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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

KIRK and AMY HENRY,)
)
Plaintiffs,)
)
vs.)
)
FREDRICK RIZZOLO aka RICK RIZZOLO,)
)
an individual; LISA RIZZOLO, individually)
)
and as trustee of The Lisa M. Rizzolo Separate)
)
Property Trust and as successor trustee of)
)
The Rick J. Rizzolo Separate Property Trust;)
)
THE RICK AND LISA RIZZOLO FAMILY)
)
TRUST; THE RICK J. RIZZOLO SEPARATE)
)
PROPERTY TRUST; THE LISA M. RIZZOLO)
)
SEPARATE PROPERTY TRUST; THE RLR)
)
TRUST; and THE LMR TRUST,)
)
Defendants.)
)

Case No. 2:08-CV-635-PMP-GWF

**PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER OR,
IN THE ALTERNATIVE,
AN ORDER REQUIRING
TELEPHONIC DEPOSITIONS
OF PLAINTIFFS KIRK AND
AMY HENRY**

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2. I am a licensed attorney in the State of Nevada Bar Number 11563. I am an associate in the law firm CAMPBELL & WILLIAMS. I am one of the attorneys representing Plaintiffs Kirk and Amy Henry in the above-captioned action.

3. On February 12, 2010, Lisa Rizzolo's counsel, Mr. Mark B. Bailus, Esq., sent a letter to Plaintiffs' counsel, Jack F. DeGree, Esq., informing Mr. DeGree of his intention to depose Plaintiffs Kirk and Amy Henry in Las Vegas, Nevada during the week of March 8, 2010. *See* Exhibit "1," Letter of February 12, 2010. Mr. Bailus requested a reply by February 24, 2010. *Id.*

4. Mr. DeGree replied by letter on February 24, 2010, and notified Mr. Bailus that the Henrys would be available for deposition testimony to be taken telephonically on March 11, 2010. *See* Exhibit "2," Letter of February 24, 2010.

5. On February 25, 2010, Mr. Bailus sent another letter to Mr. DeGree stating that the Henrys' depositions would be noticed for March 11, 2010. *See* Exhibit "3," Letter of February 25, 2010. Mr. Bailus refused to allow the depositions to be taken telephonically and stated that he expected the Henrys to be present in Las Vegas, Nevada for their depositions on that date. *Id.* Mr. Bailus's proffered reason for refusing to allow the telephonic depositions was that he must evaluate their demeanor and credibility as witnesses. *Id.*

6. On March 3, 2010, Mr. DeGree and I conducted a telephonic meet-and-confer with Mr. Bailus and George Kelesis, Esq., on a variety of discovery issues including the Henrys' depositions. Mr. DeGree and I expressed our desire to conduct the Henrys' depositions telephonically due to the nature of Mr. Henry's condition and the accompanying difficulty and expense involved with long distance travel. Mssrs. Bailus and Kelesis responded that they would

1 Plaintiffs quite obviously do not dispute that Defendants are entitled to depose the
2 Henrys. Due to the extremely difficult nature of the Henrys' circumstances, however, Plaintiffs
3 ask that the Court allow their depositions to be taken telephonically. Initially, Plaintiffs should
4 be entitled to a protective order under FRCP 26(c) because traveling to Las Vegas would place
5 an extraordinary and undue burden on the Henrys. Further, the Court should enter an order
6 requiring the deposition to be taken telephonically pursuant to FRCP 30(b)(4) because
7 Defendants cannot demonstrate any prejudice that would result from a telephonic deposition.
8 Accordingly, the Court should grant Plaintiffs' Motion on both fronts.
9

10 II. ARGUMENT

11 It is generally accepted that two provisions of the Federal Rules of Civil Procedure
12 authorize courts to require a telephonic deposition: Rule 26(c)(1) and Rule 30(b)(4). *See Clinton*
13 *v. Cal. Dep't of Corr.*, 2009 WL 210459 *3 (E.D. Cal. 2009). "Motions brought under Rules
14 30(b)(4) and 26(c)(1) are ordinarily subject to different standards." *Id.* "A Rule 30(b)(4) motion
15 focuses on the prejudice that a telephonic deposition would impose, whereas a Rule 26(c) motion
16 focuses on the prejudice plaintiff-deponent would suffer if compelled to appear in person." *Id.*
17 As a result, Plaintiffs will independently address each issue below.
18

19 A. Plaintiffs Are Entitled To A Protective Order Because They Will Suffer 20 Extreme Hardship If They Are Required To Travel To Las Vegas For Their 21 Depositions

22 Plaintiffs acknowledge the general rule "that a plaintiff will be required to make himself
23 or herself available for examination in the district in which the suit was brought." *Clinton*, 2009
24 WL 210459 at *3. Notwithstanding, the Henrys' extreme difficulty with long distance travel and
25 their unfortunate financial situation clearly justifies an exception to this rule. *Id.* at *5. Rule
26 26(c)(1) governs protective orders and states that "the court may, for good cause, issue an order
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1 to protect a party or person from annoyance, embarrassment, oppression, or undue burden or
2 expense.” Fed. R. Civ. P. 26(c)(1) “Proof must be based on particular and specific
3 demonstration of fact, as distinguished from stereotyped and conclusory statements.” *Clinton*,
4 2009 WL 210459 at *5.
5

6 Plaintiffs anticipate that Defendants will rely on *United States v. Rock Springs Vista*
7 *Development*, 185 F.R.D. 603 (D. Nev. 1999), for the proposition that Plaintiffs are not entitled
8 to a protective order simply because Mr. Henry lives out-of-state and is in a wheelchair.¹ In that
9 case, the court ruled that plaintiff-deponents must appear “absent extreme hardship,” and that the
10 handicapped plaintiffs failed to make such a showing. *Id.* at 604. However, the court expressly
11 noted that it only considered “the bare assertion by counsel that [the plaintiffs] use wheelchairs
12 and live out-of-state” and that there were “no affidavits [or] documentation of the nature of the
13 undue hardship.” *Id.* at 603. The court also relied on the fact that the plaintiffs elected to move
14 away from Nevada on their own volition which detracted from their claims of hardship. *Id.* at
15 604.
16

17 Obviously, the Henrys’ situation greatly differs from that of the plaintiff-deponents in
18 *Rock Springs*. Mr. Henry is not only wheelchair-bound but also a quadriplegic. *See* Exhibit “4,”
19 Affidavit of Kirk Henry. This handicap requires Mrs. Henry to act as his full-time caretaker
20 when he travels out-of-state. *Id.* Moreover, the heavy equipment and medical supplies required
21 for Mr. Henry to travel are quite substantial and Mrs. Henry is singlehandedly responsible for the
22 transportation of all such items. *Id.* Further, every aspect of the Henrys’ journey must be
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25 ¹ Although *Rock Springs* was technically addressing a motion under Rule 30(b)(4), it has
26 since been recognized that the court’s application of the “extreme hardship” standard was
27 equivalent to the showing required for a Rule 26(c)(1) protective order. *See Clinton*, 2009 WL
28 210459 at *4 (citing *Rock Springs* as authority standing for the proposition that “a plaintiff
must...comply with defendant’s request for an in person deposition unless plaintiff can secure a
protective order under Rule 26(c)”).

1 tailored to Mr. Henry's specific needs and painstakingly arranged beforehand with the airline,
2 ground transportation, and hotel. *Id.* This hardship is exacerbated because the Henrys do not
3 have substantial financial means (in large part due to the actions of Defendants), and long-
4 distance travel for a quadriplegic is subject to greatly increased costs of transportation and
5 accommodation. *Id.* Most importantly, Mr. Henry will be forced to miss physical therapy which
6 will not only interrupt his necessary treatment but also subject him to excessive physical pain.
7 *Id.* The Henrys' have clearly presented particular and specific facts that demonstrate extreme
8 hardship and warrant a protective order in this case.
9

10
11 **B. Plaintiffs Should Also Be Entitled To An Order Requiring The Henrys'
12 Depositions To Be Taken Telephonically Pursuant To Rule 30(b)(4)**

13 Simply put, Defendants cannot demonstrate any valid prejudice that will occur if the
14 Henrys are permitted to give their deposition testimony telephonically. Rule 30(b)(4) provides
15 that "the court may on motion order that a deposition be taken by telephone or other remote
16 means." Fed. R. Civ. P. 30(b)(4). Although the Ninth Circuit has not expressly ruled on whether
17 a plaintiff-deponent may be granted an order requiring a telephonic deposition under Rule
18 30(b)(4), a substantial amount of authority holds that a court may grant such relief in the
19 appropriate circumstances. *See, e.g., Clinton*, 2009 WL 210459 (E.D. Cal. 2009) (holding
20 plaintiffs may be entitled to an order requiring depositions be taken telephonically); *Jahr v. IU*
21 *Int'l Corp.*, 109 F.R.D. 429 (M.D.N.C. 1986); *Rehau, Inc. v. Colortech, Inc.*, 145 F.R.D. 444
22 (W.D. Mich. 1993); *Anguile v. Gerhart*, 1993 WL 414665 (D. N.J.).² "A Rule 30(b)(4) motion
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26 ² Once again, Plaintiffs anticipate that Defendants will rely on *Rock Springs*, 185 F.R.D. at
27 604, for the proposition that a plaintiff-deponent is not entitled to an order requiring depositions
28 to be taken telephonically pursuant to Rule 30(b)(7). *Rock Springs*, however, is not binding
authority and Plaintiffs have cited ample authority which stands for the contrary position.

1 should be granted absent a showing of prejudice to another party,” and the burden is on the party
2 opposing the motion. *Clinton*, 2009 WL 210459 at *4.³
3

4 Defendants are utterly incapable of identifying any prejudice which will result if the
5 Henrys’ depositions are taken telephonically. Unlike the plaintiff-deponents in *Clinton*, the
6 Henrys will not be providing controversial testimony in this matter that will prove or disprove
7 Defendants’ fraudulent conduct. Defendant Rick Rizzolo undeniably owes the Henrys a
8 substantial debt pursuant to the binding settlement agreement executed in the state court action.
9 Plaintiffs allege that Defendants have colluded to frustrate the collection of those funds by
10 engaging in a series of fraudulent transfers. The Henrys’ role in this proceeding is
11 straightforward and uncontroverted; they seek to collect settlement funds which they have been
12 wrongfully deprived of due to Defendants’ fraudulent conduct. Further, there is absolutely no
13 reason to question their trustworthiness in the first place. Defendants’ nebulous claim that they
14 must evaluate the Henrys’ demeanor and credibility as witnesses simply does not suffice to
15 establish prejudice. As such, an order requiring a telephonic deposition under Rule 30(b)(4) is
16 highly appropriate under the circumstances.
17
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22 _____
23 ³ In *Clinton*, the court held that the line of authority sanctioning telephonic depositions for
24 plaintiff-deponents provides the better rule. 2009 WL 210459 at *4. Under the unique facts of
25 the case, however, the court found that the defendants made the requisite showing of prejudice.
26 *Id.* Specifically, the plaintiff’s trustworthiness and ability to relate to a jury was at issue and the
27 defendants required certain documents to be produced at the deposition. *Id.* The Court then
28 noted that “it is not the case that in all telephonic depositions these qualities in a witness are at
issue” and that many options are available to surmount the production of documents problem.
Id. As detailed above, the Henrys’ situation is not subject to the types of prejudice raised by the
defendants in *Clinton*.

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III. CONCLUSION

Accordingly, it is respectfully requested that the Court grant Plaintiffs' Motion for Protective Order or, in the Alternative, an Order Requiring Telephonic Depositions of Plaintiffs Kirk and Amy Henry.

DATED this 5th day of March, 2010.

CAMPBELL & WILLIAMS

HUNTERTON & ASSOCIATES

By /s/
PHILIP R. ERWIN, ESQ. (11563)
700 South Seventh Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff Kirk Henry

By /s/
C. STANLEY HUNTERTON, ESQ. (1891)
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Las Vegas, Nevada 89101
Attorneys for Plaintiff Amy Henry

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CERTIFICATE OF SERVICE

I certify that I am an employee of Campbell & Williams and that I did, on the 5th day of March, 2010, serve upon the attorneys in this action a copy of the foregoing **MOTION FOR PROTECTIVE ORDER OR, IN THE ALTERNATIVE, AN ORDER REQUIRING TELEPHONIC DEPOSITIONS OF PLAINTIFFS KIRK AND AMY HENRY** via the Court's CM/ECF filing system to the following:

Mark B. Bailus, Esq.
Bailus, Cook & Kelesis, Ltd.
400 South Fourth Street, #300
Las Vegas, Nevada 89101

*Attorneys for Defendant/Cross Claimant
Lisa Rizzolo, The Lisa M. Rizzolo
Separate Property Trust, and The LMR Trust*

Kenneth G. Frizzell, III
Law Offices of Kenneth G. Frizzell
509 South Sixth Street
Las Vegas, Nevada 89101

*Attorneys for Rick Rizzolo,
The Rick and Lisa Rizzolo Family Trust,
The Rick J. Rizzolo Separate Property Trust,
And The RLR Trust*

C. Stanley Hunterton, Esq.
Hunterton & Associates
333 South Sixth Street
Las Vegas, Nevada 89101

Attorneys for Plaintiff Amy Henry

/s/
PHILIP R. ERWIN, ESQ (11563)
An Employee of Campbell & Williams

1

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February 12, 2010

VIA HAND DELIVERY

Donald J. Campbell, Esq.
Jack F. DeGree, Esq.
CAMPBELL & WILLIAMS
700 S. Seventh Street
Las Vegas, Nevada 89101

C. Stanley Hunterton, Esq.
HUNTERTON & ASSOCIATES
333 S. Sixth Street
Las Vegas, NV 89101

Re: *Rizzolo adv. Henry*

Dear Counsel:

Please be advised that we intend to schedule the following depositions during the week of
March
8, 2010:

Kirk Henry
Amy Henry
Donald J. Campbell
C. Stanley Hunterton

Please advise by Wednesday, February 24, 2010, as to your and your respective clients' availability during that week. Thank you for your courtesy and cooperation.

Very truly yours,
BAILUS COOK & KELESIS, LTD.



MARK B. BAILUS

MBB/sdg

cc: Kenneth G. Frizzell, III, Esq. (*via hand delivery*)

2



CAMPBELL
& WILLIAMS
ATTORNEYS AT LAW

February 24, 2010

VIA U.S. MAIL & FACSIMILE (702) 737-7712

Mark B. Bailus, Esq.
BAILUS COOK & KELESIS
400 South Fourth Street, Suite 300
Las Vegas, NV 89101

Re: *Henry, et al. v. Rizzolo, et al.*

Dear Mr. Bailus:

In response to your request for deposition availability the week of March 8, 2010, please be advised as follows. The subpoena duces tecum you served on Mr. Campbell and Mr. Hunterton will be objected to in a timely manner pursuant to FRCP 45(c)(2)(B). Accordingly, no deposition testimony will be provided until such time as these objections have been addressed by the Court. The Henrys will be available for deposition testimony to be taken telephonically on Thursday March 11, 2010. Should you have any questions, please do not hesitate to contact me.

Very truly yours,

CAMPBELL & WILLIAMS

Jack F. DeGree, Esq.

cc: C. Stanley Hunterton, Esq. *via facsimile* (702) 388-0361
Kenneth G. Frizzell, III, Esq. *via facsimile* (702) 384-9961

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February 25, 2010

HAND DELIVERED

Jack F. DeGree, Esq.
CAMPBELL & WILLIAMS
700 S. Seventh Street
Las Vegas, Nevada 89101

Re: *Rizzolo adv. Henry*

Dear Mr. DeGree:

This is in response to your letter of February 24, 2010. Along with this correspondence, we are serving a notice scheduling the depositions of Kirk and Amy Henry for March 11, 2010. However, we are not willing to agree to conduct these depositions telephonically. Accordingly, we expect the Henrys to be present for their depositions as noticed so as to allow us to evaluate their demeanor and credibility as witnesses.

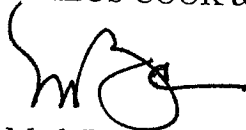
With respect to the subpoenas that were served on Mr. Campbell and Mr. Hunterton on February 17, 2010, I would expect Mr. Campbell and Mr. Hunterton to produce the subpoenaed documents subject to their objections or, to the extent they may claim privilege, then a privilege log should be provided. Moreover, we would point out that as the subpoenas were for the production of documents only, any objections that may be filed have no bearing on our request for dates for Mr. Campbell's and Mr. Hunterton's testimony. As you did not provide us with Mr. Campbell's and Mr. Hunterton's availability, we have noticed their depositions for March 12th and March 14, 2010,

Jack F. DeGree, Esq.
February 25, 2010
Page 2

respectively. Pursuant to our telephone of this date wherein you agreed to accept service of the deposition subpoenas on behalf of Mr. Campbell and Mr. Hunterton, we are also delivering said subpoenas along with this correspondence.

Very truly yours,

BAILUS COOK & KELESIS, LTD.

A handwritten signature in black ink, appearing to read 'MB', with a long horizontal stroke extending to the right.

Mark B. Bailus, Esq.

MBB/sdg

cc: Donald J. Campbell, Esq.
C. Stanley Hunterton, Esq.
Kenneth G. Frizzell, III, Esq.
(All via delivery)

4

DECLARATION OF KIRK HENRY

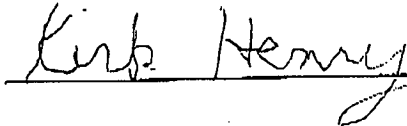
I, KIRK HENRY, declare under penalty of perjury as follows:

1. I am a resident of Johnson County, Kansas. I am over the age of eighteen (18) years and I am, in all respects, competent to make this Declaration. This Declaration is based upon my personal knowledge.
2. I am a Plaintiff in *Henry et al. v. Rizzolo et al.*, Case No. 2:08-CV-635-PMP-GWF. I give this Declaration in support of the Motion for Protective Order or, in the Alternative, an Order Requiring Telephonic Depositions of Plaintiffs Kirk and Amy Henry.
3. I was rendered a quadriplegic as a result of the incident which led to my lawsuit against Defendant Rick Rizzolo and The Crazy Horse Too. My wife Amy Henry is required to act as my full-time caretaker if I am required to travel. She is responsible for the transportation of my equipment which includes a 300-pound electric wheelchair and 25-pound charger. Additionally, my wife must transport the nursing supplies, catheter equipment, and many other things required for my day-to-day care.
4. If I am required to travel by airline then I must be specially transported through the airport. I also have to arrange for a handicap-accessible seat with the airline. Further, my equipment is subject to excessive security measures due to the complex nature of the wheelchair and its electronic components. I am also forced to check my wheelchair and equipment with the airline and it is again subjected to excessive security measures upon arrival.
5. If I am forced to travel to Las Vegas by airline then I must be transported to-and-from McCarran Airport in a specially equipped van that is able to accommodate me, my wheelchair and my equipment. I must also be transported in the same manner from my accommodations in Las Vegas to any other location in the city. The transportation is provided by Medic Coach Service and costs approximately \$77.00 each way.
6. I must stay in a handicap-accessible hotel room equipped with a hospital bed.
7. I am also required to see my physical therapist in Olathe, Kansas once every two days. If I miss a session then I suffer from increased pain due to excessive muscle spasms.
8. I have a fifteen-year-old daughter who is currently in school. If my wife and I are forced to travel away from home then we must arrange for transportation for her to-and-from school as well as to-and-from volleyball practice and other school functions.

9. The heavy financial burden that would be imposed by travel to Las Vegas is worsened by the fact that my wife and I do not have full-time employment or gainful income at present time.

10. I declare under the penalty of perjury of the laws of the United States and the State of Nevada that the foregoing is true and correct.

DATED this 4th day of March, 2010.



KIRK HENRY