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6 *Attorneys for Defendants Lisa Rizzolo
and The Lisa M. Rizzolo Separate Property Trust*

7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA

9 * * * * *

10 KIRK and AMY HENRY,)
11)
12 Plaintiffs,)
13 vs.)
14 FREDRICK RIZZOLO aka RICK RIZZOLO,)
15 an individual; LISA RIZZOLO, individually)
16 and as trustee of The Lisa M. Rizzolo)
17 Separate Property Trust and as successor)
18 trustee of The Rick J. Rizzolo Separate)
19 Property Trust; THE RICK AND LISA)
20 RIZZOLO FAMILY TRUST; THE RICK)
21 J. RIZZOLO SEPARATE PROPERTY)
22 TRUST; and THE LISA M. RIZZOLO)
23 SEPARATE PROPERTY TRUST, THE)
24 RLR TRUST; and THE LMR TRUST,)
25 Defendants.)

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

**MOTION TO DISMISS FOR FAILURE
TO JOIN A NECESSARY AND
INDISPENSABLE PARTY**

21 LISA RIZZOLO,)
22)
23 Crossclaimant,)
24 vs.)
25 FREDRICK RIZZOLO aka RICK)
26 RIZZOLO, DOES I through X and)
27 ROE CORPORATIONS I through)
28 X, inclusive,)
Crossdefendant.)

1 COMES NOW, Defendants, LISA RIZZOLO and THE LISA RIZZOLO SEPARATE
2 PROPERTY TRUST (collectively, "Defendants"), by and through their attorneys of record, BAILUS
3 COOK & KELESIS, LTD., and moves this Court pursuant to Federal Rule of Civil Procedure
4 ("FRCP") 12 and 19 to dismiss Plaintiffs' Second Amended Complaint.

5 This motion is made and based upon the attached Memorandum of Points and Authorities,
6 the pleadings and papers on file herein, and any oral argument which may be adduced at the time of
7 hearing in this matter.

8 DATED this 8th day of October, 2009.

9 BAILUS COOK & KELESIS, LTD.

10
11
12 /s/
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POINTS AND AUTHORITIES

A. FACTUAL AND PROCEDURAL BACKGROUND

In their Complaint (#1) filed May 15, 2008, Plaintiffs alleged state law causes of action for conspiracy to the fraud, common law fraud and further, a violation of Nevada’s Uniform Fraudulent Transfer Act (“UFTA”) against Defendants, Frederick “Rick” Rizzolo (“Mr. Rizzolo”), Lisa Rizzolo (“Ms. Rizzolo”) and The Rick and Lisa Rizzolo Family Trust. The causes of action in the Complaint essentially related to efforts to collect the proceeds of a settlement related to a personal injury action that allegedly occurred against the Plaintiff, Kirk Henry on or about September 20, 2001. Mr. Henry filed suit on or about October 2, 2001 in Nevada state court. Ms. Rizzolo was not a party to that action, nor the settlement thereof. On or about June 7, 2005, Mr. Rizzolo and Ms. Rizzolo obtained a lawful, non-collusive divorce in Nevada.

Subsequent to the filing of the Complaint in the case *sub judice*, the parties litigated a Motion to Dismiss pursuant to FRCP 12(b)(6). Once denied, Ms. Rizzolo filed her Answer (#24) on or about September 12, 2008.

After conducting discovery, Plaintiffs on June 16, 2009 filed their Motion for Leave to File Amended Complaint (#130). Thereafter, on July 8, 2009, the Court entered an Order (#132) granting Plaintiffs Motion for Leave to File Amended Complaint (#130).

In the First Amended Complaint (#135), Plaintiffs asserted claims against Defendants, Mr. Rizzolo, Ms. Rizzolo, The Rick and Lisa Rizzolo Family Trust and added, The Rick Rizzolo Separate Property Trust and The Lisa Rizzolo Separate Family Trust for: (1) Conspiracy to Defraud; (2) Common Law Fraud; and (3) a Violation of the Uniform Fraudulent Transfer Act.

Plaintiffs on July 31, 2009 filed their Motion for Leave to File Second Amended Complaint (#156). Thereafter, on September 15, 2009, the Court granted Plaintiffs Motion for Leave to File Second Amended Complaint. *Minutes of Proceedings* (#195).

In the Second Amended Complaint (#200) Plaintiffs asserted claims against Defendants, Mr. Rizzolo, Ms. Rizzolo, The Rick and Lisa Rizzolo Family Trust, The Rick Rizzolo Separate

1 Property Trust, The Lisa Rizzolo Separate Property Trust and added, The RLR Trust and The
2 LMR Trust for: (1) Conspiracy to Defraud; (2) Common Law Fraud; and (3) a Violation of the
3 Uniform Fraudulent Transfer Act. (“UFTA”) As with the original Complaint, Ms. Rizzolo
4 categorically denies any allegations of conspiracy to the defraud, common law fraud and/or
5 fraudulent transfers in violation of the UFTA as alleged in the Plaintiffs’ Second Amended
6 Complaint.

7 In their Second Amended Complaint,¹ Plaintiffs allege beginning on or about May 24,
8 2005 that Defendants Mr. Rizzolo and Ms. Rizzolo conspired to defraud Plaintiffs from
9 collecting on their claim by concealing and alienating the ownership of their assets. Plaintiffs
10 allege that after they filed suit against Mr. Rizzolo and The Power Company, Inc. in October
11 2001, Defendants Mr. Rizzolo and Ms. Rizzolo formed a “so-called family trust” to which they
12 transferred their assets in an attempt to shield them from Plaintiffs’ claim. *Second Amended*
13 *Complaint* (#200), ¶ 19. Plaintiffs further allege that on or about June 7, 2005, Mr. Rizzolo and
14 Ms. Rizzolo entered into a “collusive” divorce decree which awarded Ms. Rizzolo “nearly every
15 listed community asset” except for the Crazy Horse Too which Defendants knew would be
16 subject to forfeiture by the United States of America. *Id.*, ¶ 20. Plaintiffs allege that subsequent
17 to the divorce, Mr. Rizzolo and Ms. Rizzolo each established their own so-called “separate
18 property trust”, *Id.*, ¶21. Plaintiffs further allege that Mr. Rizzolo “also ‘agreed’ to assume the
19 burden of an additional ‘debt’ of Five Million Dollars which he would pay over to Ms. Rizzolo in
20 the form of ‘alimony’”, *Id.*, ¶ 22, and that Mr. Rizzolo obtained a Five million Dollar loan which
21 was secured by Crazy Horse Too with the knowledge that he would default on the loan and
22 would thereby further diminish the assets that would be available for forfeiture and to pay
23 damages to the Henrys. *Id.*, ¶ 23. Thereafter, the Second Amended Complaint alleges, upon
24 information and belief, that Mr. Rizzolo “engaged in numerous cash transactions involving
25 millions of dollars on the form of ‘loans’, gambling ‘debts’ and other third party transactions, all
26 of which were designed to further obscure and conceal the nature, extent and location of his

27
28 ¹ No statement in this pleading is an admission of the truth of any allegation stated in
Plaintiffs Second Amended Complaint. They are restated herein for illustrated purposes only.

1 assets.” *Id.*, ¶ 24.

2 As discussed in more detail below, Plaintiffs have failed to join necessary and/or
3 indispensable parties in this litigation warranting the dismissal of their Second Amended
4 Complaint.

5
6 **B. ARGUMENT**

7 FRCP 19 governs the compulsory joinder of required parties. Specifically, FRCP
8 19(a) provides:

9 A person who is subject to service of process and whose joinder will no
10 deprive the court of subject matter jurisdiction must be joined as a party if:

11 (A) in that person’s absence, the court cannot accord complete relief among
12 existing parties; or

13 (B) that person claims an interest relating to the subject of the action and is
so situated that disposing of the action in the person’s absence may:

14 (i) as a practical matter impair or impede the person’s ability to
15 protect the interest; or

16 (ii) leave an existing party subject to a substantial risk of incurring
17 double, multiple, or otherwise inconsistent obligations because of
the interest.

18 FRCP 12 provides that a complaint may be dismissed for “failure to join a party under
19 Rule 19.” Fed. R. Civ. P. 12(b)(7)²; *see also Ethicon*, 135 F.3d at 1468; *Nartron Corp. V. Borg*
20 *Indak, Inc.*, No. 06-10683, 2008 U.S. Dist. LEXIS 107745, at *33 (E.D. Mich. March 31, 2008)
21 (granting motion to dismiss), *rev’d on other grounds*, 558 F.3d 1352 (Fed. Cir. 2009); *Merial*
22 *Ltd., v. Intervet Inc.*, 430 F. Supp. 2d 1357, 1364 (N.D. Ga. 2006) (granting motion to dismiss).

23 Plaintiffs allege, *inter alia*, in their Second Amended Complaint:

- 24 11. Beginning on or about May 24, 2005, the ***Defendants Rick and Lisa Rizzolo***
25 ***together, and with each other and with third persons acting in concert with***
26 ***them (believed to include attorneys and accountants whose names are not***
presently known but who will be added as parties once their identities are

27 ² Defendant LMR Trust has not yet been served with a summons, and thus is not yet
28 under duty to respond to the Second Amended Complaint. *See* Fed. R. Civ. P. 12(a)(1)(A)(i);
See also Fed. R. Civ. P. 4(a)-(c).

- 1 *confirmed*) did combine, conspire, confederate and agree together and with each
2 other to defraud the Plaintiffs and each of them. *Id.* ¶ 11.
- 3 16. Having been keenly aware that the Plaintiffs and each of them had suffered
4 damages in excess of Ten Million Dollars, the Defendants Rick and Lisa Rizzolo
5 engaged in a concerted effort to conceal and/or alienate the ownership of their
6 assets in an effort to avoid and/or otherwise frustrate the Plaintiffs in their
7 eventual efforts to recover the substantial damages sustained. *Id.* ¶16.
- 8 17. In an overt act in furtherance of the conspiracy, ***Rick Rizzolo and Lisa Rizzolo,***
9 ***together with third parties believed to include attorneys and accountants (whose***
10 ***names are not presently known but who will be added as parties once their***
11 ***identities are confirmed***), formed a so-called “family trust” and thereafter
12 transferred their assets into the same in an attempt to shield the assets available to
13 compensate the Henry’s for their catastrophic injuries. *Id.* ¶17.
- 14 19. On or about June 7, 2005, the Defendants Rick and Lisa Rizzolo obtained a
15 collusive divorce in which Defendant Lisa Rizzolo was awarded nearly every
16 listed community asset of the parties of any appreciable value except the real
17 estate, furniture, fixtures and equipment associated with the Crazy Horse Too
18 which both Rick and Lisa Rizzolo knew would be subject to forfeiture by the
19 United States of America as a result of the racketeering activities conducted
20 through that enterprise. *Id.* ¶19.
- 21 20. Subsequent to the divorce, Mr. And Ms. Rizzolo each established their own so-
22 called “separate property trusts,” the contents of which now contain assets once
23 held under their family trust among other items of real and personal property.*Id.*
24 ¶20.
- 25 24. That all of the foregoing was done intentionally, willfully and with the specific
26 purpose of misleading and defrauding the Henry’s in their efforts to identify,
27 locate and secure assets to compensate them for their damages suffered at the
28 racketeering enterprise known as the Crazy Horse Too. *Id.* ¶24.
25. That as a result thereof, the Plaintiffs Kirk and Amy Henry have in fact been
 misled, frustrated, damaged, and defrauded in their continuing and ongoing efforts
 to locate assets to compensate them for the injuries suffered at the racketeering
 enterprise known as the Crazy Horse Too. *Id.* ¶25.

 As stated above, Plaintiffs allege that Mr. Rizzolo and Ms. Rizzolo ***“together and with
each other and with third persons acting in concert with them (believed to include attorneys
and accountants whose names are not presently known but who will be added as parties once
their identities are confirmed)”*** *Id.* ¶ 11, 17. As evident from the foregoing, Plaintiffs
allegations regarding the attorneys and/or accountants are inextricably intertwined with the
allegations in their Second Amended Complaint as to render the same necessary and/or
indispensable parties. Based on their own pleadings, it would be hypocritical for Plaintiffs to
argue otherwise. The only issue remaining is whether the names of the attorneys and/or
accountants are known to Plaintiffs (which they are). Notwithstanding, Plaintiffs failure to join

1 the attorneys and/or accountants as necessary and indispensable parties demonstrates that there is
2 no factual basis for the allegations regarding the same, and as such, are wholly meritless.

3 Notably, Defendants in their 26.1 disclosures and then in responses to Plaintiffs various
4 discovery requests have provided the Plaintiffs not only with Defendants attorneys and/or
5 accountants³ names but their addresses as well. Through the discovery process, Defendants have
6 informed Plaintiffs that the attorney who represented Ms. Rizzolo in the divorce proceedings was
7 Dean R. Patti, Esq., of Patti Sgro & Lewis in the case styled *In the Matter of Marriage of Lisa*
8 *Rizzolo and Fredrick Rizzolo*, Eighth Judicial District Court, Family Division, Case No.
9 D337616. Interestingly, and more significantly, Mr. Rizzolo was initially represented by Mr.
10 Patti's law firm in this litigation. Due to the allegations regarding attorneys in Plaintiffs
11 Complaint, said law firm filed a motion to withdraw as Mr. Rizzolo's counsel. *Motion to*
12 *Withdraw* (# 28). In said motion, Mr. Rizzolo's then counsel stated, *inter alia*, that "[i]n this
13 action, Patti Sgro & Lewis formerly represented the Defendants in their divorce and it has been
14 threatened with a lawsuit by the insinuations in Plaintiffs Complaint." Thereafter, the law firm
15 of Patti Sgro & Lewis was allowed to withdraw as counsel of record for Mr. Rizzolo. *Order* (#
16 55). As evident from the foregoing, the mere insinuation that Mr. Patti and/or Patti Sgro &
17 Lewis might be sued by Plaintiffs has been detrimental as to one of the defendants as it created a
18 potential conflict of interest between attorney and client, resulting in Mr. Patti's law firm
19 withdrawing as the attorney of record. Noteworthy, Plaintiffs have failed to name Mr. Patti
20 and/or his law firm as a defendant. Again, demonstrating the utter lack of any factual basis for
21 the allegations in their Second Amended Complaint.

22 In addition, Defendants informed Plaintiffs that John E. Dawson, Esq., of Lionel Sawyer
23 & Collins is, and has been, Ms. Rizzolo's trust and estate planning attorney. As stated above,
24 Plaintiffs allege that beginning in or around May 24, 2005, Mr. Rizzolo and Ms. Rizzolo
25 conspired to defraud Plaintiffs from collecting under State court claim by concealing and
26 alienating the ownership of their assets. *Second Amended Complaint* (¶11). Further, that Mr. and
27

28 ³ Unfortunately, Ms. Rizzolo's accountant, Bert Purdy, has past away.

1 Ms. Rizzolo formed a “so-called family trust” to which they transferred their assets in an attempt
2 to shield them from Plaintiffs claim. *Id.* ¶17. Plaintiffs’ further allege that Mr. Rizzolo and Ms.
3 Rizzolo entered into a “collusive” divorce on or about June 7, 2005. *Id.* ¶19. Subsequent to the
4 divorce, Plaintiffs allege that Mr. Rizzolo and Ms. Rizzolo established their own “so-called
5 separate property trust” the contents of which now contain assets once held under their family
6 trust among other items of real and personal property. *Id.* ¶20.

7 According to the Plaintiffs, a central feature of this alleged collusive scheme is the use of
8 offshore accounts. *Plaintiff’s Renewed Motion to Compel* (# 127). With regard to the
9 establishment of these offshore accounts, the record could not be more clear that Mr. Dawson
10 established and administered the same. *Opposition to Plaintiffs Renewed Motion to Compel*
11 (#134), Exhibits “D” and “E”.

12 Since Plaintiff is suggesting that Mr. Dawson and the law firm of Lionel, Sawyer &
13 Collins in recommending and implementing offshore accounts for the family trusts and estate of
14 Ms. Rizzolo could only have done so as part of a “collusive scheme,” then in good faith Plaintiffs
15 must amend their complaint to include counsel. Of course, it’s unlikely that Plaintiffs would do
16 that since Plaintiff knows that there really is no evidence of fraud on the part of any attorneys.

17 By failing to acknowledge the same and amending their complaint, the Plaintiff’s are in
18 effect admitting that there is no conspiracy to defraud. Plaintiff is trying to recast the decision
19 making process of the establishment and administration of offshore accounts as a fraudulent,
20 surreptitious maneuver, when in reality it was authorized by a highly respected lawyer in one of
21 the most storied Nevada law firms. Mr. Dawson should be given the opportunity to defend
22 himself and his good name against Plaintiffs’ outlandish and scandalous allegations that Ms.
23 Rizzolo’s attorneys were part of a conspiracy to defraud the Plaintiffs. These allegations are
24 patently untrue. As with Mr. Patti, this further demonstrates that there is no factual basis to make
25 these unfounded allegations.

26 There is no question that Plaintiffs have been aware of the names of the attorneys and/or
27 accountants almost from the inception from this litigation and have not on one, but on two
28 separate occasions, failed to amend their complaint to include the same. If Plaintiffs truly
believed that Defendants acted in concert with their attorneys and/or accountants as they alleged,

1 then they should have included them in their complaint. Failing to do so, warrants dismissal of
2 the Second Amended Complaint.

3 Not only have the Plaintiffs failed to name necessary and indispensable parties as to the
4 attorneys and/or accountants, but also, the failure to join the trustees of the above-named trusts is
5 also a basis for dismissal of Plaintiffs Second Amended Complaint. In the case *sub judice*, the
6 Plaintiffs have named various trusts as defendants. However, a trust is not a legal entity, it is a
7 relationship. Instead, a trustee holds property as the legal owner pursuant to the terms of a trust
8 instrument for beneficiaries who have the equitable ownership of the property. *See Robinson v.*
9 *Kind*, 23 Nev. 330, 47 P. 1, 3(1896); *see also University of Nevada v. Tarkanian*, 95 Nev. 389,
10 395-396, 594 P.2d 1159, 1163 (1979). As such, the failure to name the trustees is fatal to
11 Plaintiffs' Second Amended Complaint as the trustees are necessary and indispensable parties
12 who have not been properly joined and thus, a judgment herein would be void as to that non-
13 party. *See Guerin v. Guerin*, 114 Nev 127, 953 P.2d 716 (1998); *see also Olsen Family Trust v.*
14 *District Court*, 110 Nev 148, 874 P.2d 778 (1994).

15

16 **C. CONCLUSION**

17 Therefore, based on the foregoing reasons, it is respectfully requested that Defendants'
18 Motion to Dismiss as to Plaintiffs' Second Amended Complaint be granted.

19 DATED this 8th day of October, 2009.

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21

BAILUS COOK & KELESIS, LTD.

22

23

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of October, 2009, I electronically filed a true and correct copy of the foregoing with the Clerk of the Court for the United States District Court, District of Nevada by using the appellate CM/ECF system. All parties were served by the CM/ECF system except for the following:

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