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10 *The Lisa M. Rizzolo Separate Property Trust*  
11 *and The LMR Trust, and Crossclaimant*  
12 *Lisa M. Rizzolo*

13 UNITED STATES DISTRICT COURT  
14 DISTRICT OF NEVADA

15 \* \* \* \* \*

16 KIRK and AMY HENRY, )  
17 )  
18 Plaintiffs, )  
19 )  
20 vs. )  
21 )  
22 FREDRICK RIZZOLO aka RICK RIZZOLO, )  
23 an individual; LISA RIZZOLO, individually )  
24 and as trustee of The Lisa M. Rizzolo )  
25 Separate Property Trust and as successor )  
26 trustee of The Rick J. Rizzolo Separate )  
27 Property Trust; THE RICK AND LISA )  
28 RIZZOLO FAMILY TRUST; THE RICK )  
29 J. RIZZOLO SEPARATE PROPERTY )  
30 TRUST; and THE LISA M. RIZZOLO )  
31 SEPARATE PROPERTY TRUST, THE )  
32 RLR TRUST; and THE LMR TRUST, )  
33 Defendants. )

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

**REPLY TO PLAINTIFFS’  
OPPOSITION TO DEFENDANT  
LISA RIZZOLO’S RENEWED  
MOTION TO DISMISS FOR  
FAILURE TO JOIN A  
NECESSARY AND INDISPENSABLE  
PARTY**

34 LISA RIZZOLO, )  
35 )  
36 Crossclaimant, )  
37 )  
38 vs. )  
39 )  
40 FREDRICK RIZZOLO aka RICK )  
41 RIZZOLO, DOES I through X and )  
42 ROE CORPORATIONS I through )  
43 X, inclusive, )  
44 )  
45 Crossdefendant. )

46 COMES NOW, Defendants, LISA RIZZOLO (“Ms. Rizzolo”), THE LISA RIZZOLO  
47 SEPARATE PROPERTY TRUST and THE LMR TRUST (collectively, “Defendants”), by and



1 In the First Amended Complaint (#135), Plaintiffs asserted claims against Defendants, Mr.  
2 Rizzolo, Ms. Rizzolo, The Rick and Lisa Rizzolo Family Trust and added, The Rick Rizzolo  
3 Separate Property Trust and The Lisa Rizzolo Separate Family Trust.

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

7 In the Second Amended Complaint (#200) Plaintiffs asserted claims against Defendants, Mr.  
8 Rizzolo, Ms. Rizzolo, The Rick and Lisa Rizzolo Family Trust, The Rick Rizzolo Separate Property  
9 Trust, The Lisa Rizzolo Separate Property Trust and added, The RLR Trust and The LMR Trust.

10 Subsequent thereto, Defendants filed on October 8, 2009, a Motion to Dismiss for Failure  
11 to Join a Necessary and Indispensable Party (#216). Thereafter, Defendants filed on October 23,  
12 2009, an Opposition (#229) and Defendants' filed on November 9, 2009, a Reply (#236). In its  
13 Order (#238), the Court found that the Defendants Motion to Dismiss was premature because the  
14 deadline for filing amended pleadings and adding parties had not expired. Accordingly, the Court  
15 denied Defendants' Motion to Dismiss without Prejudice.

16 The deadline for filing amended pleadings and adding parties has now expired.  
17 Notwithstanding, Plaintiffs have failed to amend their pleadings to add necessary and/or  
18 indispensable parties. Because of such, Defendants have filed a Renewed Motion to Dismiss for  
19 Failure to Join a Necessary and Indispensable Party (#474).

## 20 **B. ARGUMENT**

### 21 **1. As to Defendant's Renewed Motion, The Court Has Not All Ready Ruled** 22 **That Joinder is Not Necessary.**

23 In their opposition, Plaintiffs argue that “the Court already ruled that Plaintiffs are not  
24 required to name additional parties.” *Plaintiffs' Opposition to Renewed Motion to Dismiss for*  
25 *Failure to Join a Necessary and Indispensable Party* (#484), p. 3. Later in their opposition,  
26 Plaintiffs quote a colloquy between the Court and Rick Rizzolo’s then attorney, Mark Hafer, Esq.,  
27 and extrapolates therefrom that the Court “did not feel it was necessary for Plaintiffs to name  
28 Defendants' attorneys and accountants as parties.” *Id.*, p. 6. Plaintiffs have misconstrued the “law

1 of the case” doctrine<sup>1</sup>. Certainly, comments made by the Court from the bench at a hearing on an  
2 unrelated motion pertaining to Defendant, Rick Rizzolo, does not constitute the “law of the case”  
3 as it relates to these issues and Ms. Rizzolo. Thus, Plaintiffs citation to the record is of no moment.

4 In its opposition, Plaintiffs further argue that “[t]his position was only reinforced when His  
5 Honor denied the original Motion to Dismiss for Failure to Join Necessary and Indispensable Parties  
6 (#216).” *Id.* Such is incorrect. In its Order (#238), the Court found that the Defendants' Motion to  
7 Dismiss (#216) was premature because the deadline for amending pleadings and adding parties had  
8 not expired. Accordingly, the Court denied Defendants' original motion to dismiss without  
9 prejudice. As such, the Court's denial of Defendants' Motion to Dismiss (#216) was not  
10 determinative as to the necessity for Plaintiffs to name Defendants' attorneys and accountants as  
11 parties.

12 **2. The Attorneys and Accountants are Inextricably Intertwined with the**  
13 **Allegations in the Second Amended Complaint so as to Render the Same**  
14 **Necessary and/or Indispensable Parties.**

15 In their Second Amended Complaint<sup>2</sup>, Plaintiffs asserted claims for: (1) conspiracy to defraud;  
16 (2) common law fraud; and (3) a civil conspiracy to violate Nevada's version of the Uniform  
17 Fraudulent Transfer Act. *Second Amended Complaint* (#200). Notwithstanding, Plaintiffs' have filed  
18 a motion for voluntary dismissal of the first and second causes of action. *Plaintiffs' Motion for*  
19 *Voluntary Dismissal of the First and Second Causes of Action Under Fed. R. Civ. P. 41(a)(2)(#455).*  
20 In their voluntary dismissal motion, Plaintiffs seek dismissal of the first and second causes of action  
21 for conspiracy to defraud and common law fraud, respectively. However, Plaintiffs are only seeking  
22 to dismiss the causes of action and accompanying claims for damages and do not seek dismissal of

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23 <sup>1</sup> Under the law of the case doctrine, “[w]hen an appellate court states a principle or rule  
24 of law necessary to a decision, the principle or rule becomes the law of the case and must be  
25 followed throughout its subsequent progress, both in the lower court and upon subsequent  
26 appeal.” *See Tien Fu Hsu v. Clark County*, 123 Nev. 625, 630, 173 P.2d 724 (2007)(quoting  
*Wickliffe v. Sunrise Hospital*, 104 Nev. 777, 780, 766 P.2d 1322 (1988)).

27 <sup>2</sup> No statement in this pleading is an admission of the truth of any allegation stated in  
28 Plaintiffs Second Amended Complaint. They are restated herein for illustrative purposes only.  
In fact, Ms. Rizzolo categorically denies the allegations in the above-mentioned complaint.

1 the general allegations contained therein. *Id.*, p. 4, n.1. Assuming *arguendo*, the Court grants  
2 Plaintiffs' voluntary dismissal motion to the extent requested, the general allegations contained in the  
3 first and second causes of action will remain.<sup>3</sup> *Second Amended Complaint* (#200), ¶¶ 11-25. As  
4 such, Plaintiffs have alleged in their Second Amended Complaint that beginning on or about May 24,  
5 2005 that Defendant, Rick Rizzolo and Ms. Rizzolo conspired “**together and with each other and**  
6 **with third persons acting in concert with them (believed to include attorneys and accountants**  
7 **whose names are not presently known but who will be added as parties as once their identities are**  
8 **confirmed)**” to defraud Plaintiffs from collecting on their claim by concealing and alienating the  
9 ownership of their assets. *Second Amended Complaint* (#200), ¶ 11, 17.

10 In their opposition, Plaintiffs argue that “Rizzolo's bare assertion that the attorneys and  
11 accountants are so 'inextricably intertwined' with Plaintiffs' allegations as to warrant dismissal has no  
12 legal basis whatsoever.” *Plaintiffs' Opposition to Renewed Motion to Dismiss for Failure to Join a*  
13 *Necessary and Indispensable Party* (#484), p. 7. Defendants disagree. As discussed below, Plaintiffs'  
14 argument is rebutted by their own pleadings.

15 Contrary to Plaintiffs' protestations, Plaintiffs' allegations regarding the attorneys and/or  
16 accountants are inextricably intertwined with the allegations in their Second Amended Complaint so  
17 as to render the same necessary and/or indispensable parties. There is no question that Plaintiffs  
18 pleadings allege that the attorneys and accountants are co-conspirators. Further, Plaintiffs do not  
19 dispute that they are aware of the names of the attorneys and/or accountants. Accordingly, Plaintiffs'  
20 failure to amend their Second Amended Complaint and add the attorneys and/or accountants  
21 demonstrates that there is no factual basis for the allegations regarding the same and as such, said  
22 allegations are wholly meritless.

23 .....  
24 .....  
25 .....

26 \_\_\_\_\_  
27 <sup>3</sup> It is of import to note, Defendants have filed a motion for summary judgment seeking,  
28 *inter alia*, dismissal of the Plaintiffs' first and second causes of action in their entirety.  
*Defendants' Motion for Summary Judgment* (#473).

1           **3. The Attorneys, Accountants and Others Named in Defendant's**  
2           **Motion are Transferees and the Failure to Amend Plaintiffs'**  
3           **Second Amended Complaint to Add the Same Warrants**  
4           **Dismissal.**

5           As stated above, Plaintiffs do not, as they cannot, deny that they knew the identities of the  
6 attorneys and accountants. Notwithstanding, Plaintiffs have failed to add the same as defendants in  
7 this action. Instead, Plaintiffs argue in their opposition that “[t]he attorneys and accountants  
8 referenced in Rizzolo’s motion are not ‘necessary’ parties to the just adjudication of this action.”  
9 *Plaintiffs' Opposition to Renewed Motion to Dismiss for Failure to Join a Necessary and*  
10 *Indispensable Party (#484), p. 3.* Simply put, Plaintiffs are wrong.

11           It is undisputed that Ms. Rizzolo’s attorneys and accountants and others named in Defendants  
12 motion received substantial sums of monies in their representation of Ms. Rizzolo as well as Rick  
13 Rizzolo and/or in the performance of their duties to Defendants. Said monies had been retained by  
14 the above-mentioned attorneys, accountants and/or trustees who are not subject to this Courts  
15 jurisdiction as they have not been named as defendants by the Plaintiffs. It is Defendants' position that  
16 the attorneys and accountants and others have claimed an interest in the monies transferred to them  
17 from the various trusts which are the subject of the Plaintiffs allegations of fraudulent transfers, and  
18 as such, are transferees. *See, e.g., Simmons v. Clark Equipment Credit Corp.*, 554 So.2d 398, 399  
19 (Ala. 1989) (grantee who retained title to property was necessary party to the action by grantor’s  
20 creditors to set aside conveyance as fraudulent); *T W M Homes, Inc. v. Atherwood Realty &*  
21 *Investment Co.*, 214 Cal.App.2d 826, 848, 29 Cal.Rptr. 887, 899 (1963) (transferees were necessary  
22 party defendants in action to set aside fraudulent conveyance); *Mihajlovski v. Elfakir*, 135 Mich.App.  
23 528, 534, 355 N.W.2d 264, 267 (1984) (presence of grantee who retains title to property was essential  
24 to permit court to render complete relief in action to set aside fraudulent conveyance); *Murray v.*  
25 *Murray*, 358 So.2d 723, 725 (Miss.1978) (grantee is necessary party in action to set aside fraudulent  
26 conveyance); *Fraley Ins. Agency v. Johnson*, 784 P.2d 430 (Okla.App.1989) (in action to set aside  
27 fraudulent conveyance or transfer of property, grantee or transferee claiming interest in subject  
28 property was necessary and indispensable to resolution of claim); *Becker v. Becker*, 138 Vt. 372, 380,

.....

1 416 A.2d 156, 162 (1980) (transfer of property creates interest in grantee that made grantee necessary  
2 party to action for fraudulent conveyance, even though no fraud on grantee's part needed to be  
3 shown).

4 Applying the foregoing, it is Defendants' position that the attorneys and accountants (as well  
5 as the trustees) received and retained substantial monetary sums and as such, are transferees.<sup>4</sup> On this  
6 basis alone, the attorneys and accountants and others named in Defendants' motion are critical parties  
7 to this lawsuit as the Plaintiff's allegations of fraudulent transfers are concerned and because of such  
8 are, at the very least, necessary parties. Since the attorneys and accountants<sup>5</sup> are residents of Nevada  
9 subject to service of process and their joinder would not have deprived the Court of jurisdiction of  
10 the subject matter of this action and as such, they should have been joined as parties under Federal  
11 Rules of Civil Procedure ("FRCP") 19(a).

12 **4. The Failure to Name the Trustees is Fatal to Plaintiffs Second**  
13 **Amended Complaint.**

14 In their opposition, Plaintiffs acknowledge that they have only named the various trusts as  
15 Defendants. *Plaintiffs' Opposition to Renewed Motion to Dismiss for Failure to Join Necessary and*  
16 *Indispensable Party (#484)*, p. 9. Notwithstanding, Plaintiffs have failed to recognize that a trustee  
17 holds property as the legal owner pursuant to the terms of a trust instrument for beneficiaries who  
18 have the equitable ownership of the property. *See Robinson v. Kind*, 23 Nev. 330, 47 P. 1, 3(1896);  
19 *see also University of Nevada v. Tarkanian*, 95 Nev. 389, 395-396, 594 P.2d 1159, 1163 (1979). As  
20 such, a trustee is the proper party to sue and defend on behalf of the beneficiaries with a third person.  
21 *See Bernstein v. Equitable discount Corp.*, 47 P.2d 518 (CA.1935). Accordingly, the failure to name

22 \_\_\_\_\_  
23 <sup>4</sup> In its opposition, Plaintiffs acknowledge that the vast majority of courts addressing third  
24 party liability for participation in a scheme to conduct fraudulent transfers to do so in the context  
25 of determining whether a cause of action exists for conspiracy to violate the UFTA. *Plaintiffs'*  
26 *Opposition to Renewed Motion to Dismiss for Failure to Join a Necessary and Indispensable*  
27 *Party (#484)*, p. 8, n. 3. Close scrutiny of the Second Amended Complaint reveals that it alleges,  
28 among other things, a conspiracy to violate the UFTA. Notwithstanding, Defendants have filed a  
motion for summary judgment seeking dismissal of Plaintiffs' Third Cause of Action, a civil  
conspiracy to violate Nevada's version of the UFTA. *Defendants' Motion for Summary Judgment*  
(#473).

<sup>5</sup> It is of import to note, Ms. Rizzolo's accountant, Bert Purdy, has passed away.

1 the trustees is fatal to Plaintiffs' Second Amended Complaint as the trustees are necessary parties who  
2 have not been properly joined and thus, a judgment herein would be void as to that non-party. *See*  
3 *Guerin v. Guerin*, 114 Nev 127, 953 P.2d 716 (1998) (judgment void as to non-party). This  
4 proposition finds further support in one of the cases relied upon by Plaintiffs, *i.e.*, *Olsen Family Trust*  
5 *v. District Court*, 110 Nev. 548, 874 P.2d 778 (1994). In the *Olsen Family Trust* case, the Nevada  
6 Supreme Court opined:

7           Moreover, since the early case of *Robinson v. Kind*, 23 Nev.. 330, 47 P. 977  
8 (1897), this court has required that all persons materially interested in the subject  
9 matter of the suit be made parties so that there is a complete decree to bind them all.  
If the interest of absent parties may be affected or bound by the decree, they must be  
brought before the court or it will not proceed to decree. *Id.* at 335, 47 P. at 978.

10           Applying the logic of the *Olsen Family Trust* decision, the proper procedure would have been  
11 not only to name the trusts but to also the trustees as parties to the litigation. *See* FRCP 19(a). Such  
12 would have insured that all persons and/or entities materially interested in the subject matter of the  
13 lawsuit were parties.

14           **5. Plaintiffs' Argument Regarding Civil Contempt Does Not Cure the**  
15 **Deficiency in Failing to Name a Necessary and/or Indispensable Party.**

16           Contrary to Plaintiffs' outrageous assertions, Defendants were in no way flaunting the Court's  
17 jurisdiction by pointing out that one of the trustees is located in the Cook Islands and as such, was an  
18 indispensable party. To even suggest that this Court would have to employ its contempt powers as  
19 to Ms. Rizzolo is absurd. Plaintiffs sidestepped the issue as to whether the trustee was an  
20 indispensable party by arguing that the proper course to enforce a judgment would be through the  
21 Court's civil contempt powers.<sup>6</sup> This argument is simply a "red herring."

22           Clearly, Plaintiffs mischaracterized Defendants' argument in the hope of diverting the Court's  
23 attention from their own deficiencies of failing to amend their complaint and adding the trustees as  
24 parties. It is Defendants' position that the trustees are necessary and/or indispensable parties.  
25 Notwithstanding, Plaintiffs' argument regarding the Court's inherent contempt powers is merely a

26 \_\_\_\_\_  
27           <sup>6</sup> In their Opposition (at 11), Plaintiffs rely heavily upon *Federal Trade Commission v.*  
28 *Affordable Media, LLC*, 179 F.3d 1228 (9<sup>th</sup> Cir. 1999). Such reliance is misplaced. A careful  
reading of the *Affordable Media* decision reveals that it did not address the propriety of failing to  
join an indispensable party. As such, it is inapposite to the case *sub judice*.





