

1 HERBERT SACHS, ESQ.
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Attorney for Defendant
4 KIMTRAN RIZZOLO

6 UNITED STATES DISTRICT COURT

7 DISTRICT OF NEVADA

9 KIRK and AMY HENRY,)

10)

11 Plaintiffs,)

12 vs.)

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

13 FREDRICK RIZZOLO, aka RICK RIZZOLO,)

14 an individual; LISA RIZZOLO, individually and)

15 as trustee of the Lisa M. Rizzolo Separate)

16 Property Trust and as successor trustee of The)

17 Rick J. Rizzolo Separate Property Trust; THE)

18 RICK AND LISA RIZZOLO FAMILY TRUST;)

19 THE RICK J. RIZZOLO SEPARATE)

20 PROPERTY TRUST; THE LISA M. RIZZOLO)

21 SEPARATE PROPERTY TRUST; THE RLR)

22 TRUST;THE LMR TRUST; KIMTRAN)

23 RIZZOLO, an individual.)

24 Defendants.)

25 **DEFENDANT KIMTRAN RIZZOLO’S OPPOSITION TO PLAINTIFFS’**

26 **MEMORANDUM OF COSTS AND ATTORNEYS FEES INCURRED IN PURSUING**

27 **THE MOTION TO COMPEL (#555) AND MOTION FOR CONTEMPT (#569)**

28 Comes now, Defendant, KIMTRAN RIZZOLO, by and through her attorney of record,

1 HERBERT SACHS, ESQ., and hereby files her Opposition to Plaintiffs' Memorandum of Costs and
2 Attorneys Fees Incurred in Pursuing the Motion to Compel (#555) and Motion for Contempt (#569).
3 Said Opposition is based in all the papers, pleadings, and proceedings heretofore had herein, the
4 attached Affirmation of Herbert Sachs, Esq., the Memorandum of Points and Authorities and such
5 evidence and argument introduced upon hearing of the motion.
6

7
8 **AFFIRMATION OF HERBERT SACHS IN SUPPORT OF DEFENDANT KIMTRAN**
9 **RIZZOLO'S OPPOSITION TO PLAINTIFFS' MEMORANDUM OF COSTS AND**
10 **ATTORNEYS FEES INCURRED IN PURSUING THE MOTION TO COMPEL AND**
11 **MOTION FOR CONTEMPT**
12

13 STATE OF NEVADA)
14) ss.
15 COUNTY OF CLARK)

16 I, HERBERT SACHS, ESQ., affirm under penalty and perjury as follows:

17 1. I am a resident of Clark County, Nevada. I am over the age of eighteen (18) years
18 and I am in all respects, competent to make this Affirmation.

19 2. I am a licensed attorney in the State of Nevada, State Bar Number 2785, having been
20 admitted to the practice of law on October 19, 1986 and prior thereto admitted to the bar in the State
21 of New York in November 1951 and have been continuously engaged in the practice of law for some
22 60 years.
23

24 3. The undersigned had commenced practicing law prior to the birth of any of the
25 parties involved in the case at bar, as well as their respective attorneys and the Judges of this Court.
26

27 4. The undersigned graduated and received a LLB Degree (Bachelor of Law now a
28

1 Juris Doctorate) and continued his legal education receiving an LLM Degree (Master of Law) in
2 1953.

3 5. In his practice of law, he has been involved in well over 1,000 trials, in various State
4 and Federal Jurisdictions and in those matters represented movants on motions and opponents on
5 said motions and was forced and did draft motions and oppositions to motions, all of which required
6 legal research.
7

8 6. In reading Plaintiff's Memorandum of Costs and Fees, I can only conclude, based
9 upon my experience, that the alleged costs and fees incurred are either false or grossly exaggerated.
10

11 7. A review of my file reveals that, in fact, Mr. Erwin did send this office a letter
12 comprised of approximately 3 paragraph totaling approximately 1/2 of 1 page, in which he states that
13 he had made 1 phone call to me the prior day, which went unanswered. Under those circumstances,
14 it is not only impossible to understand, but incredulous to comprehend how Mr. Erwin, swears in
15 his declaration, that the drafting of this short letter and making 1 telephone took 1 hour.
16

17 8. As a further example, Mr. Erwin swears it took him 1 hour to draft 2 letters dated
18 November 2, 2011, one consisting of 2 sentences and the other letter consisting of 3 sentences.

19 9. Mr. Erwin then states, under oath, that the drafted Motion to Compel required 6.8
20 hours of his time, which included, I assume research. However, his Motion to Compel consisted
21 of Points and Authorities of only 13 double spaced typewritten pages and attached copies of
22 Plaintiffs' Interrogatories and Defendant's Responses. The total number of cases cited in his Points
23 and Authorities were 5 and cited 2 rules of the Federal Rules of Civil Procedure.
24

25 10. In addition to the Points and Authorities attached to Plaintiffs Motion to Compel, Mr.
26 Erwin claims that he drafted a Declaration in support of his motion, which alleges took him 1.3
27 hours. The Declaration consisted of 3 double spaced typewritten pages.
28

11. In addition to all those hours mentioned above, Mr. Erwin swears the drafting of the

1 Motion to Compel, took him an additional 5 hours to edit the 13 pages he had drafted. Likewise, to
2 draft his Reply, Mr. Erwin took 1.7 hours, which consisted of 3 ½ double spaced typewritten pages,
3 citing 2 cases, most of which were cited in his initial motion.

4 12. In addition to the 6.8 hours, Mr. Erwin claims compensation for drafting the Motion
5 to Compel, 5 hours to edit the Motion to Compel, 1.7 hours to draft the reply and 1 hour to edit his
6 Reply. He also claims it took him an additional 2.5 hours to prepare for the hearing on his Motion
7 to Compel.
8

9 13. Mr. Erwin claims that it took him 3 hours to draft the Motion for Contempt which
10 consisted of a little over 3 double spaced typewritten pages. He also claims an additional 2.8 hours
11 to edit his Motion for Contempt.
12

13 14. Mr. Erwin claims that it took him 3.2 hours to draft his 2 ½ page reply in support of
14 his Motion for Contempt and another 2 hours to edit his reply and an additional 2 hours to edit his
15 editing and the reply in support of Defendant's Motion for Contempt.
16

17 15. The only reasonable allegation contained in the schedule setting forth the services
18 he allegedly performed and the time attributed thereto was the allegation that on January 31, 2012,
19 after he received the Opposition to Plaintiff's Motion for Contempt had a telephone conference with
20 Mr. C. Stanley Hunterton, Esq., in regard to Defendant "SACHS" Opposition to the Motion for
21 Contempt which took .4 of an hour.
22

23 16. At no time did any conversation between the undersigned and Mr. Erwin continue
24 for 1 hour and any allegation to the contrary is deliberately false and exaggerated.

25 17. Had Plaintiffs attorneys fulfilled their obligation to their client and pursued their
26 claim against the assets of Defendant Crazy Horse Too, this action would not have been filed
27 because the Plaintiffs would have been fully compensated.
28

1 WHEREFORE, it is respectfully submitted that in accordance with the above Affirmation
2 and the Points and Authorities submitted by this Defendant, that this Court not sanction either the
3 Defendant or her attorney and the Court discount the alleged 43.3 PRE hours as it is at most
4 completely false or at lease grossly exaggerated.

5 DATED: April 6, 2012.

6
7 /s/ Herbert Sachs
8 HERBERT SACHS, ESQ.
9 Nevada Bar No. 2785
10 602 South 10th Street
11 Las Vegas, NV 89101
12 (702) 387-0400
13 Attorney for Defendant
14 KIMTRAN RIZZOLO

15 **I.**

16 **POINTS AND AUTHORITIES**

17 Plaintiffs', KIRK and AMY HENRY, filed an underlying lawsuit in the District of
18 Nevada against The Power Company, Inc., dba Crazy Horse Too Gentlemen's Club and Rick
19 Rizzolo (District Case No. A440740), to recover for damages for bodily injuries sustained by Kirk
20 and Amy Henry from an alleged assault and battery by agents of the Crazy Horse Too. The matter
21 was subsequently settled for Ten Million Dollars, the terms of which were set forth in a Plea
22 Memorandum entered into between the United States Attorney Office and the Defendant Rick
23 Rizzolo in a then pending criminal indictment in the Federal District Court for the District of Nevada
24 (Case No. 2:05cr17-KJD(LRL)).

25 The Henrys' entered into the Ten Million Dollar settlement with Rick Rizzolo and The Power
26 Company within the terms contained in the Plea Memorandum above referred to. The Settlement
27 Agreement entered into between Rick Rizzolo, The Power Company, and Plaintiffs' herein provided
28

1 for an initial payment of One Million Dollars and the remaining balance of Nine Million Dollars to
2 be paid from the proceeds of the sale of the Crazy Horse Too, which was seized by the Federal
3 Government under the authority of law provided in the criminal case. At the time of the seizure of
4 the property, the Crazy Horse Too was valued at well over Thirty Million Dollars. The initial
5 payment of One Million Dollars was made to the Plaintiffs herein. Although, the Crazy Horse Too
6 was under the control of the Federal Government and subject to an attachment by the Henrys
7 pursuant to the judgment entered in accordance with the settlement agreement above referred to,
8 neither the Henrys, their attorneys or the Federal Government made any attempt to protect the value
9 of the Crazy Horse Too. The City of Las Vegas subsequently revoked the business and liquor
10 licenses of the Crazy Horse Too. It was and still is undisputed that subsequent to the revocation of
11 the business and liquor licenses by the City, the value of the Crazy Horse Too was reduced to a zero
12 value, as a result of which the Henrys were unable to recover any of the promised settlement
13 proceeds. Thereafter, and although the plea agreement required payment of the Ten Million Dollars
14 only by the Power Company¹ and the attorneys for the Henrys did nothing to protect their client and
15 pursue collecting the monies from the value of the Crazy Horse Too, Plaintiffs' attorneys filed this
16 action against Rick Rizzolo, Lisa Rizzolo, The Rick and Lisa Rizzolo Family Trust, The Rick
17 Rizzolo's Separate Property Trust, The Lisa Rizzolo's Separate Property Trust, The RLR Trust and
18 the LMR Trust and subsequently, the Defendant Kimtran Rizzolo herein. The attorneys in an effort
19 to cover their malpractice in failing to levy upon the Crazy Horse Too, allege that this Defendant,
20 together with her Co-Defendants had engaged in fraudulent transfers of property allegedly owned
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28 ¹ Please see said plea agreement attached to Plaintiff's Motion for Summary Judgment (#554) as Exhibit #2.

1 by Defendant Rick Rizzolo and on July 26, 2006, releases executed by the Defendants released all
2 parties from all liability except under the terms of the plea agreement².

3 It is important to note that this Defendant, Kimtran Rizzolo, is the widow of Bartholomew
4 Rizzolo, the father of Defendant, Rick Rizzolo and all assets in her possession were accumulated
5 by Defendant Kimtran Rizzolo and her husband from their earnings prior to any lawsuit involving
6 the Henrys, except the receipt by Kimtran Rizzolo as Executrix of the Estate of Bartholomew,
7 checks received from Vincent Piazza.
8

9 Although this Court never had the opportunity of speaking directly to or hearing directly from
10 Defendant Kimtran Rizzolo nonetheless, it concluded that this Defendant was able to understand the
11 questions posed to her by Plaintiffs' attorneys in her deposition. Defendant Kimtran Rizzolo was
12 born in Vietnam and although resided in the United States since 1980, her command and
13 understanding of the English Language is insufficient to comprehend technical terms. Nonetheless,
14 she attempted, to her best ability, to respond to questions proposed by Plaintiffs' attorney. As this
15 Court points out (Order #567) "Kimtran Rizzolo attempted to correct some of her previous response"
16 when its meanings became more clear to her.
17
18

19 Prior to the taking of her deposition, Herbert Sachs, Esq. was retained by Defendant Kimtran
20 Rizzolo to represent her in this matter and as a courtesy to Plaintiffs' attorney, knowing full well that
21 attorneys usually require answers to Interrogatories prior to the taking of a deposition, Mr. Sachs
22 contacted Plaintiffs' attorney and offered to consent to a continued date before the taking of her
23 deposition. At no time did Mr. Sachs request a continuance and only offered to consent to Plaintiffs'
24 request for a continuance if so desired. Although the offer was made, Plaintiffs' attorney advised Mr.
25
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28 ² Please see releases attached to Defendants Motion for Summary Judgment(#554) as Exhibit #1.

1 Sachs that he did not require the answers to the Interrogatories prior to the taking of the deposition
2 of Kimtran Rizzolo since he already had the information contained in his files.

3 Since he had received that response to his courteous offer to grant a continuance, Mr. Sachs
4 believed that there was no rush for the Interrogatories to be completed and since the Plaintiffs
5 attorneys already knew that Mr. Sachs had just been retained and served him with papers and
6 documents consisting of well over 2,000 pages, Mr. Sachs could only logically believe that
7 Plaintiffs' would understand that the answers to Interrogatories would take some time to be
8 responded to.
9

10 Although Mr. Sachs extended courtesies to Plaintiffs' attorney none were received from
11 Plaintiffs' attorney, who pressured Mr. Sachs to have his client complete and serve signed
12 Interrogatories.
13

14 Thereafter on January 4, 2012, this Court entered an Order (#564), which granted Plaintiffs'
15 Motion to Compel Discovery as to DEFENDANT KIMTRAN RIZZOLO. (emphasis added). The
16 Order required DEFENDANT KIMTRAN RIZZOLO to supplement her responses to certain
17 Interrogatories and Request to Produce Documents and stated that "The Court, however, cautioned
18 DEFENDANT that if she failed to comply with the order, an award of expenses or other sanctions
19 would be awarded. *Order* (#567), pg. 12. (emphasis added). The Court also stated that sanctions
20 could include contempt of court." The Court granted Plaintiffs' Motion for Contempt against
21 Defendant Kimtran Rizzolo and her counsel. The Court should be made fully aware that neither
22 Plaintiffs' Motion to Compel Discovery and Request for Sanctions (#555) nor the Court's Order
23 (#567), requested sanctions against Defendant's counsel, nor does the Court Order granting Plaintiffs
24 Motion to Compel order sanctions against Defendant's counsel. Furthermore, the Court should be
25 made aware that counsel is not a party to the action and can only comply with Interrogatory requests
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1 based upon the information received from his client and should not be held in contempt where an
2 Order does not lawfully compel counsel to comply with a court directive.

3 The Motions and Orders mentioned above do not request sanctions against Defendant's
4 counsel, the first suggestion for that request is contained in Plaintiffs' Motion for Contempt.

5 Plaintiffs' Motion for Contempt is supported by Mr. Erwin's declaration. Mr. Erwin, in his
6 blatant attempt to cover the malpractice of his firm, continues his unethical conduct by erroneously
7 stating in paragraph 3 page 2 of his declaration, for the first time, "that Defendant Kimtran Rizzolo
8 and her legal counsel Herb Sachs, Esq., did not produce any supplemental discovery responses".

9 There was no prior Order directing Mr. Sachs, not a party, to produce supplemental discovery
10 responses containing information not in his knowledge nor is there any rule, to the best knowledge
11 of Mr. Sachs, which authorizes the Court to direct a non-party to respond to an Interrogatory which
12 required facts not within his knowledge nor to supply documents not in his control or possession.

13 There is not the slightest bit of evidence, that either the Court directed Mr. Sachs to do the above,
14 or that Mr. Sachs did not comply. Therefore, under the rule of law and common sense the Court
15 would be without authority to grant that portion of Plaintiffs Motion requesting, in this instance,
16 sanctions against Mr. Sachs. Furthermore, as pointed out in Defendant Kimtran Rizzolo's
17 Opposition to Plaintiffs' Motion for Contempt (#570) supported by Mr. Sachs Affirmation that he
18 did not and could not disobey a non-existing Court Order.

19 Plaintiffs cite in their Reply to Defendant's Opposition to Plaintiff's Motion to Compel
20 (#572). F.R.C.P. 34 provides that a **PARTY** must provide documents in the possession, custody or
21 control of the **PARTY** upon whom the request is served.

22 Plaintiffs state in their Reply that "Indeed, Rizzolo is aggrieved that Plaintiffs sought
23 enforcement of the Order (#567) even though she clearly violated its strictures. As will be
24 demonstrated below, Rizzolo's brazen disobedience of the Order (#567) and the Federal Rule of
25

1 Civil Procedure warrants the imposition of sanctions here.....". Rizzolo alleges that this Motion 'is
2 false, malicious and intended solely to raise the ire of this Court against Defendant and her counsel'''.
3 The rule obviously applies to the actions of a party, not her attorney.

4 Notwithstanding the above, the Defendant in addressing the reasonableness or
5 unreasonableness of the costs and fees sought requests the Court to consider all the arguments
6 hereinabove contained in determining the amount of the award of fees which could be awarded, if
7 any.
8

9 As more fully appears in the Affidavit of Herbert Sachs, Esq., the attorney for Defendant,
10 Kimtran Rizzolo, the requests made by Plaintiff's attorney are so unreasonable as to be laughable
11 and contemptible.
12

13 WHEREFORE, based on the foregoing, Defendant respectfully requests that Plaintiffs
14 Memorandum of Costs and Attorneys Fees Incurred in Pursuing the Motion to Compel (#555) and
15 Motion for Contempt (#569) be denied and that Defendant be awarded reasonable attorney fees in
16 having to oppose this frivolous memorandum which specifically requests Defendant's counsel be
17 sanctioned and for such and further relief as this Court may deem as necessary and proper.
18

19 DATED: April 11, 2012.

20 /s/ Herbert Sachs
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25 (702) 387-0400
26 Attorney for Defendant
27 KIMTRAN RIZZOLO
28

