

D.C. No. 2:08-CV-00635-PMP/GWF

**KIMTRAN RIZZOLO,
Defendant/Appellant,**

vs.

**KIRK and AMY HENRY,
Plaintiffs/Appellees.**

APPELLANT'S CORRECTED OPENING BRIEF

**Appeal from a Final Judgment in a Civil Case of the United States District Court
for the District of Nevada, Philip M. Pro, United States District Judge**

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Was In Payment Of An Antecedent Debt; And Therefore,
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- I. EVEN ASSUMING *ARGUENDO* THAT FREDERICK RIZZOLO DID INCUR JOINT AND SEVERAL LIABILITY TO PERSONALLY PAY THE PLAINTIFFS UNDER THE TERMS OF THE SETTLEMENT AGREEMENT IN THE UNDERLYING STATE CIVIL ACTION AND THE PLEA MEMORANDUM IN THE FEDERAL CRIMINAL TAX CASE, APPELLANT RECEIVED THE FUNDS DERIVED FROM THE ASSIGNMENT OF PROCEEDS AT ISSUE AS THE WIDOW OF BART RIZZOLO UNDER A WILL EXECUTED BY HIM PRIOR TO THE ENTRY OF THE UNDERLYING STATE COURT JUDGMENT AGAINST FREDERICK RIZZOLO; AND THEREFORE, THE DISBURSEMENT OF THOSE FUNDS TO HER IS NOT VOIDABLE BY PLAINTIFFS AS A “FRAUDULENT TRANSFER.”

- II. EVEN ASSUMING *ARGUENDO* THAT THE DISTRICT COURT WAS CORRECT IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST APPELLANT, THE AMOUNT OF THE JUDGMENT ENTERED AS AGAINST APPELLANT SHOULD BE REDUCED SO AS TO CORRESPOND TO THE AMOUNT OF MONEY ATTRIBUTABLE TO THE ASSIGNMENT OF PROCEEDS IN QUESTION AS WAS ACTUALLY RECEIVED BY APPELLANT FROM BARTHOLEM EW RIZZOLO.

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STATEMENT OF JURISDICTION

A.
District Court

The jurisdiction of the district court in this matter was predicated upon Title 28 United States Code (hereinafter “USC”), Section 1332(a) (Diversity of citizenship) in that the parties to this action are of completely diverse citizenship and the amount in controversy exceeds the sum of \$75,000.00 exclusive of interests and costs.

B.
Court of Appeals

The jurisdiction of this Court is predicated upon 28 USC, Section 1291 (Final decisions of district courts).

C.
Timeliness of Appeal

The final judgment of the district court was entered in favor of Plaintiffs Kirk and Amy Henry and against Defendant Frederick Rizzolo and Defendant/Appellant Kimtran Rizzolo on April 19, 2012. ROA, Docket # 584;¹ AER, p. 96.² Appellant’s Notice of Appeal was thereafter filed on May 19, 2012. AER, pp. 101-102. Therefore, this appeal was timely brought. Federal Rule of Appellate Procedure (hereinafter “FRAP”) 4(a)(1)(A).

Appellant’s Opening Brief is timely filed pursuant to this Court’s (telephonic)

¹ Citations herein to the record on appeal are designated “ROA.”

² Citations herein to the Appellant’s Excerpt of Record are designated “AER.”

Order of August 23, 2012, granting the Appellant an enlargement of time within which to file her opening brief to September 10, 2012.

D.
Finality of Judgment Below

This is an appeal from a final judgment in a civil case, (ROA, Docket # 584; AER, p. 96), and the dispositive Order of the district court dated April 19, 2012, granting summary judgment in favor of Plaintiffs Kirk and Amy Henry and against Defendant Frederick Rizzolo and Defendant/Appellant Kimtran Rizzolo; ordering them to disgorge and transfer funds to the Plaintiffs in the amount of \$1,052,996.03. ROA, Docket # 583; AER, pp. 84-95.

2.
ISSUES PRESENTED

1. Whether the district court erred in granting summary judgment in favor of Plaintiffs and against Appellant?
 - A. Whether a genuine issue of material fact remains as to whether Frederick Rizzolo incurred joint and several liability to personally pay Plaintiffs under the terms of either the settlement agreement in the underlying state civil action or the plea memorandum in the federal criminal tax case?
 - B. Whether there a genuine issue of material fact remains as to whether Frederick Rizzolo's assignment of proceeds from the sale of his interest in the TEZ property to Bart Rizzolo was made in payment of an

a “fraudulent transfer”?

C. Whether the fact that Appellant received the funds derived from the assignment of proceeds at issue as the widow of Bart Rizzolo under a will executed by him prior to the entry of the underlying state court judgment in favor of Plaintiffs and against Frederick Rizzolo renders the disbursement of those funds to her not voidable by Plaintiffs as a “fraudulent transfer” under Nevada state law?

2. Whether the amount of the judgment entered as against Appellant should be reduced so as to correspond to the amount of money attributable to the assignment of proceeds in question as was actually received by Appellant from Bartholemew Rizzolo, in accordance with the district court’s “indicative” ruling of June 21, 2012 pursuant to Federal Rule of Civil Procedure 62.1(a)(3)?

3.

STATEMENT OF THE CASE

A.

Nature of the Case

This appeal involves an action brought by Plaintiffs alleging fraudulent asset transfer claims against Defendant/Appellant Kimtran Rizzolo; her son-in-law Defendant Frederick Rizzolo, aka “Rick” Rizzolo;³ Frederick Rizzolo’s former wife, Defendant

³ Appellant Kimtran Rizzolo is the widow of Defendant Frederick Rizzolo’s late father, Bartholemew (“Bart”) Rizzolo. She is also the executrix of Bart Rizzolo’s estate.

the Plaintiffs' lawsuit is that the Defendants allegedly engaged in fraudulent transfers of the assets of Defendant Frederick Rizzolo purportedly in order to frustrate the Plaintiffs' collection of money damages arising from an independent state personal injury action against him.

B.
Course of Proceedings and Disposition Below

This action was commenced with the filing of Plaintiffs' initial Complaint on May 16, 2008, in which Frederick Rizzolo, Lisa Rizzolo, and The Rick and Lisa Rizzolo Family Trust were named as Defendants. ROA, Docket # 1. Defendant Frederick Rizzolo moved to dismiss the Complaint on June 12, 2008. ROA, Docket # 11. On June 26, 2008, Defendant Lisa Rizzolo joined in that motion. ROA, Docket # 13. And on August 7, 2008, the motion was denied by the district court. ROA, Docket # 19.

On August 25, 2008, September 12, 2008, and October 2, 2008 Defendants Frederick Rizzolo and Lisa Rizzolo filed their respective Answers to the Complaint; filing Crossclaims against one another. ROA, Docket # 23, 24, 25.

On June 19, 2009 Plaintiffs moved for leave to file an Amended Complaint. ROA, Docket # 132. And on July 8, 2009 that motion was granted by the district court. ROA.

On July 16, 2009 Plaintiffs filed their Amended Complaint; adding The Rick J. Rizzolo Separate Property Trust and The Lisa M. Rizzolo Separate Property Trust as

On July 30, 2009 Plaintiffs moved for leave to file a Second Amended Complaint. ROA, Docket # 132. And on September 15, 2009 that motion was granted by the district court. ROA, Docket # 195.

On September 24, 2009 Plaintiffs filed their Second Amended Complaint. ROA, Docket # 200. And on December 1, 2009 and January 29, 2010 the Defendants of record filed their Answers to Plaintiffs' Second Amended Complaint. ROA, Docket # 244, 268, 272.

On September 7, 2010 Plaintiffs moved for voluntary dismissal of the first and second causes of action of their Second Amended Complaint. ROA, Docket # 455. On September 24, 2010 Defendants filed their Response and Non-Opposition thereto, respectively. ROA, Docket # 466.

On September 30, 2010 Defendant Lisa Rizzolo moved for summary judgment. ROA, Docket # 473. On October 1, 2010 Defendant Frederick Rizzolo filed a joinder to Defendant Lisa Rizzolo's Motion for Summary Judgment. ROA, Docket # 476. On October 25, 2010 Plaintiffs filed their Response to the Motion for Summary Judgment. ROA, Docket # 489. On November 15 and 16, 2010 Defendants filed their Reply in support of the Motion for Summary Judgment. ROA, Docket # 501, 502.

On June 6, 2011 Plaintiffs moved for leave to file a third amended complaint and reopen discovery. ROA, Docket # 518. On June 6, 2011 Plaintiffs also filed a Motion for Preliminary Injunction against disposition or transfer of assets by the Defendants of

Motion for Leave to File Third Amended Complaint and Reopen Discovery and their Response to Plaintiffs' Motion for Preliminary Injunction on June 22 and June 23, 2011. ROA, Docket # 526, 527, 528, 529. And Plaintiffs filed their Reply to those Responses on July 5, 2011. ROA, Docket # 530, 531.

On July 20, 2011 the district court granted Plaintiffs' Motion for Voluntary Dismissal as to Counts 1 and 2 of their Second Amended Complaint. ROA, Docket # 533.

On July 28, 2011 the district court denied the Defendants' Motion for Summary Judgment. ROA, Docket # 536. Also on July 28, 2011 the district court granted the Plaintiffs' Motion to File Third Amended Complaint and Reopen Discovery, (ROA, Docket # 537); but denied the Plaintiffs' Motion for Preliminary Injunction. ROA, Docket # 538.

On August 1, 2011 the Plaintiffs filed their Third Amended Complaint; adding Appellant Kimtran Rizzolo as a Defendant. ROA, Docket # 539.

Each of the other Defendants filed their respective Answer to the Third Amended Complaint on August 15 and 22, 2011. ROA, Docket # 543, 545. And Defendant/Appellant Kimtran Rizzolo filed her Answer on September 2, 2011. ROA, Docket # 547.

Defendant Lisa Rizzolo moved for summary judgment on November 7, 2011. ROA, Docket # 553.

Defendants Rick and Kimtran Rizzolo. ROA, Docket # 554. And on November 30, 2011 Defendant Frederick Rizzolo filed his Response thereto. ROA, Docket # 559.

On December 1, 2011 Plaintiffs filed their Response to Defendant Lisa Rizzolo's Motion for Summary Judgment. ROA, Docket # 560. And on December 19, 2011 Defendant Lisa Rizzolo filed her Reply thereto. ROA, Docket # 564.

On December 6, 2011 Defendant/Appellant Kimtran Rizzolo filed her Response to Plaintiffs' Motion for Summary Judgment as to Defendants Rick and Kimtran Rizzolo and Countermotion for Summary Judgment. ROA, Docket # 561. And on December 19, 2011 Plaintiffs filed their Omnibus Reply in Support of Motion for Summary Judgment as to Defendants Rick and Kimtran Rizzolo. ROA, Docket # 563.

On April 19, 2012 Defendant Lisa Rizzolo's Motion for Summary Judgment was denied by the district court, (ROA, Docket # 582), as was Defendant/Appellant Kimtran Rizzolo's Countermotion for Summary Judgment. ROA, Docket # 583; AER, pp. 84-95.

However, on April 19, 2012, Plaintiffs' Motion for Summary Judgment as to Defendants Rick and Kimtran Rizzolo was granted; Judgment was entered in favor of Plaintiffs and against Defendant Frederick Rizzolo and Defendant/Appellant Kimtran Rizzolo; and Defendant Frederick Rizzolo and Defendant/Appellant Kimtran Rizzolo were ordered to transfer funds in the amount of \$1,052,996.03 to Plaintiffs Kirk and Amy Henry within thirty (30) days. ROA, Docket # 583, 584; AER, pp. 84-96.

Appeal. ROA, Docket #588; AER, pp. 101-102.

On May 18, 2012 Defendant/Appellant Kimtran Rizzolo filed a Motion for New Trial or in the Alternative, to Alter or Amend Judgment. ROA, Docket # 587. Plaintiffs filed an Opposition thereto on June 4, 2012. ROA, Docket # 601. And on June 21, 2012 Defendant/Appellant Kimtran Rizzolo's Motion for New Trial or in the Alternative, to Alter or Amend Judgment was denied by the district court. ROA, Docket # 607; AER, pp. 97-100.

However, in its Order of June 21, 2012, the district court entered an "indicative" clarification of its Judgment, indicating that "the Court would clarify that as the recipient of fraudulently transferred funds, [Defendant/Appellant] Kimtran [Rizzolo] must disgorge only so much of the Judgment as she actually received from Bart Rizzolo." ROA, Docket # 607 pp. 3-4; AER, pp. 97-100.

4. STATEMENT OF FACTS

Frederick Rizzolo was the principle shareholder of The Power Company, Inc., d/b/a "Crazy Horse Too" formerly of Las Vegas, Nevada – a now-defunct "gentlemen's club." ROA, Docket # 583, p. 2; AER, p. 85. In or about February of 2005, he invested approximately \$2,000,000.00 in a business entity in Philadelphia, Pennsylvania entitled "TEZ Real Estate LP" (hereinafter "TEZ"). ROA, Docket # 554 p. 3 and Exhibit 4 pp. 123-24, Exhibit 5 p. 43, Docket # 583 p. 2; AER, pp. 85. And on October 17, 2007, he sold his interest in that entity to one Vincent Piazza for approximately \$3,000,000.00.

On April 3, 2009, Frederick Rizzolo received an initial payment of \$1,000,000.00 pursuant to the sale of his interest in TEZ. ROA, Docket # 554 p. 4 and Exhibit 4 pp. 151-66, Docket # 583 p. 3; AER, p. 86. He initially deposited these funds in the Nevada Commerce Bank account of an entity entitled “Lions Limited Partnership” (hereinafter “Lions”), (*id.*); and thereafter transferred these proceeds to the offshore account of an entity known as “The RLR Trust” in the Cook Islands. *Id.*

Frederick Rizzolo thereupon disbursed \$600,000.00 to his former wife, Lisa Rizzolo; \$200,000.00 to his father, Bartholemew Rizzolo; and \$100,000.00 to the Las Vegas law firm of Patti, Sgro & Lewis. ROA, Docket # 554 p. 4 and Exhibit 4 pp. 151-66, Docket # 583 p. 3; AER, p. 86. And he thereafter repatriated the balance of approximately \$90,000.00; depositing those remaining funds back into the Lions account at Nevada Commerce Bank. *Id.*

Under the terms of the sale of his interest in TEZ, the payment of the additional \$2,000,000.00 owed to Frederick Rizzolo by Vincent Piazza was contingent upon certain stock sales by Piazza, and was to be made in monthly installments. ROA, Docket # 554 pp. 4-5 and Exhibit 8, Docket # 583 p. 3; AER, p. 86.

On April 18, 2009, Frederick Rizzolo executed an “assignment of proceeds” from the sale of his interest in TEZ in the amount of \$789,000.00 to his father, Bart Rizzolo. ROA, Docket # 554 p. 5 and Exhibit 9, Docket # 583 p. 3; AER, p. 86.

The disbursement of funds from the sale of Frederick Rizzolo’s interest in TEZ to

Bartholemew Rizzolo. ROA, Docket # 554 Exhibit 4 pp. 293-95, Docket # 583 pp. 3-4; AER, pp. 86-87.

Bart Rizzolo received the first monthly installment payment pursuant to the assignment on April 20, 2009. ROA, Docket # 554 p.5 and Exhibits 12 and 13, Docket #583 p. 5; AER, p. 8. And by February 15, 2010, he had received a total of \$325,513.81. *Id.*

The following month, Bart Rizzolo died. ROA, Docket # 554 p. 5 and Exhibit 14 and Exhibit 15 p. 34, Docket # 583 p.5; AER, p. 88. His wife, Appellant Kimtran Rizzolo was the executor of Bart Rizzolo's estate, and inherited all of his assets, including his entitlement to the balance of funds owed to Bart by Vincent Piazza pursuant to his son's assignment of proceeds. ROA, Docket # 554 p. 5 and Exhibit 15 p. 82, Docket # 583 p. 5; AER, p. 88. And as of the time the final payment under the assignment of proceeds was made on October 19, 2010, a total of \$732,996.03 had been disbursed by Piazza pursuant thereto. ROA, Docket # 554 p. 6 and Exhibits 12 and 13, Docket # 583 p. 5; AER, p. 88.⁴

As a result of personal injuries sustained at the "Crazy Horse Too" by Plaintiff Kirk Henry, Plaintiffs Kirk and Amy Henry (husband and wife) sued The Power Company, Inc. and Frederick Rizzolo in the Eighth Judicial District Court in and for the

⁴ Thereafter, Piazza erroneously made four additional payments to Appellant in the amount of \$30,000.00 each. ROA, Docket # 554 p. 6 and Exhibits 5 pp. 77-80, 12, 13, Docket # 583 p. 5; AER, p. 88.

County of Clark, State of Nevada in the matter entitled *Kirk and Amy Henry v. The Power Company, Inc. dba Crazy Horse Too Gentlemen's Club and Rick Rizzolo, et al.*, Case No. A440740. ROA, Docket # 583, p. 2; AER, p. 85.

An indictment was thereafter filed in the United States District Court for the District of Nevada charging Frederick Rizzolo and The Power Company, Inc. with tax fraud in the matter entitled *United States of America v. Frederick Rizzolo and The Power Company, Inc. et al.*, Case No. 2:05cr17-KJD (LRL) and Case No. 2:06-CR-00186-PMP-PAL. ROA, Docket # 554 p. 3, Docket # 583 p. 2; AER, p. 85. That federal criminal case was resolved by a global plea agreement signed on May 16, 2006. ROA, Docket # 554 Exhibit 3; Docket # 583 p. 2; AER, p. 85. Pursuant thereto, Defendant Frederick Rizzolo agreed to “plead guilty to . . . [a single count] charging conspiracy to defraud the United States in violation of Title 18, United States Code, Section 371, (ROA, Docket # 554 Exhibit 3, p. 2); “THE POWER COMPANY, INC. . . . [was] pleading guilty to a violation of Title 18, United States Code, Section 1962(d) and agreeing to make restitution to Kirk and Amy Henry [in the above-captioned state case] in the aggregate amount of Ten Million Dollars (\$10,000,000) upon the sale of THE CRAZY HORSE TOO.” ROA, Docket # 554 Exhibit 3, p. 7. (Emphasis added.)

In contradistinction to the express discrete provision of the Plea Memorandum in the criminal tax case pursuant to which “Defendant [Rizzolo] agree[d] that he is jointly and severally liable for . . . [payment of] restitution [in the amount of One Million Seven Hundred Thirty Thousand Dollars (\$1,734,000) to the Internal Revenue

and Mrs. Henry – separately and independently provided for therein – was expressly limited to The Power Company, Inc. *alone*. ROA, Docket # 554 Exhibit 3, p. 7. Thus, the terms of the Plea Memorandum further expressly provided that “upon the sale of THE CRAZY HORSE TOO, Defendant [Frederick] Rizzolo, as principal owner of THE POWER COMPANY, INC., shall take all actions necessary to ensure that THE POWER COMPANY, INC. meets its obligation to make restitution to Kirk and Amy Henry in the aggregate amount of Ten Million Dollars (\$10,000,000.00) upon the sale of THE CRAZY HORSE TOO.” ROA, Docket # 554 Exhibit 3, p. 7. (Emphasis added.)

The Plaintiffs’ civil lawsuit in state court was *thereafter* likewise resolved by the parties pursuant to a settlement agreement signed on July 26, 2006, providing for a release of all claims by the Plaintiffs. ROA, Docket # 554 Exhibit 1. In consideration of that release, the settlement agreement – like the Plea Memorandum filed in the federal criminal case – provided for payment to the Plaintiffs of the total sum of Ten Million Dollars (\$10,000,000.00). ROA, Docket # 554 Exhibit 1, p. 1.

Pursuant to the express terms of the settlement agreement, the sum of \$1,000,000.00 was paid forthwith into a settlement trust fund established for the benefit of the Plaintiffs; the gentlemen’s club was to be sold; and the balance of \$9,000,000.00 was to become “due and owing upon the closing of the sale of THE POWER COMPANY, INC., dba CRAZY HORSE TOO GENTLEMEN’S CLUB.” *Id.*

As further expressly set forth in the state civil settlement agreement, the payment

those certain plea agreements made between THE POWER COMPANY, INC., FREDERICK RIZZOLO, AND THE UNITED STATES OF ANERICA” in the above-captioned federal criminal tax case (above-quoted). *Id.* Thus, the settlement agreement further expressly provided “[t]hat this release, in conjunction with those certain guilty plea agreements made between The Power Company, Frederick Rizzolo, and the United States, is the entire complete, sole and only understanding and agreement of, by, and between or among the undersigned and releasees pertaining to and concerning the subject matter and things expressed herein.” ROA, Docket # 554 Exhibit 1, p. 2. And accordingly, as the district court expressly found in its Order granting Plaintiffs Motion for Summary Judgment as to Defendants Rick and Kimtran Rizzolo: “The release of claims in the state court personal injury action was done in conjunction with plea agreements entered in June 2006 in criminal cases brought in federal court against Rick Rizzolo, The Power Company, and various other individuals.” ROA, Docket # 583 p. 2; AER, p. 85. (Emphasis added.)

Fredrick Rizzolo was permitted a time certain within which to consummate a private sale of the Crazy Horse Too, (ROA, Docket # 554 Exhibit 3, p. 8); and when he was unable to achieve a sale of the business within that time, the club was seized by the federal government with his acquiescence in order to permit the government to sell the business for the benefit of Mr. and Mrs. Henry.

Although the government thereupon assumed that right and corresponding

and tavern licenses of the business, and the area in which the club was located was thereupon re-zoned by the City of Las Vegas so as to prohibit “adult” uses. And as a result, the club became unsellable, fell into disrepair, and was ultimately foreclosed upon by the mortgagee on July 1, 2011. ROA, Docket # 583 p. 3, para. 2, l. 8, p. 5, para. 4; AER, pp. 86, 88.

Thereafter, on September 2, 2011, pursuant to the Plaintiffs’ motion to reduce the settlement agreement to judgment, the state court entered judgment in favor of the Plaintiffs’ in their state civil case in the amount of \$9,000,000.00 against Frederick Rizzolo *individually* – contrary to the above-quoted textual terms of the settlement agreement and the guilty plea memorandum incorporated by reference therein. ROA, Docket # 554 Exhibit 2; Docket # 583 pp. 5-6; AER, pp. 88-89.

5. SUMMARY OF ARGUMENT

Appellant respectfully submits that the district court erred in granting summary judgment in favor of Plaintiffs and against her. Thus, she respectfully maintains that a genuine issue of material fact remains as to whether Frederick Rizzolo incurred joint and several liability to *personally* pay the Plaintiffs under the terms of either the settlement agreement in the underlying state civil action or the plea memorandum in the federal criminal tax case. She likewise respectfully contends that there also remains a genuine issue of material fact as to whether, in any event, Frederick Rizzolo’s

assignment of proceeds from the sale of his interest in THE 1001 Bart Rizzolo was made as a payment of an antecedent debt and is therefore not voidable under Nevada state law as a “fraudulent transfer.”

Appellant further respectfully maintains that, whereas she received the funds derived from the assignment of proceeds at issue as the widow of Bart Rizzolo under a will executed by him prior to the entry of the underlying state court judgment in favor of Plaintiffs and against Frederick Rizzolo, the disbursement of those funds to her is likewise not voidable by Plaintiffs as a “fraudulent transfer” under Nevada state law.

Finally, Appellant respectfully submits that, even if this Court should decide to affirm the district court’s entry of summary judgment in favor of Plaintiffs, it should nonetheless reduce the amount of the judgment entered as against Appellant so as to correspond to the amount of money attributable to the assignment of proceeds in question as was actually received by Appellant from Bartholemew Rizzolo, in accordance with the district court’s “indicative” ruling of June 21, 2012.

6. ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND AGAINST APPELLANT .

Pursuant to the provisions of Rule 56(c)(2) of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”), a court may grant summary judgment when the submissions in the record “show that there is no genuine issue as to any material fact

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and the moving party is entitled to judgment as a matter of law” (Emphasis added.) (A of 41)
fact is “material” if it might affect the outcome of a lawsuit, as determined by the governing substantive law. *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). An issue is “genuine” if sufficient evidence exists to support a finding for the non-moving party. *Villiarimo v. Aloha Island Air, Inc.* 281 F.3d 1054, 1061 (9th Cir. 2002). And in making those determinations, a court must view the pleadings and materials on file in the light most favorable to the non-moving party. *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002).

Appellant respectfully submits that Plaintiffs have failed to satisfy either prong of this applicable legal standard; and therefore, that their Motion for Summary Judgment should not have been granted. Thus, Appellant respectfully submits that there are genuine issues of material fact in this case; and that under applicable substantive legal principles of the law of the State of Nevada, Plaintiffs are not entitled to summary judgment.

A.
A Genuine Issue Of Material Fact Remains As To Whether Frederick Rizzolo Incurred Joint And Several Liability To Personally Pay the Plaintiffs Under The Terms Of Either The Settlement Agreement In The Underlying State Civil Action Or The Plea Memorandum In The Federal Criminal Tax Case.

As a threshold matter, Appellant respectfully submits that a genuine issue of material fact obtains in this case with respect to whether, in the first instance,

under the terms of the settlement agreement in the underlying state civil action or the Plea Memorandum in the federal criminal tax case incorporated therein by reference. And in that any arguable hypothesis of liability on the part of Appellant Kimtran Rizzolo is directly dependent upon the resolution of that underlying factual issue, she respectfully submits that Plaintiffs are not entitled to judgment as a matter of law in this case. Appellant raised this issue in the district court in response to Plaintiffs' Motion for Summary Judgment. ROA, Docket # 559, 561. However, in its Order granting summary judgment in favor of Plaintiffs, the lower court summarily "determined that Rick Rizzolo is personally liable under the settlement agreement" without any discussion of the specific analysis set forth in Appellant's Response to that motion in support of her argument. ROA, Docket # 583, p. 7; AER, p. 90.

Thus, as set forth *supra*, the settlement agreement in the state civil action textually provided that, in exchange for their release of all claims, payment of the sum of \$10,000,000.00 to Plaintiffs was to be made "*consistent with the terms of those certain guilty plea agreements [previously] made between THE POWER COMPANY, INC., FREDERICK RIZZOLO, and THE UNITED STATES OF AMERICA*" ROA, Docket # 554 Exhibit 1, p. 1. (Emphasis added.) And as further expressly set forth in that settlement agreement:

"this release, *in conjunction with those certain guilty plea agreements made between The Power Company, Frederick Rizzolo, and the United States*, is the entire, complete, sole and only understanding and agreement of, by, and between or

among the undersigned and releases pertaining to and concerning the subject matter and things expressed herein.” ROA, Docket # 554 Exhibit 1, p. 2. (Emphasis added.)

Accordingly, as the settlement agreement further textually provided:

“[E]ach releasee shall be held harmless of and from and indemnified for and against all losses, damages, costs and expenses, including reasonable attorney’s fees, and all other sums which each releasee may hereafter incur, pay be required or become obligated to pay on account of any and every further, additional or other demand, claim or suit by or on behalf of KIRK AND AMY HENRY, for any loss of or damage to any property or property right, injuries to or the death of any person as provided in this release, or for any contest or attempt to modify, change, reform, break, set aside, nullify, cancel or negate this Release, or any part or provision of this Release, for any reason whatsoever.” ROA, Docket # 554 Exhibit 1, p. 2.

Thus, as the district court expressly found in its Order granting Plaintiffs Motion for Summary Judgment as to Defendants Rick and Kimtran Rizzolo: “The release of claims in the state court personal injury action was done *in conjunction with* plea agreements entered in June 2006 in criminal cases brought in federal court against Rick Rizzolo, The Power Company, and various other individuals.” ROA, Docket # 583 p. 2; AER, p. 85. (Emphasis added.)

As textually set forth, in turn, in the Plea Memorandum filed in the federal criminal tax case which was expressly incorporated by reference into the civil settlement agreement as aforesaid:

As part of the global plea being taken in this case, THE POWER COMPANY, INC. is pleading guilty to a violation of Title 18, United States Code, Section 1962(d) and agreeing to make restitution to Kirk and Amy Henry in the aggregate amount of Ten Million Dollars (\$10,000,000.00) upon the sale of THE CRAZY HORSE TOO. Defendant Rizzolo, as principle owner of THE POWER COMPANY, INC., shall take all actions necessary to ensure that THE POWER COMPANY, INC. meets its obligation to make restitution to Kirk and Amy Henry in the aggregate amount of Ten Million Dollars (\$10,000,000.00) upon the sale of THE CRAZY HORSE TOO, depositing said funds with the Clerk of the Court in an interest bearing account. Thereafter, the Clerk of the Court, upon receipt of proper notice from Kirk and Amy Henry, will transfer said funds to a designated Title 26, United States Code, Section 468B Qualified Settlement Trust Fund to permit the funding of structured annuities established for the benefit of Kirk and Amy Henry. In conjunction thereto, defendant agrees to execute any and all written instruments necessary to effectuate the intent and purpose of the transfer of funds pursuant to this section.” ROA, Docket # 554 Exhibit 3, p. 7. (Emphasis added.)

Accordingly, pursuant to the express, unambiguous terms of the text of the Plea Memorandum, only The Power Company, Inc. incurred liability to pay the Ten Million Dollar (\$10,000,000.00) restitution to the Plaintiffs in this case. Indeed, under the plain provisions of that Plea Memorandum, Frederick Rizzolo’s sole and singular obligation with respect to the payment of restitution to the Plaintiffs was strictly limited to “tak[ing] all actions necessary to ensure that THE POWER COMPANY, INC. meets its obligation to make restitution to Kirk and Amy Henry,” and to “execut[ing] any and all written instruments necessary to effectuate the intent and purpose of the transfer of

7. (Emphasis added.)

Thus, under the text of the Plea Memorandum, the obligation to pay \$10,000,000.00 in restitution to the Plaintiffs in this case was *not* a joint and several one shared by both The Power Company, Inc. and Frederick Rizzolo as an individual. And this must be deemed to be the intent of the parties pursuant to the rules of contractual construction. For, in conspicuous contradistinction to the above-quoted provision for restitution to the Plaintiffs, the same Plea Memorandum elsewhere internally contains the following independent textual provision pertaining to the payment of restitution to the Internal Revenue Service:

“Defendant Corporation [*i.e.* The Power Company, Inc.] agrees to make restitution in an amount of \$1,734,000 to the Internal Revenue Service (IRS). All matters related to Defendant Corporation’s \$1,734,000 restitution to the IRS shall be governed by the Closing Agreement between the Defendant Corporation and the IRS. This Plea Agreement is contingent on Defendant Corporation and the IRS entering a Closing Agreement. Upon entry of the said Closing Agreement, the agreement shall be attached hereto this Plea Agreement and incorporated herein by reference. This restitution amount is a restatement of the same restitution amount for which THE POWER COMPANY, INC., is obligated to pay to the Internal Revenue Service pursuant to its separate plea agreement. **Defendant [Frederick Rizzolo] agrees that he is jointly and severally liable for this restitution.**” ROA, Docket # 554 Exhibit 1, pp. 4-5. (Emphasis added.)

assumed personal, joint and several liability – together with The Power Company – to the extent of the obligation of both of those parties to make restitution *to the Internal Revenue Service*, while assuming a personal obligation only to *facilitate* the discharge of the sole and independent obligation of The Power Company *alone* to make restitution *to the Plaintiffs in this action*. And Defendant Rizzolo is entitled to the benefit of his bargains with both the government and the Plaintiffs in this regard. See *Santobello v. New York*, 404 U.S. 257 (1971).

The Plaintiffs are therefore incorrect in the basic assertions of their Motion for Summary Judgment (1) that “Rick Rizzolo entered into the Settlement Agreement with Plaintiffs [and] [t]herein . . . [purportedly] agreed to [personally] pay \$10 million dollars [to the Plaintiffs] to resolve the state court action,” (ROA, Docket # 554 p. 2); and (2) that “Rick Rizzolo’s [purported] obligation to Plaintiffs [in that regard] was also [purportedly] incorporated into the terms of his guilty plea agreement with the United States Government in the form of restitution.” ROA, Docket # 554, p. 3. And Appellant Kimtran Rizzolo likewise respectfully submits that there is no support in these governing documents of record for the fundamental finding of the lower court that “[p]ursuant to the plea agreements and the release of claims in the state civil action, The Power Company and Rick Rizzolo were to pay Plaintiffs a total of \$10 million.” ROA, Docket # 583, p. 2; AER, p. 85. (Emphasis added.)

Summary Judgment as to Defendants Rick and Kimtran Rizzolo in the light most favorable to her as the non-moving party – as the Court must – the Plaintiffs have not shown that they are entitled to judgment as a matter of law in this action as required by FRCP 56(c)(2); and therefore, that Plaintiffs’ motion should have been denied.

B.

Even Assuming Arguendo That Frederick Rizzolo Did Incur Joint And Several Liability To Personally Pay The Plaintiffs Under The Terms Of The Settlement Agreement In The Underlying State Civil Action And The Plea Memorandum In The Federal Criminal Tax Case, A Genuine Issue Of Material Fact Remains As To Whether The Assignment Of Proceeds At Issue In The Instant Case Was In Payment Of An Antecedent Debt; And Therefore, Is Not Voidable Under Nevada Law As A “Fraudulent Transfer.”

In their Motion for Summary Judgment, Plaintiffs assert that, pursuant to what they therein textually characterize as “a complex familial *conspiracy*,” Frederick Rizzolo transferred funds derived from the proceeds of the sale of his interest in TEZ Real Estate LP to his father and stepmother – Appellant Kimtran Rizzolo herein – “in order to keep it out of the hands of Plaintiffs and the Internal Revenue Service.” ROA, Docket # 554, p. 2. (Emphasis added.)⁵ Thus, Plaintiffs therein claim that “[t]his sum . . . [was] fraudulently transferred to Bart and Kimtran Rizzolo in order to conceal assets from Plaintiffs and frustrate their recovery of the debt [allegedly] owed to them [by

⁵ However, in its Order granting Plaintiffs’ Motion for Summary Judgment as to Defendants Rick and Kimtran Rizzolo, the lower court inexplicably “reject[s] the argument [of Frederick and Kimtran Rizzolo] that Plaintiffs have alleged a conspiracy.” ROA, Docket # 583, p. 7; AER, p. 90.

funds . . . therefore rightfully belong to Plaintiffs,” (*id.*); and accordingly contend that “[t]he Court should . . . void Rick Rizzolo’s [allegedly] fraudulent transfers to Bart and Kimtran Rizzolo because there is no remaining issue of material fact to be decided at trial.” ROA, Docket # 554, p. 2.

In support of the foregoing claims, Plaintiffs principally rely upon two independent communications of record from successive attorneys for Frederick Rizzolo; namely: Mark C. Hafer, Esq. and Dominic P. Gentile, Esq., respectively, which were attached as exhibits in support of Plaintiffs’ Motion for Summary Judgment as to Defendants Rick Rizzolo and Kimtran Rizzolo. ROA, Docket # 554, pp. 6, 10-11 and Exhibits 11, 17.

The first of these communications was a facsimile transmission from Attorney Hafer to John E. Dawson, Esq. of the Las Vegas law firm of Lionel, Sawyer & Collins (also an attorney for Defendant Rick Rizzolo) dated July 8, 2008, setting forth a “*list of loans made by Bart Rizzolo*,” and inquiring of Mr. Dawson whether Lion’s LP could assign its rights to collect the balance due on the sale of Frederick Rizzolo’s interest in TEZ to Bart Rizzolo in payment of that antecedent debt. ROA, Docket # 554 Exhibit 11. (Emphasis added.) This facsimile transmission was specifically acknowledged by the district Court in its Order granting Plaintiffs’ Motion for Summary Judgment as to Defendants Rick Rizzolo and Kimtran Rizzolo. ROA, Docket # 583, p. 3; AER, p. 86.

Gentile to a Mr. Stuart Cohen dated November 3, 2010. ROA, Docket # 554 Exhibit 17. In their Motion for Summary Judgment, Plaintiffs purport to attribute significance to this communication only on the basis of their observation that, by virtue of that e-mail message, “attorney Dominic Gentile ordered [Vincent] Piazza to refrain from sending any funds to Rizzolo because the right to that money was in dispute.” ROA, Docket # 554, p. 6. However, in the text of their Motion, Plaintiffs did *not* reveal that the text of this communication contained the following content:

“Thank you for speaking with me a few minutes ago about the Lions Limited payments matter. Since I have not ever received the amortization schedule that you referenced, **I have no ability to verify the accuracy of the repayment in full to Bart Rizzolo and his estate of the money owed to him that he expended to keep the [Crazy Horse Too] property safe from foreclosure and/or becoming worthless.** Please send the schedule to me.” ROA, Docket # 554 Exhibit 17. (Emphasis added.)

Thus, both of the submissions of record upon which Plaintiffs specifically purport to rely in support of their claim that Frederick Rizzolo’s assignment of funds to his father and stepmother from the sale of his interest in TEZ Real Estate LP constituted a “fraudulent transfer” voidable at the instance of Mr. and Mrs. Henry textually reflect that the assignment of funds in question was undertaken in order to satisfy an antecedent debt owed to Bart Rizzolo.

Plaintiffs' Motion for Summary Judgment as to Defendants Rick Rizzolo and Kimtran Rizzolo, Frederick Rizzolo so testified at deposition in this case. ROA, Docket # 583, p. 4; AER, p. 87.⁶

Thus, Appellant respectfully submits that the lower court's determination that there is no evidence in the record that Bart Rizzolo had made loans to Frederick Rizzolo cannot be sustained. ROA, Docket # 583, p. 10; AER, p. 93.

And Appellant respectfully submits that, under the applicable substantive law of the State of Nevada, this is a legally significant; indeed, a dispositive issue, for determination by the trier of fact; rendering summary judgment inappropriate in this case. Thus, as the United States District Court for the District of Nevada explained in *Pat Clark Sports, Inc. v. Champion Trailers, Inc.*, 487 F. Supp. 2d 1172, 1178 (D. Nev. 2007), interpreting applicable Nevada law:

[A] transfer may be fraudulent if the debtor did not receive reasonably equivalent value in exchange for the transfer and the debtor was insolvent or became insolvent as a result of the transfer. Nev. Rev. Stat. Section 112.190(1). **Reasonably equivalent value may consist of satisfaction of an antecedent debt.** Nev. Rev. Stat. 112.170(1). (Emphasis added.)

Indeed, as the court specifically pointed out in that case, "**under Nevada law, satisfaction of an antecedent debt constitutes fair consideration.**" *Id.* at 1179.

⁶ The testimony of Bart Rizzolo on this issue – who is now deceased – is obviously unavailable.

“Plaintiff[s] present[] no evidence . . . the antecedent debt was not a valid and existing debt.” *Id.*

As the court further pointed out in *Pat Clark Sports, Inc.*: “Generally, the creditor bears the burden of proving the debtor was insolvent and the consideration was inadequate.” See *Sportsco Enterprises. v. Morris*, 112 Nev. 625, 917 P.2d 934, 938 (1996). (Emphasis added.) However, if the creditor produces evidence of ‘certain indicia or badges of fraud, the burden shifts to the defendant to come forward with rebuttal evidence that a transfer was not made to defraud the creditor.’” (Quoting *Sportsco Enters., supra.*)

In their Motion for Summary Judgment as to Defendants Rick and Kimtran Rizzolo, Plaintiffs acknowledge the foregoing; recognizing that “[i]n determining actual intent to hinder, delay, or defraud creditors, a court is generally required to consider certain badges of fraud that are delineated in the NUFTA [Nevada Uniform Fraudulent Transfer Act]. NRS 112.180(2)(a)-(k).” ROA, Docket # 554 p. 10. Plaintiffs claim that “[s]uch an inquiry is unnecessary here, however, as *Rick Rizzolo admitted that the assignment of proceeds was executed with fraudulent intent.*” *Id.* (Emphasis in original.)

Plaintiffs’ purport to predicate that characterization upon Frederick Rizzolo’s deposition testimony that it was his hope to satisfy his antecedent debt to his father before any person, entity, or government agency could attach the proceeds of the sale of

II.
EVEN ASSUMING ARGUENDO THAT FREDERICK RIZZOLO DID INCUR JOINT AND SEVERAL LIABILITY TO PERSONALLY PAY THE PLAINTIFFS UNDER THE TERMS OF THE SETTLEMENT AGREEMENT IN THE UNDERLYING STATE CIVIL ACTION AND THE PLEA MEMORANDUM IN THE FEDERAL CRIMINAL TAX CASE, APPELLANT RECEIVED THE FUNDS DERIVED FROM THE ASSIGNMENT OF PROCEEDS AT ISSUE AS THE WIDOW OF BART RIZZOLO UNDER A WILL EXECUTED BY HIM PRIOR TO THE ENTRY OF THE UNDERLYING STATE COURT JUDGMENT AGAINST FREDERICK RIZZOLO; AND THEREFORE, THE DISBURSEMENT OF THOSE FUNDS TO HER IS NOT VOIDABLE BY PLAINTIFFS AS A “FRAUDULENT TRANSFER.”

The evidence of record shows that Appellant received the funds derived from the assignment of proceeds at issue in this case as the widow of Bart Rizzolo under a will

⁷ Similarly, Appellant further respectfully submits that the lower court’s finding that Frederick Rizzolo’s failure to disclose this assignment of funds to his probation officer showed that the transfer itself was “fraudulent” as to Plaintiffs under Nevada law is erroneous. See ROA, Docket # 583 p. 10; AER, p. 93. Although this circumstance may have been a relevant consideration for the Court for purposes of Frederick Rizzolo’s revocation of supervised release proceedings, Appellant maintains that it is of no moment here.

Frederick Rizzolo. She therefore maintains that, under the above- referenced applicable state substantive law, because the disbursement of those funds to her was made prior to Plaintiffs becoming judgment creditors of Frederick Rizzolo, those disbursements are not voidable by plaintiffs as “fraudulent transfers.”

However, in its Order granting Plaintiffs’ Motion for Summary Judgment as to Defendants Rick and Kimtran Rizzolo, the lower court simply rejects this contention without discussion.

**III.
EVEN ASSUMING *ARGUENDO* THAT THE DISTRICT COURT
WAS CORRECT IN GRANTING SUMMARY JUDGMENT IN
FAVOR OF PLAINTIFFS AND AGAINST APPELLANT, THE
AMOUNT OF THE JUDGMENT ENTERED AS AGAINST
APPELLANT SHOULD BE REDUCED SO AS TO CORRESPOND
TO THE AMOUNT OF MONEY ATTRIBUTABLE TO THE
ASSIGNMENT OF PROCEEDS IN QUESTION AS WAS
ACTUALLY RECEIVED BY APPELLANT FROM
BARTHOLEMMEW RIZZOLO.**

On May 18, 2012, Appellant filed a Motion for New Trial or in the Alternative to Alter or Amend Judgment in the district court; arguing that, at minimum, she should only be required to disgorge so much of the amount of the Judgment as she actually received from Bart Rizzolo. ROA, Docket # 587. However, the motion was filed after the filing of Appellant’s Notice of Appeal. ROA, Docket # 607 p. 3; AER, p. 99. And, as the district further found, the motion was not timely filed under the provisions of Fed. R. Civ. P. 59. ROA, Docket # 607 p. 2; AER, p. 98. And accordingly, the district

Ass'n of Apartment Owners of Ewa Apartments, 234 F.3d 1087, 1089 (9th Cir. 2000).
ROA, Docket # 607 p. 2; AER, p. 98.

However, in its Order denying the motion, the district court entered an “indicative” ruling pursuant to Fed. R. Civ. P. 62.1(a)(3) as follows:

[P]ursuant to Rule 62.1(a)(3), the Court hereby indicates that it would clarify the Judgment pursuant to Rule 60(a) were an appeal not presently pending which precludes the Court from clarifying the Judgment. See Fed. R. Civ. P. 60(a) (permitting district court to correct mistakes in a judgment unless an appeal has been docketed and is pending, in which case “such a mistake may be corrected only with the appellate court’s leave”). *Specifically, the Court would clarify that as the recipient of fraudulently transferred funds, Kimtran must disgorge only so much of the Judgment as she actually received from Bart Rizzolo.*” ROA, Docket # 607 pp. 3-4; AER, pp. 99-100. (Emphasis added.)

Therefore, Appellant respectfully submits that, assuming *arguendo* that this Court should affirm the grant of summary judgment in this matter in favor of Plaintiffs, it should amend the judgment in accordance with the above-quoted “indicative” ruling of the district court so as to reflect that Appellant Kimtran Rizzolo be ordered to disgorge “only so much of the Judgment as she actually received from Bart Rizzolo.”

7. CONCLUSION

THEREFORE, for all the foregoing reasons, Appellant KIMTRAN RIZZOLO respectfully prays that this Honorable Court vacate the district court’s award of

summary judgment in favor of the Plaintiff and remand this matter to the lower court for trial.

IN THE ALTERNATIVE, Appellant respectfully prays that this Honorable Court amend the Judgment below so as to order Appellant to disgorge no more of the amount of the Judgment than corresponds to the amount of funds attributable to the assignment of proceeds in question as Appellant actually received from her late husband, Bart Rizzolo.

**8.
STATEMENT OF RELATED CASES**

Pursuant to Ninth Circuit Rule 28-2.6, the undersigned counsel hereby states that to the best of counsel’s knowledge and belief, there are no cases related to the instant case which are pending in this court.

DATED this 18th day of September, 2012.

Respectfully submitted,

/s/Herbert Sachs
HERBERT SACHS, ESQ.
602 South Tenth Street
Las Vegas, Nevada 89101
(702)387-0400
Attorney for Defendant/Appellant

**CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P.
32(A)(7)(C) AND CIRCUIT RULE 32-1**

I hereby certify that pursuant to Fed. R. App. P. 32(a) (7) (C) and Ninth Circuit

has a typeface of 14 points, and contains 8,349 words.

DATED this 18th day of September, 2012.

/S/ Herbert Sachs
HERBERT SACHS, ESQ.
602 South Tenth Street
Las Vegas, Nevada 89101
(702)387-0400
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing was served on the 18th day of September 2012, via the Court's CM/ECF electronic filing system addressed to all parties on the e'service list.

/s/ Herbert Sachs
HERBERT SACHS, ESQ.
602 South Tenth Street
Las Vegas, Nevada 89101
(702)387-0400
Attorney for Defendant/Appellant

C.A. NO. 12-16207

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KIMTRAN RIZZOLO,

Defendant/Appellant,

vs.

KIRK and AMY HENRY,

Plaintiffs/Appellees.

C.A. NO. 12-16207

District Court Case No. 2:08-CV-
00635-PMP/GWF

APPELLANT'S MOTION FOR LEAVE TO FILE CORRECTED OPENING BRIEF

HERBERT SACHS, ESQ.
602 South Tenth Street
Las Vegas, Nevada 89101
Tel. (702) 387-0400
FAX (702) 384-9495

Attorney for Defendant/Appellant
KIMTRAN RIZZOLO

COMES NOW Defendant/Appellant, Kimtran Rizzolo, by and through her attorney, Herbert Sachs, Esq., and hereby respectfully requests leave to file a corrected version of the Appellant's Opening Brief in the above-entitled matter.

In support of this Motion, Appellant respectfully states the following:

1. That Appellant's Opening Brief in the above-entitled matter was timely filed on September 10, 2012;

2. That counsel for Appellant has since become aware that the version of Appellant's Opening Brief filed on September 10, 2012 as aforesaid was not the final version thereof but was a predecessor document in progress differing from the final version of the brief only to the extent that the brief filed on that date did not include the required page numbers in the Table of Contents and Table of Authorities and the required references to the Record on Appeal and to the Appellant's Excerpt of Record; and that the earlier version of the same document was inadvertently filed rather than the final (corrected) version, submitted together herewith, which contains all required references to page numbers in the tables and all required references to the Record on Appeal and Appellant's Excerpt of Record;

3. That the undersigned counsel for Appellant Kimtran Rizzolo hereby certifies that the corrected version of the Appellant's Opening Brief submitted together herewith is otherwise identical in all respects to the predecessor version of

Appellant's Opening Brief which was inadvertently filed on September 10, 2012;

4. That the filing of the wrong document on November 10, 2011 was a matter of clerical oversight for which counsel for Appellant is sincerely contrite; and

5. That Appellant therefore respectfully prays that this Court will permit her leave to file Appellant's Corrected Opening Brief submitted together herewith in order that Appellant's Opening Brief may be in compliance in all respects with all requirements pertaining to form of briefs pursuant to the Federal Rules of Appellate Procedure and the Ninth Circuit Rules.

Respectfully submitted this 18th day of September, 2012.

/s/ Herbert Sachs
HERBERT SACHS, ESQ.
602 South Tenth Street
Las Vegas, Nevada 89101
Tel. (702) 387-0400
FAX (702) 384-9495
Attorney for Defendant/Appellant
KIMTRAN RIZZOLO

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing was served on the 18th day of September 2012, via the Court's CM/ECF electronic filing system addressed to all parties on the e'service list.

/s/ Herbert Sachs
HERBERT SACHS, ESQ.