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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.

COURT OF APPEALS OF NEW MEXICO
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APPELLANT'S REPLY BRIEF

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

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Argument

Plaintiff-Appellant ("Mr. Frederick") hereby replies to the *Response Brief in Chief* ("*Response*") filed by Appellee Sun 1031 ("Sun 1031"), on behalf of itself and the Third-Party Defendants ("the TPDs").[1]

1. The allegations and claims in the Amended Complaint are based on Defendants' illegal offers of securities and *not* on the Purchase Agreements".

Sun 1031 attempts to implicate the Purchase Agreements by repeatedly arguing that Mr. Frederick's claims are based on a "*sale of real estate.*" *Response* at 9, 10-11 ¶¶ 4 & 6, 16, 35-37. This is not true. Defendants' illegal "*offers of securities*" in New Mexico is the sole focus of Mr. Frederick's 23-page Amended Complaint. **RP 868**. The offers made by Sun 1031 and the other Defendants violated several provisions of the New Mexico Securities Act of 1986 ("the Act"), which was enacted "to protect individuals from falling prey to unscrupulous, fraudulent securities-related practices." **State v. Rivera**, 2009 NMCA 132, 31, 147 N.M. 406, 223 P.3d 951. Defendants violated the Act by offering securities in New Mexico without proper licensing (Counts 1 and 2), offering unregistered securities (Count 3), offering securities in a fraudulent and deceitful manner (Counts 4 and 5), and by conspiring among themselves to offer securities in New

[1] Sun 1031, third-party plaintiff, filed a third-party complaint against the TPDs.

Mexico in violation of the Act. **RP 869**; NMSA 1978, §§ 58-13B-3(A), 58-13B-5(A), 58-13B-20, and 58-13B-30.

The Amended Complaint focuses on Defendants' illegal "offers," rather than on "sales," because of the complex way in which Sun 1031 structured the transaction. Defendants' offers of securities in New Mexico are clearly evidenced in writing,[2] but the actual securities consist of multiple interconnected documents and the "sales" were closed in three different foreign states.[3] The TPDs, which Sun 1031 created, merely conveyed real estate title to Mr. Frederick, in foreign states, in accordance with the Purchase Agreements. The Purchase Agreements are *not* securities, and Mr. Frederick does not allege that they are. The Purchase Agreements were fully performed, without breach, and are not material to Mr. Frederick's claims.

The TPDs never offered Mr. Frederick securities or otherwise violated the Act. **RP 1236** at 1-2. Sun 1031 and the other Defendants violated the Act. For example, in Count 3, Mr. Frederick alleges that Defendants illegally offered unregistered securities in New Mexico. Pursuant to the Act:

> It is unlawful for a person to *offer* to sell ... any security in New Mexico unless:

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[2] See Mr. Frederick's *Memorandum in Support of Motion for Summary Judgment of Count 3* and related reply brief. **RP1104** and **RP1174; RP 868**.

[3] The transaction is described in the Amended Complaint, **RP 868**, and in several motions. See **RP 937, 978, 993, 1015, 1030, 1057, 1174 and 1236**.

A. the security is registered under the [Act];
B. the security or transaction is exempt under that act; or
C. the security is a federal covered security.

NMSA 1978, § 58-13B-20 (emphasis added.) An "offer to sell" includes:

> ... every attempt or offer to dispose of, or solicitation of an offer to purchase, a security or interest in a security for value."

NMSA 1978, 58-13B-2(T). As held by the United States Supreme Court based on virtually identical language in federal securities laws:

> [The] range of persons potentially liable under [15 U.S.C. 77l] is not limited to persons who pass title. The inclusion of the phrase "solicitation of an offer to buy" within the definition of "offer" brings an individual who engages in solicitation, an activity not inherently confined to the actual owner, within the scope of [15 U.S.C. 77l].

Pinter et al. v. Dahl, 486 U.S. 622, 643 (1988). Thus, "there is nothing incongruous about forcing a ... solicitor," such as Sun 1031, "to assume ownership of the securities." **Pinter** at 647.

Similar to federal securities laws, Section 58-13B-40 of the Act creates a private right of action, which is the basis of the Amended Complaint. **RP 868.** Counts 1 through 5 allege that Defendants' offers violated various provisions of the Act [**RP 868** at 19 – 22], and these violations are expressly redressable under Section 58-13B-40. Contrary to Sun 1031's suggestion, *Response* at 28, Mr. Frederick is not seeking "rescission" of the Purchase Agreements. The remedy he seeks is based entirely on Section 58-13B-40 of the Act [**RP 868 at 22-23**], which

requires solicitors to pay for and "assume ownership of the securities" that they illegally offered to the public in New Mexico.

2. Arbitration is strictly a matter of contract.

Sun 1031 argues that courts can "force" parties into arbitration "in order to avoid inconsistent judgments." *Response* at 16-17. This is not true. "Arbitration is strictly a matter of contract; if the parties have not agreed to arbitrate, the courts have no authority to mandate that they do so." **Murken v. Suncor Energy, Inc.**, 2005 NMCA 102, 10, 138 N.M. 179, 117 P.3d 985 (internal cite omitted). Also:

> As a contractual remedy, arbitration clauses are governed by contract law. ... *A court will not rewrite a contract for the parties and, in its interpretation, the court will apply the plain meaning of the contract language.* ... "The terms of the agreement define the scope of the jurisdiction, conditions, limitations and restrictions on the matters to be arbitrated." *Therefore, the court's inquiry is whether the parties have agreed to arbitrate the matter under dispute.* ... When a reasonable relationship between the subject matter of the dispute and the underlying agreement exists, the dispute is within the arbitration provision and should be arbitrated.

Santa Fe Techs. v. Argus Networks, 2002 NMCA 30, 51, 131 N.M. 772, 42 P.3d 1221 (internal cite omitted, emphasis added). Mr. Frederick did not agree to arbitrate the claims presented in his Amended Complaint, nor did he agree to arbitrate *any* claims with Sun 1031 or the other Defendants.

3. None of the Defendants are parties to the Purchase Agreements.

Sun 1031 argues, without basis, that it was a party to the Purchase Agreements. *Response* at 10 ¶ 4. The Purchase Agreements are in the record and

the parties to these Agreements are clearly identified therein.[4] Sun 1031 is not a party. Indeed, just a few pages after claiming to be a "party" to the Purchase Agreements, Sun 1031 admits that it and the other Defendants are "non-signatories" to these Agreements. *Response* at 15, 28. Therefore, except for possible sanctions, this Court should disregard Sun 1031's false claim.

4. The express intent of the Purchase Agreement parties was that no third party should benefit from any provision of the Agreements.

Sun 1031 argues that it can enforce the arbitration clause of the Purchase Agreements as a non-signatory. *Response* at 8 and 38. Its argument conflicts with the express intent of the actual parties to these Agreements as well as the trial court's unappealed rulings on this issue. The Agreements provide:

> 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.*

RP 937 (¶ 8.14 of Exhibits A, B and C) (emphasis added). Paragraph 8.14 expressly precludes Sun 1031, as a non-party, from enforcing or otherwise "benefitting" from any provision of the Purchase Agreements.

Contrary to Sun 1031's contention, *Response* at 20, the trial court unequivocally ruled that Sun 1031 cannot compel arbitration. Sun 1031 set up

[4] 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 937.**

arbitration as its third affirmative defense. **RP 922**. In response to Mr. Frederick's motion for summary judgment on this defense [**RP 935**], the trial court ruled:

> Based solely on the undisputed facts currently before the Court, and the applicable law, [Mr. Frederick] is entitled to summary judgment on his *Motion for Summary Judgment on Sun 1031, LLC's Third Affirmative Defense.*

RP 1081 (May 17, 2010 *Order* ¶ 5). As explained by the trial court:

> ... the posture of this case as it stands now ... is 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. This ruling was never appealed, vacated or modified. It was "without prejudice" (*Response* at 12-13 and 20), but only with respect to the TPDs' rights:

> ... the Court cannot finally determine the issue of whether [Mr. Frederick] can be compelled to arbitrate his claims until the Court rules on [Mr. Frederick's] *Motion to Strike Sun 1031, LLC's Third-Party Claim* and Sun 1031, LLC's *Renewed Motion to Compel Arbitration.*

RP 1081 ¶ 6; July 1, 2010 Tr. at 13, Lines 15-25 (explaining that "without prejudice" related to TPDs). The trial court denied Sun 1031's *Renewed Motion to Compel Arbitration*, and this denial was also never appealed, vacated or modified. **RP1151**. Thus, Sun 1031 has no right to compel arbitration.

5. There are no "cross claims" against the TPDs.

Nothing in the record supports Sun 1031 assertion that there are "cross-claims" pending against the TPDs. *Response* at 16. The record reveals no "cross claims" among the parties. The record also reveals no claims of *any kind* as between Mr. Frederick and the TPDs.

6. The trial court's November 18, 2010, *Order Granting Motion to Compel Arbitration* ("First Order") ordered only Mr. Frederick and Sun 1031 into arbitration.

Sun 1031 argues that the trial court intended by its First Order [**RP 1288**] to send "all" of the parties into arbitration. *Response* at 14 ¶ 16. This conflicts with the express terms of the Order. The First Order required Mr. Frederick "to arbitrate all of this claims in this matter against Defendant Sun 1031 ...." **RP 1288**. The First Order partially "stayed" the litigation only as to the claims against Sun 1031, not Defendants Knight and Vaughan, and only "until such time as arbitration of [Mr. Frederick's] claims against Sun 1031 is final." Id. The First Order cites Rule 1-054(b)(2) and declares itself a "final judgment as to all of [Mr. Frederick's] claims against Sun 1031LLC." **RP1288**. Rule 1-054(b)(2) applies only to final judgments "adjudicating all issues as to one or more, but fewer than all parties rulings." Thus, the First Order unequivocally sent only Mr. Frederick and Sun 1031 into arbitration.

7. Sun 1031's Third-Party Complaint failed to state a claim.

Contrary to Sun 1031's argument, *Response* at 35-37, Sun 1031's Third-Party Complaint failed to state a valid claim under Rule 1-014, because it alleged no facts capable of supporting a plausible "right to relief under the substantive law." **Yates Exploration v. Valley Improvement Ass'n**, 108 N.M. 405, 409, 773 P.2d 350, 354 (1989). First, the argument that Sun 1031 is entitled to indemnity because Mr. Frederick is somehow trying to impute the TPDs' liability onto it (*Response* at 33), is identical to the third-party plaintiff's failed argument in **Yates**:

> VIA's [*i.e.*, the third-party plaintiff's] argument ... seems to be that since the plaintiffs seek to impute Horizon's [*i.e.*, the third-party defendant's] supposed liability to VIA, VIA is entitled to implead Horizon, the actual wrongdoer, under principles of indemnification. See **Rio Grande Gas Co. v. Stahmann Farms Inc.**, 80 N.M. 432, 457 P.2d 364 (1969) ("A common example [of the right to indemnity] is a case where a blameless employer recovers from a negligent employee, after the employer has been held liable to the injured third person upon the theory of respondeat superior"). *However, neither the plaintiffs nor VIA have ever articulated a legal theory by which VIA can be made liable for Horizon's misdeeds. Unsupported legal conclusions need not be accepted by this Court. ... Since there is no basis for claiming that the plaintiffs can impute liability to VIA, this argument in support of the third-party claim must fail.*

Yates at 409, 773 P.2d at 355 (emphasis added). As in **Yates**, Sun 1031 cannot "articulate[] a legal theory by which [it] can be held liable for [the TPDs'] misdeeds," because Sun 1031 is not being held liable for the misdeeds of a third party; it is being held liable for its own misdeeds.

Second, Sun 1031 has failed to state any traditional claim for indemnity. **Yates** at 408, 773 P.2d at 353 ("Traditionally," in order to state a claim under Rule 1-014, "derivative or secondary liability to the defendant, on the basis of indemnity, contribution, or some other theory, is considered to be essential"), citing, **Grain Dealers Mutual Insurance Co. v. Reed**, 105 N.M. 586, 734 P.2d 1269 (1987) and 6 C Wright A. Miller, *Federal Practice and Procedure* 1446 (1971). The record contains no indemnity contract. The Amended Complaint does not allege *respondeat superior* or invoke any theory of vicarious liability, but is instead based entirely on Sun 1031's "active fault." Therefore, "traditional indemnity," which applies only to defendants "who [have] been held liable without active fault," is unavailable to Sun 1031. **Amrep Southwest v. Shollenbarger Wood Treating**, 119 N.M. 542, 893 P.2d 438, 442 (1995).

Third, neither the record nor the law supports Sun 1031's claim that it and the TPDs are "concurrent tortfeasors." *Response* at 35-36. Although the Supreme Court has "relaxed the traditional rule in *negligence suits* in order to allow ... impleader of concurrent tortfeasors," **Yates** at 408, this is not a "negligence suit." Mr. Frederick does not allege that Sun 1031 was "negligent" or that it and the TPDs engaged in "concerted action." *Brief in Chief* at 6 ¶ 6; **RP 868**. The record does not support Sun 1031's contrary argument, *Response* at 35, which appears improperly to rely on the Original Complaint or facts not in evidence.

8. Under Rule 1-014, the TPDs may only assert those defenses that Sun 1031 may have to Mr. Frederick's claims.

Sun 1031's argument—that a third-party defendant can assert any defense it wants regarding the plaintiff's claims against a given defendant, *Response* at 23—conflicts with the express language of Rule 1-014(A). This Rule only permits a third-party defendant to "assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim." When "a rule of civil procedure addresses the specific situation before a court, a trial judge is not free to ignore the dictates of the rule ...." **Vigil v. Thriftway Mktg. Corp.**, 117 N.M. 176, 179, 870 P.2d 138, 141 (Ct. App. 1994).

Sun 1031 accuses Mr. Frederick of "misconstrue[ing] the holding of every case" that explains the dictates of Rule 1-014. *Response* at 23. Sun 1031 is the one misconstruing the case, as demonstrated by its misplaced reliance on **Lindner v. Meadow Gold Dairies, Inc.**, 515 F. Supp. 2d 1141 (D. Haw. 2007). *Response* at 23. In that case, plaintiff Lindner was the lessor under a lease with defendant-lessee Meadow Gold. Id. at 1144. Meadow Gold assigned the lease to the third-party defendant, Southern Foods Group, L.P. ("SFG"). Id. at 1156. Thereafter, Lindner sued Meadow Gold and Meadow Gold impleaded SFG under Rule 1-014.

The express holding in Lindner is that Rule 1-014 permits a third-party defendant to "stand in the defendant's shoes" and to assert whatever defenses the defendant may have to the plaintiff's claims against the defendant. Id. at 1149

("Rule 14(a) therefore allows [third-party defendant] SFG to stand in [defendant] Meadow Gold's shoes for the purposes of defending against [plaintiff] Lindner's claims.") Consistent with Mr. Frederick's interpretation of Rule 1-014, *Brief in Chief* at 20, the third-party defendant in Lindner did not assert defenses that were unavailable to the defendant/third-party plaintiff.

Lindner lends no support to Sun 1031's contention that it can compel arbitration. The lease between plaintiff Lindner and defendant Meadow Gold, which Meadow Gold assigned to third-party defendant SFG, formed the entire basis of Lindner's complaint and contained an arbitration clause that expressly covered Lindner's "*precise claims.*" Id. at 1154. In stark contrast to the plaintiff in Lindner, Mr. Frederick is not relying on a contract containing an arbitration clause to state claims against Sun 1031. Sun 1031 is not a party, assignee, or third-party beneficiary of any arbitration contract, and the trial court ruled that Sun 1031 cannot compel arbitration. Since Sun 1031 cannot compel arbitration, neither can the TPDs. Although Rule 1-014 permits the TPDs to "stand in the shoes" of Sun 1031, it places them in no better position than Sun 1031.

9. Points 2 and 4 are properly before this Court.

Neither the record nor the law supports Sun 1031's argument that Point 2 was not preserved:

> To preserve an issue for review on appeal, it must appear that [the] appellant fairly invoked a ruling of the trial court on the same grounds

> argued in the appellate court. ... The primary purposes for the preservation rule are: (1) to specifically alert the district court to a claim of error so that any mistake can be corrected at that time, (2) to allow the opposing party a fair opportunity to respond to the claim of error and to show why the district court should rule against that claim, and (3) to create a record sufficient to allow this Court to make an informed decision regarding the contested issue.

Kilgore v. Fuji Heavy Indus., 2009 NMCA 78, 50 (internal cites omitted). In Point 2 Mr. Frederick argues that no authority supported the TPDs' motion to compel Mr. Frederick to arbitrate with Sun 1031. Mr. Frederick "fairly invoked a ruling" on this issue several times. **RP 978** at 6-8 (under heading "3—the presence of any third-party defendant [is not] relevant to the issue of arbitration"); **RP 1236** at 6 ("the third-party defendants have no right to compel Plaintiff to arbitrate, because he has asserted no claims against them and no known legal authority allows them to compel arbitration of claims made against another party, i.e., against Sun 1031"); October 14, 2010 Tr. at 7 (Mr. Frederick's "claims run against Sun 1031" and he "never agreed to arbitrate any claims against Sun 1031 [and] compelling [him] to do so now [on the TPDs' motion] would require the Court to reverse itself and to rewrite the purchase agreements"). Mr. Frederick also filed a motion for reconsideration pursuant to Rule 1-059 NMRA, citing additional legal authority and raising Point 2 verbatim. **RP 1265**. This motion did not introduce new evidence or assert a different position; nor did it prejudice the other parties.

Sun 1031 argues that Point 4 is not properly before this Court, because the trial court's denial of Mr. Frederick's motion to strike was "interlocutory" and the trial court denied Mr. Frederick's request for interlocutory review.[5] *Response* at 17, 33. While this is true, the trial court thereafter entered two "final judgments" on the TPDs' motion, one ordering Mr. Frederick into arbitration with Sun 1031 [**RP 1288**] and another (inexplicably) ordering "all parties" into arbitration. **RP 1291**. These final judgments are appealable, Rule 1-054 NMRA, and they are in fact the subject of the instant appeal. A favorable appellate ruling in Mr. Frederick's favor on Point 4 would require complete reversal of the trial court's final judgments. Point 4 is thus properly before this Court.

Finally, the trial court committed both fundamental and plain error when it permitted Sun 1031 to implead the TPDs (Point 4), and again when it granted the TPDs' motion to compel Mr. Frederick to arbitrate with Sun 1031 and the other Defendants (Points 1 and 2). In civil cases, fundamental error occurs where "substantial justice was not done ... or, [where] there was a "total absence of anything in the record of the case showing a right to relief[.]" **Diversey Corp. v. Chem-Source Corp.**, 1998 NMCA 112, 40, 125 N.M. 748, 965 P.2d 332. Plain errors include those that "are obvious or ... [that] otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." **State v.**

[5] Mr. Frederick argues in Point 4 that the trial court erred in not striking Sun 1031's third party complaint. *Brief in Chief* at 26-29.

Summerall, 105 N.M. 82, 82-83, 728 P.2d 833, 833-834 (1986). Neither the record nor the law supports the trial court's rulings at issue in this appeal. These rulings were contrary to the express requirements of Rule 1-014, contrary to the substantive law of arbitration, and unjustly denied a New Mexico citizen basic access to the courts. NMSA 1978, § 44-7A-8(c) ("If the court finds that there is no enforceable agreement, it may not pursuant to Subsection (a) or (b) order the parties to arbitrate.") This Court can and should correct fundamental and plain errors regardless of preservation. Rules 11-103(D) & 12-216(B) NMRA.

CONCLUSION

The record on appeal consists of the Amended Complaint and the numerous motions cited by the parties. It reveals that Sun 1031 is the architect of a scheme to "bundle" foreign commercial real estate together with property management and other services. Mr. Frederick alleges that the "bundle" created by Sun 1031 constitutes an "investment contract," a type of security regulated under the Act and federal securities laws. The Amended Complaint alleges that Sun 1031 and the other Defendants offered unregistered "investment contract" securities to Mr. Frederick, and to other New Mexicans, and that Defendants' offers were misleading, fraudulent, and otherwise in violation of the Act. The Purchase Agreements are *not* "investment contracts," and Mr. Frederick does not allege that they are. The record also shows that: (1) although Sun 1031 drafted the Purchase

Agreements, it declined to be a party to these Agreements; (2) Sun 1031 created the TPDs, whose only relevant function was to transfer foreign real estate title under the Purchase Agreements; (3) the Purchase Agreements that Sun 1031 drafted include a clause (¶ 8.14) that expressly precludes non-parties from enforcing any provision of the Agreements; (4) the Amended Complaint makes no reference to the Purchase Agreements or the TPDs; and that (5) the trial court ordered Mr. Frederick to arbitrate with Sun 1031 (and the other Defendants) on the motion of the TPDs, after ruling (twice) that Sun 1031 has no right to compel arbitration.

On the basis of this record and the law, the trial court committed three reversible errors: It erred in denying Mr. Frederick's motion to strike Sun 1031's third-party complaint; it erred in ordering Mr. Frederick into arbitration with Sun 1031; and it erred in ordering "all parties" into arbitration.

WHEREFORE, Mr. Frederick respectfully requests this Court to reverse the trial court's orders contained in the record at **RP 1147, 1149, 1288 and 1291**. As a matter of law, Mr. Frederick is entitled to prosecute his claims against Defendants in a court of law.

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 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 **11th day of August 2011**. NAI the Vaughan Company and H. Ray Knight have no current address on record with the court.

R. Bruce Frederick