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DISTRICT COURT
CLARK COUNTY, NEVADA

EUGENE J. GORLICK and JEANNE M. GORLICK as general partners of THE GORLICK FAMILY LIMITED PARTNERSHIP; DANIEL M. GORLICK, individually; JANET S. GREGORY, individually; JOHN B. SLIGHT, individually; KENNETH GRAGSON and YVONNE GRAGSON, Trustees of THE KENNETH GRAGSON & YVONNE GRAGSON FAMILY TRUST; NORTH MAIN, LLC, a Nevada limited liability company; BONNIE H. GRAGSON and KENNETH RAY GRAGSON, Trustees of THE GRAGSON 1988 TRUST; RODNEY F. REBER as general partner of THE RODNEY F. REBER FAMILY LIMITED PARTNERSHIP; LINDA REBER, individually; LOIS LEVY, Trustee of THE LOIS LEVY FAMILY TRUST DTD 02/11/1993; CHARLES E. THOMPSON, Trustee of THE CHARLES E. THOMPSON 1989 TRUST; CONNIE LAVERNE THOMPSON, individually and as Trustee of THE CONNIE LAVERNE THOMPSON FAMILY TRUST DTD 12/12/05; DAWN J. GERKE and DAWN J. GERKE, Trustees of THE BYRON TRUST, DTD 05/02/1985; DAVID J. WILLDEN, Trustee of THE DAVID J. WILDEN CHARITABLE REMAINDER UNI TRUST, dated 12/28/1987; CHERYL ROGERS-BARNETT and LARRY BARNETT, Trustees of THE ROGERS-BARNETT FAMILY TRUST, DTD 11/28/2003

Plaintiff,

vs.

CASE NO. A-09-590202-B
DEPT NO. XIII

DEFENDANT THE BRITTON GROUP, A NEVADA PROFESSIONAL CORPORATION, D/B/A ROI APPRAISAL/BRITTON GROUP'S MOTION TO DISMISS

DATE:

TIME:

ASPEN FINANCIAL SERVICES, INC., a Nevada corporation; ASPEN FINANCIAL SERVICES, LLC, a Nevada limited liability company; JEFFREY B. GUINN, individually; MILANO RESIDENCES, LLC, a Nevada limited liability company; JOSHUA TREE, LLC, a Nevada limited liability company; SUSAN MARDIAN, individually; HK INVESTMENTS, LLC, a Nevada limited liability company; NEVADA CONSTRUCTION SERVICES, a Nevada corporation; THE BRITTON GROUP, a Nevada professional corporation, d/b/a ROI Appraisal/Britton Group; and DOES I THROUGH X, and ROE BUSINESS ENTITIES I through X, inclusive,

Defendants.

DEFENDANT THE BRITTON GROUP, a Nevada professional corporation, d/b/a ROI Appraisal/Britton Group (hereinafter referred to as "ROI") hereby moves for a dismissal of all claims that have been asserted against him in Plaintiff's Complaint, pursuant to NRCP 12. This motion is made and based upon the grounds that, even assuming the truth of the allegations set forth in the Complaint, (i) Plaintiff's negligent misrepresentation claim lacks the essential elements of reliance and damage resulting therefrom, (ii) Plaintiff's negligence claim lacks the essential element of causation, (iii) Plaintiff's negligence claim is barred by the statute of limitations, and (iv) all of Plaintiff's claims are barred by the economic loss doctrine.

These issues will be more fully addressed in the memorandum of points and authorities which follow.

DATED this 5th day of June, 2009.

Respectfully submitted,
FOLEY & OAKES, PC

J. Michael Oakes, Esq.
Nevada Bar No. 1999
850 East Bonneville Avenue
Las Vegas, Nevada 89101
Attorneys for Defendants ROI

NOTICE OF MOTION

TO: Aaron R. Maurice, Esq., and Scott R. Taylor, Esq., of WOODS ERICKSON WHITAKER & MAURICE, LLP, attorneys for Plaintiffs.

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned will bring the following DEFENDANT THE BRITTON GROUP, a Nevada professional corporation, d/b/a ROI Appraisal/Britton Group's Motion to Dismiss on for hearing before the above-entitled Court on the 13 day of July, 2009, at the hour of 9 .m. of said date, in Department No. XIII, or as soon thereafter as counsel can be heard.

DATED this 5th day of June, 2009.

FOLEY & OAKES, PC

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MEMORANDUM OF POINTS AND AUTHORITIES

A. STATEMENT OF THE CASE

The current economic situation is absolutely unprecedented. According to a May 6, 2009 report on CNNMoney.com, Las Vegas has been the hardest hit of any area in the country "...where a whopping 67.2% of homeowners would have to bring cash to the table if they sold their homes." The decline in values has extended to all real estate holdings, whether they be residential, commercial, or office. As a result, countless individuals and entities that have invested in real estate related transactions have seen the value of their investments plummet, and are searching for avenues of recovery that were never contemplated at the time of making their original investments. This case, insofar as it relates to The Britton Group, a Nevada professional corporation, d/b/a ROI Appraisal/Britton Group (hereafter "ROI"), is one such instance.

The Plaintiffs are a group of entities and individuals that invested in various loan transactions brokered by defendant Aspen Financial Services, Inc. (hereafter "Aspen"). Their investments are commonly referred to as "hard money loans". They involve the type of loans that institutional lenders would ordinarily avoid, while offering high interest rates to compensate for the increased risk. In good times, these rates are extraordinarily attractive. However, when sweeping unexpected downturns occur, those who chose to take the risk are left "holding the bag."

The Plaintiffs are certainly not unique in this respect. The current economic situation is so dire that probably every single hard money loan that closed in 2005 and 2006 is now "undersecured" or "underwater." It is within this backdrop that the Court should consider the role of ROI in relation to the transactions that preceded this Complaint.

ROI was retained by Aspen to prepare appraisals. ROI never had any direct relationship with any of the Plaintiffs. To the contrary, although the Complaint sets forth numerous

allegations of wrongdoing on the part of Aspen, the role of ROI, as set forth in the Complaint, was limited to preparing appraisals for Aspen. These appraisals were subsequently forwarded by Aspen to the Plaintiffs, as part of their closing packages. Specifically, there are three ROI appraisals mentioned in the Complaint, briefly described as:

a. the April 20, 2005 appraisal that was included in the closing package given to investors by Aspen, as described in paragraphs 86 and 87 of the Complaint. As alleged by Plaintiffs, the packages containing this appraisal "were not sent by Aspen to the Plaintiffs until May 6, 2005 -- the day after the $17,700,000 Loan closed." Furthermore, this loan has been paid off, so although ROI's appraisal is mentioned as part of the narrative of events, it cannot form the basis for a claim against ROI.

b. the November 8, 2006 appraisal that was included in the closing package given to investors by Aspen, as described in paragraph 103 and 104 of the Complaint. As alleged by Plaintiffs, the packages containing this appraisal "were not sent by Aspen to the Plaintiffs until December 29, 2006 -- the day the $19,240,000 Loan closed."; and

c. the appraisal for the "Extra Land" that was being offered to the Plaintiffs as additional collateral by the Borrower in a workout proposal that was rejected by the Plaintiffs, as described in paragraphs 175 and 178 of the Complaint.

There are two causes of action that are asserted directly against ROI.[1] These are the Ninth Cause of Action for negligence (alleging that ROI failed to use reasonable care in preparing its

[1] The first three causes of action, for fraud, conversion, and conspiracy are loosely labeled as being applicable to "All Defendants." However, the actual charging allegations incorporate all of the alleged wrongful acts of Aspen, and are not directed towards ROI. Thus, it is unclear whether Plaintiffs intend for those causes of action to apply to ROI. If that is their intention, then the fraud claim must fail due to the lack of essential elements as argued more fully hereinafter, or, alternatively, must be pled with more specificity under NRCP 9(b), the conversion claim must be dismissed due to the lack of any allegation that ROI received funds, and the conspiracy claim must be dismissed, as it is solely premised upon the fraud claims (See paragraph 200 of the Complaint).

appraisals) and the Tenth Cause of Action for negligent misrepresentation (alleging that ROI made unspecified "material misrepresentations").

This motion seeks a dismissal of all of the claims against ROI. There are several alternative grounds for this request, and they are:

1. Concerning the negligent misrepresentation claim, taking the allegations of the Complaint as true, the loans had closed prior to or simultaneously with the sending of the appraisals to the Plaintiffs, and, therefore, the essential elements of justifiable reliance and damage resulting therefrom are absent.

2. Similarly, concerning the negligence claim, the allegation that the loans had closed prior to or simultaneously with the sending of the appraisals to the Plaintiffs negates Plaintiffs' ability to meet the 'but for' test required to establish causation.

3. Concerning the negligence claim, the two year statute of limitations bars Plaintiff's claim.

4. Concerning the claims for negligence and negligent misrepresentation, the economic loss doctrine, which bars unintentional tort actions when the plaintiff seeks to recover "purely economic losses", bars such claims.

B. LEGAL ARGUMENT

1. For the Negligent Misrepresentation Claim, the Complaint shows that there was no reliance upon the ROI Appraisal by the plaintiffs and no damage to the Plaintiffs resulting from their reliance.

The argument for this portion of the motion is simple. It boils down to this: it is impossible to rely upon representations contained in an appraisal that you did not have.

The elements of justifiable reliance, and damage resulting from such reliance, are completely absent from the Complaint. In paragraphs 45 and 46 of the Complaint, the Plaintiffs allege that Aspen's practice was to mail an Opening Package to the Plaintiffs, which contained an

appraisal, but such materials were ordinarily provided only after escrow on the loans had already closed.

With regard to the first appraisal, which was preceding the $17,700,000 loan, (which has been paid off as described in paragraph 69 of the Complaint), the Plaintiffs allege that the appraisal was not sent by Aspen until the day after the loan had closed. *See* paragraph 86 of the Complaint.

With regard to the second appraisal, preceding the $19,240,000 loan, (which is still in effect and secured by a first position deed of trust), as described in paragraph 69 of the Complaint, the Plaintiffs allege that the appraisal was not sent by Aspen until the day the loan had closed. *See* paragraphs 103 and 104 of the Complaint.

Finally, with regard to the third appraisal, described as the appraisal of the "Extra Land", the Complaint alleges that ROI's valuation opinion was given to the Plaintiffs along with a letter from Aspen, asking the Plaintiffs to vote on various actions in response to a workout proposal from the Borrower. *See* paragraph 172 of the Complaint. Ultimately, Plaintiffs voted to decline the borrower's offer to grant the "Extra Land" as additional collateral, and, instead, chose to foreclose upon their existing encumbrance and pursue a deficiency judgment against the guarantors. Thus, Plaintiffs did nothing in reliance upon this appraisal. *See* paragraph 178 of the Complaint.

The elements of a fraud claim, including a claim for negligent misrepresentation, require that there be justifiable reliance upon the misrepresentation and damages resulting therefrom. *See* Bulbman, Inc. vs. Nevada Bell, 108 Nev. 105, A25 P.2d 588 (1992), citing Lubbe vs. Barba, 91 Nev. 596, 540 P.2d 115 (1975). The allegations in the Complaint negate the existence of these elements relative to the making of the appraisals by ROI. In the absence of these essential elements, the negligent misrepresentation claims against ROI must be dismissed.

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2. For the Negligence Claim, there is no causation.

The element of causation is germane to any cause of action for negligence. See Dow Chemical Company v. Mahlum, 114 Nev. 1468, 970 P.2d 98 (1998). This requires a Plaintiff to show that "but for" the negligence of the alleged tortfeasor, they would not have suffered the alleged harm.

Thus, just as there is a lack of reliance to support the negligent misrepresentation claim, there is also an inability to establish causation for the negligence claim.

3. Plaintiffs negligence claim against ROI is barred by the statute of limitations.

Plaintiffs action for negligence is barred by NRS 11.190 (4)(e) which states that a two year statues of limitations applies to:

> (e) Except as otherwise provided in NRS 11.215, an action to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another..."

ROI's appraisal preceding the $17,700,000 loan (which has been paid off) was allegedly provided to the Plaintiffs by Aspen on May 6, 2005, as described in paragraph 86 of the Complaint.

ROI's appraisal preceding the $19,240,000 loan was allegedly provided to the Plaintiffs by Aspen on December 29, 2006, as described in paragraph 103 of the Complaint.

Any claim for negligence that occurred in connection with the making of these two appraisals is barred, since the filing of this Complaint on May 12, 2009 was outside the two year statute of limitations governing causes of action for negligence.

4. The Plaintiffs claims are barred by the economic loss doctrine.

The economic loss doctrine bars unintentional tort actions when the plaintiff seeks to recover "purely economic losses". The Nevada Supreme Court recently refused to carve out an

exception to the doctrine in cases of professional negligence against designers and engineers. In the case of Terracon Consultants Western, Inc. v. Mandalay Resort Group, 125 Nev. Adv. Op. No. 8, (March 26, 2009), the Court framed the issue as follows:

> Applying the economic loss doctrine to accomplish its general purpose, this court has concluded that the doctrine bars unintentional tort actions when the plaintiff seeks to recover "purely economic losses." **Nevertheless, as set forth below, exceptions to the doctrine apply in certain categories of cases when strong countervailing considerations weigh in favor of imposing liability**." (Citations omitted). (Emphasis added.) *See* 125 Nev. Adv. Op. at ___.

In Terracon, supra, the Court declined to carve out an exception to the Economic Loss Doctrine in favor of a tort action against engineering and architectural firms. This Court should do the same here.

The Complaint alleges that ROI provided three appraisals to Aspen. In turn, Aspen distributed those appraisals to the individual Plaintiff investors. As described in Paragraphs 103 and 104 of the Complaint, the ROI appraisal was not sent by Aspen to the Plaintiffs until the day the loan closed. Since they had already funded their money, the Plaintiffs could not possibly have relied upon the appraisal.

Furthermore, there is no allegation of privity or any form of direct relationship between the Plaintiffs and ROI. Under these circumstances, there are certainly no "strong countervailing considerations" that would "weigh in favor of imposing liability" against ROI.

On the other hand, the imposition of tort liability against ROI (or any other appraiser in a similar instance) in favor of unknown individuals who would later claim damages resulting from ROI's negligence or negligent misrepresentation would, in effect, cause ROI to become a guarantor or insurer of the Borrower's obligation, all for merely having expressed an **opinion** as to value in exchange for a standard fee. Imposing unbounded tort liability for this purely

financial harm would inevitably result in "incentives that are perverse," causing appraisal fees to become too expensive for the average economic actor to afford.

This problem is made worse in the current economic climate. If the appraisers on loans brokered by duly licensed Nevada brokers are required to defend themselves against tort claims brought by third party investors, who did not read the appraisal prior to funding, and with whom they have no privity, the defense costs alone will be ruinous.

The problem of potentially ruinous professional tort liability to third parties that were not part of the original agreement was eloquently discussed by Justice Cardozo in Ultrameres Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), where he reasoned:

> A different question develops when we ask whether they owed a duty to these to make it without negligence. If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences. See 174 N.E. at 444.
>
> Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and adviser. Title companies insuring titles to a tract of land, with knowledge that at an approaching auction the fact that they have insured will be stated to the bidders, will become liable to purchasers who may wish the benefit of a policy without payment of a premium. These illustrations may seem to be extreme, but they go little, if any, farther than we are invited to go now. Negligence, moreover, will have one standard when viewed in relation to the employer, and another and at times a stricter standard when viewed in relation to the public. Explanations that might seem plausible, omissions that might be reasonable, if the duty is confined to the employer, conducting a business that presumably at least is not a fraud upon his creditors, might wear another aspect if an independent duty to be suspicious even of one's principal is owing to investors. **'Every one making a**

> **promise having the quality of a contract will be under a duty to the promisee by virtue of the promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together.' The law does not spread its protection so far.'** (Emphasis added). (Citations omitted). See 174 N.E. at 448.

This problem of expanded duties and unbounded tort liability has been similarly recognized in Nevada, in Local Joint Exec. Bd. v. Stern, 98 Nev. 409, 651 P.2d 637 (1982), where the employees of the MGM Grand brought a class action to recover lost salaries and employment benefits for the period they were unemployed as a result of the 1980 fire. In applying the economic loss doctrine to bar their claims, the Court stated:

> The well established common law rule is that absent privity of contract or an injury to person or property, a plaintiff may not recover in negligence for economic loss. Purely economic loss is recoverable in actions for tortious interference with contractual relations or prospective economic advantage, but the interference must be intentional. The primary purpose of the rule is to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable. See 98 Nev. at 411.

Companies that provide appraisals to brokerage companies in the business of funding hard money loans typically do so for a fee that is nominal in relation to the amount of the loan itself. Certainly, their standard compensation does not take into account the risk of being held liable in tort for "a thoughtless slip or blunder" in "an indeterminate amount for an indeterminate time to an indeterminate class." To hold otherwise would be to negate the purpose of the economic loss rule, which is "to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable."

Furthermore, as alleged in the Complaint, the primary reliance and trust of the investors is upon the mortgage broker, i.e., Aspen. (See paragraph 38 of the Complaint, stating that "When investing money with Aspen, Lenders place their trust and confidence in Aspen," and paragraphs 43 and 44 of the Complaint, alleging that the investors would frequently "roll" their money into new deals offered by Aspen when old deals paid off.) Aside from the appraisal, there are numerous other due diligence items to consider when making a loan, and Plaintiffs would be relying upon Aspen, or themselves, to investigate these items, and a determination would have to be made as to the likelihood of success of the project, the borrower's experience, the borrower's ability to repay, the status of construction, the intended use of the funds, the length of time the loan proceeds would be able to "carry" the project, the sufficiency of funds to complete the project, the financial wherewithal of the guarantors, the economic climate, and countless other due diligence items having nothing to do with the appraisal.

Under these circumstances, it would be entirely inequitable and unwise to open up the floodgates of litigation against an appraiser, such as ROI, and expose them to incalculable tort liability by carving out an exception to the economic loss doctrine.

Finally, although there is one Nevada case involving an award of damages against an appraiser for negligent misrepresentation, it involved a direct agreement between the appraiser and a residential lender. See: Goodrich & Pennington Mortgage Fund, Inc. v. J.R. Woolard, Inc., 101 P.3d 792, 120 Nev. 777 (Nev.). Not only is the decision distinguishable in that the appraiser and the lender were in direct contractual privity with one another, the opinion never even mentions the economic loss doctrine. The issue of whether the economic loss doctrine bars the recovery of damages for unintentional torts against an appraiser was neither litigated nor decided by the Court. To the contrary, the only issue decided by the Court had to do with damages, and the opinion explains that:

> Woolard concedes that the appraisal misrepresented the value and condition of the real property that secured the loan, that Goodrich was entitled to rely on the representations, and that Woolard's negligent misrepresentations induced Goodrich to consummate the loan transaction. See 120 Nev. at 781.

Conversely, see: Eikelberger vs. Rogers 92 Nev. 282, 549 P.2d 748 (Nev.), where the court emphasized the lack of privity and justifiable reliance in an action for professional negligence against an accountant, stating:

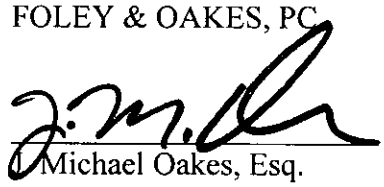
> The Eikelbergers did not employ Rogers. The Eikelbergers did not rely upon the accounting statements prepared by Rogers. To the contrary, they challenged those statements in the litigation with the Tolottis. Absent a professional relationship between the Eikelbergers and Rogers, or a reliance upon the accounting statements prepared, we perceive no legal basis for damages claimed to have been incurred by the Eikelbergers. Affirmed. 92 Nev at 282.

Thus, there is no Nevada case carving out an exception to the economic loss doctrine for cases against appraisers, particularly with regard to the unique circumstances that exist here, where the appraiser's only direct relationship was with the mortgage broker. Since there are no "strong countervailing considerations" that would "weigh in favor of imposing liability," in this instance, the negligence and negligent misrepresentation claims of the Plaintiff must be dismissed.

DATED this 5th day of June, 2009.

Respectfully submitted,

FOLEY & OAKES, PC



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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2009, I served a copy of the foregoing DEFENDANT THE BRITTON GROUP, a Nevada professional corporation, d/b/a ROI Appraisal/Britton Group's MOTION TO DISMISS by U.S. Mail, postage fully pre-paid thereon to the following counsel of record:

Aaron R. Maurice, Esq.
Scott R. Taylor, Esq.,
WOODS ERICKSON WHITAKER & MAURICE, LLP
1349 Galleria Drive, #200
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DATED this 5th day of June, 2009.

An Employee of
FOLEY & OAKES, PC.