IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ROBERT BRUCE FREDERICK,

Plaintiff-Appellant,

v.

Ct. App. No. 30,967

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.

APPELLANT'S 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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Plaintiff-Appellant, *pro se*

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INTRODUCTION

The case below is a complex civil action commenced over three years ago. It involves statutory violations of the New Mexico Securities Act of 1986 ("Securities Act"), NMSA 1978, §§ 58-13B-1 *et seq.*, against the three Defendant-Appellees—Sun 1031, LLC ("Sun 1031"), H. Ray Knight ("Knight") and NAI the Vaughan Company ("Vaughan") (collectively referred to herein as "Defendants").[1] *See, generally*, December 28, 2009 *First Amended Civil Complaint for Violations of the New Mexico Securities Act of 1986* ("Amended Complaint") [**Record Proper ("RP") at 868.**][2] Over Mr. Frederick's objections, the trial court allowed Sun 1031 to implead three additional parties—Sun Byron, LLC ("Sun Byron"), Sun Shelby, LLC ("Sun Shelby"), and Sun Tiffany, LLC ("Sun Tiffany") (hereinafter collectively referred to as "Third-Party Defendants"). Although Sun 1031 and the Third-Party Defendants are technically separate corporate entities, Sun 1031's general counsel incorporated the Third-Party Defendants and also serves as their general counsel. [**July 7, 2010, Tr. at 5, lines 17-25.**]

At issue in this appeal is whether the Third-Party Defendants have the right to force Plaintiff-Appellant Frederick ("Mr. Frederick") into arbitration with

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[1] The Securities Act of 1986 was repealed as of January 1, 2010. All of Mr. Frederick's claims arose before its repeal.

[2] The page number is where the document appears in the record proper, according to the "Case History" filed by the district court.

Defendant Sun 1031. After ruling that Sun 1031 has no right to compel Mr. Frederick to arbitrate, the trial court granted the Third-Party Defendants' motion to do exactly that, ordering Mr. Frederick into arbitration with Defendant Sun 1031. The arbitration clause relied on by Sun 1031 and the Third-Party Defendants is contained in three virtually identical Purchase Agreements that Sun 1031 drafted but did not sign. The Agreements are strictly between Mr. Frederick and the Third-Party Defendant.[3]

There is ambiguity as to which parties the trial court ordered into arbitration, because it issued two conflicting orders on the same day. The November 18, 2010, *Order Granting [Third-Party Defendants'] Motion to Compel Arbitration* ("First Order") [**RP at 1288**] sends Mr. Frederick into arbitration solely with Sun 1031, as specifically requested by the Third-Party Defendants. This Order was approved as to form by all counsel. In contrast, the November 18, 2010 *Order Denying Plaintiff's Motion for Reconsideration* ("Second Order") [**RP at 1291**], which the trial court prepared without assistance of counsel, "sends all parties into arbitration" (emphasis supplied by trial court). Mr. Frederick appeals both orders because neither has any basis in law or fact. *See, e.g.*, **Britt v. Phoenix Indem.**

[3] True and accurate copies of the Purchase Agreements are attached as Exhibits A, B and C to Mr. Frederick's February 5, 2010, *Memorandum in Support of Motion for Summary Judgment on Sun 1031's Third Affirmative Defendant* [**RP at 937**]; *see also* Exhibits A, B and C to Sun 1031's July 1, 2009, *Memorandum in Support of its Motion to Compel Arbitration* [**RP at 86.**]

Ins. Co., 120 N.M. 813, 815-816, 907 P.2d 994, 996-997 (1995) ("Orders compelling arbitration of all claims are final judgments for purposes of appeal"). In ordering Mr. Frederick into arbitration with ***any*** of the parties, the trial court committed fundamental error and violated Mr. Frederick's fundamental right of access to the courts.

Mr. Frederick makes four points on appeal, each requiring reversal: **Point 1** is that the trial court had no factual or legal basis to send "all parties into arbitration"; **Point 2** is that the Third-Party Defendants have no right to compel Mr. Frederick to arbitrate with Sun 1031, because Sun 1031 does not have this right; **Point 3** is that Mr. Frederick's securities claims against Defendants are not within the scope of the Purchase Agreements; and **Point 4** is that Sun 1031's third party complaint failed to state a valid claim under Rule 1-014, and therefore, the Third-Party Defendants are not proper parties and have no standing to assert motions against Mr. Frederick.

SUMMARY OF PROCEEDINGS

A. Nature of the Case

1. Mr. Frederick commenced the action below on March 27, 2009, by filing his *Verified Civil Complaint for Violations of State and Federal Securities Laws, Fraud, Negligent Misrepresentation, and Civil Conspiracy* ("Original

Complaint") against Sun 1031, Knight and Vaughn [**RP at 1**].[4] Mr. Frederick has since filed the Amended Complaint, which asserts only statutory securities claims based on Defendants' active and direct violations of the New Mexico Securities Act of 1986. He asserts no contract, federal or common law claims.

2. Mr. Frederick refers to Defendants Knight and Sun 1031 collectively as the "Arizona Defendants" in his Amended Complaint, because Knight is an Arizona resident and Sun 1031 is an Arizona corporation. *Amended Complaint* [**RP at 868**] *¶ 4.* Knight acted as Sun 1031's broker and Defendant Vaughan (a New Mexico corporation) promoted Sun 1031's investment products in New Mexico and solicited New Mexico investors, including Mr. Frederick. July 1, 2010, *Memorandum in Support of Motion for Summary Judgment on Count 3* ("SJM Memo in Support") [**RP at 1104**] *at 2 ¶ 2.* Approximately seventeen New Mexicans ultimately purchased the unregistered TIC Investments offered by Defendants. *SJM Memo in Support at 3 ¶ 6.*

3. The Amended Complaint alleges that Sun 1031 is in the business of acquiring income-producing properties throughout the United States and then offering multiple tenant-in-common interests or "TIC Interests" in each property to

[4] Knight and Vaughan have stopped responding to papers and are no longer represented by counsel.

the public.[5] *Amended Complaint* [**RP at 868**] *¶¶ 2-4, 14-17.* Although TIC Interests standing alone are merely real estate and ***not*** securities, *id.* ¶ 33, Sun 1031 offered more than mere TIC Interests. It offered potential investors a "package deal" consisting of TIC Interests ***coupled with*** property management by a "world class" management company, financing, market analysis, and other essential investment services. *Amended Complaint* ¶¶ 5 (defining "TIC Investment" or "TIC Package"), 18-22, 34-40, 42; July 1, 2010, *SJM Memo in Support* [**RP at 1104**] at 2-5 ¶¶ 1-5, 9, 10, 16, 17. Pursuant to well-established law, when real estate is coupled together with property management and offered to investors as a package deal, an "investment contract" results. See generally *SJM Memo in Support*; see also *Amended Complaint ¶¶ 42-50.* An "investment contract" is a type of security defined and regulated under the New Mexico Securities Act. NMSA 1978, § 58-13B-2(X) (defining "security" under the Act to include "investment contract"); *Amended Complaint ¶¶ 24-31.*

4. Defendant Sun 1031 drafted the Purchase Agreements. February 5, 2010, *Memorandum in Support of Motion for Summary Judgment on Sun 1031's Third Affirmative Defense* ("Memo Against Arbitration") [**RP at 937**] at 2 ¶¶ 2 &

[5] None of the properties are located in New Mexico and no investor lives where the properties are located. *Amended Complaint ¶ 14.* There are approximately seventy investors—some live in New Mexico but most live in various other states. See July 1, 2010, *SJM Memo in Support* at 5 ¶12.

3. However, it is not a party to those Agreements or any contract with Mr. Frederick. *Memo Against Arbitration* [**RP at 868**] *at 2 ¶¶ 4 & 5.*

5. As to each income-producing property ("TIC Property"), Sun 1031 created a separate "Sun" corporation to act as the "seller" of TIC Interests pursuant to separate (but identical) Purchase Agreements. *Memo Against Arbitration* ¶¶ 2, 5. In this case, Mr. Frederick entered into three such Purchase Agreements—one with Sun Byron, another with Sun Shelby, and a third with Sun Tiffany.[6] February 5, 2010, *Memo Against Arbitration* [**RP at 937**] at *2 ¶ 5*, Exhibits A, B and C. Sun 1031 contends that it and the Third-Party Defendants are wholly separate corporate entities. *Memo Against Arbitration at 2 ¶ 6.*

6. Mr. Frederick does not allege that the Third-Party Defendants offered him unregistered securities or otherwise violated the Securities Act. The "package deal" comprising the securities was created by Sun 1031 and offered by Defendants and not the Third-Party Defendants. The Third-Party Defendants merely transferred title in the TIC Properties to Mr. Frederick after the illegal offers had occurred, and this did not violate the Act. August 26, 2010, *Plaintiff's Response to Motion to Compel Arbitration by Sun Byron, Sun Shelby and Sun*

[6] The Purchase Agreement with Sun Byron involves commercial property located in Byron, Minnesota; the Purchase Agreement with Sun Shelby involves commercial property located in Memphis, Tennessee; and the Purchase Agreement with Sun Tiffany involves commercial property located in Kansas City, Missouri. *Amended Complaint ¶ 20.*

Tiffany [**RP at 1236**] *at 3* ("These claims predate the Purchase Agreements ..."). Mr. Frederick does not allege any breach of the Purchase Agreements or any other contract. *Amended Complaint.* His Amended Complaint makes no reference to these Agreements or to the Third-Party Defendants.

7. The following paragraphs of the Purchase Agreements are relevant to the issue of arbitration in this appeal:

> 8.12 Choice of Law. This Agreement shall be construed and enforced in accordance with the internal law of the State of Arizona, without regard to its conflict of law principles.
>
> 8.14 Third Party Beneficiaries. Buyer and Seller do not intend to benefit any party (including other Tenants in Common) that is not a party to this Agreement and ***no such party shall be deemed to be a third party beneficiary of this Agreement or any provision thereof.*** [Emphasis added.]
>
> 9.1 ALL CLAIMS SUBJECT TO ARBITRATION. ANY DISPUTE, CONTROVERSY OR OTHER CLAIM ARISING UNDER, OUT OF OR RELATING TO THIS AGREEMENT OR ANY OF THE TRANSACTIONS COMTEMPLATED [Sic] HEREBY OR ANY AMENDMENT THEREOF OR THE BREACH OR INTERPRETATION HEREOF OR THEREOF, SHALL BE DETERMINED AND SETTLED BY BINDING ARBITRATION IN PHOENIX, ARIZONA UNDER THE RULES AND PROCEDURES OF THE AMERICAN ARBITRATION ASSOCIATION. THE SUBSTANTIALLY PREVAILING PARTY IN SUCH ACTION SHALL BE ENTITLED TO AN AWARD OF ITS REASONABL [Sic] COSTS AND EXPENSES INCURRED THEREIN, INCLUDING BUT NOT LIMITED TO ATTORNEYS' FEES AND COSTS. ANY AWARD RENDERED THEREIN SHALL BE FINAL, BINDING AND NON-APPEALABLE ON EACH AND ALL OF THE PARTIES THERETO, AND JUDGMENT MAY BE ENTERED THEREON IN ANY COURT OF COMPETENT JURISDICTION. [All capitols in original.]

> 9.2 WAIVER OF LEGAL RIGHTS. BY INITIALING IN THE SPACE BELOW, THE PARTIES ACKNOWLEDGE AND AGREE TO HAVE ANY DISPUTE ARISING OUT OF ANY MATTER CONCERNING THIS AGREEMENT TO BE DECIDED BY ARBITRATION AS PROVIDED UNDER ARIZONA LAW AND THAT THEY ARE WAIVING ANY RIGHTS THEY MAY POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR BY JURY TRIAL. THE PARTIES FURTHER ACKNOWLEDGE AND AGREE THAT THEY ARE WAIVING THEIR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL. EACH PARTY'S AGREEMENT TO THIS ARTICLE IS VOLUNTARY. THE PARTIES HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTER INCLUDED IN THIS ARTICLE TO ARBITRATION AS DESCRIBED ABOVE. [All capitols in original.]

Purchase Agreements (attached as Exhibits A, B and C to February 5, 2010, *Memo Against Arbitration* [**RP at 937**]).

B. Relevant Motion Practice

8. On or around July 1, 2009, after filing its Answer to Mr. Frederick's Original Complaint, Sun 1031 filed a *Motion to Compel Arbitration or, in the Alternative, a Motion to Dismiss for Failure to Join Indispensible Parties* [**RP at 86**]. After briefing and oral argument on December 10, 2009, the trial court "stayed" Sun 1031's motion [**RP at 893**], ordered Mr. Frederick to file an amended complaint [**RP at 866**], and informed Sun 1031 that it could thereafter file a "renewed motion" to compel arbitration. [**December 10, 2009, Transcript**.] Sun 1031 designated the transcript of the December 10th hearing to be included in the record proper.

9. On December 28, 2009, Mr. Frederick filed his Amended Complaint [**RP at 868**]. All counts in the Amended Complaint are based on Defendants' direct violations of the Securities Act except Count 6, which is based on Defendants' civil conspiracy among themselves to commit violations of the Act.

10. On January 26, 2010, Defendant Sun 1031 filed its Answer to Mr. Frederick's Amended Complaint [**RP at 922**], asserting for its third affirmative defense that all Mr. Frederick's claims against it were subject to the Purchase Agreements' arbitration clause.

11. On February 5, 2010, Mr. Frederick filed a *Motion for Summary Judgment on Sun 1031's Third Affirmative Defense* [**RP at 935**]. After conducting a hearing on May 4, 2010, the trial court granted Mr. Frederick's motion, ruling that Sun 1031 has no right to compel arbitration. May 17, 2010, *Order* [**RP at 1081**]. Mr. Frederick designated the transcript of the February 5th hearing to be included in the record proper.

12. On March 8, 2010, Defendant Sun 1031 filed a *Renewed Motion to Compel Arbitration*, based on its third affirmative defense. [**RP at 1009**.] After conducting a hearing on July 1, 2010, the trial court again ruled that Sun 1031 has no right to compel arbitration. July 21, 2010, *Order Denying Renewed Motion to Compel Arbitration* [**RP at 1151**]. Mr. Frederick designated the transcript of the July 1st hearing to be included in the record proper.

13. On January 26, 2010, Sun 1031 filed a third party complaint against Sun Byron, Sun Shelby and Sun Tiffany along with its Answer to the Amended Complaint [**RP at 922**]. On March 9, 2010, before Sun 1031 had served its third party complaint, Mr. Frederick filed a *Motion to Strike Sun 1031's Third-Party Claim,* arguing among other things that Sun 1031 and the Third-Party Defendants were obviously in collusion and that Sun 1031's third party complaint failed to state a valid claim under Rule 1-014 NMRA. [**RP at 1015**.] The trial court denied Mr. Frederick's motion, suggesting *sua sponte* at the July 1, 2010 hearing that Sun 1031 had stated a common law indemnity claim. [**July 1, 2010 Tr. at 10, Lines 12-16**]; July 21, 2010, *Order Denying Motion to Strike Third-Party Complaint* [**RP at 1149**]. Sun 1031 had not previously mentioned "common law indemnity" in any of its briefing or oral argument. On July 6, 2010, Mr. Frederick filed a *Motion for Reconsideration of Court's Denial of Plaintiff's Motion to Strike Third-Party Claim, or in the Alternative, Motion for Order Allowing Interlocutory Appeal* [**RP at 1141**]. The trial court summarily denied both requests for relief. July 7, 2010, *Order Denying Plaintiff's Motion for Reconsideration of Court's Denial of Plaintiff's Motion to Strike Third-Party Claim, or in the Alternative, Motion for Order Allowing Interlocutory Appeal* [**RP at 1147**].

14. On August 16, 2010, some seven months after Sun 1031 filed its third party complaint and seventeen months after Mr. Frederick filed his Original

Complaint, the Third-Party Defendants' filed their joint *Answer to Third Party Claim* [**RP at 1211**]. In their ten-line/two-paragraph Answer, the Third-Party Defendants did not deny the allegations in Mr. Frederick's Amended Complaint; they did not assert any affirmative defenses to Mr. Frederick's claims against Defendant Sun 1031; and they did not assert any counterclaims against Mr. Frederick. Mr. Frederick has asserted no claims against the Third-Party Defendants.

15. On August 24, 2010, the Third-Party Defendants jointly filed their motion to force Mr. Frederick into arbitration, ***not*** with them, but with Defendant Sun 1031 [**RP at 1213**]. Sun 1031 joined their motion. October 2, 2010, *Notice of Joinder* [**RP at 1263**]. After conducting a hearing on October 14, 2010, the trial court granted the Third-Party Defendants' and Sun 1031's joint motion, ruling:

> Plaintiff is hereby ordered to arbitrate all of his claims in this matter against Defendant Sun 1031, LLC, in accordance with the purchase agreements entered into by Plaintiff and the Third-Party Defendants ....

November 18, 2010 *Order Granting Motion to Compel Arbitration at 2* ("First Order") [**RP at 1288**]. Mr. Frederick designated the transcript of the October 14th hearing to be included in the record proper.

16. On November 15, 2010, before the First Order was issued, Mr. Frederick filed a *Motion for Reconsideration, or, in the Alternative, Motion to Amend or Alter Final Judgment Compelling Arbitration* [**RP at 1265**]. The trial

court summarily denied Mr. Frederick's motion. November 18, 2010, *Order Denying Motion for Reconsideration* ("Second Order") [**RP at 1291**]. In the Second Order, the trial court inexplicably stated that it had sent "all parties into arbitration." This was "inexplicable" because it flatly contradicted the order referred to immediately above as well as the trial court's remarks at hearing. It is also not rationally related to any request for relief and has no known basis in the record.

ARGUMENT

POINT 1: THE TRIAL COURT HAD NO FACTUAL OR LEGAL BASIS TO SEND "ALL PARTIES INTO ARBITRATION."

Preservation and Standard of Review

The issue of whether Mr. Frederick can be forced to arbitrate with "all parties" (as opposed to just Sun 1031) did not arise until the trial court issued the Second Order, *supra*, ¶ 16, which was the last order entered by the trial court prior to appeal. The trial court's statement in this Order, that it "sent all parties into arbitration," is not consistent with any request for relief by any party and thus Mr. Frederick had no opportunity to respond or object.

Given the absence of any evidence below that any claim against Knight or Vaughan is subject to arbitration,[7] and given the undisputed fact that Mr. Frederick has no claims whatsoever against the Third-Party Defendants, the trial court's ruling that Mr. Frederick must arbitrate with these parties constitutes "fundamental error" and violates Mr. Frederick's "fundamental right" of access to the courts. Rule 1-216(B)(2) NMRA (creating exception to rule of preservation). *Cf.* NMSA 1978, § 44-7A-8 ("the court shall ... order the parties to arbitrate ***unless it finds that there is no enforceable agreement to arbitrate***") (emphasis added).

The issue of whether Mr. Frederick can be forced to arbitrate with Sun 1031 (as opposed to "all parties") ***was*** extensively litigated below for over two years. The trial court ultimately agreed with Mr. Frederick in two separate rulings that Sun 1031 has no right to compel arbitration. *Supra* ¶¶ 11, 12. Thus, Mr. Frederick has preserved this issue for appeal by "fairly invoking" a ruling in both his filings and oral argument below. Rule 1-216(A) NMRA.

The standard of review for Point 1 is *de novo*. **Santa Fe Technologies, Inc. v. Argus Networks, Inc. et al.**, 2002 NMCA 30, ¶ 51, 131 N.M. 772, 42 P.3d 1221, cert. denied, 131 N.M. 737, 42 P.3d 842 ("Whether the parties have agreed

[7] "Arbitration is a matter of contract." **Felts v. CLK Mgmt.**, 2011 N.M. App. LEXIS 7 (Ct. App. Mar. 2, 2011) *citing*, **AT&T Technologies, Inc. v. Communications Workers of America**, 475 U.S. 643, 648, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986).

to arbitrate is a question of law," and thus appellate courts review "the applicability and construction of a provision requiring arbitration *de novo*").

Appellant's contentions

This appeal calls into question the trial court's decision to grant the Third-Party Defendants' August 24, 2010, *Motion to Compel Arbitration by Sun Byron, LLC, Sun Shelby, LLC, and Sun Tiffany, LLC.* Supra, ¶ 15. Significantly, the Third-Party Defendants did not seek to compel Mr. Frederick to arbitrate with ***them***, since Mr. Frederick has no claims against them. *Supra, ¶ 14.* Nor did the Third-Party Defendants' seek to make Mr. Frederick arbitrate with Defendants Knight or Vaughan. They sought only to force Mr. Frederick into arbitration with Sun 1031. Supra, ¶ 15. Neither Knight nor Vaughan participated in briefing the Third-Party Defendants' motion to compel arbitration, and neither showed up at the October 14, 2010 hearing. At that hearing, Judge Campbell made it clear that he was only "sending the parties who have appeared on this matter into arbitration." [**October 14, 2010 Tr. at 23, Lines 19-20.**] Accordingly, the Secord Order, which allegedly "sent all parties into arbitration," *supra*, ¶ 16, is manifestly baseless, arbitrary and capricious.

First, the record below is devoid of any evidence of ***any*** contract between Mr. Frederick and any Defendant, much less an arbitration contract. Therefore, as a matter of law, none of the Defendants have the right to compel arbitration or

deny Mr. Frederick his day in court. "Generally, third parties who are not signatories to an arbitration agreement are not bound by the agreement and are not subject to, and cannot compel, arbitration." **Horanburg v. Felter et al.**, 2004 NMCA 121, ¶ 16, 99 P3d. 685, 689 (Ct. App. 2004). The same general rule applies under Arizona law.[8] **Able Distributing Company, Inc., et al. v. Lampe**, 773 P.2d 504, 415 (Az. Ct. App., 1989) (an arbitration agreement "binds only the parties to the arbitration agreement, and is therefore inapplicable to non-parties"); **Heinig v. Hudman *et al.***, 865 P.2d 110, 117 (Az. Ct. App. 1993) ("While Arizona law and public policy have long favored arbitration, ... the preference for arbitration presupposes a valid arbitration agreement between or among the parties.").

Second, aside from the Third-Party Defendants, Sun 1031 is the only other party that sought to force Mr. Frederick into arbitration, but it sought to compel him to arbitrate only with it and not with any other party. *Supra*, ¶¶ 8, 12. Sun 1031 also joined the Third-Party Defendants' motion to accomplish this same objective. No party has argued that the claims against Knight and Vaughan are subject to arbitration. Third-Party Defendants and Sun 1031 sought only to force Mr. Frederick into arbitration with Sun 1031. *Supra*, ¶ 15.

[8] The Purchase Agreements contain a "choice of law" clause designating Arizona law. *Supra*, ¶ 7.

Third, the trial court ruled that Sun 1031, as a non-signatory, has no right to enforce the Purchase Agreements' arbitration clause. *Supra* ¶¶ 11, 12. At hearing Judge Campbell held:

> ... the posture of this case as it stands now ... is that both Arizona law and New Mexico law provide that nonparties to arbitration agreements, only in the rarest of circumstances ... only in those unique circumstances would a nonparty to an arbitration agreement, basically, get to invoke the clause, particularly when the arbitration ... agreement itself – is contained within an agreement that suggests that the person moving for arbitration is not a third-party beneficiary to the arbitration agreement.

[**May 4, 2010, Tr. at 4, Lines 11-22**.] The denial of a motion to compel arbitration is a final, appealable order. **Campos v. Homes by Joe Boyden, L.L.C.**, 2006 NMCA 86, 2, 140 N.M. 122, 140 P.3d 543. Sun 1031 never appealed the trial court's rulings that it has no right to compel arbitration and these rulings are not subject to review in the instant appeal.[9]

Accordingly, the trial court's Second Order, which inexplicably "sent all parties into arbitration," is manifestly baseless, arbitrary and capricious. None of the Defendants has the right to compel arbitration, and therefore, the trial court's November 18, 2010, *Order Denying Plaintiff's Motion for Reconsideration* [**RP at 1291**] ("Second Order") must be reversed.

[9] The only issue in this appeal is whether the Third-Party Defendants can compel Mr. Frederick to arbitrate with Sun 1031.

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.

Preservation and Standard of Review

Mr. Frederick invoked a ruling on this issue in his August 26, 2010, *Response to Motion to Compel Arbitration by Sun Byron, LLC, Sun Shelby, LLC and Sun Tiffany, LLC*, and in his November 15, 2010, *Motion for Reconsideration, or, in the Alternative, Motion to Amend or Alter Final Judgment Compelling Arbitration*. Supra, ¶¶ 15, 16. Issues concerning arbitration were also raised in numerous filings associated with various motions. ***Supra*** ¶¶ 8, 11-16. Mr. Frederick also raised this issue at oral argument. **[October 14, 2010 Tr. at 4-13.]** Thus, Mr. Frederick preserved this issue for appeal by "fairly invoking" a ruling in both his filings and oral argument. Rule 1-216(A) NMRA. Moreover, the trial court's ruling that the Third-Party Defendants can compel arbitration with Sun 1031—after ruling that Sun 1031 does not have this right—constitutes "fundamental error" and violates Mr. Frederick's "fundamental right" of access to the courts. Rule 1-216(B)(2) NMRA (creating exception to rule of preservation).

The standard of review relating to Point 2 is *de novo*, same as Point 1.

Appellant's Contentions

Whether the Third-Party Defendants can force Mr. Frederick into arbitration with Defendant Sun 1031 turns on Rule 1-014, which provides in pertinent part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. ... The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 1-012 NMRA and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 1-013 NMRA. ***The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim***. 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. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 1-012 NMRA and his counterclaims and cross-claims as provided in Rule 1-013 NMRA.

Rule 1-014(A), NMRA (emphasis added). The Third Party Defendants did not assert any claims against Mr. Frederick and he has asserted no claims against them. *Supra*, ¶ 14. Most significantly, they did not assert "against the plaintiff [i.e., Mr. Frederick] any defenses which the third-party plaintiff [i.e., Sun 1031] has to the plaintiff's claim," Rule 1-014(A) NMRA. Accordingly, there is no adversity between Mr. Frederick and the Third-Party Defendants. **Pettus v. Grace Line, Inc.**, 166 F. Supp. 463, 464 (E.D.N.Y. 1958) ("If [third-party defendant] does not avail himself of the right provided by Rule 14 [to assert claims and defenses against plaintiff] then, obviously, there is no issue between the plaintiff and the

third-party defendant and the plaintiff is not a party adverse to the third-party defendant.")

Nevertheless, the trial court allowed Sun 1031 to use the Third-Party Defendants as a tool to circumvent the court's prior rulings against Sun 1031 on the issue of arbitration.[10] The Third-Party Defendants' motion seeks to compel Mr. Frederick to arbitrate, not with them, but with Sun 1031. *Supra*, ¶ 15. Sun 1031 joined their motion, since it was substantively identical to their motions to compel arbitration. *Id.* However, given the trial court's repeated and unappealed rulings that Sun 1031 has no right to compel arbitration, *supra*, ¶¶ 11, 12, the trial court committed fundamental error in granting the Third-Party Defendants' and Sun 1031's joint motion.

As to Mr. Frederick's claims against Sun 1031, the Third-Party Defendants are in no better position than Sun 1031—they may assert ***only*** those defenses that Sun 1031 "has" to Mr. Frederick's claims against Sun 1031. Rule 1-014(A) NMRA (allowing a third-party defendant to "assert against the plaintiff any defenses which the third-party plaintiff ***has*** to the plaintiff's claim") (emphasis added). Because Sun 1031 "has" no right to force Mr. Frederick into arbitration with Sun 1031, *supra*, ¶¶ 11, 12, the Third-Party Defendants also do not have this

[10] Indeed, the signature page of the Third-Party Defendants' Motion shows it was drafted by Defendant Sun 1031's lawyers, "Beall and Biehler." **[RP at 1213.]**

right, since they merely stand in Sun 1031's shoes. This follows from the plain language of Rule 1-014.

It is also the express holding of multiple federal and state courts in other jurisdictions. **Lindner v. Meadow Gold Dairies, Inc.**, 515 F. Supp. 2d 1141, 1149 (D. Haw. 2007) (citing Moore's Federal Practice § 14.25 (Matthew Bender 3d) (holding that Rule 14 "recognizes the derivative nature of the third-party defendant's potential liability and permits it essentially to *stand in the defendant's shoes and assert its defenses*") (emphasis added); **Minnesota Landmarks v. M.A. Mortenson Co.**, 466 N.W.2d 413, 415 (Minn. Ct. App. 1991) ("Under Rule 14.01, [third-party defendants] may raise any statute of limitations defense which the third-party plaintiff "has" to plaintiff's claim; in asserting this derivative defense, third-party defendants cannot place themselves in a better position than that held by [the defendants]"); **Bellefeuille v. City & County Sav. Bank**, 43 A.D.2d 335, 338 (N.Y. App. Div. 3d Dep't 1974) (holding that third-party defendant could not assert a defense to plaintiff's claims that was not available to defendant); **Falcon Tankers, Inc. v. Litton Systems, Inc.**, 300 A.2d 231, 237-238 (Del. Sup. Ct. 1972) (holding that defendants' waiver of arbitration defense was binding on the third-party defendant, citing 6 Wright and Miller, Federal Practice and Procedure § 1457); **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 judgment

to the same extent as the defendant, but he is in no better position than the defendant ...") (emphasis added); **Brandt v. Olson**, 179 F. Supp. 363, 371 (N.D. Iowa 1959) (defendant's waiver of improper venue binding on third-party defendant); **Fitzgerald v. American Surety Co.**, 150 N.Y.S.2d 128, 130 (N.Y. City Ct. 1956) ("The aforesaid statute [similar to Rule 14] permits the third-party defendant to assert against the plaintiff only those defenses which the third-party plaintiff ... may have to the plaintiffs' claim"); **Idaho v. Bunker Hill Co.**, 1987 U.S. Dist. LEXIS 14997 (D. Idaho 1987) ("Since third-party defendants are given derivative standing under Rule 14 to raise defenses in the underlying action, their rights do not exceed those of the original defendants"); **Chrysler Credit Corp. v. Empire Mut. Ins. Co.**, 1972 U.S. Dist. LEXIS 10906 (S.D.N.Y. 1972) (interpreting federal Rule 14 to "limit the [third-party defendant] government's defenses to the plaintiff's claim against [defendant] Empire to defenses which Empire itself could raise"); *cf.* **Yelin v. Carvel Corp.**, 119 N.M. 554, 555, 893 P.2d 450, 451 (1995) (explaining the derivative nature of a third-party defendant's status under Rule 14). Thus, as a matter of law, a third-party defendant cannot prevail on a defense where the defendant has failed.

Rule 14 also cannot be used to make the plaintiff sue persons that he does not wish to sue. **Grain Dealers Mut. Ins. Co. v. Reed**, 105 N.M. 586, 588, 734 P.2d 1269, 1271 (1987). The Rule is expressly "designed to preserve the plaintiff's

choice of parties and to prevent the defendant from compelling the plaintiff to amend his pleadings in order to seek relief against a third-party defendant tendered by the original defendant." *Id.* Had Mr. Frederick sued the Third-Party Defendants, then they might have been able to use the Purchase Agreements to force him into arbitration with them, depending on the nature of the claims.[11] But Mr. Frederick did not sue them; he sued Sun 1031. Accordingly, the Third-Party Defendants may only assert those defenses that Sun 1031 "has" to Mr. Frederick's claims, and the trial court ruled that Sun 1031 "has" no defense of arbitration. *Supra*, ¶¶ 11, 12.

Accordingly, this Court must reverse the trial court's November 18, 2010, *Order Granting [Third-Party Defendants'] Motion to Compel Arbitration* [**RP at 1288**] and the November 18, 2010, *Order Denying Plaintiff's Motion for Reconsideration* [**RP at 1291**]. After ruling that Sun 1031 has no right to compel arbitration, the trial court committed fundamental error in granting the Third-Party Defendants' and Sun 1031's joint motion to compel Mr. Frederick to arbitrate with Sun 1031.

[11] Mr. Frederick's securities claims are beyond the scope of the Purchase Agreements and thus are not subject to arbitration. [*Infra*, Point 3.]

POINT 3: MR. FREDERICK'S SECURITIES CLAIMS AGAINST DEFENDANTS ARE NOT WITHIN THE SCOPE OF THE PURCHASE AGREEMENTS.

Preservation and Standard of Review

This issue was preserved for appeal in numerous briefs that Mr. Frederick provided to the trial court in connection with the motion practice described herein. *Supra*, ¶¶ 8, 11-16; *Motion for Summary Judgment on Sun 1031's Third Affirmative Defense* (see February 5, 2010, memorandum in support [**RP at 937**] and March 3, 2010, reply briefs [**RP at 978, 993**]), Sun 1031's original *Motion to Compel Arbitration* (see July 16, 2009 response [**RP at 400**]), Sun 1031's *Renewed Motion to Compel Arbitration* (see March 9, 2010, response [**RP at 1030**]), and the Third-Party Defendants' *Motion to Compel Arbitration* (see August 26, 2010 response)]. Mr. Frederick also raised this issue at multiple hearings. [See **Transcripts of December 10, 2009, May 4, July 1, and October 14, 2010 hearings**.] Thus, Mr. Frederick "fairly invoked" a ruling on this issue in both his filings and oral argument below. Rule 1-216(A) NMRA. The standard of review applicable to Point 3 is *de novo*, same as Points 1 and 2.

Appellant's Contentions

Mr. Frederick's securities claims against Defendants are not within the scope of the Purchase Agreements, and therefore, he cannot be forced into arbitration with Sun 1031 or any other party. First, none of the Defendants are

parties to the Purchase Agreements, and these Agreements expressly provide that there they have no ***third-party beneficiaries***. *Purchase Agreements* ¶ 8.14 ("Buyer and Seller do not intend to benefit any party … that is not a party to this Agreement and no such party shall be deemed to be a third party beneficiary of this Agreement ***or any provision thereof***") (emphasis added); *supra* ¶ 7.] Therefore, because it "is axiomatic under the common law that courts will not undertake to rewrite the parties' agreement," **Ramirez-Eames v. Hover**, 108 N.M. 520, 522, 775 P.2d 722, 724 (1989), Mr. Frederick cannot be forced into arbitration with non-parties such as Sun 1031. The trial court's contrary ruling defeats the express intention of the Purchase Agreement parties not "to benefit any party … that is not a party to this Agreement and [that] no such party shall be deemed to be a third party beneficiary of this Agreement or any provision thereof."[12] *Supra*, ¶ 7.

Second, under Arizona law:

> [In] order for the dispute to be characterized as arising out of or related to the subject matter of the contract, and thus subject to arbitration, it must, at the very least, raise some issue the resolution of which requires a reference to or construction of some portion of the contract itself. The relationship between the dispute and the contract is not satisfied simply because the dispute would not have arisen absent the existence of a contract between the parties. …
>
> If the contract places the parties in a unique relationship that creates new duties not otherwise imposed by law, then a dispute regarding a

[12] Sun 1031's position is clearly unjust, seeking as it does to both avoid contract liability and, at the same time, enforce the contract's arbitration clause despite the no-third-party-beneficiary clause that it drafted.

> breach of a contractually-imposed duty is one that arises from the contract. ... If, on the other hand, the duty alleged to be breached is one imposed by law in recognition of public policy and is generally owed to others besides the contracting parties, then a dispute regarding such a breach is not one arising from the contract, but sounds in tort.

Dusold v. Porta-John Corporation, 807 P.2d 526, 530-531 (Az. Ct. App. 1990); *cf.* **K.L. House Construction, Inc. v. City of Albuquerque**, 91 N.M. 492, 493, 576 P.2d 752, 753 (1978) (holding that "any disputes *pertaining to the performance of the contract*" come within a contract's broad arbitration clause)(emphasis added); **Telecom Italia, SPA v. Wholesale Telecom Corp.**, 248 F.3d 1109, 1116 (11th Cir. 2001) ("Disputes that are not related—with at least some directness—to performance of duties specified by the contract do not count as disputes arising out of the contract, and are not covered by the standard arbitration clause")(internal quotes omitted); **McCanna v. Eagle**, 2009 U.S. Dist. LEXIS 38191 (M.D. Fla. May 5, 2009) ("Where arbitration agreements include the 'relating to' language, the issue of whether a claim relates to the agreement depends on whether it was an immediate, foreseeable result of the performance of contractual duties").

Mr. Frederick's securities claims do not relate to the performance of the Purchase Agreements. *Supra*, ¶ 6. The "duty alleged to be breached is one imposed by" the Securities Act, *supra* ¶¶ 1-3, not the Purchase Agreements. *Cf.* **Dusold**, *supra*. The Purchase Agreements impose duties relating to the purchase

and sale of real estate, not securities. The duties arising under the Securities Act are not "contractually-imposed" and obviously are not owed only to Mr. Frederick, but are "generally owed to others besides the contracting parties." *Id.* Therefore, the securities claims in the Amended Complaint are beyond the scope of the Purchase Agreements; and accordingly, Mr. Frederick cannot be forced to arbitrate these claims with anyone. *Id.* This Court must reverse the trial court's November 18, 2010, *Order Granting [Third-Party Defendants'] Motion to Compel Arbitration* and November 18, 2010 [**RP at 1288**], *Order Denying Plaintiff's Motion for Reconsideration* [**RP at 1291**].

POINT 4: SUN 1031'S THIRD-PARTY COMPLAINT FAILED TO STATE A VALID CLAIM UNDER RULE 1-014, AND THEREFORE, THE THIRD-PARTY DEFENDANTS ARE NOT PROPER PARTIES AND HAVE NO STANDING TO ASSERT MOTIONS AGAINST MR. FREDERICK.

Preservation and Standard of Review

Point 4 was preserved for appeal in the numerous briefs that Mr. Frederick provided to the trial court in connection with the motion practice described herein, including Mr. Frederick's March 9, 2010, *Motion to Strike Sun 1031, LLC's, Third Party Claim* [**RP at 1015**] (see also April 7, 2010, reply [**RP at 1057**]) and his July 6, 2010, *Motion to Reconsider Court's Denial of Plaintiff's Motion to Strike Sun 1031, LLC's Motion to Strike Third Party Claim* [**RP at 1141**]. Mr. Frederick also raised this issue at oral argument on July 1 and October 14, 2010. Thus, Mr.

Frederick "fairly invoked" a ruling on this issue. Rule 1-216(A) NMRA. Moreover, the trial court's ruling that Sun 1031 has a right under common law to be indemnified for its active violations of the Securities Act constitutes "fundamental error." Rule 1-216(B)(2) NMRA (creating exception to rule of preservation).

The standard of review is abuse of discretion. **Yates Exploration v. Valley Improvement Ass'n**, 108 N.M. 405, 410, 773 P.2d 350, 355 (1989). It constitutes "abuse of discretion" for a trial court "to refuse to dismiss a third-party claim which [does] not meet the standards of Rule 1-014." **Yelin v. Carvel Corp.**, 119 N.M. 554, 555, 893 P.2d 450, 451 (1995) (*quoting* **Yates**).

Appellant's Contentions

Mr. Frederick's Amended Complaint is based entirely on Defendants' "active" violations of the Securities Act. *Amended Complaint.* None of Mr. Frederick's causes of action seek to impose vicarious liability on Defendants or to otherwise hold them liable for merely "passive" conduct. Therefore, as a matter of law, "traditional" common law indemnity is not available to Sun 1031:

> The purpose of traditional indemnification is to allow a party who has been held liable *without active fault* to seek recovery from one who was actively at fault. Thus the right to indemnification involves whether the conduct of the party seeking indemnification was passive and not active or in *pari delicto* with the indemnitor.

Amrep Southwest v. Shollenbarger Wood Treating (In re Consolidated Vista Hills Retaining Wall Litig.), 119 N.M. 542, 546, 893 P.2d 438, 442 (1995) (emphasis added). Moreover, it is against public policy to allow indemnification of persons who actively violate securities laws. *Cf.* **Eichenholtz v. Brennan**, 52 F.3d 478 (3d Cir. N.J. 1995) ("Generally, federal courts disallow claims for indemnification because such claims run counter to the policies underlying the federal securities acts"); **Globus v. Law Research Service, Inc.**, 418 F.2d 1276 (2d Cir. N.Y. 1969). Finally, Sun 1031's third party complaint fails to allege the existence of any agreement or fact that would, if proven, obligate the Third-Party Defendants to indemnify Sun 1031 if it should be found liable to Mr. Frederick. **Yates** at 410, 773 P.2d at 355 (upholding dismissal of third-party complaint where defendant had "not presented this Court with any legal theory which would form the basis of a right to relief under the substantive law"). Therefore, pursuant to Rule 1-014(A), the trial court abused its discretion by not striking Sun 1031's third party complaint.[13]

Because Sun 1031's third party complaint fails to state a valid claim under Rule 1-014(A), the Third-Party Defendants are not proper parties below and have no standing to participate in the case below. Therefore, this Court must reverse the trial court's November 18, 2010, *Order Granting [Third-Party Defendants']*

[13] Rule 1-014(A) expressly allows motions to strike third party complaints.

Motion to Compel Arbitration [**RP at 1288**], the November 18, 2010, *Order Denying Plaintiff's Motion for Reconsideration* [**RP at 1291**], and the *Order Denying Plaintiff's Motion to Strike Third Party Complaint* [**RP at 1149**].

CONCLUSION

For all the foregoing reasons, Mr. Frederick respectfully requests this Court to reverse the trial court's November 18, 2010, *Order Granting [Third-Party Defendant's] Motion to Compel Arbitration* [**RP at 1288**], the November 18, 2010, *Order Denying Plaintiff's Motion for Reconsideration* [**RP at 1291**], and the *Order Denying Plaintiff's Motion to Strike Third Party Complaint* [**RP at 1149**] and to remand this matter back to the trial court for a decision on the merits.

REQUEST FOR ORAL ARGUMENT

This case involves complex securities claims, multiple Defendants, and multiple Third-Party Defendants. Mr. Frederick and the Third-Party Defendants are signatories to Purchase Agreements that include an arbitration clause but that also include a "no-third-party-beneficiary clause." Mr. Frederick has no contractual relationship with any Defendant and he has no claims against the Third-Party Defendants, yet the trial court inexplicably ordered him to into arbitration with "all parties." The complexity relating to the underlying securities claims and the multiple parties in this case may unnecessarily complicate the relatively simple issue of whether the Third-Party Defendants and Sun 1031 can

jointly force Mr. Frederick into arbitration with Defendant Sun 1031 or any other Defendant. Accordingly, oral argument will enable counsel to assist the Court in sorting through the complexity, much of which is not material to the immediate issue on appeal, *i.e.*, whether the Third-Party Defendants and Sun 1031 can jointly compel Mr. Frederick to arbitrate with Sun 1031.

Respectfully submitted,

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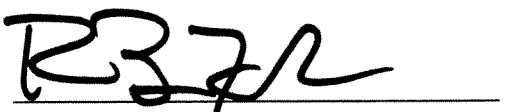
Plaintiff-Appellant, *pro se*

CERTIFICATE OF SERVICE: I, an attorney licensed in the State of New Mexico, certify that mailed copies of the foregoing paper, first class, to NAI the Vaughan Company, 6753 Academy, Albuquerque, NM 87109, H. Ray Knight, 2310 West Monroe Street, Phoenix, AZ 85009, and on Gregory L. Biehler, Beall & Biehler, 6715 Academy Road, NE, Albuquerque, NM 87109 (Attorney for Defendant Sun 1031), and to Steven C. Henry, P.O. Box 1249 Corrales, NM 87048 (Attorney for Third-Party Defendants) on the **14th day of June 2011**.



Robert Bruce Frederick