IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ROBERT BRUCE FREDERICK,

Plaintiff-Appellant,

vs.

SUN 1031, LLC, H. RAY KNIGHT, and NAI THE VAUGHAN COMPANY,

Defendant-Appellees,

and

SUN BYRON, LLC, SUN SHELBY, LLC, and SUN TIFFANY, LLC,

Third-Party Defendants-Appellees.

Ct. App. No. 30,967

APPELLEES' RESPONSE BRIEF IN CHIEF

Civil Appeal from the Second Judicial District Court
County of Bernalillo
The Honorable Clay Campbell
(No. CV 2009-3624)

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INTRODUCTION

The Appellant accurately states this matter arises from a complex civil action involving Appellant's purchase of TIC investments involving three TIC real estate properties. *Amended Complaint* [**RP at 868**] ¶ 20 and 22. However, the issue before this Court is not so complicated: Does the real estate purchase agreement entered by Mr. Frederick require him to arbitrate any claims relating to the purchase of that real estate? The trial court properly ruled that Mr. Frederick was bound by the agreement he signed to arbitrate "ANY DISPUTE, CONTROVERSY OR OTHER CLAIM ARISING UNDER, OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED [Sic] HEREBY OR ANY AMENDMENT THEREOF OR THE BREACH OR INTERPRETATION HEREOF OR THEREOF…" [All capitals in original.] *Purchase Agreements* (attached as Exhibits A, B, and C to February 5, 2010, *Memo Against Arbitration* [**RP at 937**]). The trial court properly stated, "But when I'm weighing the analysis, I've got the proper parties. Two of those parties have an enforceable arbitration clause that contemplates this cause of action, boom. Arbitration clauses are favored clauses. They are clauses that are interpreted broadly. I mean, that's the start of the expanding universe, is the case law that says you interpret the arbitration clause broadly." [**October 14, 2010 Tr. at 16, line 24 through 17, line 5**].

Mr. Frederick raises four points on appeal, none of which have merit: Point 1: "the trial court had no factual or legal basis to send 'all parties into arbitration'" – This is a red herring because only Mr. Frederick has refused to consent to the arbitration of these claims (Defendants Knight and Vaughan have failed to partipate in proceedings since the previous withdrawal of their counsel [RP at 1095-7]), and the trial court's basis for sending Mr. Frederick to arbitration is that Mr. Frederick agreed to arbitrate *any claim* relating to his real estate purchase agreement *or any of the transactions contemplated hereby*. Point 2: "the Third-Party Defendants have no right to compel Mr. Frederick to arbitrate with Sun 1031, because Sun 1031 does not have this right" – This is illogical because the Third-Party Defendants' right to compel Mr. Frederick to arbitration does not rely upon Sun 1031, but upon Mr. Frederick's signed purchase agreements with the Third-Party Defendants. Once the Third-Party Defendants were properly named in a cross-claim to this action, they were entitled to enforce the purchase agreements' to compel Mr. Frederick to arbitrate all claims relating to the real estate purchases. Regardless, Sun 1031 also has the right to compel arbitration. Point 3: "Mr. Frederick's securities claims against Defendants are not within the scope of the Purchase Agreements" – This is incorrect because Appellant's securities claims require Mr. Frederick to have purchased real estate and other services in "a package deal", thus the purchase agreements for that real estate, and the

requirement to arbitrate "any of the transactions contemplated hereby", clearly encompass Mr. Frederick's securities claims. *Amended Complaint* [RP at 868] ¶ 33. Point 4: "Sun 1031's third-party complaint failed to state a valid claim…" – This matter had been previously addressed by the trial court, who ruled the Third-Party Defendants were proper parties, and that ruling was not appealed. Furthermore, they are proper parties where Mr. Frederick seeks to return the property he received under purchase agreements with the Third-Party Defendants and have Sun 1031 return the consideration he paid under the purchase agreements with those third parties. Mr. Frederick's allegations rely upon misrepresentations regarding the properties sold to him by the Third-Party Defendants, and thus clearly implicate the Third-Party Defendants in the misrepresentations. Thus, the Third-Party Defendants are properly named parties to answer for their alleged participation in misrepresentations regarding properties they sold to Mr. Frederick under purchase agreements that required Mr. Frederick to arbitrate any claims relating thereto.

RESPONSE TO SUMMARY OF PROCEEDINGS

Appellant's summary of proceedings is generally accurate as to the facts, therefore Appellees have not prepared a separate summary. Rule 12-213(B) NMRA. However, Appellant inserts argument into the summary of proceedings, to which Appellees respond to each of Appellant's numbered paragraphs as follows:

2. Alleged facts regarding the pre-litigation participation of Defendants Knight, Vaughan and other New Mexico purchasers are irrelevant to both the summary of proceedings and the issue of arbitrarality of Mr. Frederick's claims.

3. Appellant states that he makes a claim for securities violations. He asserts that the security in question is an investment contract because his purchase allegedly involved the purchase of real estate coupled with property management. His definition illustrates why he is subject to arbitration: in order to establish a security, he must establish that he purchased real estate in conjunction with services. Therefore his claims are subject to arbitration because they are related to the real estate he purchased under the purchase agreements requiring such arbitration.

4. Appellant asserts Sun 1031 is not a party to the purchase agreements. Appellants statement is illogical because, if Sun 1031 was not a party to the real estate sale, then Sun 1031 could not have allegedly engaged in a sale of an investment contract alone (constituting a sale of services *and* real estate) and must implicitly have the collusion of the Third-Party Defendants and their purchase agreement.

6. Appellant's illogical argument is continued by stating that it is Sun 1031, not the Third-Party Defendants who offered him the subject real estate. If this was so, then the understanding of the parties regarding the sale of the real

estate would be that Sun 1031 was selling Mr. Frederick the properties under the purchase agreements subject to the broad arbitration clauses, and thus Mr. Frederick is still bound to arbitrate his claims under the rules of construction favoring the application of arbitration. *See* **Dusold v. Porta-John Corporation**, 807 P.2d 526, 529 (Az. Ct. App., 1990). Mr. Frederick also notes that his amended complaint makes no reference to the purchase agreements or to the Third-Party Defendants. The trial court also previously noted Mr. Frederick's talent for drafting complaints:

> I will also tell both sides that the equities on this are extremely close. On the one hand, I struggle with the idea of what is clearly drafting of a complaint to avoid the binding effect of an arbitration clause that you agreed to, Mr. Frederick. That, to me, is clear from the complaint and from the gymnastics that you are doing to avoid claiming that the non-parties are in any way liable. I mean, the limbic – you are a very limber man, but amend the complaint and we will revisit it.... I mean, Mr. Frederick, you can address that to the extent that you think it's necessary when you amend the complaint, but a number of things are clear from the complaint, not the least which is the fact that all of this arises out of and relates to the purchase agreements.

[**December 9, 2009 Tr. at 33, line 10 through 34, line 5** (Note: the trial court never stated the "other hand" at this hearing – *cf.* **Tr. at 34, line 22-24**)]; *see also Original Complaint* [**RP at 1**]; *see also Amended Complaint at prayer for relief* (Mr. Frederick seeks relief under N.M.S.A. 1978, 58-13B-40, which provides Mr. Frederick relief ***only after*** he tenders the security back to the seller... and thus

implicitly requires the sale of the security to have been completed for a right to recovery to exist [RP at 848].

7. Appellant accurately states the relevant paragraphs from the purchase agreements, but there is an important additional fact to note in reviewing these paragraphs: Mr. Frederick is an experienced, licensed New Mexico attorney who agreed to these provisions.

11. Appellant attempts to mislead the court by stating, "the trial court granted Mr. Frederick's motion, ruling that Sun 1031 has no right to compel arbitration." This is inaccurate. The trial court's order actually stated, "6. However, and notwithstanding Finding #5, the Court cannot finally determine the issue of whether Plaintiff can be compelled to arbitrate his claims until the Court rules on *Plaintiff's Motion to Strike Sun 1031, LLC's Third-Party Claim* and *Sun, 1031, LLC's Renewed Motion to Compel Arbitration.* THEREFORE, Plaintiff's *Motion for Summary Judgment on Sun 1031, LLC's Third Affirmative Defense* is hereby GRANTED WITHOUT PREJUDICE." (all capitals and italics in original) [RP at 1081].

12. Appellant again attempts to mislead the court by stating, "the trial court again ruled that Sun 1031 has no right to compel arbitration." The trial court actually stated, "So, until this matter is ripe for my determination, I'm not going to decide – I am – I'm going to deny the renewed motion, but it's without prejudice,

because I don't have all the facts in front of me. I don't have the third-party defendants here. I don't know for certain whether they are going to insist – I don't know what their theory on insisting that the matter be compelled to arbitration is." [July 1, 2010 Tr. at 13, line 15-22].

13. Appellant incorrectly states Sun 1031 had not previously mentioned "common law indemnity" in any of its briefing or oral argument regarding Mr. Frederick's motion to strike the third-party complaint. Sun 1031's response to the motion specifically argued, "So, Sun 1031's third-party claims are obviously based on a substantive legal theory of indemnification that is derived from liability to the Plaintiff, and thus the Sun entities may be responsible for all or part of Plaintiff's claim." *Response to Plaintiff's Motion to Strike* [**RP at 1050**].

15. Appellant attempts to mislead the Court regarding third-party defendants' motion to compel arbitration by asserting it was not to compel arbitration with them but with Sun 1031. The motion actually states, "... and move this Court to compel arbitration of all disputes in this matter..." *Motion to Compel Arbitration by Sun Byron, LLC, Sun Shelby, LLC and Sun Tiffany, LLC* [**RP at** 1213]. Appellant is continuing an absurd word game because the third-party defendants and Sun 1031 were already implicitly consenting to arbitration of these claims by filing motions to compel arbitration. Plaintiff has carefully attempted to couch his claims as only being against Sun 1031 to avoid agreed-upon arbitration,

and thus it was Plaintiff's word play in his complaint that results in the compulsion of arbitration with Sun 1031 by the third-party defendants of Plaintiff's claims against Sun 1031.

16. Appellant continues the same word game with regards to the orders compelling arbitration. The initial order focused on the compulsion of Mr. Frederick's claims to arbitration because all other claims were already subject to arbitration by consent of Sun 1031 and the Third-Party Defendants and by the failure of Defendants Knight and Vaughan to participate. The order denying Appellant's motion to reconsider clarified that all parties were being compelled to arbitration, as requested in the Third-Party Defendants' underlying motion that was granted, although the order's only practical effect was upon Mr. Frederick.

ARGUMENT

POINT 1: THE TRIAL COURT PROPERLY HELD APPELLANT TO HIS AGREEMENT TO ARBITRATE CLAIMS RELATING TO THE AGREEMENT

Preservation and Standard of Review

Appellant seems to advance two arguments under point 1: That the trial court's order should be reversed insofar as it orders Defendants Knight and Vaughan to arbitration; and that the trial court's order should be reversed because there is no contract requiring arbitration between Mr. Frederick and Sun 1031.

Appellees concede Appellant has standing to appeal both contentions. Appellees also concede that arbitrarality is a matter of law that is to be reviewed *de novo*.

Response to Appellant's Contention

With regards to ordering Defendants Knight and Vaughan to arbitration, Appellant accurately states Defendants Knight and Vaughan did not participate in any of the motions to compel arbitration. However, Third-Party Defendants did file their motion to "move this Court to compel arbitration of all disputes in this matter". [**RP at 1213**]. This motion was granted. [**RP at 1288**]. Appellant correctly notes that the trial court stated at the hearing that the judgment compelling arbitration was only directed to the parties that participated in the hearing thereon, and the trial court expected Mr. Frederick to file a motion for default judgment against Knight and Vaughan. [**October 14, 2010 Tr. at 21, lines 24-25 and at 23, lines 16-20**]. Mr. Frederick has failed to do so thus far. However, the trial court subsequently ordered, in denying Mr. Frederick's motion for reconsideration, that all parties were being sent to arbitration. The issue for this Court is whether it was appropriate to order the non-participating defendants to arbitration in the second order.

Defendants Knight and Vaughan could have properly objected to participation in arbitration as nonsignatories. Murken v. Suncor Energy, Inc., 138 N.M. 179, 183, 117 P.3d 985, 989 (Ct. App., 2005). However, it was

appropriate for the trial court to order Knight and Vaughan to arbitration when Knight and Vaughan failed to respond to the Third-Party Defendants' motion to compel arbitration. Rule 1-007.1(D) NMRA. It is unknown if Knight and Vaughan would have voluntarily consented to the arbitration. It is also appropriate for the trial court to order Knight and Vaughan to arbitration because Mr. Frederick's claims against Knight and Vaughan allege them to have participated in the sale of securities to Mr. Frederick and are thus also related to the subject purchase agreements in which Mr. Frederick agreed to arbitrate all related claims. [RP at 848-9]. Finally, it is appropriate to send the claims against Knight and Vaughan to arbitration because the principles of proportional contribution and/or indemnification will apply to all defendants. If the claims against Sun 1031 and cross-claims against the Third-Party Defendants are arbitrated under the agreement with Mr. Frederick, but Mr. Frederick is allowed to maintain his claims against Knight and Vaughan in the trial court, then both cases will be subject to inconsistent judgments in which liability will be assessed against empty chairs of missing defendants. While it is appropriate to force Knight and Vaughan to arbitration in order to avoid inconsistent judgments where they have failed to respond to a motion to compel arbitration, and appropriate to force Mr. Frederick's claims to arbitration where he agreed to do so in writing, it would be inappropriate to deprive the Third-Party Defendants of their right to arbitration in order to avoid

inconsistent judgments due to the failure of Knight and Vaughan to timely respond. *Cf.* Reeves v Wimberly, 107 N.M. 231, 235, 755 P.2d 75, 79 (Ct. App., 1988) (discussing nonmutual collateral estoppel in civil cases and considering the need to avoid inconsistent judgments). Regardless of whether nonsignatory Defendants Knight and Vaughan are properly compelled to arbitration, the signatory Appellant's claims against Sun 1031, as well as the third-party claims deriving therefrom, are properly subject to arbitration.

With regards to Appellant's second argument that the trial court's order should be reversed because there is no contract requiring arbitration between Mr. Frederick and Sun 1031, Mr. Frederick misses the point of the trial court's ruling: it is not nonsignatory Sun 1031 that is compelling him to arbitration, but the third-party signatory defendants that are compelling arbitration of all claims relating to the purchase agreements, to which Mr. Frederick was a signatory. [**October 14, 2010 Tr. at 16, line 24 through 17, line 13**]. The trial court ruled that Sun 1031 filed proper claims against the Third-Party Defendants that derived from Mr. Frederick's claims against Sun 1031. [**July 1, 2010 Tr. at 10, lines 12-19**]. The trial court denied Mr. Frederick's motion to allow interlocutory appeal on striking the third-party claim, and so his challenge thereto is not properly before this Court. [**RP at 1147**]; *see also* Rule 1-054(B)(1) NMRA.

Clearly, derivative claims are intertwined with the underlying claims, so it was proper for the trial court to require Mr. Frederick to arbitrate his underlying, intertwined claims against Sun 1031 because he agreed with the Third-Party Defendants to arbitrate any claim relating to the purchase agreements and because nonsignatory Sun 1031 has consented to the arbitration. *Supra* **Murken**, 138 N.M. at 183; *see also* **Lindner v. Meadow Gold Dairies, Inc.**, 515 F.Supp. 2d 1141, 1149, 1153-4 (D. Haw., 2007) (discussed in detail hereinbelow).

POINT 2: THE THIRD-PARTY DEFENDANTS HAVE THE RIGHT COMPEL MR. FREDERICK INTO ARBITRATION OF ALL CLAIMS RELATING TO THE AGREEMENT, INCLUDING THOSE AGAINST SUN 1031, LLC

Preservation and Standard of Review

Mr. Frederick incorrectly states he invoked a ruling on his claim that the Third-Party Defendants' rights are limited to those of Sun 1031 in his *Response to Motion to Compel Arbitration by Sun Byron, LLC, Sun Shelby, LLC and Sun Tiffany, LLC*. Nowhere therein does he raise the issue of limitations on derivative defenses, and instead merely asserts that there is no authority for Third-Party Defendants to compel arbitration of his claims against Sun 1031. This does not meet the requirement of specificity necessary to have constituted invocation of a ruling on Appellant's point 2. **State v. Lopez**, 84 N.M. 805, 809, 508 P.2d 1292, 1296 (1973). Mr. Frederick did raise the issue in his *Motion for Reconsideration, or, in the Alternative, Motion to Amend or Alter Final Judgment Compelling*

Arbitration. However, raising a new issue in a motion to reconsider after a matter has already been briefed, argued, and an order is already entered declaring itself "a final judgment" thereon does not have a sufficient "invoked ruling" to raise a new issue on an interlocutory appeal. *See* **Ramirez v. Ramirez**, 122 N.M. 590, 929 P.2d 982 (1996) (motion to reconsider fairly invoked ruling where it was filed *prior* to ruling on underlying motion); *see also Order Granting Motion to Compel Arbitration* [**RP at 1288**]; *see also Motion for Reconsideration of, or in the Alternative, Motion to Amend or Alter Final Judgment Compelling* Arbitration [**RP at 1245**] (Note: While the motion to reconsider appears to have been filed three days before the order compelling arbitration, the order was originally signed by Judge Campbell on or about November 8, 2010 and was merely filed late due to filing error). Similarly, the order denying the motion to reconsider cannot be considered to constitute an "invoked ruling" on the issue because the standard of review and briefing/argument processes are drastically different for a motion to reconsider. *See* **Wilde v. Westland Development Co., Inc.**, 148 N.M. 627, 637-8, 241 P.3d 628, 638-9 (Ct. App., 2010) (stating trial court properly denied motion to reconsider where movant failed to establish any grounds for failing to make the additional arguments at the hearing). Appellees would argue that Appellant's Point 2 is not properly before this Court since the matter was not properly brought before

the trial court with sufficient briefing and argument from both sides to invoke a sufficiently specific ruling thereon.

Appellant's Point 2 also relies upon Appellant's argument that "the trial court ruled that Sun 1031 'has' no defense of arbitration." This is incorrect. The trial court ruled against Sun 1031's motion to compel arbitration *without prejudice*, noting that it did not have sufficient information to make a final ruling on that issue until the Third-Party Defendants were present to address the issue. **[July 1, 2010 Tr. at 13, line 15-22]**. Therefore, a ruling that Sun 1031 is not entitled to compel arbitration with Mr. Frederick is not before this Court in a "final judgment... upon an express determination that there is no just reason for delay" and thus Appellant is not entitled to rely upon this alleged "ruling" in support of the appeal. Rule 1-054(B)(1).

Appellant also invokes the grounds of "fundamental error" and "fundamental right". However, the theory of fundamental error is based upon the innocence of the accused or corruption of actual justice, and fundamental rights may be waived or lost by the right-holder. State v. Rogers, 80 N.M. 230, 453 P.2d 593 (Ct. App., 1969). In this case, Mr. Frederick is not being deprived of actual justice or accused of anything, he is simply being required to adjudicate his case in binding arbitration, so this appeal does not involve a "fundamental error". Likewise, it is Mr. Frederick who agreed to a broad arbitration clause covering any

claims relating to the real estate purchase agreements, and thus shows his right to a formal trial versus an arbitration is not a fundamental right in this case, and that he has waived any such right regardless. *See* State v. Rodriguez, 81 N.M. 503, 469 P.2d 148 (1970) (if there is substantial evidence to support a decision, the Court will not resort to fundamental error).

Appellees concede the proper standard of review is de novo.

Response to Appellant's Contentions

Mr. Frederick relies upon Rule 1-014 NMRA to attempt to claim that the Third-Party Defendants may only assert against the Mr. Frederick any defenses which the Third-Party Plaintiff has. Mr. Frederick's argument ignores that the sentence he cites from Rule 1-014 states, "The third-party defendant ***may*** assert against the plaintiff any defenses…" (emphasis added) and is thus a permissive rule, and does not require that a third-party defendant ***must*** assert ***only*** such defenses against a plaintiff. In fact, the very next sentence of Rule 1-014 states, "The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the Third-Party Plaintiff."

Mr. Frederick next asserts that the Third-Party Defendants asserted no claims or defenses against him. This is incorrect. The Third-Party Defendants' answer to the complaint denied Sun 1031's allegation that Sun 1031 was entitled to

indemnity from the Third-Party Defendants. [RP at 1211]. One implicit method for the Third-Party Defendants to establish Sun 1031 is not entitled to any indemnification of Mr. Frederick's claims is to establish that Mr. Frederick is not entitled to recover from Sun 1031. This is not an affirmative defense but merely the right to contest Plaintiff's establishment of the elements of Plaintiff's cause of action, the establishment of which are a necessary element for the indemnification claim against the Third-Party Defendants.

Furthermore, Mr. Frederick is clearly wrong that the Third-Party Defendants have asserted no defenses against him because this appeal would not exist if that were so. "Even if a defense is not raised in the answer, if it is brought out in a pretrial motion for summary judgment and in a supplement pretrial statement, the purpose of giving the plaintiff notice is served, and the defense is not waived." **Inclusion in pretrial motion, memorandum, statement, order, or other pleading**, 61A Am. Jur. 2d Pleading § 326 (updated 2011); *see also* **Mundy & Mundy, Inc. v. Adams**, 93 N.M. 534, 537, 602 P.2d 1021, 1024 (1979) ("Rule 12 of the Rules of Civil Procedure clearly contemplates that all affirmative defenses be raised either in the responsive pleading to a complaint or by a separate motion, and be decided prior to entry of judgment."); *see also* **Dean Witter Reynolds, Inc. v. Roven**, 94 N.M. 273, 275, 609 P.2d 720, 722 (1980) (although not properly

raised as a 1-012(b)(1) motion, the court was sufficiently put on notice of the existence of a meritorious defense of the right to arbitration, raised by the motion).

Mr. Frederick cites a long line of cases, most over 40 years old and pre-dating the general acceptance of the comparative negligence system, allegedly in support of the proposition that the Third-Party Defendants are limited to the defenses of Sun 1031. Appellant misconstrues the holding of every case cited, many of which actually support the proposition that Third-Party Defendants are entitled to assert their own defenses to claims of the Appellant against the Defendant/Third-Party Plaintiff for which the Third-Party Defendants may have derivative liability: **Lindner v. Meadow Gold Dairies, Inc.**, 515 F.Supp. 2d 1141, 1149, 1153-4 (D. Haw., 2007) (Holding the statutory purpose of Rule 14 is to avoid the unfairness that would result if a third-party defendant had no ***opportunity*** to assert ***all*** of the defenses available to the defendant/third-party plaintiff (no mention of restriction of third-party defendant's defenses). Also, holding that the third-party ***nonsignatory*** defendant had an ***independent*** right to assert a defense of the right to arbitration under a lease agreement which only the plaintiff and defendant had signed, regarding both the derivative ***and*** underlying claims, even though the plaintiff argued that he only agreed to arbitration with the defendant. The court also noted, "As an additional basis for its finding, the court notes that [the defendant/third-party plaintiff] has joined in [the third-party defendant's]

Motion for Partial Summary Judgment and Motion to Compel Arbitration. Once the court grants [the defendant/third-party plaintiff's] joinder, denying [the third-party defendant's] motion would make little sense and place form over substance."); *see also Sun 1031's Notice of Joinder* [RP at 1263]. Minnesota Landmarks v. M.A. Mortenson Co., 466 N.W.2d 413, 415-6 (Minn. Ct. App., 1991) (stating third-party defendants *may* assert the defendant/third-party plaintiff's statute of limitations defense, but must also accept the defendant/third-party plaintiff's previous agreement to toll the statute on the claims against the defendant/third-party plaintiff (again, no mention of restriction of third-party defendant's access to defenses). The court then holds that the third-party subcontractor defendant is entitled to assert their ***independent*** defense of time barred warranty claims to the ***underlying*** claims against the general contractor to the extent the underlying claims could imply a breach of warranty claim against the third-party defendant). Bellefeuille v. City & County Sav. Bank, 43 A.D.2d 335 (N.Y. App. Div. 3d Dep't, 1974) (held that the exclusivity defense of workers compensation could not be applied by a third-party defendant on behalf of a non-employer defendant against the plaintiff's claims to the non-employer defendant because the defense is exclusive to the employer-employee relationship). Falcon Tankers, Inc. v. Litton Systems, Inc., 300 A.2d 231, 236-7 (Del. Sup. Ct. 1972) (holding the third-party defendant could not assert the defendant's arbitration

defense after the defendant had waived it, "In view of the personal nature of the defense waived, the limited interests of the arbitration clause was designed to protect, and the absence of collusion or other form of unfair play…" However, the court also noted that the third-party defendant *could have* enforced a defense of the right to arbitration if the third-party defendant was in privity with the plaintiff in an arbitration agreement (In *Falcon*, since the third-party defendant was neither a signatory nor a contemplated third-party beneficiary, the court ruled the third-party defendant could not enforce the arbitration clause)). **F & D Property Co. v. Alkire**, 385 F.2d 97, 100 (10th Cir., 1967) ("Quite clearly a third-party defendant may resist plaintiff's motion for summary judgments to the same extent as the defendant, but he is in no better position than the defendant, ***and the requirement to respond to a showing in support of a motion for summary judgment is applicable to him as though he were the defendant.***" (emphasis added to highlight the rest of the sentence Appellant did not quote… this ruling highlights that a third-party defendant is entitled to defend against a plaintiff's claims independently of the defendant/third-party plaintiff). **Brandt v. Olson**, 179 F. Supp. 363, 371 (N.D. Iowa, 1959) ("At any rate, the third-party defendant cannot, ***and does not***, urge that venue in the principal action is improper, because the privilege of objecting to ***venue in the main action is a personal privilege*** belonging to the defendant Olson and not to the third-party defendant." – contrary to Appellant's claimed holding in

this case (emphasis added)). Fitzgerald v. American Surety Co., 150 N.Y.S.2d 128, 130 (N.Y. City Ct., 1956) (Appellant asserts that the statute addressed in the quotation is "[similar to Rule 14]". It is obviously not similar because Rule 14 allows third-party defendants to assert any claims against the plaintiff arising out of the subject transaction. Conversely, "Section 193-a, subd. 3 of the Civil Practice Act permits a third-party defendant to interpose a counterclaim against the plaintiff only if the plaintiff amends his pleading to assert a claim against the third-party defendant." Appellant offers no further citation in support of his contention the statute in *Fitzgerald* is "similar to Rule 14"). Idaho v. Bunker Hill Co., 1987 WL 6335, ¶ 2-3 (D.Idaho) (The court holds that Third-Party Defendants cannot assert defenses to the plaintiff's claims where the defendant/third-party plaintiff has already settled the underlying claims with the plaintiff because, as a practical matter, there is no one to respond to the defenses. However, the court holds that the third-party defendants can still challenge the remaining claims against them on the basis that defendant/third-party plaintiff's settlement was unreasonable in light of the defenses that would have been available to the underlying claims). Chrysler Credit Corp. v. Empire Mutual Ins. Co., 1972 WL 461, ¶ 5 (S.D.N.Y.) (The court held that a defense of the statute of limitations to a potential unfiled claim by the plaintiff could not be used by third-party defendants because they were sued by the defendant/third-party plaintiff on a cause of action unrelated to the unfiled

claim). Yelin v. Carvel Corp., 119 N.M. 554, 893 P.2d 450 (1995) (Appellant accurately states that *Yelin* discusses the deriviative nature of third-party claims. However, Appellant's arguments regarding his right to select the defendants and regarding his Point 4 ignore that the *Yelin* court also noted, "In addition, this Court recently recognized the theory of proportional indemnification, which applies when both a defendant and a third-party would be concurrently liable to the plaintiff but, because of the plaintiff's choice of remedy, the liability is placed only on the former and cannot be prorated between the wrongdoers.").

Thus, the Third-Party Defendants in this case have the right to compel Mr. Frederick into arbitration of all claims relating the agreement because the indemnification claims against the Third-Party Defendants derive from Mr. Frederick's underlying claims, and both the underlying and derivative claims are intertwined with the purchase agreements that Mr. Frederick signed. Those purchase agreements require Mr. Frederick to arbitrate any claims relating to the purchase agreements or transactions contemplated thereby.

Even if Appellant were correct that Third-Party Defendant's arbitration defense is only available if it is available to Sun 1031, such a defense ***is*** available to Sun 1031. As previously discussed, the trial court did not issue final judgment regarding whether Sun 1031 has the right to compel Mr. Frederick to arbitration. **[July 1, 2010 Tr. at 13, line 15-22]**. However, Sun 1031's right to do so was

discussed in Murken v. Suncor Energy, Inc., 138 N.M. 179, 182-3, 117 P.3d 985, 988-9 (Ct. App., 2005). In *Murken*, the court discussed a line of federal cases applying equitable estoppel to deny a signatory's right to avoid arbitration demanded by a non-signatory where "(1) they knowingly exploit the agreement containing the arbitration clause, or (2) their claims are intimately intertwined with the contract containing the arbitration clause." *Id.* The *Murken* court then held that equitable estoppel did not apply because the party being compelled was a non-signatory. In this case, Appellant and the Third-Party Defendants are signatories to the arbitration clause, and Sun 1031 is the non-signatory. Furthermore, Appellant seeks to exploit the agreement containing the arbitration clause by filing a securities claim that, essentially, seeks rescission of that agreement based upon a cause of action that requires the purchase agreement to have been entered. *See* N.M.S.A. 1978, 58-13B-40. Finally, Mr. Frederick's claims are clearly intertwined with the contract containing the arbitration clause, as previously noted at length by the trial court. **[December 9, 2009 Tr. at 33, line 10 through 34, line 5]**.

Therefore, the signatory Appellant has been properly compelled to arbitration by the signatory Third-Party Defendants. "It has been commented that 'the crucial lesson from Thomson ... is the Court's recognition of the distinction between estopping a non-signatory as opposed to a signatory claimant.'" Murken, 138 N.M. at 183.

POINT 3: MR. FREDERICK'S SECURITIES CLAIMS AGAINST DEFENDANTS ARE RELATED TO THE PURCHASE AGREEMENT

Preservation and Standard of Review

Appellees agree that Appellant "fairly invoked" a ruling on this issue and that the standard of review is *de novo*.

Response to Appellant's Contentions

Appellant states that Point 3 is to be an argument that his claims are not within the scope of the purchase agreements, but he does not address the scope of the arbitration clause in the purchase agreements at all. The reason is obvious: because the arbitration clause covers, "ANY DISPUTE, CONTROVERSY ***OR OTHER CLAIM*** ARISING UNDER, OUT OF ***OR RELATING TO*** THIS AGREEMENT ***OR ANY OF THE TRANSACTIONS CONTEMPLATED [Sic] HEREBY*** OR ANY AMENDMENT THEREOF OR THE BREACH ***OR INTERPRETATION HEREOF*** OR THEREOF…" (emphasis added)[RP at 937 (exhibits A, B, and C)]. Mr. Frederick has filed a securities claim for the alleged sale of real estate coupled with property management services. Mr. Frederick bought the real estate through the purchase agreements. Therefore, Mr. Frederick's claims plainly relate to the purchase agreements and the transactions contemplated thereby and are within the scope of the arbitration clause. Appellant's arguments regarding third-party beneficiaries and rewriting the agreement are irrelevant because it is the parties to the agreement, the Third-Party Defendants, that are

compelling his underlying claims to arbitration because they are so closely entwined with the derivative claims against the Third-Party Defendants. Furthermore, such arguments are actually just a recitation of Point 1, addressed hereinabove.

Appellant cites to **Dusold v. Porta-John Corporation**, 807 P.2d 526 (Az. Ct. App., 1990) to support his contention that the purchase agreements do not encompass his complaint because "Mr. Frederick's securities claims do not relate to the performance of the Purchase Agreements." Even while citing *Dusold*, Plaintiff notes that New Mexico case law holds that any disputes pertaining to the performance of a contract come within a broad arbitration clause. **K.L. House Construction, Inc. v. City of Albuquerque**, 91 N.M. 492, 493, 576 P.2d 752, 753 (1978); *see also* **Fiser v. Dell Computer Corporation**, 144 N.M. 464, 467, 188 P.3d 1215, 1218 (2008) ("However, when application of the law chosen by the parties offends New Mexico public policy, our courts may decline to enforce the choice-of-law provision and apply New Mexico law instead."); *see also* **Doctor's Associates, Inc. v. Casarotto**, 517 U.S. 681, 686, 116 S.Ct. 1652, 1656 (U.S. Mont., 1996). ("Section 2 of the FAA provides that written arbitration agreements 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'... Courts may not, however,

invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.").

Appellant is incorrect regarding the application of *Dusold* to this case, even under Arizona law. As cited by Appellant, *Dusold*'s limitation on the application of an arbitration clause requires that a duty be owed "to others besides the contracting parties". *Dusold,* 807 P.2d at 530. In the *Dusold* case, the court ruled that the duty alleged was a duty to warn of the risks from chemicals to which the plaintiff was exposed while cleaning portable toilets under a contract for plaintiff's services (containing the arbitration clause) to clean the defendant's toilets. *Id* at 527, 531. Therefore, the *Dusold* defendants would owe the subject duty to anyone they exposed to the chemicals, regardless of a contract. *Id.* In this case, one of the duties asserted by Appellant to have been owed is a duty to sell securities through a securities broker. Thus, Appellant's claim requires a breach of this duty through an agreement between the parties that sold securities to Appellant without a securities broker's involvement. Therefore, the alleged duty of the defendants to Mr. Frederick only arises out of the creation of an agreement/contract to sell him those securities, and is not a duty owed to parties who do not contract to purchase securities. That agreement to allegedly sell Mr. Frederick securities is memorialized, in great part, in the purchase agreements.

The *Dusold* case also does not apply to this case for the same reason it was not applied in In re Swift Transp. Co., Inc., 279 S.W.3d 403, 407-8 (Tex.App.–Dallas, 2009). Therein, the court noted:

> Nevertheless, we do not need to determine whether we agree with the holding in *Dusold*, or whether the reasoning in that case would apply to an arbitration clause governed by the FAA, because the arbitration clause in this case is different from the arbitration clause in *Dusold*. In this case, the parties expressly agreed to arbitrate not only disputes "arising out of or relating to" their agreement, as in *Dusold*, but also all disputes " arising out of or relating to the relationship created by the Agreement " (emphasis added). And under general principles of contract construction, we must "striv[e] to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative." *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex.1998). Accordingly, we assume that "arising out of or relating to the relationship created by the Agreement" means something different from "arising out of or relating to this Agreement," and strive to give meaning to that phrase.

As in the *Swift* case, the arbitration clause in this case is much broader than just "relating to the agreement", but also includes "or any of the transactions contemplated hereby". Since contract construction requires every phrase to be given meaning, the arbitration clauses clearly contemplate disputes regarding the transactions surrounding the real estate purchases, and thus Mr. Frederick's claims are within the scope of the arbitration clauses. *Supra* **Doctor's Associates**.

Furthermore, Mr. Frederick sued Sun 1031 for acting as a broker-dealer or sales representative without being licensed. [**RP at 848**, ¶ 66]. N.M.S.A. 1978, § 58-13B-2(B),(V),(T) define such activities as effecting sales of securities, which

"includes every *contract of sale*, contract to sell or other disposition of a security *or interest in a security* for value." Therefore, Appellant's complaint clearly encompasses, relates to, and construes the purchase agreements for his claims. *See Original Complaint* [**RP at 1**, at ¶ 43]. Furthermore, the alleged violation of the securities act, of not having a licensed broker selling the securities, would be an immediate foreseeable result of completing the purchase agreements without such a licensed broker. Therefore, the securities claims in the amended complaint are within the scope of the purchase agreements.

POINT 4: SUN 1031-S THIRD-PARTY COMPLAINT STATED A VALID CLAIM FOR INDEMNITY

Preservation and Standard of Review

Appellant's Point 4 ***was not*** properly preserved for appeal. Appellant sought to preserve the issue of failure to state a third-party claim for interlocutory appeal. [**RP at 1141**]. However, the Court denied the motion to allow interlocutory appeal of this issue. [**RP at 1147**]. As such, Appellant does not have a "final judgment" from which to appeal this issue, as required by Rule 1-054(B)(1) NMRA. Appellant's attempts to bootstrap this issue into a hearing on compelling arbitration, after the trial court already denied his motion for reconsideration and interlocutory appeal, is improper and cannot "fairly invoke" a final, appealable judgment.

Furthermore, as addressed hereinabove, "fundamental error" is a corruption of justice so great as to shock the conscience. *Supra* Rogers; *see also* State v. Dietrich, 145 N.M. 733, 204 P.3d 748 (Ct. App., 2009) ("As we stated, this Court will reverse a conviction for fundamental error only where the defendant demonstrates a miscarriage of justice, a conviction that shocks the conscience, a denial of substantial justice, or an error of such magnitude that it affects the outcome of the trial."). In this case, allowing a third-party defendant does not deprive Mr. Frederick of any justice, and certainly not to the extent it could "shock the conscience". Even if Mr. Frederick were correct on Point 4, that there is no viable claim against the Third-Party Defendants, then it would not affect his ability to recover from Sun 1031 in any regard, he is still deprived of nothing, and so no fundamental error authorizing appeal on this point is available.

Appellees agree the standard of review on this point is only for an abuse of the trial court's discretion in allowing the third-party claim to proceed.

Response to Appellant's Contentions

Appellant cites **In re Consolidated Vista Hills Retaining Wall Litigation**, 119 N.M. 542, 893 P.2d 438 (1995) to support his claim that Sun 1031 cannot file a third-party claim for indemnification against the Third-Party Defendants because Sun 1031 is not entitled to seek indemnification if they had "active" conduct. However, Plaintiff misses critical points from the *Consolidated* case: 1) the case

does not address all forms of indemnification; 2) the case notes even traditional indemnification is available where the parties are in *pari delicto* (and Mr. Frederick claims Sun 1031 and the Third-Party Defendants were acting in concert regarding these real estate transactions – *see* [**RP at 1236**, at pg. 4], [**RP at 1**, at ¶ 9, 36, 37, 43, 52], and *Appellant's brief-in-chief,* at pg. 1, 2, 5, 6, and 10); and 3) the *Consolidated* case holds that the defendant is entitled to seek a proportional indemnification claim if proportional contribution is not available against a third-party defendant because of the plaintiff's election. Sun 1031 has not filed for complete indemnification and/or to be removed from this case, but for indemnification to the extent that the Third-Party Defendants sold the TIC interests to Mr. Frederick and received the consideration paid by Mr. Frederick for his alleged securities. [**RP at 922**]. Sun 1031 seeks no more than a comparative assignment of any liability for Plaintiff's claims between the defendants and third-party defendants, just as was provided in the *Consolidated* case. *See also* ***Yelin v. Carvel Corp.***, 119 N.M. 554, 556, 893 P.2d 450, 452 (1995) (A proportional indemnification claim is available to a concurrent tortfeasor where a plaintiff elects to just sue one tortfeasor).

Appellant also contends it is against public policy to allow indemnification of persons who actively violate securities laws. However, Appellant again ignores the holdings of the very cases he cites: **Eichenholtz v. Brennan**, 52 F.3d 478 (3d

Cir. N.J., 1995) holds complete contractual indemnification is not available to the security underwriter, but that the trial court properly enabled the jury to comparatively assign liability between the underwriter and issuer of a security in proportion to their fault under a proportionate judgment reduction rule that placed all parties onto the verdict sheet, comparing the practice to an appropriate form of comparative contribution. **Globus v. Law Research Service, Inc.**, 418 F.2d 1276, 1289 (2d Cir. N.Y., 1969) holds complete contractual indemnification is not available to the security underwriter against the security issuer, but allowing the jury to determine the comparative culpability, and thus liability, between the underwriter and issuer was appropriate. In this case, Sun 1031 has stated a sufficient claim for indemnification against the Third-Party Defendants under traditional indemnification (joint tortfeasors regarding the conduct of securities transactions in which they both participated under an implied agreement between them), equitable indemnification (Third-Party Defendants are unjustly enriched if they retain Mr. Frederick's consideration when Mr. Frederick tenders back the securities and then demands payment from Sun 1031), indemnification based on a chain of supply theory (relating to Mr. Frederick's claims of misrepresentation regarding the condition of the real estate held by the Third-Party Defendants but allegedly sold by Sun 1031), and proportional indemnification (for Third-Party Defendants' alleged concurrent liability in these securities transactions). *Supra*

Yelin, 119 N.M. at 556. Therefore, the trial court did not abuse its discretion in allowing Sun 1031's derivative liability claims against the Third-Party Defendants.

CONCLUSION

Appellant has repeatedly attempted to assert equitable issues into the rulings regarding arbitration in this case, complaining of colluding defendants, even while ignoring his own agreement to arbitrate claims relating to the subject real estate transactions and attempts to skirt around his obligations through "limber" pleading noted by the trial court. However, the Court should also consider the broader scope of the subject events when evaluating equities in this case: Attorney Frederick was seeking to avoid paying taxes by purchasing TIC investment properties. This is not illegal, but it is hardly the sort of activity for which a sophisticated lawyer should receive equitable protection from his own agreements. Simply put: this case should be decided upon the law, not equity.

Mr. Frederick filed suit against Sun 1031 for improprieties in the sale of securities. Mr. Frederick alleges the subject securities consist of real property and services sold to him. The Third-Party Defendants sold him the subject real property under the purchase agreements. Sun 1031 has filed a valid derivative claim for indemnification of Mr. Frederick's claims against the Third-Party Defendants for their participation in the alleged securities sales. The Third-Party Defendants then sought to enforce the arbitration clause from the purchase agreements to arbitrate

any claims relating to the real estate purchase agreements and the transactions contemplated thereby. Both Mr. Frederick's underlying claims and Sun 1031's intertwined, derivative claims relate to the purchase agreements and the transactions contemplated thereby. Nonsignatory Sun 1031 joined in the motion to compel arbitration of all claims. The law entitles both nonsignatory Sun 1031 and signatory Third-Party Defendants to compel the signatory appellant to arbitration under his agreement to arbitrate all claims relating to the real estate transactions. Therefore, the signatory Appellant has been properly compelled to arbitrate all of his claims, and the trial court's ruling should be affirmed.

RESPONSE TO REQUEST FOR ORAL ARGUMENT

Appellees disagree that oral argument is necessary to resolve this appeal. The issue is simple: Appellant filed claims relating to his real estate purchases. His real estate purchase agreements require him to arbitrate any claims relating to the purchases. He has now been compelled to arbitration by the other parties to the purchase agreements and the transactions. This matter is as simple as holding Mr. Frederick to his contractual agreement.

Respectfully submitted:

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