivanlaw.com>
Subject: Re: Russo - proposed settlement agreement

I patiently waited a week for any "approval" or proposed amendments. Having heard nothing from either of you it is time to move forward. There will be no further delay.

Thank you,

On Mon, Oct 28, 2019 at 10:32 AM Leonard Fink <lfink@springelfink.com> wrote:

Dave, thanks, but I did say that my client had not yet approved the agreement when I sent it out. Although I don't foresee an issue, I need to be clear on that. I also have the settlement check here, so once we get

this done and done I can get it to you.

From: David Sampson <davidsampsonlaw@gmail.com>

Sent: Monday, October 28, 2019 10:16 AM

To: Joseph Meloro <jmeloro@sgroandroger.com>

Cc: Leonard Fink <lfink@springelfink.com>; William Lemkul <Lemkul@morrisullivanlaw.com>; Christopher com> <turtzo@morrisullivanlaw.com>; Julie Funai <JFunai@lipsonneilson.com>; David Clark <DClark@lipsonneilson.com>; Thomas G. Levine <tlevine@springelfink.com>

Subject: Re: Russo - proposed settlement agreement

A week ago Mr. Fink provided a proposed settlement release as required by the Court. As you surely recall, Plaintiff insisted, and the Court agreed, that there should not be any undue delay in Defendants providing the release (final, not proposed) to Plaintiff. The same day Mr. Fink provided the proposed release I responded with proposed changes. Mr. Meloro also provided comments. Having not heard from anyone else in the last week regarding the proposed release nor the proposed changes or comments, I have finalized the release which includes my proposed changes and addresses Mr. Meloro's comments. I have attached the same hereto for your convenience. Be advised Dr. Russo will sign the same today and that, therefore, the checks need to be delivered to my office within 14 days as agreed.

Thank you all for your work on this matter.

On Thu, Oct 24, 2019 at 10:07 AM Joseph Meloro <jmeloro@sgroandroger.com> wrote:

Just a reminder:

To All:

1. Please change the first full sentence on the top of page 3 to read:

"BUSHBAKER and SCARCELLI shall not make any payment to PLAINTIFF, but both BUSHBAKER AND SCARCELLI agree to waive any rights that they may have from any other settled PARTY for fee and/or costs."

2. On page 3, 2. COVENANT NOT TO SUE AND DISMISSAL. The amount of \$140,000.00 seems to be incorrect.

3. As for Mr. Sampson's recommended change and page 3, section 3. "upon a proper and timely tender"

The term is vague. I prefer to remove or revise.

Please do not hesitate to contact my office with any questions or concerns. Thank you very much.

Sincerely,

Joseph S. Meloro

SGRO | ROGER

ATTORNEYS AT LAW

720 S. 7th Street, 3rd Floor

Las Vegas, NV 89101

Telephone: (702) 384-9800

Facsimile: (702) 665-4120

jmeloro@sgroandroger.com

www.sgroandroger.com

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From: Joseph Meloro <jmeloro@sgroandroger.com>
Date: Monday, October 21, 2019 at 11:45 AM
To: David Sampson <davidsampsonlaw@gmail.com>, Leonard Fink <lfink@springelfink.com>
Cc: William Lemkul <Lemkul@morrisullivanlaw.com>, "Christopher com" <turtzo@morrisullivanlaw.com>, Julie Funai <JFunai@lipsonneilson.com>, David Clark <DClark@lipsonneilson.com>, "Thomas G. Levine" <tlevine@springelfink.com>
Subject: Re: Russo - proposed settlement agreement

To All:

1. Please change the first full sentence on the top of page 3 to read:

"BUSHBAKER and SCARCELLI shall not make any payment to PLAINTIFF, but both BUSHBAKER AND SCARCELLI agree to waive any rights that they may have from any other settled PARTY for fee and/or costs."

2. On page 3, 2. COVENANT NOT TO SUE AND DISMISSAL. The amount of \$140,000.00 seems to be incorrect.

3. As for Mr. Sampson's recommended change and page 3, section 3. "upon a proper and timely tender"

The term is vague. I prefer to remove or revise.

Please do not hesitate to contact my office with any questions or concerns. Thank you very much.

Sincerely,

Joseph S. Meloro

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From: David Sampson <davidsampsonlaw@gmail.com>

Date: Monday, October 21, 2019 at 10:20 AM

To: Leonard Fink <lfink@springelfink.com>

Cc: William Lemkul <Lemkul@morrisullivanlaw.com>, "Christopher com"

<turtzo@morrisullivanlaw.com>, Joseph Meloro <jmeloro@sgroandroger.com>, Julie Funai <JFunai@lipsonneilson.com>, David Clark <DClark@lipsonneilson.com>, "Thomas G. Levine" <tlevine@springelfink.com>

Subject: Re: Russo - proposed settlement agreement

We need to make modifications regarding the remaining defaulted defendants. I have attached some proposed changes that may work but I welcome any feedback.

Thank you,

On Sun, Oct 20, 2019 at 8:31 PM Leonard Fink <lfink@springelfink.com> wrote:

Everyone, attached is my first shot at the settlement agreement. Please let me know any additions or subtractions.

[website](#) | [bio](#) | [vCard](#) | [map](#) | [email](#)



LEONARD T. FINK | PARTNER

Telephone: (702) 804-0706 Facsimile: (702) 804-0798
10655 Park Run Drive, Suite 275 Las Vegas, NV 89144

CALIFORNIA NEVADA ARIZONA

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--

David Sampson, Esq.

Certified Personal Injury Specialist (Nevada Justice Association, State Bar of Nevada)

Trial Lawyer of the Year (Nevada Reptile Trial Lawyers 2017)

The Law Office of David Sampson, LLC.

630 S. 3rd St.

Las Vegas NV 89101

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EXHIBIT “2”





David Sampson <davidsampsonlaw@gmail.com>

Re: Russo - proposed settlement agreement

1 message

Christopher A. Turtzo <turtzo@morrisullivanlaw.com>

Mon, Oct 28, 2019 at 10:44 AM

To: Leonard Fink <lfink@springelfink.com>, David Sampson <davidsampsonlaw@gmail.com>, Joseph Meloro <jmeloro@sgroandroger.com>

Cc: Will Lemkul <Lemkul@morrisullivanlaw.com>, Julie Funai <JFunai@lipsonneilson.com>, David Clark <DClark@lipsonneilson.com>, "Thomas G. Levine" <tlevine@springelfink.com>

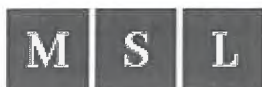
We are in the same position regarding approval of the release. I will follow up shortly on status.

-Chris.

Sent from my mobile phone

Christopher A. Turtzo

Partner

**MORRIS • SULLIVAN • LEMKUL****Nevada Office****Please note new address for NV Office**

3960 Howard Hughes Parkway, Suite 420
Las Vegas, NV 89169
Telephone: (702) 405-8100
Telecopier: (702) 405-8101

California Office

9915 Mira Mesa Blvd, Suite 300
San Diego, CA 92131
Telephone: (858) 566-7600
Telecopier: (858) 566-6602

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From: lfink@springelfink.com**Sent:** October 28, 2019 10:32 AM**To:** davidsampsonlaw@gmail.com; jmeloro@sgroandroger.com**Cc:** Lemkul@morrisullivanlaw.com; turtzo@morrisullivanlaw.com; JFunai@lipsonneilson.com;**DClark@lipsonneilson.com; tlevine@springelfink.com****Subject:** RE: Russo - proposed settlement agreement