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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
*** * ***

KIRK and AMY HENRY,

Plaintiffs,

vs.

FREDERICK RIZZOLO aka RICK RIZZOLO, an individual; LISA RIZZOLO, individually and as trustee of The Lisa M. Rizzolo Separate Property Trust and as successor trustee of The Rick J. Rizzolo Separate Property Trust; THE RICK AND LISA RIZZOLO FAMILY TRUST; THE RICK J. RIZZOLO SEPARATE PROPERTY TRUST; and THE LISA M. RIZZOLO SEPARATE PROPERTY TRUST, THE RLR TRUST; and THE LMR TRUST,

Defendants.

LISA RIZZOLO,

Crossclaimant,

vs.

FREDERICK RIZZOLO aka RICK RIZZOLO, individually and as trustee of The Rick J. Rizzolo Separate Property Trust; RICK J. RIZZOLO SEPARATE PROPERTY TRUST and THE RLR TRUST

Crossdefendant

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

REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT LISA RIZZOLO'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT RICK RIZZOLO'S JOINDER THERETO

COMES NOW, Defendants, LISA RIZZOLO ("Ms. Rizzolo"), THE LISA M. RIZZOLO SEPARATE PROPERTY TRUST, and THE LMR TRUST (collectively, "Defendants") and Crossclaimant LISA M. RIZZOLO, and hereby submits the following Reply to Plaintiffs' Opposition to Defendant Lisa Rizzolo's Motion for Summary Judgment.

This reply is made and based upon the pleadings and papers on file together with the arguments of counsel should a hearing on this matter be scheduled by this Honorable Court.

DATED: November 15, 2010

BAILUS COOK & KELESIS, LTD.

By /s/
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POINTS AND AUTHORITIES

I.

STATEMENT OF FACTS

Ms. Rizzolo submits that the following facts are undisputed:

On or about May 18, 2001, Rick Rizzolo engaged attorney John E. Dawson, Esq., for the purposes of estate planning. *Plaintiffs' Opposition to Motion for Summary Judgment (#489), Exhibit "2".* To accomplish the same, Mr. Dawson created a variety of business entities and trusts including The Rick and Lisa Family Trust dated August 30, 2001.[1] *Id., Exhibit "1".*

On or about October 2, 2001, Plaintiffs Kirk and Amy Henry (the "Henrys") filed a personal injury suit against Rick Rizzolo and The Power Company, Inc. ("Power Company") in Nevada district court in the case styled "*Kirk Henry and Amy Henry v. The Power Company, Inc. and Rick Rizzolo,"* Case No. A440740 (the "State Court Case"). In the State Court Case, Plaintiff Kirk Henry ("Mr. Henry") alleged that he was assaulted and severely injured by agents of the Crazy Horse Too Gentlemen's Club ("Crazy Horse Too") on or about September 20, 2001. Crazy Horse Too was owned and operated by the Power Company which Plaintiffs alleged was Rick Rizzolo's alter ego. Ms. Rizzolo was not a party to said lawsuit. As such, Ms. Rizzolo is not obligated to pay the Henrys in the State Court Case.

[1] See Exhibit "A", The Rick and Lisa Family Trust (front page).

On or about May 24, 2005, Ms. Rizzolo and her former husband, Rick Rizzolo, filed a Joint Petition for Summary Decree of Divorce in Nevada district court (family division) in the case styled *"In the Matter of Marriage of Lisa Rizzolo and Frederick Rizzolo,"* Case No. 05-D-337616 (the "State Divorce Case").[2] On or about June 7, 2005, the Decree of Divorce was entered in the State Divorce Case.[3] The Rizzolo's conducted their divorce in open court and in view of the public and did not request to seal the case as would have been allowed under NRS 125.110. Plaintiffs, prior to entering into the global settlement, were aware of the Rizzolo's divorce and the division of assets provided for in said divorce.[4] The divorce decree was in accordance with considerations allowed by Nevada state law regarding the division of marital property. As such, the decree of divorce determined the interest of the parties in the marital assets.

The Crazy Horse Too which was awarded to Rick Rizzolo pursuant to the decree of divorce, had a value in excess of $30 million at the time the decree of divorce was entered.[5] Essentially, Ms. Rizzolo received the marital residence in Las Vegas, Nevada, a house in Newport Beach, California and a condo in Chicago, Illinois, as well as the Oppenheimer accounts in the amount of $7.2 million.[6] At the time of the divorce, the Crazy Horse Too was worth substantially more than the property received by Ms. Rizzolo in the divorce.[7] As such, awarding Rick Rizzolo the Crazy Horse Too did not render him insolvent.

On or about June 2, 2006, Rick Rizzolo and the Power Company executed a Plea Memorandum in the federal criminal case styled "*United States of America v. Power Company, Inc.*, ...

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[2] See Exhibit "B", Joint Petition for Summary Divorce Decree.

[3] See Exhibit "C", Decree of Divorce.

[4] See Exhibit "D", Plaintiff Kirk Henry's Answers to Defendant Lisa Rizzolo's First Set of Request for Admissions.

[5] See Exhibit "E", Deposition Testimony of Kirk Henry, pp. 31-33.

[6] See Exhibit "B", Joint Petition for Summary Divorce Decree, Section V.

[7] See Exhibit "E", Deposition Testimony of Kirk Henry, pp. 42-46.

doing business as The Crazy Horse Too, and Frederick Rizzolo," Case No. 2:06-CR-0186-PMP (PAL) ("the Federal Criminal Case").[8]

On or about July 26, 2006, Plaintiffs entered into a Release of All Claims and Agreement to Indemnify for and in Consideration of the Issuance of a Draft (the "Settlement Agreement"),[9] with Defendant Rick Rizzolo and the Power Company pursuant to which they released all claims in exchange for the payment of $10 million. The Settlement Agreement provided for an initial payment of $1 million and that the $9 million balance would be paid from the sale of the Crazy Horse Too. Following execution of the settlement agreement, the initial $1 million was paid to the Henrys. The Settlement Agreement does not contain any specific provisions regarding when the closing of the sale of the Crazy Horse Too would occur.

During the course of the negotiations regarding the language of the settlement agreement, Rick Rizzolo's counsel in the State Court Case advised Plaintiffs' counsel that Mr. Rizzolo did not have sufficient funds to pay the $9 million in the event the Crazy Horse Too did not sell. *Plaintiffs' Opposition to Motion for Summary Judgment (#489), Exhibit "9".* Aware of the same, Plaintiffs still entered into the settlement agreement with Rick Rizzolo and the Power Company in the State Court Case.

The City of Las Vegas subsequently revoked the liquor and/or business license of the Crazy Horse Too. At the time of the revocation, an escrow had been opened for the sale of the Crazy Horse Too in the amount of $45 million.[10] The planned sale of the Crazy Horse Too reportedly failed because of the revocation of its liquor license which diminished its value.[11] The Federal Government has since seized the Crazy Horse Too.[12] The proceeds from a forfeiture sale of the

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[8] See Exhibit "F", Plea Memorandums.

[9] See Exhibit "G", Settlement Agreement.

[10] See Exhibit "H", Reporter's Transcripts of Hearing in Re Motion for Preliminary Injunction pp. 113-116 (testimony of Stuart Caldwell).

[11] See Id.

[12] In the Federal Criminal Case, Plaintiffs have agreed to abandon their interest in the sale of the Crazy Horse Too to the Government, allowing the Government to forfeit the property, in

Crazy Horse Too would have been sufficient to pay the Henrys settlement, but for the Government's failure to preserve its liquor and/or business license.

In April 2007, the Henrys filed a motion in the State Court Case to reduce the Settlement Agreement to judgment and for a judgment debtor examination. The district court denied the Henrys' motion because there had not been any breach of the Settlement Agreement by Rick Rizzolo and the Power Company.[13] Further the Settlement Agreement did not provide for a stipulated judgment or confession of judgment. The district court noted that the balance of the settlement proceeds were to be paid from the proceeds of the sale of the Crazy Horse Too which had not yet occurred. Accordingly, the district court has ruled that Plaintiffs are not entitled to a judgment since there has been no breach of the Settlement Agreement.

Undeterred, several months later Plaintiffs again tried to obtain a judgment based on the Settlement Agreement when it appeared a sale would never be closed. Again their request was refused:

> COURT: Mr. Campbell, stop, please. This is the second time you've been here. . . . I did not draft the settlement agreement. I did not draft the federal government's guilty plea agreement. I had no control over that. So because of the way I read that this is written, there isn't a vehicle at this time for me to do anything other than wait for the sale of this business.
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> Now the fact that Mr. Rizzolo says he's broke, or he can't pay, is something that everybody should have

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consideration that the Plaintiffs would be the first to receive any proceeds of the sale. On September 7 2007, the Petition and Settlement Agreement, Stipulation for Entry of Order of Forfeiture, and Order (#70) was entered in the Federal Criminal case. On May 7, 2008, the Government filed and distributed in the Federal Criminal Case a proposed First Amended Order of Forfeiture (#180), reducing the Plaintiffs from first position (#70) to fifth position, to which the Plaintiffs objected (#185, #191), citing the transfer of assets in the State Divorce Case. On June 24, 2008, the proposed First Amended Order of Forfeiture was entered in the Federal Criminal Case (#222), as an order acknowledging the Henrys' abandonment of their interest in the Crazy Horse Too. On October 15, 2008, a Second Amended Order of Forfeiture (#242) was entered in the Federal Criminal Case acknowledging the abandonment of the Henrys' interest in the Crazy Horse Too and their fifth position as payment from the proceeds of the sale of the Crazy Horse Too.

[13] See Exhibit "I", Order Regarding Plaintiffs' Motion to Reduce Settlement to Judgment, and for Judgment Debtor Examination..

> anticipated at the time the settlement was entered into. But for you to come in here now, again, and ask me to enforce something that appears to me to be not enforceable because of the way it is written by somebody else, I don't know who I still don't have any authority. . . .[14]

Thwarted in their premature efforts to collect under the terms of the Settlement Agreement in the State Court Case, Plaintiffs then filed on or about May 16, 2008, their Complaint in this litigation. *Complaint (#1).* In their Complaint, Plaintiffs' alleged the following causes of action: (1) conspiracy to defraud; (2) common law fraud; and (3) a civil conspiracy to violate Nevada's Uniform Fraudulent Transfer Act ("UFTA"). *Id.* Defendants filed an answer to Plaintiffs complaint. *Answer (#24).* Plaintiffs have since filed their first and second amended complaints. *First and Second Amended Complaints (#143, #200).* Defendants' have filed their answer to the same. *Answer (#244).* Ms. Rizzolo has complied with all the dictates of the scheduling orders and deadlines contained therein. Additionally, Ms. Rizzolo has timely responded to Plaintiffs' discovery requests and has periodically supplemented the same. Ms. Rizzolo has not engaged in a pattern of deceptive conduct during the discovery process to obstruct Plaintiffs' access to information regarding the trusts and assets contained therein.

II.

ARGUMENT

1. Summary Judgment on Plaintiffs' Claims are Warranted

a. Plaintiffs' Civil Conspiracy to Violate the UFTA, if One Even Exists, Should be Dismissed.

In her moving papers, Ms. Rizzolo argued that a cause of action for civil conspiracy to violate the UFTA is not available in Nevada.[15] *Motion for Summary Judgment (#473), p. 8.*

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[14] See Exhibit "J", Transcript of proceedings from June 29, 2007 hearing in the State Court Case, p. 7.

[15] Plaintiffs have cited no authorities that a civil action for conspiracy to violate the UFTA exists in Nevada. In addition, it was Plaintiffs burden to demonstrate the same and further, present competent and admissible evidence in support thereof. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23(1986); *see also Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421 (9th Cir.1995), *cert denied*, 516 U.S. 987 (1986) Absent such, summary judgment is warranted as a matter of law.

Assuming *arguendo,* in Nevada a cause of action for civil conspiracy to violate the UFTA does exist, Ms. Rizzolo argued that Plaintiffs' have failed to properly plead the same against Defendants and further, lacked competent and admissible evidence to prove the essential elements of a civil conspiracy to violate Nevada's UFTA.[16] *Id., pp. 8-9.* While Plaintiffs have filed a lengthy opposition addressing Ms. Rizzolo's other issues raised therein, Plaintiffs failed to respond to the foregoing issues. Clearly, these were dispositive issues that compels a response. The Plaintiffs failure to respond to said issues

should constitute a consent to the granting of the motion. *See* Local Rule[17] 7-2 (d).[18] *See also eg., World Mkt. Ctr. Venture, LLC v. Ritz,* 597 F.Supp.2d 1186 (D. Nev. 2009); *Roberts vs. United States*, 2002 WL 1770930 (D. Nev.2002). Rather than respond, Plaintiffs instead argue a tangential issue that the value of the Crazy Horse Too is speculative. Plaintiffs' argument is of no moment.

In order for summary judgment to be granted, the moving party need not *affirmatively*

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[16] In Nevada, the elements of civil conspiracy require: (1) two or more persons; (2) who, by some concerted effort, undergo certain acts; (3) which are to reach an unlawful objective; (4) for the purpose of harming another person, and damage must result from this act or acts. *See Dow Chemical Co. v. Mahlum*, 114 Nev. 1468, 970 P.2d 98, 112 (1998) (citing *Sutherland v. Gross*, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989)). Specifically, *Dow Chemical Co., supra*, requires under its third and fourth elements, a specific and intentional effort to perform an illegal act for the purpose of harming another person. Further, this fourth element additionally requires that damage results from this act. Plaintiffs have not alleged nor provided proof that an agreement was made and that the specific intent of the agreement was to harm the Plaintiffs as is required under *Consolidated Generator - Nevada, Inc., v. Cummins Engine Co. Inc.*, 971 P.2d 1251, 1256 (Nev.1998); *see also Morris v Bank of America Nevada*, 886 P.2d 454, 456 (Nev.1994). In addition, Plaintiffs have not suffered any damages as a result of any alleged conspiracy to violate the UFTA. The foregoing defeats Plaintiffs third cause of action. Notwithstanding, Ms. Rizzolo owed no duty to Plaintiffs under the Settlement Agreement or any breach thereof and/or is not obligated to pay the Plaintiffs in the State Court Case. The foregoing bolsters Ms. Rizzolo's argument that she did not conspire to commit a fraudulent transfer as she would have no reason to do the same.

[17] "Local Rule" refers to the U. S. District Court Rules, District of Nevada, Local Rules.

[18] Local Rule 7-2 (d) provides:

> The failure of a moving party to file points and authorities in support of the motion shall constitute a consent to the denial of the motion. The failure of an opposing party to file points in response to any motion shall constitute a consent to the granting of the motion.

produce any evidence negating the *prima facie* elements of the nonmoving party's claim. *See* FRCP 56(a); *see also Celotex Corporation v. Catrett, supra*, 477 U.S. at 323; *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099 (9th Cir. 2000). Rather, the moving party may simply point out the *lack* of evidence produced by the Plaintiffs on any of the *prima facie* elements of the claim. If the moving party - in spite of the existence of fact issues in the case - shows that there is an absence of evidence to support the nonmovant's case, the nonmoving party then bears the burden of producing evidence to sustain a jury verdict on all those issues for which it bears the burden at trial. *See Rebel Oil Co. V. Atl. Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995), *cert. denied*, 516 U.S. 987(1995). When there is a complete failure of proof concerning an essential element of the opposing party's case, all other facts - disputed or not - are rendered "immaterial" and the moving party is entitled to judgment as a matter of law. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23 (1986).

Applying the foregoing, there is a complete failure of proof concerning the essential elements of Plaintiffs' Third Cause of Action, an alleged civil conspiracy to violate Nevada's UFTA. In her moving papers, Ms. Rizzolo pointed out the deficiencies in Plaintiffs' claim. Resultantly, Plaintiffs had the burden of producing evidence in support of the essential elements of the Third Cause of Action which they have abrogated by failing to even address the deficiencies raised by Ms. Rizzolo in her motion for summary judgment. Since there is a complete failure of proof concerning essential elements of Plaintiffs' claim, all the other facts argued by Plaintiffs are immaterial and Ms. Rizzolo is entitled to judgment as a matter of law.[19] *Id.*

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[19] It is Defendants' position that any award of marital property in a non-collusive dissolution proceeding conducted in accordance with state law, such as here, is conclusively presumed to be in exchange for reasonably equivalent value. *See eg., In re Erlewine*, 349 F.3d 205 (5th Cir. 2003). Ms. Rizzolo is entitled to the presumption that the divorce proceedings were not collusive and were in accordance with considerations allowed by Nevada state law regarding the division of marital property. Clearly, the division of marital assets in the decree of divorce was of reasonably equivalent value. As such, the decree of divorce determined the interest of the parties in the property.

Contrary to Plaintiffs' contentions, the division of community assets in the Rizzolo's divorce was of reasonably equivalent value and did not render Defendant Rick Rizzolo insolvent[20]. Notwithstanding, Plaintiffs dispute that the value of the Crazy Horse Too at the time of the Rizzolo's divorce was in excess of $30 million. Such is incorrect.

There should be no quarrel that the value of the Crazy Horse Too must be determined at the time of the transfer. Plaintiffs have acknowledged that the value of the real property of an alleged fraudulent transfer is the date of the transfer. *Plaintiffs' Opposition to Motion for Summary Judgment (#489), p. 10.* In the case *sub judice*, the transfer occurred on or about June 7, 2005, the date the Decree of Divorce was entered. The Crazy Horse Too had been unquestionably valued in excess of $30 million at the time the Decree of Divorce was entered. Recognizing that the foregoing defeats their argument regarding reasonably equivalent value, Plaintiffs argue that the courts are "not barred from considering subsequent events when they were foreseeable or connected to the allegedly fraudulent transfer." *Id., p. 11.* Ms. Rizzolo disputes the same. It is Ms. Rizzolo's position that the consideration of subsequent events referenced in Plaintiffs' opposition were not *reasonably* foreseeable and as such, consideration of the same by the Court would constitute improper hindsight. *See, eg., Cissell v. First National Bank of Cincinnati,* 476 F.Supp. 474 (S.D. Oh. 1979)*; First National Bank of Kenosha v. United States,* 763 F.2d 891 (7th Cir.1985); *Moody v. Security Pacific Business Credit, Inc.*, 971 F.2d 1056 (3rd Cir. 1992).

Notwithstanding, Plaintiffs' rely heavily upon *In re W. R. Grace & Co.*, 281 B.R. 852, 869 (D.Del.2002) for the proposition that the Courts are not barred from considering subsequent events. Such reliance is misplaced. Close scrutiny of the *Grace* case reveals that it is factually and/or legally inapposite. In the *Grace* case, the creditor's committee brought an adversary proceeding to avoid, as constructively fraudulent, debtor-manufacturers transfer of one of its divisions at a time when it was facing future asbestos-related liability claims. As evident from the foregoing, the *Grace* decision dealt with potential mass-tort litigation. In addition, the underlying rationale of the *Grace* decision

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[20] It is of import to note, reasonably equivalent value is not an essential element of Plaintiffs' third cause of action, but rather, is one of the non-exclusive "badges of fraud" as contained in NRS 112.150.

was premised on a determination of the debtor's solvency, under the provision of the UFTA permitting a creditor to avoid, as constructively fraudulent, a transfer of assets for less than reasonably equivalent value when the debtor with already insolvent or was rendered insolvent by the transfer. *See* NRS 112.180(1)(b). In the case *sub judice*, NRS 112.180(1)(b) is not implicated.[21] Absent such, the *Grace* case is legally distinguishable as the underlying analysis regarding the propriety of considering subsequent events in the determination of the debtor's insolvency was predicated on a constructive, and not actual, fraud under the UFTA. Accordingly, the *Grace* decision and its progeny are not controlling.

Assuming *arguendo*, the forfeiture of the Crazy Horse Too was foreseeable as suggested by Plaintiffs, it was *not* foreseeable that the City of Las Vegas would revoke the liquor license of the Crazy Horse Too. At the time of the revocation, an escrow had been opened for the sale of the Crazy Horse Too in the amount of $45 million. The planned sale of the Crazy Horse Too failed because of the unforseen revocation of its liquor license by the City of Las Vegas which diminished its value.

It is noteworthy that Mr. Henry's attorney, Donald J. Campbell, as well as Amy Henry and her attorney, C. Stanley Hunterton, attended the City Council meeting and made arguments in support of Rick Rizzolo retaining the liquor license in order to maintain the value of the Crazy Horse Too, so upon the sale the Henrys would realize the $9 Million as contemplated by the settlement agreement.[22] At the City Council meeting, Mrs. Henry stated that "[a]fter one year of intensive and incredibly complex negotiations with the United States Attorney's Office, the FBI, the Crazy Horse lawyers and our lawyers, Kirk [Henry] and I thought this matter was finally resolved. *Never in our wildest dreams that the Las Vegas City Attorney would try to close the club before we got our settlement.*" *Id.* The sentiments expressed by Mrs. Henry were reaffirmed by both Mr. Campbell

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[21]In their UFTA claim, Plaintiffs allege that the Defendants made transfers and otherwise incurred obligations with the *actual intent* to hinder, delay or defraud Plaintiffs. *Second Amended Complaint, ¶ 32.* "Actual fraud" pursuant to Nevada's UFTA occurs when a debtor transfers property with the intent to hinder, delay, or defraud his creditors. N.R.S. 112.180(1).

[22] See Exhibit "I", Transcripts from Las Vegas City Council meeting of September 6, 2006, pp. 72-83.

and Mr. Hunterton wherein they acknowledged that it was not foreseeable to the parties during the extensive negotiations culminating in a global settlement that the City Council would revoke the liquor license for the Crazy Horse Too. *Id.*

In fact, Rick Rizzolo has argued that nobody could foresee at the time the settlement agreement was entered into that the City of Las Vegas would revoke the liquor license of the Crazy Horse Too diminishing its value. Additionally, Rick Rizzolo has argued that it was not foreseeable that the Government after seizing the Crazy Horse Too would not protect the asset by reopening same in order to preserve its value. Such is evidenced by the following argument propounded by Rick Rizzolo in this litigation:

> RICK RIZZOLO genuinely wants to pay the HENRYS from a sale of the Crazy Horse Too and he has cooperated with the Government to effectuate a sale. But neither party to the settlement contract could predict that the City of Las Vegas would throw a monkey wrench into their deal by revoking the liquor license of the business while it was in escrow for a sale at $48,000,000.00. Nobody could predict in 2006 that the United States would substitute an asset, it contends is worth at least $31,000,000.00, to satisfy a $4,250,000.00 forfeiture. See: United States Of America's Motion To Stay The Expiration Of The Exotic Dance Use Permit And Tavern License For The Crazy Horse Too (Doc. #198), filed June 4, 2008 in Case No. 2:06-CR-0186-PMP (PAL). Nobody could predict in 2006 that the United States would adamantly refuse to allow the business to be reopened to preserve its value and facilitate a sale in preference of keeping it closed and selling it as a closed business in danger of losing its value. See: United States Of America's Response To Defendants' Motion To Enforce Plea Agreements And Require United States Marshals Service To Obtain A Liquor License And Reopen The Business Of The Crazy Horse Too; And United States Of America's Opposition to Alternative Motion To Appoint Receiver Of The Crazy Horse Too's Business (Doc. #197), filed June 4, 2008 in Case No. 2:06-CR-0186-PMP (PAL).

Defendant, Rick Rizzolo's Motion to Dismiss Complaint (#11).

As evident from the foregoing, the subsequent events as they relate to the value of the Crazy Horse Too is of no solace to Plaintiffs. It is incontrovertible that the revocation of the liquor and/or business license for the Crazy Horse Too was not foreseeable by the parties. In addition, it was not foreseeable after the Government seized the Crazy Horse Too would not reopen the same in order to preserve its value. As such, the subsequent events relating to the forfeiture would be improper hindsight in determining the value of the Crazy Horse Too.

In their opposition, Plaintiffs fail to recognize the relevance of their knowledge prior to entering into the Settlement Agreement of the Rizzolo's divorce and the division of marital assets

as a result thereof. *Plaintiffs' Opposition to Motion for Summary Judgment (#489), p. 13.* Such is patently relevant.

Prior to entering into the settlement agreement, Plaintiffs have admitted they were aware of the division of assets provided for in said decree.[23] In fact, the settlement agreement (and related plea memorandums) are premised on the fact that the Crazy Horse Too is the sole and separate property of Rick Rizzolo. Absent such, the global settlement could not have been structured so that the $9 million could be paid from the proceeds of the sale of the Crazy Horse Too. As such, it was Plaintiffs who assessed the assets of Rick Rizzolo in structuring the global settlement and determined which assets were essentially unencumbered. Accordingly, Plaintiffs, *de facto*, cast as alienable, the interest in the other marital assets save and accept the Crazy Horse Too. It is disingenuous for Plaintiffs to now claim the Rizzolo's divorce decree was a fraudulent transfer as well as Ms. Rizzolo's separate property trusts for the benefit of her children, when it was the Plaintiffs who evaluated the Crazy Horse Too as a viable asset forming the essence of the settlement agreement.[24]

2. Failure to Comply with Local Rule 56-1 Does Not Warrant Denial of the Motion for Summary Judgment.

Typically, the local rules supplement and "shall be construed in harmony" with the Federal Rules of Civil Procedure ("FRCP"). *See Frazier v. Heebe*, 482 U.S. 641, 107 S.Ct. 2607, 96 L.Ed.2d 557, (1987); *see also Miner v. Atlass*, 363 U.S. 641, 80 S.Ct. 1300, 4 L.Ed.2d 1462 (1960). The district court is required by FRCP 56(c) itself to consider the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," in determining whether

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[23] Attached hereto as Exhibit "A" and incorporation herein by this reference is a portion of Plaintiff Kirk Henry's Answers to Defendant Lisa Rizzolo's First Set of Request for Admissions which evidences the foregoing.

[24] During the course of the negotiations regarding the language of the settlement agreement, Defendant Rick Rizzolo's counsel in the State Court case advised Plaintiffs' counsel that Mr. Rizzolo did not have sufficient funds to pay the $9 Million Dollars in the event the Crazy Horse Too did not sell. *Plaintiffs' Opposition to Motion for Summary Judgment (#489), Exhibit "9"*. Aware of the same, Plaintiffs still entered into the settlement agreement with Defendant Rick Rizzolo and the Power Company in the State Court case.

"there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FRCP 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2550, 91 L.Ed.2d 265 (1986). Although Local Rule 56-1 facilitates more precise identification of the record materials on which the parties rely, Rule 56(c) identifies the materials the court is to consider before granting summary judgment.

The plain language of Local Rule 56-1 does not require the Court to deny a motion for summary judgment because of a party's default in complying with the same. As such, courts have long recognized that the district court does not abuse its discretion by declining to invoke the requirement of the local rule in ruling on a motion for summary judgment. *See eg., Cleveland County Assoc. For Gov't by the People v. Cleveland County Bde. Of Comm'rs*, 142 F.3d 468, 475 n.12 (D.C.Cir 1998)(the court rejected the argument that failure to comply with the local rule mandated judgment against the defaulting party, holding that it was within the district court's discretion to consider its motion despite the lapse).

Courts have cautioned that failure to comply with a local rule "should only be applied to egregious conduct." *See Robbins v. Reagan*, 780 F.2d 37, 52 & n. 23 (D.C.Cir. 1985) (citing *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 643, 96 S.Ct. 2778, 2781, 49 L.Ed.2d 747 (1976)). The presence of "egregious conduct" in the case relied upon by Plaintiffs, *i.e., Jackson v. Finnegan, et. al.*, 101 F.3d 145 (D.C.Cir. 1996), sufficed for the court to decline to hold that the district court abused its discretion in denying, given the moving party's repeated failures to adhere to the scheduling order, multiple violations of the local rules, after a variety of continuances and the grant of several motions to correct deficiencies, a further request to supplement a statement of material facts in dispute where the moving party claimed it would be prejudiced, and in striking a deficient statement in which the plaintiff failed to raise the central claim of racial discrimination underlying his Title VII claim, and which also lacked citations to the record, depositions, or affidavits. *See Id.*,101 F.3d at 147-48. Certainly, the "egregious conduct" referenced in the *Jackson* case is not present in the case *sub judice*. Consequently, the application of Local Rule 56-1 would be inapplicable and the Court should decline to apply the same.

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Notwithstanding, Ms. Rizzolo's motion for summary judgment contained a concise statement of the factual and procedural background. *Motion for Summary Judgment (#473), pp. 3-5.* Notwithstanding, Plaintiffs' argue that "[e]ven if Rizzolo's arguments had merit, the Court should deny the Motion in its entirety because she utterly fails to include a concise statement stating each material fact that is allegedly in issue." *Plaintiffs' Opposition to Motion for Summary Judgment (#489), p. 14.* Ms. Rizzolo disagrees. Assuming *arguendo*, Ms. Rizzolo's motion does not comply with Local Rule 56-1, [25] Ms. Rizzolo would request that she be allowed to supplement and/or amend the same by the Statement of Facts contained in this Reply. *See Burke v. Gould IV,* 286 F.3d 513 (D.C. Cir.2002); *see also Robertson v. American Airlines, Inc.*, 239 F.Supp.2d 5 (D.C. 2002). Such would cure any alleged deficiencies. Notwithstanding, a denial of Ms. Rizzolo's motion for summary judgment for failing to comply with Local Rule56-1 is not appropriate. Due to the severity of a dismissal of a meritorious motion, such should only be applied to the most egregious conduct. Unlike *Jackson,* Ms. Rizzolo has complied with all the dictates of the scheduling order and deadlines contained therein and/or the local rules. Further, Ms. Rizzolo has requested to supplement and/or amend the statement of material facts which would cure any deficiencies. As such, the Court should determine Ms. Rizzolo's motion for summary judgment on the merits.

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[25]Local Rule 56-1 provides:

> Motions for summary judgment and responses thereto shall include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies.

CONCLUSION

For the foregoing reasons, Ms. Rizzolo would request this Honorable Court to grant her motion for summary judgment.

DATED: November 15, 2010

BAILUS COOK & KELESIS, LTD.

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CERTIFICATE OF SERVICE

I hereby certify that 15th day of November, 2010, I electronically filed a true and correct copy of **REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT LISA RIZZOLO'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT RICK RIZZOLO'S JOINDER THERETO** with the Clerk of the Court for the United State District Court, District of Nevada, by using the CM/ECF system:

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