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SUPREME COURT

STATE OF NEVADA

RONALD J. ROBINSON,

Appellant,

vs.

STEVEN A. HOTCHKISS,

Respondent.

RONALD J. ROBINSON,

Appellant,

vs.

ANTHONY WHITE, ROBIN SUNTHEIMER, TROY SUNTHEIMER, STEPHENS GHESQUIERE, JACKIE STONE, GAYLE CHANY, KENDALL SMITH, GABRIELE LAVERMICOCCA, ROBERT KAISER.

Respondents.

No. 83250

APPELLANT'S REPLY BRIEF

NRAP 26.1 DISCLOSURE STATEMENT

Counsel for defendant/appellant, Ronald J. Robinson, 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.

1. Defendant/appellant is an individual who resides in Clark County, Nevada, so there are no parent corporations or any publicly held company that owns 10% of more of defendant/appellant.

2. Michael F. Bohn, Esq. of the Law Offices of Michael F. Bohn, Esq., Ltd. is representing defendant/appellant in this appeal, and Harold P. Gewerter, Esq. represented defendant/appellant in the district court.

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SUMMARY OF THE ARGUMENT

Plaintiffs' actions were subject to dismissal because Provident Trust Group (hereinafter "Provident") was an indispensable party and did not join the actions.

The judgment improperly granted double recovery to each plaintiff because Provident's receipt of stock in Virtual Communications Corporation (hereinafter "VCC") in "full and final satisfaction" of each note discharged each obligation allegedly guaranteed by Ronald Robinson (hereinafter "Robinson").

Plaintiffs did not prove that they individually loaned any money to VCC or that Robinson signed the Personal Guarantee at the end of each Promissory Note.

Plaintiffs' claim based on NRS 90.660 was barred by the statute of limitations in NRS 90.670.

Plaintiffs had no right to rescind Provident's receipt of the VCC stock in full satisfaction of each promissory note.

The language quoted by plaintiffs from the order confirming VCC's Chapter 11 Plan and in Article X (B)(3) of the Plan does not relate to Provident's Class 3 unsecured claims.

Plaintiffs did not prove that each note was a security that was required to be registered pursuant to NRS 90.460.

Plaintiffs did not prove that they were entitled to recover damages from Robinson pursuant to NRS 90.660.

Plaintiffs did not prove that they are entitled to recover damages for fraud, misrepresentations, and omissions.

The amount of attorneys fees awarded to plaintiffs is not supported by substantial evidence.

ARGUMENT

1. Plaintiffs' actions were subject to dismissal because Provident was an indispensable party and did not join the actions.

At page 1 of their Brief, plaintiffs state that "Appellant's contract with Provident Trust disclaimed any duty to pursue litigation." On the other hand, the exhibits admitted at trial do not include any agreement between Robinson and Provident. *See* Exhibits 1 to 14 at APP000821-APP001157.

At page 7 of their Brief, plaintiffs state that the relationship between plaintiffs and Provident is "governed by contract," which means that plaintiffs are bound by their agreement that each "Individual Retirement Custodial Account Agreement" (hereinafter "Custodial Agreement") is governed by 26 U.S.C. § 408(a). *See* first page of Custodial Agreement at AA-4:APP000520.

Paragraph 8.05(a) of the Custodial Agreement states that "your selection of

investments must be limited to those types of investments that comport with our internal policies, practices, and standards and are deemed administratively feasible by us." (AA-4:APP000523)

Paragraph 8.05(b) of the Custodial Agreement (AA-4:APP000523) provides:

> **We also have the right not to effect any transaction/investment** that we deem to be beyond the scope of our administrative responsibilities, capabilities, or expertise or **that we determine in our sole discretion does not comport with our internal policies, practices, or standards.** (emphasis added)

Paragraph 8.07 of the Custodial Agreement also gave Provident control over making the required minimum distributions using the uniform lifetime table in Regulations section 1.401(a)(9)-9. (AA-4:APP000524)

This language proves that Provident was not a "passive" custodian, but that Provident had active duties and powers as Trustee.

As discussed at pages 44 and 45 of Appellant's Opening Brief, plaintiffs are also estopped by their express representation in Paragraph 8.03(f) of the Custodial Agreement that every investment by the IRA "has been registered or **is exempt from registration under federal and state securities laws**. . . ." (AA-4:APP00522) *See* Cheqer, Inc. v. Painters and Decorators Joint Committee, Inc., 98 Nev. 609, 614, 655 P.2d 996, 998-99 (1982). Plaintiffs cite no contrary authority.

At page 8 of their Brief, plaintiffs state that "Provident Trust disclaimed any

obligation to pursue these claims," but Provident did not disclaim its obligation to serve as Trustee of each account as required by 26 U.S.C. § 408(a).

Plaintiffs also do not cite any authority that prevents the Trustee of an IRA from being the holder of a promissory note drawn payable to the Trustee.

Plaintiffs state that "[n]ext to Plaintiffs' signatures is a stamped signature from Provident Trust where the CEO signed off as **a consultant** and not as a Trustee." In fact, **none of the promissory notes bear a signature by any officer or employee of Provident.**

Except for the note held by Provident for Robin L. Suntheimer's Roth IRA, which does not bear any signature by Provident (AA-5:APP000835), the signature line on page 3 of each promissory note bears the signature of each individual plaintiff acting as a "Consultant" for Provident. *See* AA-5:APP000823; AA-5:APP000827; AA-5:APP000831; AA-5:APP000838; AA-5:APP000842; AA-5:APP000847; AA-5:APP000850; AA-5:APP000856; and AA-5:APP000859.

At the bottom of page 8 and top of page 9 of their Brief, plaintiffs quote from paragraph 8.05(b) of the Custodial Agreement, but plaintiffs do not identify any language that states Provident was not acting as a Trustee of each account as required by 26 U.S.C. § 408(a).

At page 9 of their Brief, plaintiffs state that "Appellant has not explained how Plaintiffs could have forced Provident Trust to sue on their behaves," but no such explanation is required by Nev. R. Civ. P. 19(a)(1). Nev. R. Civ. P. 19(a)(1) instead requires that the real party in interest "must be joined as a party."

Plaintiffs also state that "Appellant took no action to bring Provident Trust into the case," but Nev. R. Civ. P. 19(a)(1) does not impose any such obligation on Robinson.

Plaintiffs object that Robinson raised the issue "on the eve of trial," but Nev. R. Civ. P. 19(a)(1) does not contain any time limit on when the issue must be raised.

In the last paragraph at page 9 of their Brief, plaintiffs make a series of statements that are directly contradicted by the language in the Custodial Agreement.

At page 10 of their Brief, plaintiffs quote from the unpublished order in Deem v. Baron, 2:15-cv-00755-DS (D. Utah 2016), but the order has no persuasive value because the court did not discuss at all the language in 26 U.S.C. § 408(a) that requires the trust relationship to meet certain requirements.

In Vannest v. Sage, Rutty & Co., Inc., 960 F. Supp. 651 (W.D.N.Y. 1997), "Vannest's shares were purchased by his IRA Rollover and it was not until 1990 that **they were sold out of the IRA Rollover and purchased by him individually**." Id.

at 658. (emphasis added) Consequently, in Vannest, title to the shares was no longer held by the trustee of the trust expressly required by 26 U.S.C. § 408(a).

In FBO David Sweet IRA v. Taylor, 4 F. Supp. 3d 1282 (M.D. Ala. 2014), the plaintiff filed a complaint for breach of contract and specific performance, and the court applied Alabama law to conclude that "**under the limited facts and circumstances** surrounding **this unique situation**, the Court finds that **for the purposes of this case**, ETC served as merely a holding company while Sweet acted as trustee of his Self-Directed IRA." Id. at 1285. (emphasis added)

In addition to ignoring the express language in 26 U.S.C. § 408(a), the three cases cited by plaintiffs do not discuss language like that found in paragraphs 8.05(a), 8.05(b). 8.06, 8.07 and 8.13 of the Custodial Agreement signed by each plaintiff. Plaintiffs also do not identify any authority that permits an account owner and a custodian to contract around the mandatory language adopted by Congress in 26 U.S.C. § 408(a)(2).

At page 11 of their Brief, plaintiffs state that they applied a "belt and suspenders" approach, but they do not cite any authority that allowed Provident to delegate its duties as trustee to plaintiffs.

Plaintiffs state that "Appellant has not explained how the Court failed to

provide 'complete relief' or how Provident might have had 'an interest relating to the subject matter of the action,'" but plaintiffs do not cite any authority that contradicts the language in NRS 163.020(4), Nev. R. Civ. P. 17(a)(1)(E), or the holding in Back Streets, Inc. v. Campbell, 95 Nev. 651, 601 P.2d 54, 55 (1979).

How is Robinson protected from a future lawsuit filed by the holder of each promissory note, i.e. Provident, when the individual plaintiffs did not have any right to serve as the trustee required by 26 U.S.C. § 408?

In the last paragraph at page 11, plaintiffs state that 26 U.S.C. § 408(a)(2) does not require that Provident be a Bank, but the controlling fact is that the individual plaintiffs could never qualify to be an IRA Custodian under 26 U.S.C. § 408(a)(2).

At page 12 of their Brief, plaintiffs state that their contract with Provident "unequivocally states that Provident Trust has no duty to bring claims on Plaintiff's behalf." The Custodial Agreement, however, does not authorize Provident to delegate or assign to plaintiffs the right to file a lawsuit based on a registration claim under state securities law that plaintiffs expressly represented did not exist. *See* paragraph 8.03(f) of Custodial Agreement at AA-4:APP00522.

2. The judgment improperly granted double recovery to each plaintiff because Provident's receipt of stock in VCC in "full and final satisfaction" of each note discharged each obligation allegedly guaranteed by Robinson.

At page 1 of their Brief, plaintiffs also state that the shares of VCC stock that Provident received in "complete satisfaction" of each promissory note "are unregistered, have no market value, and Plaintiffs have not received any 'recovery.'" At page 2 of their Brief, plaintiffs state that "Appellant has not proven that Respondents received anything of value when the bankruptcy court ordered their Notes be exchanged for VCC's preferred shares." Plaintiffs repeat this same argument at page 6 of their Brief and at pages 12 and 13 of their Brief.

On the other hand, none of the valuation methods discussed in Southdown, Inc. v. McGinnis, 89 Nev. 184, 188-90, 510 P.2d 636, 639 (1973), require that a stock be "registered" in order for the stock to have value.

Hotchkiss admitted at trial that he received 15,000 shares of VCC stock valued at $5.00 each. (AA-4:APP000600, l. 11 to APP000601, l. 3) Plaintiffs did not present any admissible evidence that disproves that value.

At page 13 of their Brief, plaintiffs quote Mr. Hotchkiss' testimony that he cannot sell his stock in VCC to anybody "as far as I know." (AA-4:APP000603, ll. 20-24)

On the other hand, the record on appeal does not contain any letter restricting Provident's ability to sell the VCC stock received in return for each note. See

definition of "restricted security" in Black's Law Dictionary (10th ed. 2014).

Section III(B)(3) of VCC's Chapter 11 Plant (AA-10:APP001297) VCC's Chapter 11 Plan (AA-10:APP001812) also does not place any restrictions on Provident's ability to sell the stock distributed to Provident in return for each note.

Plaintiffs also state that the shares "pay no distributions" and that the shares issued to Provident "represent a tiny fraction of VCC's outstanding shares." On the other hand, this court can take judicial notice pursuant to NRS 47.130(2) that each share of stock in Amazon.com, Inc. was worth $2,799.72 on January 25, 2022 even though the company has never issued a dividend to its stockholders and 507.15 million shares are outstanding.

Plaintiffs describe VCC as "a privately held, money losing company," but Robinson testified on February 24, 2020, that VCC was "very profitable right now" (AA-4:APP000653, l. 13) and that VCC's "technology has been improved, proved and proved to such an extent" that "a billion dollar Japanese company like Konica and Minolta that comes in as your venture partner." (AA-4:APP000675, ll. 16-21)

Paragraph Z of the Order Confirming First Amended Chapter 11 Plan of Reorganization of Virtual Communications Corporation (AA-10:APP001451, ll. 10-13) states:

> Pursuant to Sections 105(a), 1123(b)(3), 1129, and 1141 and Bankruptcy Rules 3016 and 9019, **the settlements, compromises**, discharges, releases, and injunctions set forth in the Plan are approved as an integral part of the Plan, **are fair, equitable, reasonable, and in the best interest of** the Debtor, its Estate, and **the holders of Claims** and Equity Interests. (emphasis added)

Plaintiffs do not cite any legal authority that empowered the district court to "second guess" these findings by the bankruptcy court.

At page 12 of their Brief, plaintiffs state that "Appellant argues that his personal guarantee was extinguished by the VCC Bankruptcy," but that is not Robinson's argument. Instead, as set forth at page 27 of Appellant's Opening Brief, the "full and final satisfaction, compromise, settlement, release, and discharge" of each promissory note pursuant to Section III(B)(3) of VCC's Chapter 11 Plant (AA-10:APP001297), discharged each guarantee pursuant to Nevada law. First Interstate Bank of Nevada v. Shields, 102 Nev. 616, 619-620, 730 P.2d 429, 431-432 (1986).

At page 13 of their Brief, plaintiffs cite the "general rule" that "a discharge of a debtor does not affect the liability of another entity for the discharged debt."

As discussed at pages 23 and 24 of Appellant's Opening Brief, however, creditors are bound by the satisfaction of a guaranteed obligation pursuant to a confirmed plan of reorganization. Travelers Indemnity Co. v. Bailey, 557 U.S. 137 (2009); Trullis v. Barton, 67 F.3d 779, 785 (9th Cir. 1995); Republic Supply Co. v.

Shoaf, 815 F.2d 1046 (5th Cir. 1987).

Plaintiffs do not cite any bankruptcy case or section of the Bankruptcy Code that prohibits a debtor from confirming a chapter 11 plan of reorganization that exchanges equity in the reorganized debtor for full satisfaction of a creditor's claim. Plaintiffs instead cite Owaski v. Jet Florida Systems, Inc. (In re Jet Florida Systems, Inc.), 883 F.2d 970, 976 (11th Cir. 1989), and In re Edgeworth, 993 F.2d 51, 54 (5th Cir. 1993), which both involved Chapter 7 bankruptcy cases that did not involve a confirmed Chapter 11 plan where debt was exchanged for stock in the reorganized debtor.

3. Plaintiffs did not prove that they individually loaned any money to VCC or that Robinson signed the Personal Guarantee at the end of each Promissory Note.

At page 3 of their Brief, plaintiffs state that "Appellant has set forth a schedule of the dates and amounts **invested by the individual Plaintiffs** on pages 12 and 13 of his Opening Brief." (emphasis added)

However, Robinson did not state that **any** amounts were "invested by the individual Plaintiffs." The list at pages 12 and 13 of Appellant's Opening Brief instead listed the "FBO" name for the eleven (11) promissory notes that identified "Provident" as the Holder. (AA-5:APP00821-APP00859).

At page 4 of their Brief, plaintiffs state that "Mr. Robinson claimed that his signature was used without his permission, and that he did not intend to guarantee repayment."

At trial, Mr. Robinson instead testified that "I had intended to guarantee some of them but not all of them" (AA-4:APP000624, ll. 9-10) and "that's the reason why I asked her to allow me to put initials on anyone she was going to use, because I wanted to be in a position to determine that factor." (AA-4:APP000624, ll. 12-14)

Plaintiffs did not produce any testimony by Julie Minuskin (hereinafter "Minuskin") that contradicted Robinson's system to limit the amount of the notes that he guaranteed.

Plaintiffs also did not prove that Robinson actually signed each of the promissory notes.

At page 4 of their Brief, plaintiffs state that "[t]he Court disagreed," but plaintiffs do not identify any evidence in the record that would support such a "disagreement" by the Court.

Plaintiffs also state that "[a]t least four separate documents evidence Mr. Robinson's intent to guarantee the Note. **AA pp. 865, 869, 1001, 1044**."

On the other hand, the second sentence in paragraph 1 of the agreement, dated

December 7, 2012 (AA-6:APP000865), states:

> Consultant agrees to identify 1 million dollars for Company within 6 months, before end of June, 2013.

As set forth at pages 12 and 13 of Appellant's Opening Brief, only two (2) of the eleven (11) promissory notes were dated before the end of June, 2013. *See* promissory note for $62,000.00 at AA-5:APP000854-APP000856 and promissory note for $35,000.00 at AA-5:APP000829-APP000831. The record on appeal does not contain any writing signed by Robinson where he agreed to guarantee any of the nine (9) promissory notes dated after June 30, 2013.

With respect to the agreement, dated January 15, 2013 (AA-6:APP000869), the agreement does not state that Robinson would personally guarantee any payments to "investors for the funding of Wintech, LLC." Plaintiffs also did not prove that VCC issued "A NOTE TO R.J. ROBINSON FOR THE TOTAL AMOUNT OF INVESTOR FUNDS" as required by the last paragraph of that agreement.

The third document (AA-7:APP001001) is one page from the consolidated notes to VCC's financial statements, dated September 30, 2014. "Note 8 - Notes Payable" does not specifically mention any of the notes identified at pages 12 and 13 of Appellant's Opening Brief. In this regard, the promissory note for $28,000.00, dated December 24, 2014 (AA-5:APP000851-APP000853) is dated after the time

period covered by Note 8. The $1,639,000 figure in Note 8 also includes at least $639,000.00 more than the agreed maximum amount of "1 million dollars" stated in paragraph 1 of the agreement, dated December 7, 2012. (AA-6:APP000865)

The fourth document (AA-8:APP001044) is one page from the consolidated notes to VCC's financial statements, dated December 31, 2015 & 2014. "Note 8 - Notes Payable" does not specifically mention any of the notes identified at pages 12 and 13 of Appellant's Opening Brief. The $188,800 and $2,187,500 figures in Note 7 include at least $1,376,300.00 more than the agreed maximum amount of "1 million dollars" stated in paragraph 1 of the agreement, dated December 7, 2012. (AA-6:APP000865)

At the top of page 5 of their Brief, plaintiffs state that Frank Yoder testified that "Appellant intended to guarantee the Note. **AA p. 733 lines 1-6.**"

Mr. Yoder instead testified that Robinson and Vernon Rodriguez "went about raising funds" and "they handled all – everything to do with the finances." (AA-5:733, ll. 2-3) Mr. Yoder then stated:

> As I understood it, Ron was going to give a personal guarantee on whatever promissory notes were created for the investors.
>
> (AA-5:733, ll. 3-4)

Mr. Yoder, however, did not identify any basis for his "understanding."

Mr. Yoder also testified that "I didn't know any of this information" and that "Ron and Vern were completely in charge of the finances and kept us in the dark, in fact." (AA-5:734, ll. 21-25)

Mr. Yoder also testified that "Ron and Vernon dealt with the Retire Happy, the company that was raising the funds, and Mike and I didn't have any contact with them." (AA-5:736, ll. 15-17)

Mr. Yoder also testified to preparing the powerpoint presentation attached to the email identified as document 61. (AA-5:734, ll. 4-15) The powerpoint presentation specifically identified the "Minimum Offering" as "$20,000" and the "Maximum Offering" as "$1,000,000." (AA-6:APP000947) The $1,000,000 "maximum" matches the "1 million dollars" limit in paragraph 1 of the agreement, dated December 7, 2012. (AA-6:APP000865)

Plaintiffs did not prove that any of the promissory notes listed at pages 12 and 13 of Appellant's Opening Brief were part of the $1,000,000 mentioned in the powerpoint slide.

At page 5, lines 3-8, plaintiffs include their characterization of deposition testimony provided by Robinson in the case of Reva Waldo v. Ronald J. Robinson, Case No. A-15-725246-C, but this deposition testimony was not published or

introduced into evidence in the present case.

Robinson's deposition testimony related to two (2) specific emails, dated September 17, 2013 (AA-6:APP000900-APP000901) and September 18, 2013. (AA-6:APP000904-APP000907) Noticeably absent from either email was any authorization for Minuskin to use the pre-signed promissory note without first obtaining Robinson's authorization.

Plaintiffs also claim that "[w]hen called to the stand, Ms. Davis refuted the testimony of her grandfather. **AA p. 698 lines 4-24**."

Noticeably absent from Ms. Davis' testimony, however, is any statement by Ms. Davis that she authorized Minuskin to use the pre-signed promissory note without first obtaining Robinson's authorization.

Also absent from the record on appeal is any testimony by Minuskin that she interpreted the September 18, 2013 email (AA-6:APP000904-APP000907) as an authorization to use the blank pre-signed promissory note without first obtaining Robinson's consent.

4. Plaintiffs' claim based on NRS 90.660 was barred by the statute of limitations in NRS 90.670.

At page 2 of their Brief, plaintiffs state that "Appellant failed to raise the affirmative defense of statute of limitations in any of the four answers he filed in the

Hotchkiss (and White) case(s)." Plaintiffs make this same claim at page 32 of their Brief.

On the other hand, in Affirmative Defense xvi at page 7 of defendant Vernon Rodriguez's answer to complaint (APP000043), Rodriguez stated: "Plaintiff is barred from relief because the deadline for the applicable statutes of limitation have passed."

Rodriguez also raised the argument based on NRS 90.670 at pages 10 to 13 of his opposition to plaintiffs' motion for damages and attorneys' fees. (AA-10:APP001260-APP001263)

As stated at page 46 of Appellant's Opening Brief, Robinson timely raised the defense at page 2 of his opposition and partial joinder filed on May 27, 2020 (AA-10:APP001320) when Robinson expressly joined "Defendant Rodriguez's legal authorities and arguments" as to "statute of limitations." (AA-10:APP001320)

In their reply to defendant Rodriguez' opposition (AA-10:APP001328-APP001345), plaintiffs did not object to Robinson's joinder as being untimely filed.

Plaintiffs also state that "[n]ot a single piece of evidence was introduced (or even offered) at trial in support of the defense." (AA-10:APP001333)

On the other hand, defendant Rodriguez supported his argument based on NRS 90.670 with the admissions made by plaintiffs in plaintiffs' motion for damages and

attorneys' fees, filed on May 11, 2020. (AA-9:APP001200-APP001247)

NRS 90.730(1) expressly provides that the registration information filed with the "Administrator" is "public information" and is "available for public examination." Consequently, the holding in Baroi v. Platinum Condominium Development, LLC, 914 F. Supp. 2d 1179, 1199 (D. Nev. 2012), established that defendants cannot use the "discovery rule" to extend the statute of limitations because "[t]he securities' status as registered or unregistered was publicly available information capable of discovery through reasonable care."

NRS 90.670 states that an action claiming that a person is liable pursuant to NRS 90.660(4) must be filed "**within the earliest of** 2 years after the discovery of the violation, **2 years after discovery should have been made by the exercise of reasonable care,** or 5 years after the act, omission or transaction constituting the violation." (emphasis added)

Because VCC's alleged violation of NRS 90.660(1)(b) was a matter of public record on the date each promissory note was executed, Provident had only two (2) years from the date of each promissory note to file a complaint alleging that Robinson was liable pursuant to NRS 90.660(4). Because every promissory note was signed by VCC on or before December 24, 2014, every claim against Robinson based on NRS

90.660 in the complaint filed on September 28, 2017 in Case No. A-17-762264-C (AA-1:APP000001-APP000016) and in the complaint filed on October 12, 2017 in Case No. A-17-763003-C (AA-1:APP000017-APP000036) was time-barred.

At page 6 of their Brief, plaintiffs state that "pursuant to NRS § 90.660," the VCC stock received by Provident "will be transferred to Appellant upon payment of the rescission amount ordered by the Court." NRS 90.660, however, does not contain any language that allows plaintiffs to rescind the "complete satisfaction, discharge, and release" of each promissory note pursuant to Section XI(A) of VCC's first amended Chapter 11 plan. (AA-10: APP001311)

At page 32 of their Brief, plaintiffs state that plaintiffs' guarantee claims are governed by the 6 year limitations period in NRS 11.190(1)(b), but those claims do not exist because Provident received VCC stock in "full and final satisfaction" of each such claim.

Plaintiffs also state that "a 5 year statute of limitations governs Respondents' securities law claims," but plaintiffs' claim against Robinson as a "control person" is subject to "the earliest of" the three options listed in NRS 90.670. The earliest option is 2 years after the issuance of each promissory note because the unregistered status of each promissory note was "publicly available information capable of discovery

through reasonable care." Baroi v. Platinum Condominium Development, LLC, 914 F. Supp. 2d 1179, 1199 (D. Nev. 2012).

At page 34 of their Brief, plaintiffs state that "[t]he appropriate accrual date for the statute of limitations is a question of law only if the facts are uncontroverted." Plaintiffs, however, have not identified any possible way that they could not have discovered the public records that "are public information and are available for public examination." NRS 90.730(1).

Because every single promissory note was signed by VCC on or before December 24, 2014, the two (2) year statute of limitations for every claim based on an alleged violation of NRS 90.460 expired no later than December 24, 2016.

At page 34 of their Brief, plaintiffs state that Vernon Rodriguez and Robinson sent emails to Mr. Hotchkiss "asking him to be patient," but these emails were all dated **after December 24, 2016.** *See* AA-6:APP000873, APP000876, APP000877. These emails also did not state that VCC "intended to return his principal," but instead proposed to offer equity in VCC to satisfy VCC's debt. (AA-6:APP000874)

Plaintiffs do not cite any authority that these emails could or did toll the statute of limitations. Plaintiffs also did not prove that these emails caused Mr. Hotchkiss "to wait before filing his complaint."

The complaint in Case No. A-17-762264-C was not filed until September 28, 2017, and the complaint in Case No. A-17-763003-C was not filed until October 12, 2017. Every claim asserted by plaintiffs based on NRS 90.660 was therefore time-barred and could not support entry of any judgment against Robinson.

5. Plaintiffs had no right to rescind Provident's receipt of the VCC stock in full satisfaction of each promissory note.

At page 2 of their Brief, plaintiffs state that "N.R.S. § 90.660 provides a mechanism to settle the rescission related accounting issues." NRS 90.660, however, does not include any language that allows plaintiffs to "rescind" the exchange of VCC stock for "full and final satisfaction" of each promissory note. The express language of NRS 90.660(1) instead required that the court deduct "the value of the security when the purchaser disposed of it" before judgment was entered against Robinson.

Although NRS 90.660(1) provides for an award of "interest at the legal rate of this State from the date of disposition of the security," the amount distributed to each Allowed Class 3 Claim included a "Common Stock Distribution" that was "equal to the total amount of all contract-rate interest accrued on the aggregate principal balance included within all Allowed Class 3 Claims as of the Petition Date." *See* definition for "Common Stock Distribution" at AA-10:APP001289. Plaintiffs have not cited any authority that authorized them to continue to collect interest on promissory notes that

were satisfied "in full."

6. The language quoted by plaintiffs from the order confirming VCC's Chapter 11 Plan and Article X (B)(3) of the Plan does not relate to Provident's Class 3 unsecured claims.

At pages 14 and 15 of their Brief, plaintiffs quote specific language that appears in the Order Confirming First Amended Chapter 11 Plan of Reorganization, filed on September 5, 2018 (AA-10:APP001277) and in Article X (B)(3) of VCC's Chapter 11 Plan of Reorganization, filed on June 8, 2018. (AA-10:APP001310-APP001311).

At page 15 of their Brief, plaintiffs state that this language "makes it clear that the reorganization, with the issuance of preferred shares to Plaintiffs did not serve as a release of any claims that Plaintiffs had against Mr. Robinson."

This particular release, however, is limited solely to providing a "full release **from** the debtor and its estate" of "causes of action that might be asserted **on behalf of** the debtor or its estate" against "the debtor and all current officers and directors of the debtor as of the effective date." (emphasis added)

The release is also limited to causes of action that are "IN ANY WAY RELATED TO THE CHAPTER 11 CASE, THE DEBTOR'S RESTRUCTURING, THE NEGOTIATION, FORMULATION OR PREPARATION OF THE PLAN, THE DISCLOSURE STATEMENT, OR ANY OTHER ACT OR OMISSION RELATED THERETO OCCURRING ON OR BEFORE THE CONFIRMATION DATE."

The language highlighted in bold by plaintiffs at page 15 of their Brief relates only to "THE FOREGOING RELEASE."

The language quoted by plaintiffs does not apply in any way to the "full and final satisfaction, compromise, settlement, release, and discharge of each Allowed Class 3 Claim" upon which Robinson bases his argument. *See* Article III, Section B(3) at page 11 of VCC's chapter 11 plan at AA-10:APP001310-APP001311.

At pages 15 and 16 of their Brief, plaintiffs state that Provident's receipt of VCC stock cannot be a novation because plaintiffs did not consent to the modification. On the other hand, paragraph 5 of the order confirming VCC's chapter 11 plan expressly provides that the Plan is binding on plaintiffs "regardless of whether any such Claimants or Holders voted to accept the Plan, is Impaired under the Plan, or has filed, or is deemed to have filed, a Proof of Claim." (AA-10:APP001278)

At page 16 of their Brief, plaintiffs again claim that"VCC's Chairman and CEO Appellant Robinson deliberately placed VCC into bankruptcy (**AA pp. 1184-1186**)," but the evidence proves that Robinson was only one of the three directors that unanimously consented to the filing of VCC's Chapter 11 petition.

Plaintiffs also state that Marion Properties, Ltd. v. Goff,108 Nev. 946, 840 P.2d 1230 (1992), is unlike the present case because "a creditor voluntarily dismissed

claims against the debtor with prejudice." (emphasis by plaintiffs)

As quoted at page 11 of defendants' pretrial memorandum (AA-3:APP 446) and at page 26 of Appellant's Opening Brief, Marion Properties, Ltd. v. Goff cited Howard v. Associated Grocers, 601 P.2d 593 (Ariz. 1979), where the corporation filed bankruptcy and the individual guarantors received the benefit of the bankruptcy trustee's agreement with creditor Associated that "completely extinguished" the underlying debt.

At page 17 of their Brief, plaintiffs state that "Appellant also claimed the bankruptcy 'modified' the underlying contract giving him a 'get out of jail free card' on his guarantee," but Robinson did not use any such language in either defendants' trial brief (AA-9:APP001666-APP001667) or Appellant's Opening Brief.

Plaintiffs also quote from Marc Nelson Oil Products, Inc. v. Grim Logging Co., Inc., 110 P.3d 120 (Or. Ct. App. 2005), but that case did not involve a creditor who received stock in "full and final satisfaction" of a promissory note. Moreover, the court reversed the summary judgment entered against Robert Grim because "the assignment changed the principal parties to the contract, which is undeniably material." 110 P.3d at 126.

At pages 17 and 18 of their brief, plaintiffs state that "Robinson wouldn't be

discharged because the modification did not materially increase his risk," but Robinson's liability was discharged because the underlying debt was paid in full pursuant to the confirmed plan of reorganization and confirmation order from which plaintiffs did not appeal. *See* Travelers Indemnity Co. v. Bailey, 557 U.S. 137 (2009), and Trullis v. Barton, 67 F.3d 779, 785 (9th Cir. 1995).

At page 18 of their Brief, plaintiffs cite Schleicher v. Wendt, 529 F. Supp. 2d 959 (S.D. Ind. 2007), but as stated at page 39 of Appellant's Opening Brief, the alleged primary violator in Schleicher v. Wendt did not confirm a Chapter 11 plan where sufficient creditors voted to accept stock in the reorganized debtor in "full and final satisfaction" of each creditor's unsecured claim.

Similarly, in In re Citisource, Inc. Securities Litigation, 694 F. Supp. 1069 (S.D.N.Y. 1988), and in Elliott Graphics, Inc. v. Stein, 660 F. Supp. 378 (N.D. Ill. 1987), neither court addressed what happens when the primary violator's wrong has been fully and finally satisfied, compromised, settled, released and discharged.

At page 20 of their Brief, plaintiffs repeat their argument that "VCC was put into bankruptcy by its control person, Chairman and CEO, Appellant Robinson" and that the VCC shares are "restricted" and that "Plaintiffs cannot sell them." Plaintiffs do not identify any evidence that proves these claims.

Plaintiffs also cite NRS 90.660(1) and underline the words: "A purchaser who no longer owns the security may recover damages." Plaintiffs ignore, however, the next sentence in NRS 90.660(1) that requires the amount of damages to be reduced by "the value of the security when the purchaser disposed of it."

At page 21 of their Brief, plaintiffs state that "[h]ere, we have a hybrid" where plaintiffs "are obligated to tender these preferred shares to Appellant upon payment of the judgment amount." The language in NRS 90.660(1) instead required that Robinson receive credit for the value of the VCC stock received by Provident before any judgment was entered against Robinson.

7. Plaintiffs did not prove that each note was a security that was required to be registered pursuant to NRS 90.460.

At page 2 of their Brief, plaintiffs state that "[t]he Court performed an analysis under State v. Friend, 118 Nev. 115 (2002)." At page 22 of their Brief, plaintiffs also state that each note is a "security" pursuant to the "family resemblance test" adopted in State v. Friend, 118 Nev. 115, 40 P.3d 436 (2002).

At page 25 of their Brief, plaintiffs state that "Plaintiffs were motivated by the 9% interest payable over 18 months." Plaintiffs, however, did not elicit any testimony by any plaintiff that this was his or her motivation. Plaintiffs' counsel instead asked Robinson to speculate on what each plaintiff expected. (AA-4:APP00625, ll. 8-10)

Moreover, as demonstrated at pages 42 to 43 of Appellant's Opening Brief, the holder/payee named in every promissory note was Provident. (AA-5:APP000821, APP000825, APP000829, APP000833, APP000836, APP000840, APP000845, APP000848, APP000851, APP000854, and APP000857)

The record on appeal does not contain any evidence proving the "motivations" of Provident to loan money to VCC.

With respect to the second element of the test in State v. Friend, the evidence proves that Minuskin and Retire Happy did not offer or sell the VCC promissory notes "to a broad segment of the public." 118 Nev. at 123, 40 P.3d at 440.

During the trial, counsel for plaintiffs asked Robinson about the agreement between VCC and Retire Happy, dated December 7, 2012 (AA6:APP000865), and Robinson testified:

> Q And did you believe that they were a licensed broker dealer?
>
> A They were dealing with Provident Trust and **we were in agreement that Provident Trust was actually the lender by virtue of the fact that they represented all of the investors in our notes** were essentially Provident Trust. (emphasis added)

(AA-4:APP000621, ll. 8-20)

At page 27 of their Brief, plaintiffs set forth testimony by Robinson from AA-4:APP000649 regarding note 8 at page 163 in tab 12 (AA-7:APP001001), but note 8

states that "the Company received proceeds of $1,639,00 from the aforementioned notes" and not $4.5 million as stated by plaintiffs' counsel. Note 8 also does not state how VCC located the "several unrelated parties."

At page 28 of their Brief, plaintiffs state that "[i]t is clear that the intent was to market the investment to a broad section of the public." The evidence instead proves that every plaintiff invested in Provident, who is the only person who loaned monies to VCC.

Plaintiffs also state that "Mr. Robinson referred to the Notes as investments, and the purchasers as investors." The email from Robinson to Minuskin instead refers to "you investors" and "your investors" (AA-6:APP000862), which is consistent with Robinson's testimony that Provident was the lender that loaned monies to VCC.

At page 29 of their Brief, plaintiffs state that the PowerPoint slides (AA-6:APP000897, AA-6:APP000928, and AA-6:APP000947)) referred to the Notes as securities, but the notes were only offered to Provident.

Plaintiffs state that the fourth factor in the second step is satisfied because each note is "an investment sold to members of the public." Each note instead proves that each loan was made by Provident.

At page 29 of their Brief, plaintiffs state that "[d]efendants never raised the

issue of exemption at any point in this proceeding," but Mr. Robinson testified that the transactions with Provident were exempt from securities laws under Rule 144. (AA-4:APP000642, l. 22-APP000643, l. 6)

At page 31 of their Brief, plaintiffs call the fact that each note was issued to Provident "sleight of hand" and "misdirection," and plaintiffs call the language in Section 8.03(f) of the Custodial Agreement (AA-4:APP000522) "boilerplate," but plaintiffs do not cite any authority that prevents plaintiffs from being estopped by their express written representations in Section 8.03(f).

8. Plaintiffs did not prove that they were entitled to recover damages from Robinson pursuant to NRS 90.660.

At pages 35 and 36 of their Brief, plaintiffs quote from NRS 90.460 and NRS 90.660, but fail to acknowledge the impact of the words "less the value of the security when the purchaser disposed of it" in NRS 90.660.

At pages 36 and 37 of their Brief, plaintiffs state that "Appellant did not offer any evidence or testimony concerning the value of the preferred shares," but Mr. Hotchkiss testified that each share of VCC was valued at $5.00 (AA-4:APP000600, l. 11 to APP000601, l. 3), and Mr. Robinson testified on February 24, 2020 that VCC was "very profitable right now." (AA-4:APP000653, l. 13)

At the bottom of page 37 of their Brief, plaintiffs state that "they received

worthless preferred shares," but plaintiffs did not introduce any admissible evidence proving the VCC shares are worthless. Under Nevada law, "[a]rguments of counsel are not evidence and do not establish the facts of the case." Jain v. McFarland, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993).

At page 38 of their Brief, plaintiffs state that "interest does not stop accruing until the purchaser receives the consideration paid for the security," but VCC's Chapter 11 Plan included a "Common Stock Distribution" based on "the amount of contract-rate interest accrued on the principal balance included in each Holder's respective Allowed Class 3 Claim as of the Petition Date." (AA-10:APP001289)

In the last sentence at page 38 of their Brief, plaintiffs suggest that "the parties can request an evidentiary hearing in District Court to introduce expert testimony on the valuation of the preferred shares." The Bankruptcy Court already performed the valuation that is incorporated into a final order from which plaintiffs did not file a timely appeal. (AA-10:APP001277, ll. 10-13) Plaintiffs do not cite any authority that entitles them to have a new hearing to belatedly challenge the final order entered by the Bankruptcy Court.

9. Plaintiffs did not prove that they are entitled to recover damages for fraud, misrepresentations, and omissions.

At page 39 of their Brief, plaintiffs abandon their claim for fraud,

misrepresentations and omissions and do not identify any authority or evidence that supports such a claim.

10. The amount of attorneys fees awarded to plaintiffs is not supported by substantial evidence.

At page 3 of their Brief, plaintiffs state that "[t]he court performed a Brunzell analysis," but plaintiffs did not explain how the court could determine *"the work actually performed by the lawyer*: the skill, time and attention given to the work" as required by Brunzell v. Golden Gate National Bank, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969), when counsel for plaintiffs admitted that "[a]s I took this case on a contingency fee basis **I did not keep strict track of my time**" and that "if I had to make **an educated guess** on the amount of time I spent on this case, I would estimate it is well over 250 hours." (AA-10:APP001250, ¶ 13) (emphasis added)

At pages 40 and 41 of their Brief, plaintiffs quote from Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 124 P.3d 530 (2005), but that case involved a "constructional defects" case and an award of attorneys' fees under NRS 40.655(1)(a). The language quoted by plaintiffs also required that the court consider "the work performed" and that "the court provides sufficient reasoning in support of its ultimate determination." 124 P.3d at 549.

Plaintiffs also cite Cooke v. Gove, 61 Nev. 55, 57, 114 P.2d 87, 88 (1941), but

plaintiffs did not produce any depositions from attorneys testifying about the value of the services rendered like the depositions in that case.

Plaintiffs also cite O'Connell v. Wynn Las Vegas, LLC, 134 Nev. 550, 429 P.3d 664 (Nev. App. 2018), but the court of appeals stated that "[u]ltimately a party seeking attorney fees based on a contingency fee agreement must provide or point to substantial evidence of counsel's efforts to satisfy the *Beattie* and *Brunzel*l factors." In the present case, plaintiffs did not provide "substantial evidence" of the services provided, but only counsel's "educated guess." (AA-9:APP001250, ¶ 13)(emphasis added)

CONCLUSION

By reason of the foregoing, Robinson respectfully requests that this Court reverse the findings of fact and conclusions of law and judgment entered by the district court and remand this case to the district court with instructions to enter judgment in favor of Robinson.

DATED this 28th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 37(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and contains 6,964 words.

3. 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 of the transcript or appendix where the matter relied on is to be found.

DATED this 28th day of January, 2022.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 28th day of January, 2022, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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