

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDITH SALTER, INDIVIDUALLY;
JOSHUA KANER, INDIVIDUALLY;
AND JOSHUA KANER AS
GUARDIAN AND NATURAL
PARENT OF SYDNEY KANER, A
MINOR,

Appellant,

vs.

EDWARD RODRIGUEZ MOYA, AN
INDIVIDUAL; AND BERENICE
DOMENZIAN-RODRIGUEZ, AN
INDIVIDUAL,

Respondents.

CASE NO. 83239

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RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellants Judith Salter and Joshua Kaner, as individual and as guardian and natural parent of Sydney Kaner, are individuals, and were in the underlying action and are in this Appeal represented by Daniel Price, Esq. and Christopher Beckstrom, Esq., of the law firm Price Beckstrom, PLLC.

Respondents Edward Rodriguez Moya and Berenice Domenzian-Rodriguez are individuals and were in the underlying action and are in this Appeal represented by Darrell D. Dennis, Esq. and Michael R. Smith, Esq., of the law firm Lewis Brisbois Bisgaard & Smith, LLP.

DATED this 2nd day of December, 2021

LEWIS BRISBOIS BISGAARD & SMITH LLP

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I.

ROUTING STATEMENT

This matter is presumptively assigned to the Nevada Court of Appeals as this Appeal involves a contract dispute wherein the amount in controversy is less than \$75,000.00. NRCP 17(b)(6).

II.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a “time-limited settlement offer,” which articulates the material terms of an agreement and provides only for acceptance by performance, is sufficient to establish a contract;
2. Whether an automobile liability insurer’s manifestation of intent to satisfy the material terms of the offer which also makes request for additional information to allow for performance under the contract serves to demonstrate acceptance of a valid and enforceable contract or serves as a counteroffer to the original offer, thereby terminating the offer element of a valid contract sufficient to terminate the established underlying contract;
3. Whether an automobile liability insurer’s request for additional information to allow for performance under the contract violates the material terms of the contract sufficient to terminate the established contract;
4. Whether compliance with Nevada Revised Statutes Section 41.200, which is

- Nevada's Minor's Compromise Claim Statute, is mandatory or permissive;
5. Whether the contract offeror's silence to an automobile liability insurer's request for additional information to allow for performance under the contract is unfaithful to the purpose of the contract.

III.

STATEMENT OF THE CASE

This is an appeal from a final order entered by the Honorable Jacqueline M. Bluth, District Judge of the Eighth Judicial District Court, Clark County, which was entered in favor of Respondents Edward Rodriguez Moya and Berenice Domenzain-Rodriguez. Appendix, Volume ("Vol.") 3, 542-547 and 548-556.¹

The underlying case arises from an alleged two-vehicle contact event which occurred on July 25, 2020. Vol. 1, 1-122.

On October 22, 2020, Defendants sent Moya & Domenzain-Rodriguez's automobile liability insurance provider GEICO a letter titled "Time-Limited Settlement Offer," which stated:

My clients' [*sic*] make this one-time offer to settle all of my clients' claims arising from this loss against your insured in exchange for the formal limits of your insureds' policy limits of \$50,000 as a global tender.

This offer expires on November 23, 2020 at 1:00 p.m., Pacific Time.

This offer can only be accepted by the following performance, accomplished prior to the expiration of this offer:

¹ All references herein are to Petitioners' Appendix. NRAP 30.

1) Receipt of \$50,000 (the global policy limits of this policy) in my office, payable to “Price Beckstrom, PLLC, Judith Salter, Joshua Kaner, and Sydney Kaner”. [*sic*]
Vol. 1, 13-14. Emphasis in original.

On November 12, 2020, GEICO, on behalf of its insureds Moya and Domenzain-Rodriguez, sent Salter and Kaner a responsive letter in which they accepted the offer. Vol. 1, 112-113. In this acceptance letter, GEICO stated, “At this time, we are extending an offer of the global limit of \$50,000.00 to settle three (3) bodily injury claims presented in this loss.” Vol. 1, 112-113.

On December 1, 2020, Salter and Kaner sent GEICO a letter in which they stated, “My clients were surprised that you did not accept their settlement offer dated October 22, 2020. We did receive your counteroffer dated November 12, 2020, which my clients reject.” Vol. 1, 115.

Salter and Moya filed their Complaint in the Eighth Judicial District Court for the State of Nevada on December 25, 2020, and Moya and Domenzain-Rodriguez filed their Answer on January 22, 2021.

On February 12, 2021, Moya and Domenzain-Rodriguez filed their Motion to Enforce Settlement Agreement, in which they argued a valid and enforceable contract had been formed by Salter and Kaner’s October 22, 2020, Offer Letter and Moya and Domenzain-Rodriguez’s November 12, 2020, Acceptance Letter. Vol. 1, 1-112.

On February 18, 2021, Salter and Kaner filed their Opposition to Defendants' Motion to Enforce Settlement, in which they argued they argued their October 22, 2020, Settlement Offer could only be accepted by performance of a specific act (like a reward), and that Moya and Domenzain-Rodriguez's November 12, 2020, Letter was a rejection of the material terms of the October 22, 2020, settlement offer and a counteroffer. Vol. 1, 113-137.

On February 23, 2021, Moya and Domenzain-Rodriguez filed their Reply to Plaintiff's Opposition to Defendants' Motion to Enforce Settlement Agreement. Vol. 1, 138-250, Vol. 2, 251-255.

Prior to the date set for Hearing on the matter, the district court issued a Minute Order in which they denied Defendants' Motion to Enforce Settlement. Vol. 2, 258-261.

On March 19, 2021, Moya and Domenzain-Rodriguez filed their Motion for Reconsideration of Court's March 15, 2021, Minute Order Denying Defendants' Motion to Enforce Settlement, in which they argued that the district court failed to consider that GEICO's November 12, 2020, Letter was not a renunciation of the material terms of the offered contract, but rather a manifestation of assent to the material terms and a request for information and guidance on the impediments to blind tender of \$50,000.00 to Salter and Kaner's counsel, namely compliance with Nev. Rev. Stat. 485.185 and Nev. Rev. Stat. 41.200. Vol. 2, 269-392.

On April 2, 2021, Salter and Moya filed their Opposition to Defendants' Motion for Reconsideration of Court's March 15, 2021, Minute Order Denying Defendants' Motion to Enforce Settlement. Vol. 2, 393-412. In this Opposition, Salter and Kaner again asserted no contract was formed as GEICO's November 12, 2020, Letter served as a rejection and counteroffer, and because GEICO did not blindly tender Moya and Domenzain-Rodriguez's automobile liability policy limits by the date demanded. Vol. 2, 393-412.

On April 8, 2021, Moya and Domenzain-Rodriguez filed their Reply to Plaintiff's Opposition to Defendants' Motion for Reconsideration of Court's March 15, 2021, Minute Order Denying Defendants' Motion to Enforce Settlement. Vol. 2, 413-500, Vol. 3, 501-541.

At Hearing on the matter, the district court determined that Salter and Kaner's October 22, 2020, Letter sufficiently laid out the material terms of an agreement to allow a contract to be formed; that GEICO's November 12, 2020, Letter was a valid acceptance of Salter and Kaner's offer to settle; and that GEICO's November 12, 2020, Letter was not a repudiation of offer or counteroffer, but rather a request for additional information and guidance to allow GEICO to proceed with performance. Vol. 3, 542-547.

Salter and Moya appealed the decision of the district court.

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IV.

STATEMENT OF FACTS

Respondent Edward Rodriguez Moya was driving his vehicle, which he co-owns with his wife, Respondent Berenice Domenzian-Rodriguez, on July 25, 2020, southbound on Rancho Drive in Las, Vegas, Nevada. According to Appellants Judith Salter and Joshua Kaner, Edward Rodriguez Moya “rear-ended” their vehicle. Vol. 1, 1-112.

No police were summoned to the scene, and no police report was filed. (*See*, Nev. Rev. Stat. 484E.070(2), which provides no police report is necessary if no parties are injured and the apparent property damage is less than \$750.00.)

On July 28, 2020, Salter and Kaner informed Moya and Domenzain-Rodriguez’s automobile liability insurance provider, GEICO, of their retention of attorneys. Vol. 1, 134. In the July 28, 2020, Letter Salter and Kaner requested information about Moya and Domenzain-Rodriguez’s automobile liability insurance policy and other information. *Id.*

On July 29, 2020, Salter and Kaner’s attorneys sent another letter to GEICO, in which they provided “provider-specific” authorizations for the release of Salter and Kaner’s medical information and again demanded information about Moya and Domenzain-Rodriguez’s automobile liability insurance policy. Vol. 3, 528.

In response to the July 28, and July 29, 2020, Letters, GEICO provided the

requested information concerning Moya and Domenzain-Rodriguez's automobile liability insurance policy. Vol. 1, 137. In this Letter, GEICO also denied Salter and Kaner's claims of injuries. *Id.*

Several months later, on October 22, 2020, Salter and Kaner sent GEICO a letter titled "Time-Limited Settlement Offer," in which Salter and Kaner made demand for the entirety of Moya and Domenzain-Rodriguez's automobile liability insurance policy, which was \$50,000.00, in exchange for release of all possible claims. Vol. 1, 10-11. Salter and Kaner stated the offer could only be accepted by performance- the performance of a single check payable to the attorneys for Salter, Kaner, and minor Kaner, due to their attorneys not later than 1:00 p.m. on November 23, 2020. *Id.*

On November 12, 2020, GEICO responded to Salter and Kaner's letter by agreeing the material terms of their offer (i.e., payment of the totality of their automobile liability insurance policy in exchange for release of all potential claims). Vol. 1, 109-110. In the November 12, 2020, Letter, GEICO requested information regarding the division of the settlement funds between the claimants (to comply with Nev. Rev. Stat. 485.185), and requested court approval of the minor Kaner's claim (as for compliance with Nev. Rev. Stat. 41.200). Vol. 1, 109-110.

Salter and Kaner did not respond to GEICO's November 12, 2020, Letter.

On December 1, 2020, Salter and Kaner sent GEICO a letter stating they were

disappointed GEICO did not accept their settlement offer, and stated they considered GEICO's November 12, 2020, Letter which repeated the material terms of Salter and Kaner's settlement offer, as a counteroffer. Vol. 1, 112. In the December 1, 2020, Letter, Salter and Kaner stated they would not accept GEICO's acceptance of their extended offer. *Id.*

Salter and Kaner filed their Complaint in the Eighth Judicial District Court for the State of Nevada on December 25, 2020. Moya and Domenzain-Rodriguez filed their Answer on January 22, 2021.

Moya and Domenzain-Rodriguez filed their Motion to Enforce Settlement Agreement on February 12, 2021. Vol. 1, 1-112. The matter was set for Hearing before the District Court, with Hearing set for on March 17, 2021. However, on March 15, 2021, and without Hearing, the District Court issued a Minute Order denying Moya and Domenzain-Rodriguez's Motion to Enforce Settlement. Vol. 2, 256-257.

On March 19, 2021, Moya and Domenzain-Rodriguez filed their Motion for Reconsideration of the Court's March 15, 2021, Minute Order, in which they argued the district court's March 15, 2021, Minute Order was clearly erroneous as the district court failed to consider whether GEICO's November 12, 2020, was a repudiation of Salter and Kaner's settlement offer or an acceptance of the offer and a request for information to allow GEICO to comply with Nev. Rev. Stat. 485.185

and Nev. Rev. Stat. 41.200. Vol. 2, 269-392.

After Hearing on the merits, the district court agreed with Moya and Domenzain-Rodriguez that a valid contract existed between the parties and that the contract should be enforced. Vol. 3, 548-556.

Salter and Kaner appealed.

V.

STANDARD OF REVIEW

Contract interpretation is subject to a *de novo* standard of review. However, whether a contract exists is a question of fact, requiring the Nevada Supreme Court to defer to the district court's finding unless the district court's findings are clearly erroneous or not based on substantial evidence. May v. Anderson, 121 Nev. 668, 672-673, 119 P.3d 1254, 1257 (2005).

VI.

SUMMARY OF ARGUMENT

The instant case is about contract formation and the respective acts of the parties to a contract in the formation and enforcement of a contract.

Salter and Kaner argue that their "time-limited settlement offer" could only be accepted by performance, like a reward, and that any actions taken by GEICO on behalf of their insureds Moya and Domenzain-Rodriguez to satisfy or perform under

the contract are not to be considered when evaluating performance or beginning of performance under the contract.

Moya and Domenzain-Rodriguez assert that Salter and Kaner made an offer, which was accepted by overt manifestation of intent to perform and satisfy the material terms of the contract, such that a valid and enforceable contract were formed. Moya and Domenzain-Rodriguez assert that Salter and Kaner's actions/ silence following the overt manifestation of intent to perform and satisfy the material terms of the contract thwarted complete performance under the contract.

The district court properly determined that a valid and enforceable contract was created by way of Salter and Kaner's offer to settle and Moya and Domenzain-Rodriguez's overt manifestation of intent to perform and satisfy the material terms of the contract.

The district court's determination and grant of enforcement of contract should be affirmed.

VI.

ARGUMENT

A. The District Court Properly Determined that a Valid and Enforceable Contract Was Formed and Existed Between the Parties.

Requirements of Contract

Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration. A meeting of the minds exists

when the parties have agreed upon the contract's essential terms. Which terms are essential depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought. Certified Fire Prot. Inc. v. Precision Constr., 128 Nev. 371, 283 P.3d 250, 255 (2012), internal citations omitted.

A contract, to be enforceable, must be sufficiently definite. In determining whether a contract or its terms are definite, an importance consideration is whether the court can determine the putative contract's exact meaning and fix the legal liability of the parties. Chung v. Atwell, 103 Nev. 482, 484, 745 P.2d 370, 371 (1987) internal citations omitted.

In the present matter, the district court determined there was an offer with acceptance, a meeting of the minds between the parties concerning the material terms of the agreement, and consideration sufficient to determine that a valid and enforceable contract had been formed. Vol. 3, 548-556.

Offer and Material Terms

An Offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Restatement (Second) of Contracts § 24.

“A contract can be formed, however, when the parties have agreed to the material terms, even though the contract’s exact language is not finalized until later.” May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

In the present matter, by virtue of their October 22, 2020, Letter, Salter and Kaner extended an offer to settle their alleged claims against Moya and Domenzain-Rodriguez in exchange for the entirety of Moya and Domenzain-Rodriguez’s GEICO automobile liability insurance policy. Vol. 1, 10-11.

The material terms of the settlement agreement were plain and unambiguous-release of all of Salter and Kaner’s potential claims against Moya and Domenzain-Rodriguez in exchange for \$50,000.00, which represented the entirety of Moya and Domenzain-Rodriguez’s automobile liability insurance policy.

The district court reviewed the Salter/Kaner October 22, 2020, Letter and determined that the material terms of the underlying contract were sufficiently articulated to create a valid offer. Vol. 3, 548-556.

Meeting of Minds on Material Terms and Acceptance

Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. Restatement (Second) of Contracts § 50(1).

An acceptance contemplates a meeting of the minds as to the essential terms of the contract and acceptance of the same terms contained in the offer. Keddie v. Beneficial Inc., 94 Nev. 418, 421, 580 P.2d 955, 957 (1978).

A contract is founded upon the meeting of the minds of the parties as to ascertainable terms. Back Streets v. Campbell, 95 Nev. 651, 652, 601 P.2d 54, 55 (1979).

In the present matter, there was meeting of the minds and acceptance of the material terms. Vol. 3, 548-556.

In GEICO's November 12, 2020, Letter, GEICO responded to Salter and Kaner that it would provide the entirety of Moya and Domenzain-Rodriguez's automobile liability insurance policy in exchange for release of all of Salter and Kaner's possible claims against Moya and Domenzain-Rodriguez. Vol. 1, 109-110. GEICO's November 12, 2020, Letter demonstrated a meeting of the minds between the parties concerning the material terms of Salter and Kaner's offer and reflected GEICO's assent to the material terms of Salter and Kaner's offer. *Id.*

Manifestation of Intent to Perform

Manifestation of mutual assent to an exchange requires that each party either make a promise or being to render a performance. Restatement (Second) of Contracts § 18.

The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act. Restatement (Second) of Contracts § 19(1).

Acceptance of an offer may be implied from acts or conduct. In re Estate of Mariotte, 127 Ariz. 291, 292, referencing “Industrial America,” Inc. v. Fulton Industries, Inc., 285 A.2d 412 (Del.Super.1971)

In the instant matter, by way of the November 12, 2020, letter, GEICO demonstrated an overt manifestation of assent to the material terms of the contract as offered by Salter and Kaner, thereby solidifying the agreement and establishing the existence of a valid and enforceable contract. Vol. 1, 109-110.

Consideration for Agreement

The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists. Restatement (Second) of Contracts § 74.

A settlement agreement is a contract, and thus, must be supported by consideration in order to be enforceable. Consideration is the exchange of a promise or performance, bargained for by the parties. Jones v. Suntrust Mortg., Inc., 128 Nev. 188 191, 274 P.3d 762 (2012).

In the instant matter, Salter and Kaner exchanged a promise to settle any and all possible claims against Moya and Domenzain-Rodriguez in exchange for \$50,000.00, which Salter and Kaner knew was the entirety of Moya and Domenzain-Rodriguez's automobile liability insurance policy. Vol. 1, 10-11.

The district court determined that there was a valid offer with clear material terms, an acceptance of the material terms, a meeting of the minds on the material terms, and consideration such that a valid and enforceable contract existed between the parties. Vol. 3, 548-556.

B. The GEICO November 12, 2020, Letter was not a Counteroffer, but Rather a Request for Information to Facilitate Compliance with Nevada Law and Fulfilment of the Contract.

In the November 12, 2020, Letter, GEICO indicated an intent to perform under the offer and began performance sufficient to create an enforceable contract. Vol. 1, 109-110. In the November 12, 2020, Letter, GEICO sought instruction and additional information on two points, namely the manner by which the settlement checks would be distributed to allow compliance with Nev. Rev. Stat. 485.185 and the existence of a court's compromise of the claimant minor's claim pursuant to Nev. Rev. Stat. 41.200. *Id.*

Nev. Rev. Stat. 485.185

Nevada Revised Statute § 485.185 is Nevada's minimum automobile liability

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insurance coverage statute, and states:

1. Except as otherwise provided in subsection 2, every owner of a motor vehicle which is registered or required to be registered in this State shall continuously provide, while the motor vehicle is present or registered in this State, insurance provided by an insurance company licensed by the Division of Insurance of the Department of Business and Industry approved to do business in this State:
 - (a) In the amount of \$25,000 for bodily injury to or death of one person in any one crash;
 - (b) Subject to the limit for one person, in the amount of \$50,000 for bodily injury to or death of two or more persons in any one crash; and
 - (c) In the amount of \$20,000 for injury to or destruction of property of others in any one crash, for the payment of tort liabilities arising from the maintenance or use of the motor vehicle.
2. the provisions of this section do not apply to a moped.

Moya and Domenzain-Rodriguez have a contract of automobile liability insurance which provides bodily injury coverage up to \$25,000 per person/\$50,000 per occurrence. Vol. 1, 137. In the underlying action three persons asserted potential claims against the automobile liability insurance policy. Vol. 1, 10-11.

In GEICO's November 12, 2020, Letter, GEICO requested information and guidance on how the settlement payments would be allocated to allow compliance with this statute. Vol. 1, 109-110.

Salter and Kaner did not provide any information or guidance on this topic, instead waiting until December 1, 2020, to respond to GEICO's request for information and guidance, and then by stating they were unilaterally withdrawing

the accepted offer. Vol. 1, 112.

The district court properly determined that GEICO's request for information and guidance was not a rejection to Salter and Kaner's offer and was not a counter-offer. Vol. 3, 548-556.

Nev. Rev. Stat. 41.200

Nevada Revised Statute § 41.200 is Nevada's Minor's Compromise Claim Statue, and was designed and implemented to protect minors who have legitimate claims against third-party tortfeasors. While the persons from whom the minor needs protection is not specified, the statue makes clear the purpose of the court intervention is to determine and assert the best interests of the minor. Nev. Rev. Stat. § 41.200. *See also, Haley v. Eighth Judicial Dist. Court*, 128 Nev. 171, 273 P.3d 855 (2012).

In the November 12, 2020, Letter, GEICO stated its position on adhering to the provisions of this statute. Vol. 1, 109-110.

Salter and Kaner did not provide any information or guidance on this topic, instead waiting until December 1, 2020, to respond to GEICO's request for information and guidance by stating they were rejecting the claimed counteroffer. Vol. 1, 112.

The district court determined that GEICO's request for adherence to Nevada law was not a rejection of Salter and Kaner's offer and was not a counter-offer. Vol.

3, 548-556.

C. Plaintiffs Acts Prevented Completion of the Contract Under the Immaterial Terms Which Plaintiffs Now Claim Prevented Formation Of Valid and Enforceable Contract.

In GEICO's November 12, 2020, Letter, GEICO demonstrated a manifest intent to enter into the contract on the material terms proposed by Salter and Kaner.

Vol. 1, 109-110.

Salter and Kaner did not respond to GEICO's request for information/guidance on how to adequately perform under the contract, and instead waited until after the initial offer period to revoke the offer. Vol. 1, 112.

Every Contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. Restatement (Second) of Contracts § 205.

“It is well established within Nevada that every contract imposes upon the contracting parties the duty of good faith and fair dealing.” Hilton Hotels Corp. v. Butch Lewis Prods., 109 Nev. 1043, 1046, 862 P.2d 1207, 1209 (1993), *quoting* A.C. Shaw Construction v. Washoe County, 105 Nev. 913, 784 P.2d 9 (1989).

“The implied covenant of good faith and fair dealing exists in every Nevada contract and essentially forbids arbitrary, unfair acts by one party that disadvantage the other.” J.A. Jones Constr. C. v. Lehrer McGovern Bovis, Inc., 201 Nev. 277, 286, 89 P.3d 1009, 1015 (2004).

“When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith. Whether the controlling party’s actions fall outside the reasonable expectations of the dependent party is determined by the various factors and special circumstances that shape these expectations.” Hilton Hotels Corp. v. Butch Lewis Prods., 107 Nev. 266, 234, 808 P.2d 919, 923-24 (1991), *quoting* A.C. Shaw Construction v. Washoe County, 105 Nev. 913, 784 P.2d 9 (1989).

A request for additional information to allow performance under a contract offer is acceptance of the contract terms, and does not act to invalidate the offer. Pravorne v. McLeod, 79 Nev. 341, 383 P.2d 855 (1963).

“Because a settlement contract is formed when the parties have agreed to its material terms... a party’s refusal to later execute a ... document after agreeing upon the ... essential terms does not render the settlement agreement invalid.” Phung v. Doan, 2018 Nev. Unpub. Lexis 399, 420 P.3d 1029 (Nev. 2018), *quoting* May v. Anderson, 121 Nev. 668, 670, 119 P.3d 1254, 1256 (2005).

When looking at the issues surrounding the formation of a contract, “The better approach is for the courts to examine the circumstances surrounding the parties’ agreement in order to determine the true mutual intentions of the parties. Courts today tend to be willing to look beyond the written document to find the ‘true

understanding of the parties.” Hilton Hotels Corp. v. Butch Lewis Prods., 107 Nev. 226, 231, 808 P.2d 919, 921-22 (1991), *quoting* Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 780 (9th Cir. 1981).

In the instant matter, Salter and Kaner made a valid and unambiguous offer. Vol. 1, 10-11. In the instant matter, there was a meeting of the minds of the material terms of plaintiff’s offered contract, and GEICO manifested an overt intent to accept the offer and perform according to plaintiff’s offer. Vol. 1, 109-110; Vol. 3, 548-556. GEICO only requested instruction or guidance on how to perform and maintain compliance with Nevada statutes. Vol. 1, 109-110.

By sending the November 12, 2020, Letter, GEICO exerted a clear and overt manifestation of intent to accept plaintiff’s offer and enter into a settlement agreement with plaintiff at the material terms presented. GEICO agreed to all material terms presented in plaintiff’s offer letter, and only requested direction on how to comply with Salter and Kaner’s demands and remain in compliance with Nev. Rev. Stat. 485.185 and Nev. Rev. Stat. 41.200. Vol. 1, 109-110.

Salter and Kaner’s attorneys did not respond to this acceptance of material terms. Vol. 1, 115. As stated by the Nevada Supreme Court in J.A. Jones Constr. Co. v. Lehrer McGovern Bovis, Inc., *supra*, delays caused by the other party’s bad faith or fraud and delays caused by the other party’s active interference are evidence

of intentional violations of the implied covenant of good faith and fair dealing. *See also*, Restatement (Second) of Contracts, § 241.

This failure to respond was deliberately intended to breach the established contract.

D. Salter and Kaner Assert the October 22, 2020, Letter Created a Unilateral Contract Which Could Only Be Accepted By Performance. Salter and Kaner Are Mistaken About the Distinction Between Unilateral and Bilateral Contracts.

In their Opening Brief, Salter and Kaner assert that the October 22, 2020, Letter was an offer to enter into a unilateral contract which could only be accepted by performance, i.e., blind submission of a single check in the amount of \$50,000.00 to their counsel without concern for either Nev. Rev. Stat. 485.185 or Nev. Rev. Stat. 41.200.

In their Opening Brief, Salter and Kaner present the unpublished Nevada Supreme Court case of Eagle Materials, Inc. v. Stiren, 2011 Nev. Unpub. LEXIS 1086, 2011 WL 379187 (2011) for their claimed support that a unilateral contract invited acceptance by performance of an act, and the performance of the specified act is the only manner of acceptance of the offer. In Eagle Materials, Inc. v. Stiren, *supra*, the dispute involved an employee's earned bonus under an employer's bonus program- the employee worked under the bonus plan and was entitled to his earned bonus. Without relitigating the facts in Eagle Materials, Inc. v. Stiren, *supra*, it should be clear that only way an employee could earn a bonus from his employer

was by performance- the bonus was more akin to a reward for performance than a mutually bargained-for exchange. The facts of Eagle Materials, Inc. v. Stiren, *supra*, are very different than the instant matter.

In the Opening Brief, Salter and Kaner also rely on the 1934 California case of Davis v. Jacoby, 1 Cal. 2d 370, 34 P.2d 1026 (1934) for the proposition that “The distinction between unilateral and bilateral contracts is well settled in the law.”

However, the Davis Court continued by stating:

Although the legal distinction between unilateral and bilateral contracts is thus well settled, the difficulty in any particular case is to determine whether the particular offer is one to enter into a bilateral or unilateral contract. Some cases are quite clear cut. This an offer to sell which is accepted is clearly a bilateral contract, while an offer of a reward is a clear-cut offer of a unilateral contract which cannot be accepted by a promise to perform, but only by performance...By the provisions of the Restatement of the Law of Contracts it is expressly provided that there is a presumption that the offer is to enter into a bilateral contract. Davis v. Jacoby, 1 Cal.2d 370, 378-79, 34 P.2d 1026, 1030 (1934).

As stated by Restatement (Second) of Contracts § 1, comment f:

Section 12 of the original Restatement defined unilateral and bilateral contracts. It has not been carried forward because of doubt as to the utility of the distinction, often treated as fundamental, between the two types. [...] The principal value of the distinction has been the emphasis it has given to the fact that a promise is often binding on the promisor even though the promisee is not bound by any promise. This value is retained in § 25 on option contracts. But the terms unilateral and bilateral are generally avoided in this Restatement.

The Restatement (Second) of Contracts evolved past the adherence to unilateral/bilateral contracts, and instead advances that the intent and actions of the

parties controls.

As stated by the Nevada Supreme Court in Eagle Materials, Inc. v. Stiren, *supra*, “Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. Where an offer invites an offeree to accept by rendering a performance ... [a] contract is created when the offeree tenders or begins the invited performance.” *quoting* Restatement (Second) of Contracts §§ 50 and 45 (1981).

In the instant matter, GEICO manifest an intent to enter into a contract with Salter and Kaner on the material terms of the offered contract. Vol. 1, 109-110. Salter and Kaner’s offer was not a reward for performance, which is the archetypical unilateral contract. Salter and Kaner’s offer was a bilateral contract in that it requested return promises.

GEICO’s November 12, 2020, Letter demonstrated an overt manifestation of intent to be bound by the contract offered by Salter and Kaner in their October 22, 2020, Letter. Vol. 1, 109-110. GEICO’s actions in response to Salter and Kaner’s October 22, 2020, Letter, created a valid and enforceable contract. Nothing GEICO did or failed to do prevented Salter and Kaner from providing the information/guidance requested by GEICO to satisfy the contract. By failing to respond, Salter and Kaner breached the existing valid and enforceable contract.

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CONCLUSION

Based on the foregoing, Moya and Domenzain-Rodriguez respectfully request this Honorable Court affirm the judgment of the district court.

DATED this 2nd day of December 2021

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ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman, size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **6,260** words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 2nd day of December, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b) and N.E.F.C.R. 4(b)(1), 5(k) and 10(b), I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and that on this 2nd day of December, 2021, I did cause a true and correct copy of **RESPONDENTS' ANSWERING BRIEF** to be served via the Court's electronic filing and service system (EFlex) to all parties on the current service list.

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