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ASPEN FINANCIAL SERVICES, INC.,

ASPEN FINANCIAL SERVICES, LLC; and

JEFFREY B. GUINN

DISTRICT COURT

CLARK COUNTY, NEVADA

DONNA A. RUTHE, an individual;)
TODAY'S REALTY, INC., a Nevada)
Corporation; CDR INVESTMENTS, LLC, a)
Nevada Limited Liability Company; DONNA)
A. RUTHE as attorney in fact for: CHARLES)
L. RUTHE, in his individual and in)
representative capacities as trustee for the)
CHARLES L. RUTHIE TRUST and on)
behalf of his Individual Retirement Account;)
CALOGERO S. GRANIERI in his)
representative capacity as trustee for)
RICHARD F. ACOVINO IRREVOCABLE)
TRUST; FRANK E. GRANIERI, in his)
representative capacity as trustee for the)
FRANK E. GRANIERI REVOCABLE)
LIVING TRUST; and RICHARD)
ACOVINO, an individual,)

Plaintiffs,)

vs.)

ASPEN FINANCIAL SERVICES, INC., a)
Nevada, corporation; ASPEN FINANCIAL)
SERVICES, LLC, a Nevada Limited Liability)

Case No. A587791

Dept. No. XIX

**DEFENDANTS' MOTION TO
DISMISS PLAINTIFFS' FIRST
AMENDED COMPLAINT PURSUANT
TO N.R.C.P. 12(b)(5)**

1 Company; JEFFREY B. GUINN, an)
2 individual; DOES I through X, inclusive; and)
3 ROE BUSINESS ENTITIES I through X,)
4 inclusive,)

5 Defendants.)
6)

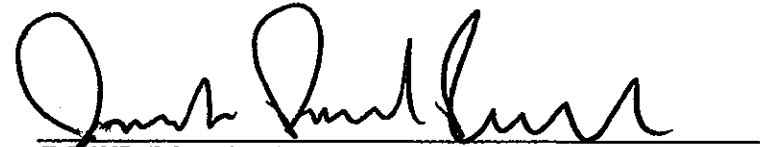
7 Defendants Aspen Financial Services, Inc., Aspen Financial Services, LLC, and Jeffrey
8 B. Guinn (collectively “Defendants”) move this Court pursuant to N.R.C.P. 12(b)(5) to dismiss
9 Plaintiff Donna A. Ruthe as attorney-in-fact for: Charles L. Ruthe, in his individual and in
10 representative capacities as trustee for the Charles L. Ruthie Trust and on behalf of his
11 Individual Retirement Account; Calogero S. Granieri in his representative capacity as trustee for
12 Richard F. Acovino Irrevocable Trust; Frank E. Granieri, in his representative capacity as trustee
13 for the Frank E. Granieri Revocable Living Trust; and Richard Acovino, an individual
14 (“Plaintiffs”), as Donna Ruthe does not have standing to bring claims on behalf of others as
15 attorney-in-fact . Defendants further request, pursuant to N.R.C.P. 8(a), that the Court dismiss
16 any claims related to any loans for which no facts were plead. Additionally, Defendants move
17 the Court to dismiss Plaintiffs’ Complaint pursuant to N.R.C.P 9(b), which sounds entirely in
18 fraud.

19 Alternatively, if the Court does not dismiss the entire Complaint, Defendants request that
20 Plaintiffs’ first, sixth, seventh, eighth, sixteenth, and seventeenth claims—which are
21 undisputedly fraud based claims—be dismissed for failure to meet the pleading requirements
22 under N.R.C.P. 9(b). Additionally, Defendants move the Court to dismiss Plaintiffs’ second,
23 third, fourth, fifth, seventh, tenth, eleventh, twelfth, and thirteenth claims pursuant to N.R.C.P.
24 12(b)(5). Likewise, Defendants move the Court to dismiss Plaintiffs’ eighteenth claim, pursuant
25 to N.R.C.P. 12(b)(5), which does not meet the stringent pleading requirements for a RICO
26 claim. Finally, defendant Jeffrey B. Guinn (“Mr. Guinn”) asks the Court to dismiss him from
27 the Complaint as Plaintiffs failed to make a single allegation supporting liability against him in
28 his individual capacity.

DATED this 21st day of May, 2009.

BAILEY ♦ KENNEDY

By:



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NOTICE OF MOTION

PLEASE TAKE NOTICE that the foregoing Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint pursuant to N.R.C.P. 12(b)(5) will come on for hearing before the Court on the 25 day of June, 2009, at the hour of 8:30 A.M., or as soon thereafter as counsel can be heard.

DATED this 21st day of May, 2009.

BAILEY ♦ KENNEDY

By:



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ASPEN FINANCIAL SERVICES, INC.
ASPEN FINANCIAL SERVICES, LLC
and JEFFREY B. GUINN

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Four plaintiffs, including one who purports to be the attorney-in-fact for seven
4 individuals and/or trusts and/or individual retirement account representatives, launched a 45
5 page Amended Complaint (the "Complaint") with hundreds of allegations and 19 claims for
6 relief.

7 However, despite the volume, people, parties, and transactions in the Complaint,
8 Plaintiffs' claims are undeterminable and incomprehensible. Mostly by way of exhibit, the
9 Complaint references 27 separate loans, in which the Plaintiffs, in varying degrees and
10 sometimes not at all, had an interest. Though all of the loans were separate transactions, with
11 separate participants and attendant facts, Plaintiffs failed to make a single allegation for 15 of
12 the loans. For most of the 12 loans that Plaintiffs did choose to include in the body of their
13 Complaint there are but a few allegations.

14 The infirmities in Plaintiffs' Complaint make it subject to dismissal under N.R.C.P.
15 12(b)(5). Several of the claims fail to meet even the notice pleading requirements under
16 N.R.C.P. 8(a). Furthermore, Donna A. Ruthe as the purported attorney-in-fact for various
17 individuals and entities must be dismissed because she lacks standing to bring the claims of the
18 individuals and entities she claims to represent.

19 Plaintiffs' entire Complaint alleges a unified course of fraudulent conduct against Aspen
20 and Mr. Guinn and is "grounded in fraud;" thus, pursuant to N.R.C.P. 9(b), the entire Complaint
21 must be pled with specificity. Since the entire Complaint falls far short of N.R.C.P. 9(b)'s
22 pleading requirements, it should be dismissed.

23 Though the Complaint is essentially one long fraud allegation upon which all of
24 Plaintiffs' claims are based, Plaintiffs have specifically categorized several of their claims
25 specifically fraud based claims. These claims do not however meet the pleading requirements
26 under N.R.C.P. 9(b) and are therefore also subject to dismissal.

27 Most of the other claims in the Complaint, if not dismissed with the rest of the
28 Complaint, fail because Plaintiffs did not plead sufficient facts to support the elements of the

1 claims. Furthermore, in their eighteenth claim, Plaintiffs have made very serious, yet
2 groundless, RICO allegations against the Defendants; however, the Complaint fails to meet the
3 stringent pleading requirements for violation of Nevada's RICO statutes.

4 Finally, the Court should dismiss Mr. Guinn from the Complaint as there is not a single
5 allegation implicating him individually.

6 II. PLAINTIFFS' ALLEGATIONS¹

7 The Complaint identifies the following individuals and entities: Donna A. Ruthe, an
8 individual; Today's Realty, Inc., a Nevada Corporation ("Today's Realty"); CDR Investments,
9 LLC, a Nevada LLC ("CDR Investments"); and Donna A. Ruthe as attorney-in-fact for various
10 entities. (Pl. Compl. p. 2-3, ¶¶ 1-8.) Donna A. Ruthe claims to be the authorized attorney-in-
11 fact for the following individuals serving in various capacities: Charles L. Ruthe, in his
12 individual and in representative capacities as trustee for the Charles L. Ruthie Trust and on
13 behalf of his Individual Retirement Account; Calogero S. Granieri in his representative capacity
14 as trustee for Richard F. Acovino Irrevocable Trust; Frank E. Granieri, in his representative
15 capacity as trustee for the Frank E. Granieri Revocable Living Trust; and Richard Acovino, an
16 individual. (*Id.*)

17 Aspen Financial Services, Inc. and Aspen Financial Services, LLC (collectively
18 "Aspen") are Nevada Corporations. (Pl. Compl. p. 3, ¶¶ 9-10.) Mr. Guinn is an individual and
19 owner/operator of Aspen. (*Id.* p. 3, ¶ 12.) Aspen is a maker, broker and servicer of loans in
20 Nevada. (*Id.* p. 4, ¶ 16.) Generally, Aspen matches borrowers seeking to acquire and develop
21 real estate with investors interested in providing capital. (*Id.* p. 4, ¶ 17.) Because of the volume
22 of loans that Aspen brokers, Aspen combines the deposits from several investors into one loan
23 package. (*Id.* p. 4, ¶ 19.) As a result, the investors obtain fractional interest in the loan
24 agreements, promissory notes evidencing the loans, and recorded deeds of trust on the properties
25 that served as security for the loans. (*Id.* p. 4, ¶ 20.) For its services, Aspen receives "points"
26 from the loan proceeds paid out of escrow from the borrower's proceeds. (*Id.* p. 4, ¶ 21.)

27
28 ¹ While Defendants deny the majority—if not all—of Plaintiffs' baseless allegations, for the purposes of
Defendants' 12(b)(5) Motion to Dismiss, such allegations are accepted as true.

1 In order to facilitate the lending process, and to assist Aspen in enforcing investor rights,
2 investors execute a standard Loan Servicing Agreement authorizing Aspen to service the loans it
3 arranges and brokers. (*Id.* p. 5, ¶ 23.) For its services, Aspen generally receives a fee from the
4 interest payments paid from the borrowers to the investors. (*Id.* p. 5, ¶ 24.) In order to allow
5 Aspen to execute provisions of the Loan Servicing Agreements, investors execute revocable
6 Special Power of Attorneys, and Subordination Addendums. (*Id.* p. 5, ¶¶ 25-26.)

7 From 2001 through 2007, Aspen arranged and Plaintiffs participated in at least 26 loans.
8 (See *id.* p. 5-6, ¶ 27 and Ex. A attached thereto.)² Aspen was the loan servicer on these loans as
9 well. (*Id.* at p. 6, ¶ 27.) In connection with the loans, Aspen, on behalf of Plaintiffs and as their
10 agent, executed various Loan Agreements. (*Id.* p. 6, ¶ 28.) Under these Loan Agreements,
11 Aspen served as Plaintiffs' agent with regard to certain provisions under the loans. (*Id.*)

12 Most of Plaintiffs' Complaint centers around two investments; namely: 1) Flamingo TC;
13 and 2) Plaintiff Today's Realty's \$100,000 investment in the Milano Residences, LLC Loan
14 (hereinafter "Milano"). (See *id.* p. 6-24 and Ex. A attached thereto.)

15 1. The Flamingo/TC Loan.

16 The Flamingo/TC, LLC Loan (60-00294-6) involves property situated near the
17 intersection of Flamingo and Town Center in Clark County Nevada ("Flamingo/TC Property").
18 (*Id.* p. 6-7, ¶ 32.) Aspen's involvement in the Flamingo/TC Property began in December of
19 2005 when Aspen arranged, brokered, and financed first and second priority loans on the
20 property. (*Id.*) Around September 6, 2006, some of the Plaintiffs allege that they were solicited
21 by Aspen for participation in a new second priority loan. (*Id.* at p. 7, ¶ 34.) In the solicitation
22 package, Aspen allegedly represented that Ohio Savings Bank n/k/a AmTrust Bank ("AmTrust")
23 would have a first priority deed of trust on the Flamingo TC Property. (*Id.* p. 7, ¶ 35.)

24 With respect to the Flamingo TC/LLC Loan, Plaintiffs complain that prior to the closing
25 Aspen breached the Loan Servicing Agreement and breached its fiduciary duties by signing an
26 "unconscionable" Intercreditor Agreement that allegedly favored AmTrust. (*Id.* p. 8, ¶ 38-39.)
27

28 ² Exhibit A references 27 loans.

1 Plaintiffs further allege that Aspen made misrepresentations or failed to disclose to Plaintiffs
2 information relating to the term of the loan, the security underlying the loan, and the timing of
3 the development of the property. (*Id.* p.7, ¶36; p. 9-10 ¶¶ 41-46.) Plaintiffs also accuse Aspen
4 and Mr. Guinn of improperly benefitting from the loan. (*Id.* p. 11, ¶ 50.) Plaintiffs further
5 allege that Aspen failed to notify them of various “material events” concerning the Flamingo/TC
6 Loan. (*Id.* p. 11-13, ¶¶ 51-65.)

7 2. The Milano Loan.

8 Milano is a 100 unit condominium project in Clark County, Nevada. (*Id.* p. 13, ¶ 66.) In
9 2006, Aspen allegedly presented Today’s Realty with a solicitation package. (*Id.* p. 15 ¶ 73.)
10 The solicitation package allegedly disclosed that the proceeds of the loan would be used to
11 “refinance Aspen’s then existing second priority loan [on the Milano project] and other costs
12 related to the project, loan fees and interest reserves for the 1st and 2nd Mortgages.” (*Id.*) The
13 Complaint alleges that Aspen did not make certain disclosures, including information relating to
14 a construction contract on the Milano project, the status of construction, and disbursements of
15 loan proceeds to Joshua Tree LLC (“Joshua Tree”). (*Id.* p. 15-16 ¶¶ 74, 77-79.)

16 In connection with the Milano Loan, Today’s Realty alleges that Aspen failed to notify it
17 of material events; failed to require additional deposits from Milano (*See id.* p. 16); failed to
18 monitor liens and enforce Today’s Realty’s rights concerning the liens (*See id.* p. 17); failed to
19 notify Today’s Realty of conditions precedent for granting a loan extension; and that Aspen
20 improperly retained loan extension proceeds (*See id.* p. 18). Additionally, Today’s Realty
21 alleges that Aspen failed to enforce the loan to value ratio covenants on the Milano Property and
22 improperly subordinated Plaintiffs’ interest to Joshua Tree. (*See id.* p. 19-22.) Today’s Realty
23 further complains that Aspen failed to halt disbursements of loan proceeds and that Aspen
24 prevented Today’s Realty from investigating issues with respect to the Milano Loan. (*See id.* p.
25 22-23.)

26 3. Other Loans.

27 In addition to the Flamingo/TC and Milano Loans, Plaintiffs state that they have
28 “substantial insecurity concerns regarding other Aspen loans.” (*See id.* p. 24.) Specifically,

1 Plaintiffs claim that Aspen committed the same wrongful actions with regard to the Canyons
2 Edge Homes (60-00304-2) and Christopher Homes Ridges (60-00320-2) that it committed with
3 regard to the Flamingo/TC Loan. (*Id.* p. 25, ¶ 137-39.)

4 Next, Plaintiffs allege that Aspen made an improper distribution to Coronado South,
5 LLC in another loan—Monarch Ridge Project, LLC Loan (#60-0031305). (*See id.* p. 25 ¶¶ 140-
6 142.)

7 With regard to another loan—Aspen Self Storage, LLC Loan (#60-00292-2)—Plaintiffs
8 allege that Aspen made improper disbursements to Joshua Tree and that Aspen granted an
9 improper loan extension. (*See id.* p. 26-28.) Plaintiffs further allege that Aspen made improper
10 distributions relating to various Celebrate Homes Loans. (*See id.* p. 28-29.)

11 With regard to another loan—Golshan Weber AGA Kahrobai (#80-00064-0)—Plaintiffs
12 allege Aspen violated duties and obligations by failing to pay investors extension fees associated
13 with loan extensions. (*See id.* p.30 ¶ 173.) Plaintiffs allege that Aspen failed to obtain extension
14 fees in another loan—Coronado Eastern, LLC Loan (#80-00065-1). (*See id.* p. 30 ¶ 174.)

15 Finally, Plaintiffs generally allege that Aspen misrepresented the use of loan proceeds,
16 directed escrow companies to withhold documents from them, overcharged them for loan
17 service fees, failed to render an accounting and supporting detail, and failed to provide lists of
18 names and addresses for other lenders. (*See id.* p. 30-33.)

19 III. ARGUMENT

20 A. Legal Standard.

21 While the Court must accept a plaintiff's allegations as true, the question is whether the
22 plaintiff has pled facts sufficient to establish every element of a claim for relief. *Stockmeier v.*
23 *Nevada Dept. of Corrections*, 124 Nev. 30, 183 P.3d 133, 135 (2008) ("Dismissal is proper
24 where the allegations are insufficient to establish the elements of a claim for relief.") (citation
25 omitted). Here, even assuming the truth of the allegations in Plaintiffs' Complaint, they simply
26 have not alleged facts sufficient to support their claims.

27 B. Donna A. Ruthe As Attorney-In-Fact Lacks Standing To Bring Claims On 28 Behalf Of Other Plaintiffs.

1 The Nevada Supreme Court has expressly defined a justiciable controversy as a “ripe
2 dispute between two interested and adverse parties, in which the moving party’s interest is
3 legally recognized.” *Mesagate Hoa v. City of Fernley*, 194 P.3d 1248, 1251 (Nev. 2008). In
4 fact, “Nevada has a long history of requiring an actual justiciable controversy as a predicate to
5 judicial relief.” *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) (citing *Kress v.*
6 *Corey*, 65 Nev. 1, 189 P.2d 352 (1948) listing four-part justiciability test including adverse and
7 legal interest requirements).

8 A third-party does not have a legally recognizable interest to support a claim on behalf of
9 another only unless the interested party has assigned the claim to the third-party. *Sprint*
10 *Commc’ns. Co., L.P. v. APCC Servs., Inc.*, See 554 U.S. ___, 128 S.Ct. 2531, 2542-44, 171
11 L.Ed.2d 424 (2008).³ Additionally, an attorney-in-fact, without an actual assignment from the
12 legal owner of the claim, lacks the requisite standing—even where the legal owner has
13 authorized the attorney-in-fact to sue on its behalf by way of a duly executed power of attorney.
14 *W.R. Huff Asset Mgt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 108-09 (2nd Cir. 2008).⁴ A
15 power of attorney authorizing suit is insufficient because it does not transfer interest in a claim.
16 *Id.* at 108.

17 In *W.R. Huff*, the court denied standing to an investment adviser attempting to sue on
18 behalf of his clients even though the adviser was his clients’ attorney-in-fact and even though
19 the clients had executed a power of attorney authorizing the adviser to sue on their behalf. *Id.*
20 The court noted that nowhere in the complaint did it ever appear that the clients assigned their
21 claim to the investment advisor. *Id.* at 106. The court reasoned that the investment adviser
22
23

24 ³ While the Article III requirement for standing is in some ways different than the Nevada requirement, both
25 require an injury to a legally cognizable or protected interest. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555,
26 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

27 ⁴ Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority in
28 interpreting the Nevada Rules of Civil Procedure because the Nevada Rules of Civil Procedure are based in large
29 part upon their federal counterparts. *Executive Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876
30 (2002); *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990).

1 lacked standing because his only interest in the case, in his capacity as attorney-in-fact, was the
2 attorney fees associated with his clients' claims. *Id.* at 109.

3 Here, Plaintiff Donna A. Ruthe as attorney-in-fact, lacks standing to bring any claims on
4 behalf of Charles L. Ruthe, in his individual and in representative capacities as trustee for the
5 Charles L. Ruthie Trust and on behalf of his Individual Retirement Account; Calogero S.
6 Granieri in his representative capacity as trustee for Richard F. Acovino Irrevocable Trust;
7 Frank E. Granieri, in his representative capacity as trustee for the Frank E. Granieri Revocable
8 Living Trust; and Richard Acovino, an individual. Plaintiffs' Complaint does not contain any
9 indication that any party Donna A. Ruthe purports to represent as attorney-in-fact ever assigned
10 the right to any claims that may exist to her. While Mrs. Ruthe may be entitled to bring claims
11 on her own behalf, she—like the investment adviser in *W.R. Huff*—lacks standing in her
12 capacity as attorney-in-fact to bring claims on behalf of third parties. Although Plaintiffs'
13 complaint does not even indicate that a power of attorney was executed, any power of attorney
14 that may have been executed authorizing Ms. Ruthe to sue is legally insufficient to confer
15 standing upon her. Mrs. Ruthe has not alleged any injury stemming from her role as attorney-in-
16 fact and has not alleged a legally cognizable interest in the claims. Therefore, the Court should
17 dismiss Donna A Ruthe in her capacity as attorney-in-fact.

18 **C. Fourteen Of Plaintiffs' Claims Do Not Meet The Notice Pleading Requirements**
19 **Under N.R.C.P. 8(a).**

20 A pleading which sets forth a claim for relief ... shall contain (1) a short and plain
21 statement of the claim showing that the pleader is entitled to relief, and (2) a demand for
22 judgment for the relief the pleader seeks. N.R.C.P. 8(a). "[W]ithout some factual allegation in
23 the complaint, a claimant cannot satisfy the requirement that he or she provide not only 'fair
24 notice,' but also the 'grounds' on which the claim rests." *Phillips v. County of Allegheny*, 515
25 F.3d 224, 233 (3rd Cir. 2008) (citing to *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965
26
27
28

n.3 (2007))⁵, *see also Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984) (“The test for determining whether the allegations of a cause of action are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of the claim and relief requested.”) Where a complaint is entirely devoid of factual allegations the court should dismiss the complaint. *See Ravera*, 100 Nev. at 71, 675 P.2d at 408 (affirming the dismissal of plaintiff’s conspiracy claim for failure to comply with N.R.C.P. 8(a)); *see also Mason v. County of Delaware Sheriff’s Dept.*, 150 F.R.D. 27, 28 (N.D.N.Y. 1993).

Here, Plaintiffs have only alleged facts related to only 12 of the 27 loans included in their Exhibit A.⁶ Plaintiffs have failed to meet the pleading requirements related to every loan for which no allegations were made. As a result, the Court should dismiss claims related to any loans for which Plaintiffs did not plead facts.

D. Plaintiffs Have Failed To Meet The Pleading Requirements Under N.R.C.P. 9(b).

1. Plaintiffs’ entire Complaint should be dismissed because it sounds in fraud and fails to meet the pleading requirements under N.R.C.P. 9(b).

“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” N.R.C.P. 9(b). “This heightened pleading requirement is a response to the ‘great harm to the reputation of a business firm or other enterprise a fraud claim can do.’” *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7th Cir. 2007). “Thus, ‘a plaintiff claiming fraud or mistake must do more pre-complaint investigation to assure that the claim is responsible and supported, rather than defamatory and extortionate.’” *Id.*

⁵ The United States Supreme Court has recently declared that the “plausibility” standard announced in *Twombly* applies to all claims in a complaint in all federal cases. *Ashcroft v. Iqbal*, No. 07-1015 at 13-16 (U.S. 5/18/2009) (2009).

⁶ Exhibit A lists 27 loans with various investors. Plaintiffs pled facts related to only 12 of those loans; to wit: Flamingo TC (60-00294-6); Milano Residences (60-00277-1); Canyons Edge Homes (60-00304-2) and Christopher Homes Ridges (60-00320-2); Monarch Ridge; (60-00313-5); Aspen Self Storage; (60-00292-2) Celebrate Homes 46, LLC (10-325-9); Celebrate Investments, LLC Loan (10-00337-1); Celebrate Investments, LLC Loan (60-00302-4); Celebrate Properties, LLC (10-00326); Golshan Weber AGA Kahrobai (80-00064-0); Coronado Eastern, LLC Loan (80-00065-1).

1 “The circumstances that must be detailed include averments to the time, the place, the
2 identity of the parties involved, and the nature of the fraud or mistake.” *Brown v. Kellar*, 97
3 Nev. 582, 583-4, 636 P.2d 874, 874 (1981); *see also Borsellino*, 477 F.3d at 507 (“A complaint
4 alleging fraud must provide “the who, what, when, where, and how.”). “The circumstances
5 constituting the alleged fraud must be ‘specific enough to give defendants notice of the
6 particular misconduct.’” *G.K. Las Vegas Ltd. P’ship v. Simon Prop. Group, Inc.*, 460 F.Sup.2d
7 1246, 1257 (D. Nev. 2006). “A plaintiff must set forth more than the neutral facts necessary to
8 identify the transaction.” The plaintiff must set forth what is false or misleading about a
9 statement, and why it is false.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.
10 2003).

11 Further, “Rule 9(b) does not allow a complaint to merely lump multiple defendants
12 together but require[s] plaintiffs to differentiate their allegations when suing more than one
13 defendant ... and inform each defendant separately of the allegations surrounding his alleged
14 participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007).

15 Although certain claims may not require an element of fraud, a plaintiff may nonetheless
16 be subject to Rule 9(b)’s particularity mandate if his complaint “sounds in fraud.” *Rubke v.*
17 *Capitol Bancorp Ltd.*, 460 F.Sup.2d 1124, 1134 (N.D. Cal. 2006) (citing *In re Daou*, 411 F.3d
18 1006, 1027 (9th Cir. 2005)). Where a plaintiff alleges a unified course of allegedly fraudulent
19 conduct and relies entirely on that course of conduct as the basis of its complaint, the complaint
20 is said to sound in fraud and the complaint as a whole must satisfy the particularity requirement
21 of Rule 9(b). *Vess*, 317 F.3d at 1108. “Fraud can be averred by specifically alleging fraud, or
22 by alleging facts that necessarily constitute fraud (even if the word “fraud” is not used).” *Vess*,
23 317 F.3d at 1105.

24 Where averments of fraud are made in claims in which fraud is not an element, the
25 proper course is to disregard averments of fraud not meeting Rule 9(b)’s requirements and then
26 ask whether a claim has been stated. *Rubke*, 460 F.Sup.2d at 1134. However, a court is not
27 required to rewrite a defective complaint. *Id.* Where a complaint makes a wholesale adoption
28

1 of fraud allegations for purposes of other claims, a court need not “sift through allegations of
2 fraud in search of some ‘lesser included’ claim.” *Id.*

3 Courts may look to the substance and allegations of the complaint to determine whether
4 it is based in fraud. *Borsellino*, 477 F.3d at 507. In *Borsellino*, though faced with claims that
5 did not require fraud as an element, the court nonetheless dismissed a number of claims that
6 sounded in fraud. *Id.* In doing so, the court determined that the dismissed claims sounded in
7 fraud, in part because of representations in the complaint. *Id.* The complaint in *Borsellino*
8 alleged that the action arose out of “a pattern of fraud and racketeering activity” and continued
9 on to allege conspiracy and other fraud based claims. *Id.* Similarly, in *In re Daou*, the court
10 found the language of the complaint significant in determining that it sounded in fraud. 411
11 F.3d at 1028. The *In re Daou* complaint, like the *Borsellino* complaint, was riddled with
12 fraudulent scheme and misrepresentation allegations. *Id.* Significantly, “the complaint fully
13 incorporate[d] all allegations previously averred in the complaint for purposes of all their
14 claims.” *Id.*

15 Here, Plaintiffs’ Complaint sounds in fraud. The entire Complaint is based on alleged
16 misrepresentations and omissions Aspen supposedly made to investors and Plaintiffs have made
17 a wholesale adoption of those fraud allegations in order to support every claim in their
18 Complaint. Plaintiffs’ Flamingo/TC allegations allege harm based on Aspen’s failure to advise
19 the investors of the “true facts and circumstances regarding the Flamingo/TC Loan.” (Pl.
20 Compl. p. 13 ¶ 63.)

21 In fact, Plaintiffs included other loans in the Complaint based entirely on Plaintiffs’
22 concerns “relating to Aspen’s representations, acts and/or omissions with respect to their other
23 Aspen Loans, particularly in light of (1) Aspen’s solicitation of loans using false and /or
24 misleading representations . . . (3) Aspen’s failure to act with the fidelity, honesty, and good
25 faith required of an agent.” (Pl. Compl. p. 24 ¶ 135.) Similarly, the allegations in most of these
26 “other loans” are mere references to the allegations made in the Flamingo/TC and Milano Loans.
27 (See Pl. Compl. p. 24-33.) For instance, the Canyons Edge Homes and Christopher Homes
28 Ridge Loans are based on Plaintiffs’ belief that “[a]s it did in the Flamingo/TC transaction,

1 Plaintiff is informed and believes that Aspen may have made similar misrepresentation and/or
2 performed similar wrongful actions in other loan transactions.” (Pl. Compl. p. 25.) Further, it is
3 no small point that Plaintiffs, though insufficiently so, amended their Complaint to include a
4 RICO allegation against Defendants—an allegation that relies on a similar course of action.

5 Plaintiffs have simply alleged a unified course of allegedly fraudulent conduct and are
6 attempting to rely entirely on that course of conduct as the basis for every claim in their
7 Complaint. As a result, the entire Complaint is subject to N.R.C.P. 9(b)’s pleading
8 requirements. Tellingly, as in *In re Daou*, Plaintiffs incorporate each and every allegation in the
9 Complaint to support each and every claim.

10 Further, an examination of the Complaint reveals that Plaintiffs have entirely failed to
11 meet the pleading requirements under N.R.C.P. 9(b). First, throughout the entire Complaint,
12 Plaintiffs have simply lumped the Defendants together. Plaintiffs have failed to inform each
13 Defendant of the allegations related to its alleged participation in any fraud or claims that sound
14 in fraud. Defendants are unable to respond to Plaintiffs’ Complaint because they have no idea
15 who the allegations are pointed toward or what role—if any—Plaintiffs allege each Defendant
16 played in the alleged fraudulent scheme.

17 Second, Plaintiffs have failed to plead the necessary who, what, when, where and how
18 that N.R.C.P. 9(b) requires. For example, Plaintiffs droned on for 10 pages regarding the
19 Milano Loan, yet it is still unclear who from Aspen and Today’s Realty were involved in the
20 transaction and how any of the alleged misrepresentations or concealments harmed Today’s
21 Realty. Similar infirmities plague each and every claim in Plaintiffs’ Complaint.

22 The task of deciphering Plaintiffs’ incomprehensible Complaint has been difficult enough
23 for Defendants; fortunately, this Court need not rewrite Plaintiffs’ Complaint in an effort to save
24 it. As the court explained in *Rubke*, when, as here, a complaint makes a wholesale adoption of
25 fraud allegations for purposes of other claims, a court need not sift through allegations of fraud
26 in search of some lesser included claim. *Rubke*, 460 F.Sup.2d at 1134. The Court should
27 dismiss Plaintiffs’ Complaint in its entirety.

28

1 2. Regardless of whether the entire Complaint sounds in fraud, Plaintiffs'
2 specific fraud based claims should be dismissed because they fail to meet the
3 pleading requirements under N.R.C.P. 9(b).

4 Some of Plaintiffs' claims are specifically and clearly fraud based claims and these
5 claims do not meet the pleading requirements under N.R.C.P. 9(b).

6 Although some claims like civil conspiracy and breach of fiduciary duty are not
7 technically fraud claims, the requirements of N.R.C.P. 9(b) still apply to such claims because
8 they "sound in fraud." *See Borsellino*, 477 F.3d at 507; *Vess*, 317 F.3d at 1106 (applying 9(b)
9 standard to fraud based conspiracy claim). "Rule 9(b) applies to "averments of fraud," not
10 claims of fraud, so whether the rule applies will depend on the plaintiffs' factual allegations."
11 *Borsellino*, 477 F.3d at 507. "A claim that 'sounds in fraud'—in other words, one that is
12 premised upon a course of fraudulent conduct—can [also] implicate Rule 9(b)'s heightened
13 pleading requirements." *Id.*

14 Plaintiffs' first claim alleges that Defendants, collectively, breached fiduciary duties by
15 failing to provide full disclosure—an action that sounds in fraud. (*See Pl. Compl.* p. 33-34.)
16 Plaintiffs' sixth cause of action is for fraudulent concealment. (*See id.* p. 36-37.) Plaintiffs'
17 seventh claim is for aiding and abetting and civil conspiracy, related to Plaintiffs' breach of
18 fiduciary duty and fraud claims. (*See Pl. Compl.* p. 37.) Plaintiffs' eighth claim is for rescission
19 based on fraud. (*See id.* p. 37-38.) Plaintiffs' sixteenth and seventeenth claims are for fraud.
20 (*See id.* p. 42-43.)⁷

21 Again, but this time specifically with respect to these claims, Plaintiffs have simply
22 lumped all Defendants together. Plaintiffs have failed to inform each Defendant of the
23 allegations related to its alleged participation in any fraud, breach of fiduciary duty, or
24 conspiracy. Defendants are unable to respond to Plaintiffs' fraud based claims because they
25 have no idea who the allegations are pointed toward or what role—if any—Plaintiffs allege each
26 Defendant played in the supposed fraud.

27 ⁷ Due to Plaintiffs' unorthodox pleading style in which they do not name their claims, the identification of
28 such claims is necessarily based solely upon Defendants' interpretation of Plaintiffs' vague and often repetitive
allegations.

1 Again, here, Plaintiffs have failed to plead the necessary who, what, when, where and
2 how that N.R.C.P. 9(b) requires. Again, for instance, it is still unclear who from Aspen and
3 Today's Realty were involved in the Milano Loan transaction and how any of the alleged
4 misrepresentations or concealments harmed Today's Realty. The same is true with the
5 Flamingo T/C transaction. In another example, related to Plaintiffs' conspiracy claims,
6 Plaintiffs failed to inform Defendants of any of the details regarding the alleged conspiracy
7 between Milano and Aspen. Plaintiffs failed to allege when the conspiracy was arranged and
8 what—if any—principals from the entities were involved. *See Borsellino*, 477 F.3d at 509.

9 The other transactions mentioned in the Complaint, if included within Plaintiffs' fraud
10 based claims, fail to sufficiently describe the circumstances related to each Plaintiff and each
11 transaction upon which the Plaintiffs make their claims. For example, Plaintiffs' allegations
12 with regard to the Canyons Edge Homes and Christopher Homes Ridges Loans contain a mere
13 three paragraphs of facts and only conclusory allegations regarding what misrepresentations
14 were made by whom and when and in what form. (Pl. Compl. p. 25, ¶¶ 137-139.) Plaintiffs
15 again made no attempt to inform each Defendant of its role in any alleged fraud. Nor did
16 Plaintiffs include the time, place, manner, or harm related to any supposed fraud.

17 As to the other 15 loans incorporated by exhibit, there are no allegations at all;
18 consequently, any fraud based claims related to these transactions must be dismissed (*i.e.*,
19 Plaintiffs' claims for fraudulent concealment and breach of fiduciary duty).

20 **E. Plaintiffs' Contract Claims Do Not Demonstrate The Existence Of Any**
21 **Obligation Between Plaintiffs And Defendants.**

22 The essential elements of a breach of contract claim are: (1) the existence of a contract;
23 (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's breach; and (4)
24 the resulting damages to the plaintiff. *Reichert v. Gen. Ins. Co. of Am.*, 442 P.2d 377, 381 (Cal.
25 1968). "The essential elements of a valid contract include offer, acceptance, and bargained for
26 consideration." *D'Angelo v. Gardner*, 107 Nev. 704, 744 819 P.2d 206, 233 (1991).

27 Plaintiffs' second claim appears to be a breach of contract claim and Plaintiffs' Third
28 Claim appears to be a claim for tortious and contractual breach of the implied covenant of good

1 faith and fair dealing. Plaintiffs have alleged that Defendants executed numerous promissory
2 notes, deeds of trusts, contracts, loans, assignments, transfers, exchanges, and/or other
3 transactions or "Subject Agreements" with or on behalf of Plaintiff. (*See* Pl. Compl. p. 34, ¶
4 197.) Likewise, Plaintiffs allege breach of the implied duty of good faith and fair dealing related
5 to those Subject Agreements. (*See id.* p. 27 ¶ 168-69.)

6 First, with regard to the second and third claims in the Complaint, Plaintiffs have again
7 simply lumped all of the Defendants together. Plaintiffs failed to provide any indication as to
8 which Plaintiffs entered which "Subject Agreements" with which Defendants and what those
9 Agreements obligate the Defendant(s) to do. Most notably, Plaintiffs failed to identify any
10 contract they have executed with Mr. Guinn in his individual capacity.

11 Second, Plaintiffs' Complaint fails to identify which "Subject Agreements" Aspen
12 supposedly entered on their behalf and which "Subject Agreements" Aspen allegedly executed
13 with Plaintiffs. The distinction is fundamental. Any claims related to "Subject Agreements"
14 that Plaintiffs allege Aspen executed on Plaintiffs' behalf fail as a matter of law because such
15 agreements lack the essential elements of contracts. For these "Subject Agreements" there is no
16 offer, acceptance, consideration, or mutuality of obligation between Plaintiffs and Aspen. Any
17 "Subject Agreements" Aspen allegedly executed on behalf of Plaintiffs created contracts
18 between Plaintiffs and some other party but not between Plaintiffs and Aspen.

19 For any "Subject Agreement" that Plaintiffs allege they executed with Aspen, Plaintiffs
20 failed to identify the agreements, the obligations contained therein, and the parties bound by
21 such "Subject Agreements." While Plaintiffs and Aspen did enter the Loan Servicing
22 Agreement with one another, the Loan Servicing Agreement does not appear to be included in
23 Plaintiffs' laundry list of Subject Agreements. Thus, Plaintiffs' second and third claims must be
24 dismissed.

25 **F. Plaintiffs' Fourth And Fifth Claims For Negligence Are Barred By The**
26 **Economic Loss Doctrine.**
27
28

1 Plaintiffs' fourth and fifth claims—which sound in negligence—are actually based on the
2 “Subject Agreements” and the alleged damages that flow from them; and therefore, as a result,
3 these claims are barred by the economic loss doctrine.

4 The Nevada Supreme Court has explained that the economic loss doctrine “marks the
5 fundamental boundary between contract law, which is designed to enforce the expectancy
6 interests of the parties, and tort law, which imposes a duty of reasonable care and thereby
7 generally encourages citizens to avoid causing physical harm to others.” *Terracon Consultants*
8 *Western, Inc. v. Mandalay Resort Group*, 125 Nev. Adv. Op. No. 8, 8-9 (Nev. 3/26/2009). “The
9 doctrine bars unintentional tort actions when the plaintiff seeks to recover ‘purely economic
10 losses.’” *Id.* at 9. Specifically, where a defendant’s responsibility flows from a contract, the
11 economic loss doctrine applies to bar tort claims. *See 2314 Lincoln Park West Condo. v. Mann*,
12 555 N.E.2d 346, 353 (Ill. 1990).

13 “[T]he doctrine generally provides that purely economic losses are not recoverable in tort
14 absent personal injury or property damage.” *Terracon Consultants*, 125 Nev. Adv. Op. No. 8 at
15 12. Courts have determined that very limited exceptions to the economic loss doctrine apply to
16 certain professions, including attorneys, accountants, real estate professionals, and insurance
17 brokers. *See id.* at 8 and cases cited therein. Nevada does not recognize an exception for
18 mortgage brokers/hard money lenders such as Aspen.

19 Once again, it is unclear to which loans and parties Plaintiffs' fourth and fifth claims
20 apply. Nevertheless, these claims relate to the alleged Subject Agreements and alleged duties to
21 service Plaintiffs' loans as Plaintiffs' agent. (*See* Pl. Compl. p. 35-36, ¶¶ 210, 215.) The
22 Subject Agreements are contracts, though some create no duty for Aspen to Plaintiffs.
23 Additionally, any duties owed to Plaintiffs regarding loan servicing come from the Loan Service
24 Agreements, which are also contracts. (*See* Pl. Compl. p. 5 ¶¶ 23-24.)

25 Plaintiffs fourth and fifth claims for negligence, which seek recovery for economic losses
26 related to the Subject Agreements and the Loan Servicing Agreements, are simply barred under
27 the economic loss doctrine. Any damages resulting from alleged breaches of the Subject
28 Agreements or Loan Service Agreements must be determined under contract law, not tort law.

1 Plaintiffs, in contravention of *Terracon*, are attempting to recover economic damages
2 through unintentional tort claims. Here, Plaintiffs do not allege personal injury or property
3 damage. Aspens' duties—if any—stem from the Loan Servicing Agreements. Thus, Plaintiffs'
4 fourth and fifth Claims should be dismissed.

5 **G. Plaintiffs Failed To Plead Facts Sufficient To Support Either A Claim For**
6 **Aiding And Abetting Or Civil Conspiracy.**

7 Plaintiffs' seventh claim fails because Plaintiffs have not alleged—other than in a
8 conclusory fashion—any conspiracy or alleged any duty owed to Plaintiffs by a third party.

9 Civil conspiracy consists of a combination of two or more persons who, by some
10 concerted action, intend to accomplish an unlawful objective for the purpose of harming another,
11 and damage results from the act or acts. *Consol. Generator-Nevada, Inc. v. Cummins Engine*
12 *Co., Inc.*, 114 Nev. 1304, 1311 971 P.2d 1251, 1256 (1998). “The gist of a civil conspiracy is
13 not the unlawful agreement but the damage resulting from that agreement or its execution.”
14 *Eikelberger v. Tolotti*, 96 Nev. 525, 528, 611 P.2d 1086, 1088 (1980). “The cause of action is
15 not created by the conspiracy but by the wrongful acts done by the defendants to the injury of
16 the plaintiff.” *Id.*

17 “Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons
18 who, although not actually committing a tort themselves, share with the immediate tortfeasors a
19 common plan or design in its perpetration. *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7
20 Cal.4th 503, 510-511 (1994) (internal citations omitted.) “By participation in a civil conspiracy,
21 a coconspirator effectively adopts as his or her own the torts of other coconspirators within the
22 ambit of the conspiracy.” *Id.* “In this way, a coconspirator incurs tort liability co-equal with the
23 immediate tortfeasors.” *Id.* “The major significance of the conspiracy lies in the fact that it
24 renders each participant in the wrongful act responsible as a joint tortfeasor for all damages
25 ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of
26 the degree of his activity.” *Id.* at 511.

1 Civil aiding and abetting requires a plaintiff to prove that a defendant substantially
2 assisted or encouraged another's conduct in breaching a duty to a third person. *Dow Chem. Co.*
3 *v. Mahlum*, 114 Nev. 1468, 1490, 970 P.2d 98, 112 (1998) (overruled in part on other grounds).

4 In their seventh claim, Plaintiffs allege that "Defendant, either explicitly or tacitly agreed
5 with or conspired, and aided and abetted Milano and other borrowing entities to defraud
6 Plaintiff." (See Pl compl. p. 29 ¶ 191.) Plaintiffs appear to have attempted to conflate the
7 separate torts of civil conspiracy and aiding and abetting into one claim for relief.

8 If Plaintiffs' claim is for civil conspiracy, it is subject to the N.R.C.P 9(b)'s specific
9 pleading requirements as discussed above. Regardless of the specificity required, the claim fails
10 because Plaintiffs have not made any allegations of fraud against Milano or the "other
11 borrowing entities" other than the conclusory allegation in paragraph 228 of its Complaint.
12 Certainly Plaintiffs have not pled any facts sufficient to support a fraud allegation against
13 Milano or the unnamed other borrowing entities and neither Milano nor any other borrowing
14 entity is a party to this lawsuit. As a result, Plaintiffs have not alleged any unlawful act
15 involving Milano and the other borrowers to which Defendants might have made a concerted act
16 to further.

17 Plaintiffs are simply trying to create a cause of action out of their civil conspiracy claim.
18 As *Applied Equip.* demonstrates, a claim for civil conspiracy would be pointless here. There is
19 no reason to create joint tortfeasors out of Milano, the other borrowing entities, and the
20 Defendants because Plaintiffs do not allege any wrongdoing against anyone other than the
21 Defendants, who are incapable of conspiring with each other. See *Collins v. Union Fed. Sav.*
22 *And Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983) ("Agents and employees of a
23 corporation cannot conspire with their corporate principal or employer where they act in their
24 official capacities on behalf of the corporation and not as individuals for their individual
25 advantage.").

26 If Plaintiffs' seventh claim is for aiding and abetting, it similarly fails because Plaintiffs
27 have not alleged that Milano or the other borrowing entities owed them any duty. Where no
28 duty exists between Milano or the other borrowing entities and Plaintiffs, it is impossible for

1 Defendants to have substantially assisted in any breach of duty perpetrated by Milano or the
2 other borrowing entities. Therefore, Plaintiffs' seventh claim should be dismissed.

3 **H. Plaintiffs' Have Not Alleged Any Act Of Wrongful Dominion Sufficient To**
4 **Support Their Tenth Claim For Conversion.**

5 Defendants did not commit any act of dominion, wrongful or otherwise, over Plaintiffs'
6 property and thus, Plaintiffs' conversion claim fails as a matter of law.

7 In Nevada, conversion is a "distinct act of dominion wrongfully exerted over another's
8 personal property in denial of, or inconsistent with his title or rights therein or in derogation,
9 exclusion, or defiance of such title or rights." *M.C. Multi-Family Dev. v. Crestdale Assocs.*, 193
10 P.3d 536, 542-43 (Nev. 2008) (citing *Wantz v. Redfield*, 74 Nev. 196, 199, 326 P.2d 413, 414
11 (1958)). A party who exercises a right that belongs to another may be found to have committed
12 an act of wrongful dominion. *Id.* at 538. "An exercise of the rights of ownership sufficient to
13 constitute conversion is present when a tortfeasor takes possession, sells the property, and
14 pockets the proceeds of the sale." *Pelletier v. Pelletier*, 103 Nev. 408, 411 742 P.2d 1027, 1028
15 (1987).

16 Here, in their tenth claim, Plaintiffs allege that "Defendant provided contributions to
17 Defendant for the sole purpose of funding the development of the properties of the Loans" and
18 that "Defendant exercised dominion and control over such contribution such that it deprives
19 Plaintiff of the ownership, possession, and benefits of its monies." (*See* Pl. Compl. p. 38, ¶ 246.)

20 However, Plaintiffs have not pointed to any distinct act of dominion wrongfully exerted.
21 In fact, Plaintiffs allege that Aspen acted as its agent, with the authority to execute various acts
22 on its behalf, including the disbursement of loan funds to borrowers. (*See* Pl. Compl. p. 6, ¶ 28;
23 p. 15, ¶ 76; p. 34, ¶ 197.) Here, there can be no wrongful exercise of dominion because every
24 act Aspen took relating to the transactions was pursuant to Aspen's role as Plaintiffs' agent or
25 pursuant to the Loan Agreements and Loan Servicing Agreements. Simply put, Plaintiffs
26 knowingly and unilaterally provided funds to Aspen to lend to the respective borrowers. Aspen
27 did not exert dominion and control over these funds without the consent of Plaintiffs. Therefore,
28 Plaintiffs' tenth claim should be dismissed.

1 **I. Plaintiffs' Eleventh Claim For The Appointment Of A Receiver Should Be**
2 **Dismissed Because Nevada's Division Of Mortgage Lending Has Primary**
3 **Jurisdiction Over The Appointment Of A Receiver**

4 Aspen, as a mortgage broker, is subject to the provisions of Chapter 645B of the Nevada
5 Revised Statutes. NRS 645B.0125. Pursuant to NRS 645B, any person may file a complaint
6 with the Commissioner of Mortgage Lending (the "Commissioner") alleging violations of
7 Chapter 645B. NRS 645B.600(1). Upon the filing of such a complaint, the Commissioner is
8 compelled to investigate the complainant's allegations. NRS 645B.610(1). Upon the conclusion
9 of the investigation, the Commissioner will decide whether the complaint has merit, and if so, he
10 will order a hearing concerning the alleged violation(s). NRS 645B.610(3)-(5).

11 If the Commissioner believes that a mortgage broker is conducting business in an unsafe
12 or injurious manner possibly resulting in danger to the public, the Commissioner is required to
13 take possession of the property, business, and assets of the mortgage broker pending further
14 proceedings. NRS 645B.630(1)(b). Once the Commissioner takes possession of the business,
15 the mortgage broker has 60 days to remedy any deficiencies. NRS 645B.640(1). If the
16 mortgage broker does not remedy its deficiencies, the Commissioner may apply to the Court to
17 be appointed a receiver and proceed to liquidate the business. NRS 645B.640(2). Notably,
18 ***"[n]o other person may be appointed receiver by any court without first giving the***
19 ***Commissioner ample notice of his application."*** NRS 645B.640(3) (emphasis added).

20 Clearly, Chapter 645B provides the Division with primary jurisdiction to appoint a
21 receiver over a company such as Aspen. The rationale behind this is simple: Aspen is a state-
22 monitored, regulated and licensed entity, and the Division of Mortgage Lending (the "Division")
23 has a substantial interest in ensuring that it is operated in compliance with Chapter 645B. The
24 Division, which closely monitors Aspen and other such brokers, is in the best position to
25 determine whether or not a mortgage broker is in violation of NRS 645B, whether the
26 appointment of a receiver is required, and if so, who that receiver should be. Therefore, the
27 Commissioner is given primary jurisdiction to be appointed receiver of any mortgage broker that
28 is in violation of NRS 645B.

1 In a similar ongoing litigation involving a small group of other Aspen investors, Judge
2 Gonzalez refused to appoint a receiver based upon the regulatory structure in place. (See
3 hearing transcript p. 17, lines 1-6, attached hereto as Ex. 1.)⁸ (“Here it is clear that there are
4 breach of fiduciary duties which are at issue. And given that, while in certain cases I might
5 appoint a receiver or what I would call and account pendent lite, given the regulatory structure, I
6 will not do so in this case.”) Judge Gonzalez recognized that a court appointed receiver was
7 unnecessary and inappropriate considering the state-monitored regulatory structure. The
8 Division is in the best position to determine whether a receiver is appropriate. Therefore, the
9 Plaintiffs’ Eleventh claim, requesting a receiver, should be dismissed.

10 **J. Plaintiffs’ Twelfth Claim For Unjust Enrichment Fails Because Written**
11 **Agreements Govern Plaintiffs’ Investments And Plaintiffs Have Not Alleged**
12 **That Defendants Retained Any Money Or Property.**

13 “An action based on a theory of unjust enrichment is not available when there is an
14 express, written contract, because no agreement can be implied when there is an express
15 agreement.” *LeasePartners Corp. v. Brooks Trust*, 113 Nev. 747, 755, 942 P.2d 182, 187
16 (1997). “To permit recovery by quasi-contract where a written agreement exists would
17 constitute a subversion of contractual principles.” *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379,
18 566 P.2d 819, 824 (1977).

19 Furthermore, “[a] claim for unjust enrichment requires that a plaintiff show that a
20 defendant retained the money or property of another against fundamental principles of justice or
21 equity and good conscience.” *Asphalt Prods. Corp. v. All Star Ready Mix, Inc.*, 111 Nev. 799,
22 802, 898 P.2d 699, 701 (1995).

23 In their twelfth claim, Plaintiffs conclude that they made contributions to Defendants in
24 expectation that the money would be used to fund the development properties, that the money
25 was not used to fund the development of property, but was instead used by Defendants for their
26 own gain. (See Pl. Compl. p. 39, ¶¶ 253-54.) First, Plaintiffs’ claim for unjust enrichment must

27 ⁸ Pursuant to NRS 47.130 and 47.150, Defendants ask that this Court take judicial notice of Judge
28 Gonzalez’s order. Due to the similarity between the action in Judge Gonzalez’s court and the instant action, this
Court may take judicial notice of the order in the action before Judge Gonzalez. *Mack v. Estate of Mack*, 125 Nev.
Adv. Op. No. 9 (Nev. 3/26/2009); see also *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 570 (1981).

1 fail because Plaintiffs entered written agreements, including the Loan Servicing Agreements,
2 directing Aspen to invest their funds. Further, the Loan Agreements, while not contracts
3 between Aspen and Plaintiffs, govern the distribution of Plaintiffs' investments with regard to a
4 particular loan. As a result of these written agreements, there can be no claim for unjust
5 enrichment.

6 Additionally, there is not a single factual allegation that Aspen retained any of the money
7 Plaintiffs contributed. In fact, Plaintiffs allege that the money was distributed to other entities
8 such as Milano and Joshua Tree. (*See* Pl. Compl. p. 15-16 ¶¶ 76, 78; p. 26 ¶¶ 143, 148.)
9 Because Defendants did not retain any of Plaintiffs' money or property, their claim for unjust
10 enrichment also fails.

11 **K. Plaintiffs' Thirteenth Claim For Constructive Trust Fails Because Plaintiffs**
12 **Cannot Demonstrate Unjust Enrichment Nor Can that Defendants' Hold Legal**
13 **Title to Monies Distributed Under the "Subject Agreements."**

14 "In Nevada, imposition of a constructive trust requires: (1) that a confidential
15 relationship exists between the parties; (2) retention of legal title by the holder thereof against
16 another would be inequitable; and (3) the existence of such a trust is essential to the effectuation
17 of justice." *Waldman v. Maini*, 195 P.3d 850, 857 (Nev. 2008). "The requirement that a
18 confidential relationship exists is based on the idea that the existence of the relationship creates
19 an inference of fraud or undue influence when property is obtained without consideration." *Id.*
20 While Nevada may not require fraud, at the very least, unjust enrichment is required before
21 imposing a constructive trust. *Id.* at 858.

22 Further, the "requirement that a constructive trustee have title (not mere possession) to
23 the property involved is critical to the imposition of a constructive trust." *Danning v. Lum's,*
24 *Inc.*, 86 Nev. 868, 871, 478 P.2d 166, 168 (1970).

25 Here, Plaintiffs have failed to allege facts sufficient to demonstrate the elements of a
26 constructive trust. First, Plaintiffs do not allege that Defendants hold legal title to any of the
27 funds they contributed; instead, they allege that the funds were dispersed to Milano and Joshua
28 Tree. (*See* Pl. Compl. p. 15-16, ¶¶ 76, 78; p. 26, ¶¶ 143, 148.) Second, Plaintiffs have not even
alleged that Defendants retained any of the contributions, a necessary element of a claim for

1 unjust enrichment. Finally, Defendants have not pleaded an allegation of fraud sufficient to
2 support a constructive trust. Without some type of fraud, or at least unjust enrichment, a
3 constructive trust is inappropriate. Therefore, a constructive trust is inapplicable and Plaintiffs'
4 thirteenth claim should be dismissed.

5 **L. Plaintiffs' Eighteenth Claim For Relief Must Be Dismissed Because it Fails To**
6 **Meet The Stringent Pleading Requirements For A RICO Claim.**

7 Plaintiffs' Complaint falls well short of the pleading requirements for a racketeering or
8 civil "RICO" claim.

9 "Racketeering activity" means engaging in at least two crimes related to racketeering
10 that have the same or similar pattern, intents, results, accomplices, victims or methods of
11 commission, or are otherwise interrelated by distinguishing characteristics and are not isolated
12 incidents." NRS 207.380. The "crimes related to racketeering" are listed in NRS 207.360 and
13 include among other crimes: 1) taking property from another under circumstances not
14 amounting to robbery—NRS 207.360(9); 2) embezzlement of money or property valued at \$250
15 or more—NRS 207.360(25); and 3) obtaining possession of money or property valued at \$250
16 or more, or obtaining a signature by means of false pretenses—NRS 207.360(26).

17 Allegations of RICO are serious matters that should not be alleged lightly. *Hale v.*
18 *Burkhardt*, 104 Nev. 632, 638, 764 P.2d 866, 869 (1988). In making RICO allegations, a
19 plaintiff accuses a defendant of criminal violations thereby creating the serious potential for
20 social stigma. *Id.* Furthermore, in a RICO case, a plaintiff faces the prospect of treble damages.
21 *Id.*

22 Because a civil RICO action, despite its "fundamentally civil nature, (1) involves
23 pleading the commission of racketeering-related crimes and (2) permits the levy of serious
24 punitive consequences, the same degree of specificity is called for as in a criminal indictment or
25 information." *Id.* The Nevada Supreme Court has stated:

26 A civil RICO pleading must, in that portion of the pleading which
27 describes the criminal acts that the defendant is charged to have
28 committed, contain a sufficiently plain, concise and definite
statement of the essential facts such that it would provide a person
of ordinary understanding with notice of the charges.

1 (internal citation omitted) *Id.* at 869-70. “This means the complaint should provide information
2 as to ‘when, where and how’ the underlying criminal acts occurred. *Cummings v. Charter Hosp.*
3 *of Las Vegas, Inc.*, 111 Nev. 639, 646, 896 P.2d 1137, 1141 (1995) (dismissing civil RICO
4 claim because the complaint did “not state, in any detail, the circumstances surrounding the
5 allegations, nor [did] it specify with particularity what conduct is complained of and when and
6 where the conduct occurred.”)

7 In *Hale*, the court rejected a complaint in part because the “complaint’s description of [a]
8 supposed ‘scheme’ consist[ed] of a disjointed series of vague allegations lacking in overall
9 coherence.” *Hale*, 104 Nev. at 641, 764 P.2d at 871. Among the deficiencies the court noted in
10 the plaintiff’s complaint were plaintiff’s failure to: 1) explain what relationship there might be
11 between the defendant’s alleged breach of contract and charged, but unspecified, false
12 representations; 2) reveal the identities of the parties to whom misrepresentations were made; 3)
13 identify who was actually defrauded; 4) identify how much the defendant allegedly gained from
14 its scheme; and 5) specify the requisite elements of false pretenses. *Id.* False pretenses consists
15 of the following elements: (1) intent to defraud; (2) a false representation; (3) reliance on the
16 false representation; and (4) that the victim be defrauded. *Id.* at 870.

17 Here, Plaintiffs’ Complaint comes nowhere close to meeting the pleading requirements
18 under Nevada law. First, Plaintiffs have failed to identify two crimes related to racketeering that
19 have the same or similar pattern, intents, results, accomplices, victims or methods of
20 commission. A review of the Complaint demonstrates that each loan consists of different
21 actions, participants, and results. For instance, on the Flamingo/TC Loan, Plaintiffs allege that
22 Aspen’s wrongdoing was entering an unconscionable intercreditor agreement and improperly
23 benefitting from the loan. (*See* Pl. Compl. p. 8, 11.) On the Milano Loan, Plaintiffs allege that
24 Aspen made improper distributions to a third party and improperly retained extension fees. (*See*
25 Pl. Compl. p. 18-20.) On the Aspen Self Storage Loan, Plaintiffs allege that Aspen improperly
26 granted an extension because Aspen Self Storage’s net asset value had allegedly declined. (*See*
27 Pl. Compl. p. 27.) Plaintiffs’ disjointed and vague allegations are exactly like the “disjointed
28 series of vague allegations lacking in overall coherence” that the Court struggled with in *Hale*.

1 Plaintiffs have simply failed to allege what—if any—link exists between these disparate
2 transactions.

3 Additionally, the Complaint suffers from the same defects the Court identified in *Hale*.
4 Plaintiffs failed to reveal the identities of the parties to whom misrepresentations were made,
5 failed to identify who was actually defrauded, failed to identify how much Aspen allegedly
6 gained from its alleged scheme, and failed to specify the requisite elements of false pretenses.

7 Further, Plaintiffs have entirely shirked their responsibility to plead the “when, where,
8 and how” that is essential to making a RICO allegation. As Plaintiffs failed to do for their fraud
9 related claims, Plaintiffs have similarly failed here to sufficiently identify when any false or
10 misleading statements were made, by whom, to whom, or how any action or non-action taken by
11 Aspen constitute a RICO violation. Instead, Plaintiffs have again chosen to lump all the
12 Defendants together, lump all the Plaintiffs together, and lump all the loans together in a
13 confusing catch-all allegation. However, Nevada law requires more specificity in order for a
14 party to accuse another of a RICO violation.

15 **M. Mr. Guinn Should Be Dismissed From Plaintiffs’ Lawsuit.**

16 Corporations are distinct, independent, legal entities separate from their officers and
17 shareholders. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 489, 117 P.3d 219,
18 225 (2005); *see also Main Bank of Chicago v. Baker*, 427 N.E.2d 94, 101 (Ill. 1981). The
19 corporate cloak is not lightly thrown aside, and the alter ego doctrine is the exception to the
20 well-settled rule recognizing corporate independence. *Truck Ins. Ex. v. Palmer J. Swanson, Inc.*,
21 124 Nev. Adv. Op. 59, 189 P.3d 656, 660 (2008).

22 The mere showing that one corporation is owned by another, or that the two share
23 interlocking officers or directors, is insufficient to support a finding of alter ego. *Bonanza Hotel*
24 *Gift Shop, Inc., v. Bonanza No. 2*, 95 Nev. 463, 466, 596 P.2d 227, 229 (1979). In order to
25 establish an alter ego claim, a party must show that: (1) the corporation is influenced and
26 governed by the person asserted to be its alter ego; (2) there is such a unity of interest and
27 ownership that one is inseparable from the other; and (3) the facts demonstrate that adherence to
28

1 the fiction of separate entity would, under the circumstances, sanction a fraud or promote
2 injustice. *Id.*

3 Here, the Complaint does not even mention the concept of alter ego let alone set forth
4 allegations sufficient to support the elements required to invoke individual liability against Mr.
5 Guinn. Plaintiffs' Complaint confirms Mr. Guinn's role as a corporate officer which shields him
6 from individual liability on their claims. (See Pl. Compl. p. 3 ¶ 11) As a result, the Court
7 should dismiss Mr. Guinn from Plaintiffs' suit.

8 IV. CONCLUSION

9 For the foregoing reasons, the Court should dismiss any claims related to the 15 loans for
10 which no facts were pled. The Court should dismiss Donna A. Ruthe as attorney-in-fact for the
11 Plaintiffs she purports to represent because she lacks standing. Further, this Court should
12 dismiss Plaintiffs' Complaint in its entirety because the Complaint itself is grounded in fraud,
13 yet fails to meet the pleading requirements of N.R.C.P. 9(b). Alternatively, even if the Court
14 finds the Complaint is not entirely based in fraud, the Court should dismiss Plaintiffs' first,
15 sixth, seventh, eighth, sixteenth, and seventeenth fraud based claims because they do not meet
16 the pleading requirements of N.R.C.P. 9(b). Further, the Court should dismiss Plaintiff's
17 second, third, fourth, fifth, seventh, tenth, eleventh, twelfth, and thirteenth claims because
18 Plaintiffs failed to plead sufficient facts to support the elements of the claims. Additionally,
19 Plaintiffs' eighteenth claim for RICO violations should be dismissed because it falls well short
20 of the stringent pleading requirements necessary for a RICO claim. Finally, the Court should
21 dismiss Mr. Guinn from this suit as Plaintiffs have made no allegations implicating his
22 individual liability.

23 DATED this 21st day of May, 2009.

24 BAILEY ♦ KENNEDY

25
26 By:



JOHN R. BAILEY
JOSEPH A. LIEBMAN
BRANDON P. KEMBLE
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148

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(702)562-8820

Attorneys for Defendants
ASPEN FINANCIAL SERVICES, INC.
ASPEN FINANCIAL SERVICES, LLC
and JEFFREY B. GUINN

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the 21st day of May, 2009, a copy of DEFENDANTS' MOTION
3 TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO N.R.C.P.
4 12(b)(5) was served by depositing a true and correct copy in the U.S. Mail, first class postage
5 prepaid, and addressed to the following at their last known addresses:

6 Mark A. Solomon, Esq.
7 Alan D. Freer, Esq.
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13 
14 Bonnie O'Laughlin, an Employee of

15 BAILEY ♦ KENNEDY
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EXHIBIT 1

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

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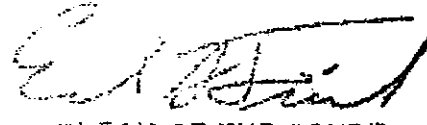
LOIS LEVY, et al.

Plaintiffs

vs.

ASPEN FINANCIAL SERVICES,
INC., et al.

Defendants
.....


CLERK OF THE COURT
CASE NO. A-575322

DEPT. NO. XI

Transcript of
Proceedings

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON PLAINTIFFS' MOTION FOR ACCOUNTING

TUESDAY, FEBRUARY 10, 2009

APPEARANCES:

FOR THE PLAINTIFFS:

JOSEPH S. KISTLER, ESQ.

FOR THE DEFENDANTS:

JOHN R. BAILEY, ESQ.
JOSEPH LIEBMAN, ESQ.

COURT RECORDER:

TRANSCRIPTION BY:

JILL HAWKINS
District Court

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

1 LAS VEGAS, NEVADA, TUESDAY, FEBRUARY 10, 2009, 9:03 A.M.

2 (Court was called to order)

3 THE COURT: Levy versus Aspen.

4 MR. KISTLER: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. KISTLER: Joseph Kistler on behalf of the

7 plaintiffs.

8 MR. BAILEY: Good morning, Your Honor. John Bailey

9 and Joseph Liebman on behalf of the Aspen defendants.

10 THE COURT: It's your motion, Mr. Kistler.

11 MR. KISTLER: This is getting to be an every-day

12 thing for us.

13 THE COURT: Every other day.

14 MR. KISTLER: Almost. It's like an every-other-day

15 thing, but not necessarily on this case.

16 Your Honor, appearing with me today in the courtroom

17 are Charles Thompson, David Willden, and Kenneth Gragson,

18 plaintiffs in the case.

19 As Your Honor is well aware, I represent 14 first-

20 position lenders on loans that were solicited, brokered, made,

21 and serviced by Aspen. Your Honor, under the documents and

22 under the relationship that was established between my clients

23 and Aspen, Aspen is a fiduciary of my clients. And, as we

24 know, that means that Aspen is required to place my clients'

25 interests ahead of its own interests and the interests of its

1 affiliates and business partners. Aspen owes my clients a
2 duty of utmost fidelity. That's well established, and that's
3 not contradicted.

4 And they failed repeatedly in satisfying their
5 statutory, as well as their fiduciary, duties. They place an
6 interest -- they've placed an interest of themselves ahead of
7 my clients. They're placing interests of their principals
8 ahead of my clients, they're placing the interests of the
9 borrowers and business associates and guarantors on the first-
10 position loans ahead of my clients. They've placed the
11 interests of the second-position lenders that they represented
12 and participated in ahead of my clients. They've failed to
13 keep the property taxes current, particularly from the
14 borrowers originally that they -- that they negotiated with,
15 and also the second-position lenders that they assisted in
16 later owning the different properties as outlined in our
17 pleadings.

18 And finally, Your Honor, it's absolutely clear that
19 they concealed vital information from my clients and other
20 first-position lenders in order to attempt to legitimize what
21 they've done in this case.

22 Now, Your Honor, just so it's clear, what we're
23 asking for in our motion is we're asking for a receiver at
24 least over the six following loans, the Celebrate LLC loan, as
25 referenced in our complaint; the Coronado Eastern Number 80

1 loan, similarly referenced; the Imoda Development loan; the
2 Pay Dirt Development loan; plus the Centennial Lamb LLC loan
3 that's referenced in page 33 of our motion; and also the JV
4 Properties loan based on different -- based on different
5 analysis.

6 The first five of those loan are all loans where my
7 clients are first-position lenders represented by Aspen where
8 there's also -- and that loan is in default. There's also
9 second-position lenders that are represented by Aspen, and
10 sometimes the second-position loans -- actually many times,
11 most times, if not at all times, were participating in an
12 undisclosed fashion by Aspen. That the firsts and seconds are
13 in default, that the seconds' rights have been pursued,
14 property's been foreclosed upon, and the first-position rights
15 have not been pursued. There's been no pursuit of guarantors,
16 and in two of these cases, the Celebrate LLC property and the
17 Centennial Lamb property, taxes are significantly in arrears,
18 and the property is in danger of being wasted as a result of
19 that.

20 We're asking for a receiver over the JV Properties
21 loans based upon the undisclosed extension of forbearance fees
22 that Aspen has received based upon the information we've
23 provided before the Court. So we're asking for a receiver
24 over all six of these loans to pursue the rights of the first-
25 position lenders on those first-position loans.

1 We're asking for a Court-appointed official subject
2 to the Court's supervision to simply do what Aspen should have
3 been doing for the last year, year and a half, and what they
4 haven't been doing as a result of their own self interests
5 conflicts and inactivity.

6 Your Honor, we're asking also for a receiver, we
7 deem it a receiver or master, over all of the loans that my
8 clients are involved in as outlined in the pleadings to look
9 at the voting process, the disclosures made to the different
10 first-position lenders on all the loans, as well as the voting
11 tabulations that were made based upon that.

12 Now, Your Honor knows down deep in the Court's bones
13 that in order to represent a first-position lender on a
14 defaulted loan and a second-position lender on a defaulted
15 loan involving the same borrower, same collateral, sometimes
16 same individuals as the defendant itself as either the
17 original borrower, the original guarantor, or the lender on
18 the seconds, that in order to have a fair and complete and
19 full voting process the disclosures that would have to occur
20 by a company like Aspen would be voluminous, would be page
21 upon page upon page upon page of disclosures of all the
22 conflicts, all the intricacies of advising the individuals you
23 owe a fiduciary duty to enable them to knowing and
24 intelligently exercise their franchise right.

25 And that hasn't happened here. We know, we know,

1 Your Honor, that the disclosures would have to be the most
2 wide-ranging and probably complicated as you've ever seen.
3 And we don't have that.

4 Therefore, Your Honor, we would ask for the Court to
5 appoint an officer, a receiver, if you will, a master that
6 reports to the Court with the results of the solicitations
7 made by Aspen on all of the loans for votes, as well as the
8 actual votes themselves.

9 And then finally, Your Honor, in our motion we're
10 asking for an accounting. And just so we're -- just so I'm
11 crystal clear with the Court in terms of what we want with an
12 accounting, we want an accounting over all moneys received
13 from borrowers from all Aspen loans where the plaintiffs were
14 lenders, plus disbursements made by Aspen of the funds they
15 received. And the reason I say that, in other words, we want
16 -- let's say that Centennial Lamb -- I have clients that were
17 lenders as first-position lenders on Centennial Lamb. We
18 would want an accounting of all moneys received on the first-
19 position loans and the second-position loans on Centennial
20 Lamb from that borrower, plus we want to know what happened to
21 the moneys once Aspen received them.

22 And why do we want that, Your Honor? Because,
23 again, one of the minor conflicts easily predictable is what
24 if -- and we don't know this, but what if the first-position
25 loan is in default, the second-position loan is not in

1 default, and the borrower sends money to Aspen and says, apply
2 it to the second-position loan? What does Aspen do at that
3 point? Did they apply it to the defaulted first, or did they
4 actually apply it to the second that's not in default? Do
5 they have the right to make that choice? Do they have the
6 right to turn their backs on the fiduciary obligations to my
7 clients that they voluntarily assumed and do something like
8 that?

9 So we want -- we want a receiver in terms of forcing
10 -- or in terms of enforcing my clients' rights under the
11 first-position loans as I've outlined, we want a
12 receiver/master to look into the voting and the disclosures
13 that were -- that were made where voting's occurred or didn't
14 occur, and we want an accounting of all the first- and second-
15 position loans where my clients are involved in firsts with
16 those borrowers.

17 THE COURT: You're not asking for a receiver over
18 Aspen Financial Services.

19 MR. KISTLER: Correct.

20 THE COURT: Okay. You're asking for, in summary,
21 someone with an accounting background to look at the
22 transactions that occurred on the loans in which your clients
23 are involved.

24 MR. KISTLER: That's what I want for an accounting,
25 yes, Your Honor.

1 THE COURT: Okay. And then you want somebody else,
2 or maybe the same person, to look at the documentation
3 regarding the voting and disclosures that were made regarding
4 any of the issues related to those loans.

5 MR. KISTLER: You stated it more clearly and
6 succinctly than I did.

7 THE COURT: So you don't really want a receiver,
8 because a receiver has certain connotations that occur in both
9 a regulatory and a lending respect that may be adverse to
10 everybody in this case if I were to appoint one.

11 MR. KISTLER: Your Honor, I also want someone to
12 step into the shoes of Aspen in servicing the first-position
13 loans on the six first-position loans that I requested. I
14 deem that to be a receiver, someone that will foreclose on the
15 property --

16 THE COURT: But at this point you do not have all of
17 the lenders involved in this case, and for me to do that don't
18 you think you would have to give notice to all of the lenders
19 involved in those loans?

20 MR. KISTLER: No, Your Honor, I don't think I have
21 to -- I haven't given notice to all of the lenders, and I
22 don't believe I'm required to give notice to all the lenders.
23 And let me respond to that in a couple of -- on a couple of
24 different levels. First of all, none of those lenders have
25 come and said, Your Honor, don't do it. In fact, the only

1 party that has objected to the relief that I've requested is
2 the very party that's burdened by the obvious conflicts and
3 the obvious self dealings and the obvious wrongdoings and
4 concealments that we've outlined in our pleading. That's
5 Aspen.

6 Your Honor, all we're asking someone to do -- all
7 we're asking for the Court-appointed official to do is do what
8 Aspen is required to but, however, under the Court's
9 supervision. In other words, we're asking for someone to come
10 in and represent the first-position lenders on these first-
11 position defaulted loans, to foreclose as necessary, if
12 feasible and if appropriate, to pursue the guarantors, to go
13 after deficiencies, and all -- and to do all of those things
14 subject to the Court's supervision and control and oversight.

15 And, Your Honor, you say perhaps that would have
16 monetary ramifications, et cetera, et cetera. Well, it would
17 have no more monetary ramification than had Aspen itself
18 actually been performing those duties and doing the things
19 that it was required to do. So we're simply asking for
20 someone to act in Aspen's place to do what Aspen has not been
21 doing, under the Court's supervision.

22 THE COURT: Thank you, Mr. Kistler.

23 Mr. Bailey.

24 MR. BAILEY: Good morning, Your Honor. As you know,
25 this motion was originally scheduled to be an in-camera

1 proceeding. The plaintiffs were the one who requested an oral
2 argument, and I suppose that the reason they want an oral
3 argument is because after their 54-page motion and 420 pages
4 of exhibits --

5 THE COURT: That would be these?

6 MR. BAILEY: Yeah, those.

7 -- our 25 pages --

8 THE COURT: Yours aren't much better.

9 MR. BAILEY: -- our 25 pages of opposition with 160
10 pages of exhibits --

11 THE COURT: And then the reply.

12 MR. BAILEY: -- and then their reply brief of
13 38 pages and 130 pages of exhibits, they must believe that the
14 Court still needs some assistance in trying to understand
15 their position. And now for the third time plaintiffs'
16 counsel has repeated the very same arguments that they have
17 made in their motion and their reply and the very same
18 arguments that we have demonstrated in our opposition have no
19 substantive basis. The arguments that they make don't make
20 sense, and the arguments that they make clearly do not support
21 the appointment of a receiver.

22 Now, I can tell from the questions you've asked Mr.
23 Kistler that he really doesn't understand what he wants,
24 because a receiver is not the appropriate type of person based
25 on what he is trying to accomplish. In fact, in essence what

1 you see when you review their motion and their reply is that
2 these plaintiffs are disgruntled because they desire a
3 particular course of action, which is not the course of action
4 that the other investors, the majority of the investors in
5 these very same loans want to take. They want to take a
6 course of action; the majority of the other investors want to
7 take a different course of action.

8 Under all the documents Aspen is required to take
9 the course of action that the majority of investors in a
10 particular loan want to take. These 14 plaintiffs out of the
11 3500 investors of Aspen are the only plaintiffs, the only
12 investors that think that they should be able to dictate how
13 particular loans go. That's the essence of their argument.
14 And what they want is they want to put in someone to do
15 exactly the opposite of what the agreements they signed
16 require Aspen to do, and they want to be able to dictate how
17 the course of action occurs between each of the loans when the
18 majority of the investors in those very same loans want to do
19 something different.

20 Now, there are simply four reasons why the relief
21 that they're asking for, the very relief that they've
22 identified in their pleadings, should be denied. First,
23 there's no allegation, there is no evidence, there is no
24 suggestion that any money is missing, that any money has been
25 misappropriated or has otherwise been diverted somewhere other

1 than where it should go. This is not like Southwest
2 Exchange, a case that my firm has some familiarity with, where
3 \$100 million has gone, and the Court needs to appoint a
4 receiver to go out and try to get those moneys back. This is
5 not that case. There is no money missing, there's no money
6 that's even alleged to be missing or misappropriated or
7 diverted in any manner.

8 Second, Aspen is highly regulated and monitored by
9 the Nevada Division of Mortgage Lending, who as recently as a
10 few months ago conducted a thorough investigation of Aspen.
11 Now, when I say a thorough investigation I don't mean somebody
12 stopped in at 2:00 o'clock in the afternoon and left at 4:00.
13 Their investigation consisted of 145 hours at Aspen looking
14 over everything that Aspen does. When they finished that
15 investigation they concluded that Aspen was in substantial
16 compliance with all laws and regulations.

17 Number three, the regulatory apparatus found in
18 NRS 645B allows an investor such as Mr. Kistler's clients to
19 file a complaint with the Division if they believe that Aspen
20 is doing something that it should not be doing. Based on the
21 law, the Division is required to investigate that complaint
22 and, if warranted, to take action through the Commissioner to
23 seek a receivership. To our knowledge, no such complaint has
24 been filed. If a complaint has been filed, it has been deemed
25 meritless by the Division because no such action by the

1 Commissioner has taken place.

2 We've also indicated in our opposition that under
3 NRS 645B.640(3) no party is permitted to even seek an
4 application for a receiver over a licensee of the Division
5 unless they first notify the Division of their attempt to do
6 so.

7 Now, when you see their reply, the plaintiffs'
8 reply, they say, oh, yeah, by the way, after we saw the
9 opposition and we saw that we're in violation of that law we
10 sent a notice up to the Division. Well, you have to send the
11 notice before you file your application. They're certainly in
12 violation of that.

13 And fourth, Judge, the reason why the relief they're
14 seeking cannot be granted is because, as you know, the Nevada
15 Supreme Court as recently as in 2006 in the Bedora versus
16 Familian case indicated that the appointment of a receiver is
17 a harsh and extreme remedy which should be sparingly used, and
18 it is also a remedy that is one of last resort. In this case
19 there is clearly no evidence to support the appointment of a
20 receiver.

21 The other relief they seek is for some kind of an
22 accounting. And, as you know, Judge, they are going to get
23 whatever information is appropriate and relevant to their
24 claims through the course of discovery. We have indicated to
25 you in our opposition that if this Court wants to look in-

1 camera at the voting results of any of these subject loans, we
2 are more than happy to produce those. Not a problem. What we
3 don't want is we don't want these 14 plaintiffs to look at the
4 results and find out how other investors voted, even though
5 collectively the vast majority of them voted for a course of
6 action that Aspen took.

7 THE COURT: Why do you think they're not entitled to
8 that, Mr. Bailey?

9 MR. BAILEY: Why do I think what?

10 THE COURT: Why do you think they're not entitled to
11 see that?

12 MR. BAILEY: I think they're entitled to see it, but
13 what I don't think they're entitled to see is how a particular
14 investor may have voted. Are they able to look at the votes
15 and look at the cumulative effect? Absolutely. What we don't
16 want is these particular plaintiffs to go out and see how --
17 I'm just going to pick a name -- Jane Doe voted and then go
18 out and harass Jane Doe because she voted in a way that's
19 inconsistent with the course of action that they want to take.
20 That's the point. An accounting is nothing more than what
21 they are going to get in discovery. There's been absolutely
22 no evidence to suggest that Aspen, my client, has done
23 anything wrong. What they have done is they have followed the
24 wishes of the majority of the investors in each one of these
25 loans. These plaintiffs are in the minority. And as you've

1 seen from pages 8 through 10 in our opposition, they comprise
2 in most of the loans less than 1 percent of the actual
3 investment in the loan, yet they believe that they should be
4 able to dictate how every course of action is taken.

5 Judge, this motion needs to be denied. Thank you.

6 THE COURT: Thank you, Mr. Bailey.

7 Mr. Kistler, anything else?

8 MR. KISTLER: Just very briefly, Your Honor. I'll
9 restrain from calling Mr. Bailey by name over and over again
10 and to interject that degree of personalized snarkiness into
11 the argument.

12 Your Honor, we will -- you know, each of the four --

13 THE COURT: I rode up in the elevator with one of
14 the D.A.s, and he remarked that he really likes it when he
15 doesn't have to come sit in my courtroom on a civil day.

16 MR. KISTLER: Your Honor, we responded to each of
17 the allegations that was placed -- that was made in the
18 opposition. The simple fact remains that it would be
19 impossible for any mortgage-servicing organization without
20 unbelievable disclosures to represent defaulted firsts and
21 seconds on the same property to the same borrower. And that's
22 putting aside the fact that your own principals are the
23 borrowers -- or the borrower on at least one of these loans.
24 The guarantor on at least one of these loans is not being
25 pursued, and that Aspen, its principals and its family members

1 themselves are lenders on the second-position loans. You
2 know, it's impossible.

3 And so for the opposition to come in and say, well,
4 Aspen hasn't done anything wrong, we've put forth sadly
5 voluminous information before the Court as to what Aspen has
6 done wrong and how Aspen has not and perhaps cannot act in the
7 best interests of these plaintiffs.

8 Again, all we're asking for is that the Court
9 appoint someone to do for all of the first-position lenders
10 what Aspen should have been doing under the Court's
11 supervision. That's all we're asking for, Your Honor. And if
12 in fact that individual says, well, you know, foreclosure is
13 something we shouldn't do at this time, or, we really should
14 do this or that or this other based upon that individual's
15 interaction with the first-position lenders, then that's the
16 call. But Aspen hasn't done -- we want someone that's not
17 burdened by Aspen's obvious conflicts, obvious self dealings,
18 obvious improprieties to be making the decisions for the
19 first-position lenders. We think that the accounting is
20 totally and completely appropriate, and we think looking into
21 the voting, both the -- both the disclosures that were made,
22 which are patently inadequate, but the disclosures that were
23 made to solicit the votes, as well as the votes themselves
24 should be a subject the both we and the Court are entitled to
25 review.

1 THE COURT: Thank you, Mr. Kistler.

2 Here it is clear that there are breach of fiduciary
3 duties which are at issue. And given that, while in certain
4 cases I might appoint a receiver or what I would call an
5 account pendent lite, given the regulatory structure, I will
6 not do so in this case.

7 However, an accounting is something that we are
8 going to do, whether it's through the discovery process or
9 through another mechanism that the Court supervises, as well
10 as a review of the voting documents.

11 What I need you gentlemen to think about, and it may
12 be you want to think about it for a few minutes and then come
13 back and wave at me and tell me you've consulted with your
14 clients and you want to tell me the answers, is whether we're
15 going to be able to develop a confidentiality agreement that
16 protects the privacy rights of the other lenders as part of
17 this discovery process we're going to go through, whether we
18 should have a meeting to discuss a mechanism to produce the
19 financial records or whether you want to agree to one person
20 to look at the financial records for both of you, how those
21 financial records are currently stored and what the best
22 mechanism for the production of those are, whether you want to
23 have an independent person review the voting records or
24 whether, unfortunately, as I've had to do in the past, I'm the
25 person who gets to review those records, and then I need to

1 also set a Rule 16 conference at which you and I and your
2 clients will have a chance to sit down and talk about ways to
3 streamline our discovery process and get a way for us to get
4 to a resolution point and/or a trial, whichever seems to be
5 the one that works out.

6 So do you want a few minutes to think about my list
7 of things I just gave you?

8 MR. BAILEY: Judge, the list of things you gave us
9 to me all clearly appear to be appropriate. What I'd like to
10 do is, with your permission, have an opportunity to talk to
11 Mr. Kistler about whether it should be you or some independent
12 person to get these voting records and so forth. I'm not sure
13 we can accomplish that right this morning.

14 THE COURT: Okay.

15 MR. BAILEY: So can we come back or send you a
16 letter or whatever's appropriate?

17 THE COURT: Well, here's my next question. I do my
18 Rule 16 conferences on Fridays.

19 MR. BAILEY: Okay.

20 THE COURT: If you gentlemen want to talk to your
21 clients and give me a Friday or two that you both agree on
22 that your clients and you are available to come -- and, Mr.
23 Kistler, you do not have to bring all of your clients, but I
24 would like you to bring a representative sample, since they
25 seem to be coming to most of my hearings. That's fine. But I

1 do need some of your clients here to participate in the
2 discussion, and a representative from Aspen.

3 MR. BAILEY: That would be fine. I will get with
4 Mr. Kistler, and we will pick a Friday --

5 THE COURT: Because I want to find a way to get you
6 guys on the right track.

7 MR. BAILEY: No. Understood.

8 MR. KISTLER: And, Your Honor, I'll prepare the
9 order, submit it to Mr. Bailey for his review prior to the
10 time that it comes to the Court.

11 MR. BAILEY: Actually, Judge, in light of the
12 ruling, I think I should probably prepare the order.

13 THE COURT: I don't care who prepares it, because I
14 didn't really say anything today except we're going to have
15 another meeting.

16 MR. BAILEY: You denied the receivership part of
17 their --

18 THE COURT: I denied the receivership.

19 MR. KISTLER: You found that there was a breach of
20 fiduciary duty, Your Honor.

21 MR. BAILEY: Yeah.

22 MR. KISTLER: And you also granted the accounting.

23 THE COURT: I denied the receivership, yeah. I said
24 there were allegations of fiduciary duties.

25 MR. BAILEY: Therein lies the problem. He thinks

1 you said there were, and you said there are allegations. We
2 understand that, because that's in the complaint. I'll
3 prepare the order, Judge, if you don't mind, and I'll send it
4 to Mr. Kistler for his review.

5 THE COURT: You don't need an order from today.

6 MR. BAILEY: Don't want an order?

7 THE COURT: We don't need an order.

8 MR. BAILEY: Okay.

9 THE COURT: The minute order will suffice. The
10 motion was denied, but I have given you homework. So I don't
11 need a written order from today. I do, however, need from you
12 dates that you guys can come on a Friday with your clients.
13 If I don't get dates from you by next Thursday, the 17th, on
14 which day this will be on my chambers calendar, I'm going to
15 issue an order with about three weeks' notice for you.

16 MR. BAILEY: We will -- I will commit to giving you
17 dates by this afternoon.

18 THE COURT: That's fine, too. But if you --

19 MR. KISTLER: I'm sure that we can do that, as well,
20 Your Honor.

21 THE COURT: -- haven't by next Thursday, I'm going
22 to pick dates and issue a written order.

23 And, Mr. Bailey, one of the things I need to know
24 from you, and I may have learned this in another case I had
25 with Aspen, is the method by which they keep their records.

1 My recollection is they essentially use Quick Books, but I'm
2 not certain.

3 MR. BAILEY: I don't know off the top of my head.

4 THE COURT: That's one of the questions I may need
5 answered.

6 MR. BAILEY: But I will -- I will find out the
7 answer to that. Thank you, Judge.

8 MR. KISTLER: Thank you, Your Honor.

9 THE COURT: Okay. 'Bye. Have a nice day.

10 THE PROCEEDINGS CONCLUDED AT 9:29 A.M.

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CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

Florence M. Hoyt

FLORENCE HOYT, TRANSCRIBER

2/25/09

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