

1 **MSJ**

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9 Limited Partnership, and Harold Mathis, Jr., individually and as a partner of the Mathis Family
10 Limited Partnership

11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 MARSHALL SYLVER, 14 Plaintiff, 15 16 vs. 17 18 MARGARET MATHIS, , et al., 19 Defendants.	20 CASE NO.: 2:09-cv-00855 21 22 MOTION FOR SUMMARY JUDGMENT
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23 TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

24 Defendants Margaret Mathis, individually and as a partner of the Mathis Family Limited
25 Partnership, and Harold Mathis, Jr., individually and as a partner of the Mathis Family Limited
26 Partnership (“Defendants”) hereby file this Motion for Summary Judgment, as follows:

27 **I. Summary of the Argument**

28 According to Plaintiff Marshall Sylver (“Sylver”), Defendants defrauded him and sent
him false information so that their son, Ben Mathis, could obtain a loan from him in the summer
of 2007. This assertion is the crux of Sylver’s fraud, fraud in the inducement, civil racketeering,
and negligent misrepresentation claims against Defendants. It is also undermined by the
evidence.

Defendants neither interacted with nor spoke to Sylver before August 24, 2007. By that
time, Sylver had already executed three promissory notes with and for Ben Mathis. Sylver’s
version of events is logically impossible; he relied on no information from Defendants. His
claims are unavailing and the Court should grant Defendants’ motion for summary judgment.

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II. Background

Sylver is an entertainer, motivational speaker, and a local businessman. Exhibit A: Plaintiff's Complaint at p. at p. 3, ¶ 11. According to Sylver, Benjamin Mathis, Defendants' son, solicited him "for the purpose of securing a personal loan" on June 25, 2007. *Id.* at p. 4, ¶ 12. Sylver asserts that he relied on financial statements sent by Defendants to him at that time. *Id.* at p. 4, ¶ 14. The purpose of this alleged document transfer was to show to Sylver "that Benjamin Mathis had enough assets to pay back the \$500,000.00 loan" *Id.*

On October 12, 2007, Benjamin Mathis filed for bankruptcy in the Central District of California. *Id.* at p. 4, ¶ 15. Sylver's counsel subsequently deposed Defendants in connection with an adversary action filed in Benjamin Mathis' bankruptcy proceeding. *Id.* at p. 4, ¶¶ 16-17. According to Sylver, the depositions of Defendants showed that he received fraudulent documents from Defendants. *See id.* at p. 4, ¶ 17. Sylver has consequently sued Defendants for fraud, fraud in the inducement, civil racketeering, and negligent misrepresentation. *Id.* at pp. 4-10, ¶¶ 17-33. He seeks to recover actual damages, exemplary damages, attorneys' fees, costs, and interest. *Id.* at pp. 10-11, ¶¶ 34-48.

III. Arguments and Authorities

A. Legal Standard

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A movant is entitled to summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)(2). Issues of material fact are genuine only if they require resolution by a trier of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also* FED. R. CIV. P. 56(c)(2). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

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To meet this burden, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts" by "coming forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quotation omitted). Summary judgment should be

1 granted only if the evidence indicates that a reasonable fact-finder could not find in favor of the
2 nonmoving party. *Anderson*, 477 U.S. at 248.

3 **B. Analysis**

4 **1. The Court Should Grant Summary Judgment on Sylver's Fraud Claim.**

5 Sylver believes that Defendants defrauded him. Exhibit A at p. 5 ,¶ 18. Under Nevada
6 law, "fraud is never presumed; it must be clearly and satisfactorily proved." *Havas v. Alger*, 461
7 P.2d 857, 860 (Nev. 1969). The plaintiff must prove each of the following elements by clear and
8 convincing evidence:

- 9 (1) a false representation made by the defendant;
- 10 (2) defendant's knowledge or belief that the representation is false (or insufficient
11 basis for making the representation);
- 12 (3) defendant's intention to induce the plaintiff to act or to refrain from acting in
13 reliance upon the misrepresentation;
- 14 (4) plaintiff's justifiable reliance upon the misrepresentation; and
- 15 (5) damage to the plaintiff resulting from such reliance.

16 *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 592 (Nev. 1992). Both the documents and
17 testimony show that Defendants neither made false representations nor had the requisite
18 knowledge nor intended to induce Sylver.

19 The crux of Sylver's common law fraud claim is that Defendants connived him into
20 loaning their son money. But as Mrs. Mathis testified during her deposition, she has never met
21 Sylver or talked to him before. Exhibit B: Excerpts from the Oral Deposition of Margaret
22 Mathis at 8:11-13. Further, Mrs. Mathis adamantly denied ever falsifying any financial
23 statements. *Id.* at 25:14-18. When Mrs. Mathis sent documents to her son, she believed that he
24 held the exact same amount of assets in a Smith Barney account in Los Angeles. *Id.* at 24:18-
25 25:4. Indeed, Mrs. Mathis had *no idea* from whom her son was borrowing money. Exhibit C:
26 Excerpts from the Oral Deposition of Margaret Mathis in Ben Mathis' bankruptcy proceeding at
27 35:18-36:8.

28 Mr. Mathis' deposition testimony is entirely consistent on this issue. His understanding
was that his wife faxed Ben Mathis documents so that he could show that the assets he had at
Smith Barney which had allegedly been frozen. Exhibit D: Excerpts from the Oral Deposition of
Harold Mathis, Jr. at 35:21-36:4. During Mr. Mathis' deposition in his son's bankruptcy

1 proceeding, Mr. Mathis testified he had no knowledge of his son's gambling expenditures until
2 August 24, 2007. Exhibit E: Excerpts from the Oral Deposition of Harold Mathis, Jr. in Ben
3 Mathis' bankruptcy proceeding at 46:12-47:7.

4 Sylver's own discovery responses undermine his fraud claim completely. Sylver never
5 spoke to either Mr. Mathis or Mrs. Mathis before August 24, 2007. Exhibit F: Plaintiff's
6 Responses to Defendant Harold Mathis, Jr.'s First Request for Admissions at p. 6 (Request No.
7 10); Exhibit G: Plaintiff's Responses to Defendant Margaret Mathis' First Request for
8 Admissions at p. 6 (Request No. 10). Further, Sylver and Ben Mathis executed promissory notes
9 on April 5, 2007, June 1, 2007, and June 25, 2007. Each of these notes predates the documents
10 Mrs. Mathis sent to her son by other a month. See Exhibit H: Promissory Notes.

11 Neither Mr. Mathis nor Mrs. Mathis either made a fraudulent representation or evinced
12 fraudulent intent. Further, the documents on which Sylver relied in issuing loans to Ben Mathis
13 were documents other than the ones Mrs. Mathis faxed to her son on August 10, 2007.
14 Accordingly, Sylver cannot establish justifiable reliance. See Exhibit I: Financial Statements at
15 pp .1-2. The Court should grant summary judgment on Sylver's unavailing fraud claim.

16 **2. The Court Should Grant Summary Judgment on Sylver's Fraud In the**
17 **Inducement Claim.**

18 Sylver has also asserted a claim against Defendants for fraud in the inducement. Exhibit
19 A at p. 6, ¶ 22. To establish fraud in the inducement, Sylver must prove by clear and convincing
20 evidence each of the following elements:

- 21 (1) a false representation made by Defendants;
- 22 (2) Defendants' knowledge or belief that the representation was false (or
23 knowledge that they had an insufficient basis for making the representation);
- 24 (3) Defendants' intention to induce the plaintiff to consent to the contract's
25 formation;
- 26 (4) the plaintiff's justifiable reliance upon the misrepresentation; and
- 27 (5) damage to the plaintiff resulting from such reliance.

28 *Havas*, 461 P.2d at 860. Sylver's fraudulent inducement claim fails for the same reasons as his
fraud claim. See Exhibits B, D, F, G. As Defendants' deposition testimony and Sylver's
discovery responses show, Defendants did not make any false representations to Sylver. Further,
none of Defendants' statements and actions caused Sylver to loan Ben Mathis money. Thus, the

1 Court should grant summary judgment on Sylver’s fraudulent inducement claim.

2 **3. The Court Should Grant Summary Judgment on Sylver’s Racketeering**
3 **Activity Claim.**

4 Sylver avers that Defendants engaged in racketeering activity. Exhibit A at p. 7, ¶ 26.
5 “Any person who is injured in his or her business or property by reason of any violation of NRS
6 207.400 has a cause of action against a person causing such injury for three times the actual
7 damages sustained.” NEV. REV. STAT. ANN. § 207.470(1) (1983). Under section 207.400 of the
8 Nevada Revised Statutes, it is unlawful for a person “[t]hrough racketeering activity to acquire or
9 maintain, directly or indirectly, any interest in or control of any enterprise.” *Id.* § 207.400(1)(b).
10 Similarly, it is unlawful for a person to “transport property, to attempt to transport property or to
11 provide property to another person knowing that the other person intends to use the property to
12 further racketeering activity.” *Id.* § 207.400(1)(h). Subparts (1)(b) and (1)(h) to section 207.400
13 both require racketeering activity, which is defined as follows:

14 [E]ngaging in *at least two crimes related to racketeering* that have the same or
15 similar pattern, intents, results, accomplices, victims or methods of commission,
16 or are otherwise interrelated by distinguishing characteristics and are not isolated
17 incidents, if at least one of the incidents occurred after July 1, 1983, and the last
of the incidents occurred within 5 years after a prior commission of a crime
related to racketeering.

18 *Id.* § 207.390 (emphasis added). The term “crime related to racketeering” means “the
19 commission of, attempt to commit or conspiracy to commit any of the following crimes: . . . 9.
20 Taking property from another under circumstances not amounting to robbery; . . . Obtaining
21 possession of money or property valued at \$250 or more, or obtaining a signature by means of
22 false pretenses; . . .” *Id.* §§ 207.360(9), 207.360(26). No such racketing took place.

23 As the promissory notes demonstrate, Defendants did not obtain or possess any money or
24 property from Sylver at any time. Indeed, the evidence shows, and Sylver cannot dispute, that
25 Sylver wired money to Ben Mathis, who is not a party to this lawsuit. Thus, no crime related to
26 racketeering occurred.

27 Sylver may well argue that Defendants and their son entered into a conspiracy. But
28 conspirators must have knowledge of the goal of the conspiracy, and Defendants had no such
awareness. Both Mr. Mathis and Mrs. Mathis testified that they didn’t know about their son’s

1 financial difficulties until late August 2007—long after the execution of the three notes. Any
2 assertion that a conspiracy occurred is implausible and unpersuasive. *See* Exhibits B, D, F, G.
3 The Court should grant summary judgment on Sylver’s racketeering activity claim.

4 **4. The Court Should Grant Summary Judgment on Sylver’s Negligent**
5 **Misrepresentation Claim.**

6 Sylver contends that Defendants made various negligent misrepresentations. Exhibit A at
7 p. 9, ¶ 30. Under Nevada law, the tort of negligent misrepresentation is defined as follows:

8 One who, in the course of his business, profession or employment, or in any other
9 action in which he has a pecuniary interest, supplies false information for the
10 guidance of others in their business transactions, is subject to liability for
11 pecuniary loss caused to them by their justifiable reliance upon the information, if
he fails to exercise reasonable care in obtaining or communicating the
information.

12 *Bill Stremmel Motors, Inc. v. First Nat’l Bank of Nevada*, 575 P.2d 938, 940 (Nev. 1978). The
13 summary judgment evidence, however, nullifies Sylver’s assertions.

14 Defendants did not talk to Sylver before August 24, 2007. *See* Exhibits B, D, F, G. By
15 that time, Sylver had already executed three promissory notes with Ben Mathis. Accordingly,
16 Defendants did not supply any information on which Sylver relied before the crucial
17 transactions. Further, Sylver could not have relied, much less justifiably, on any alleged
18 information sent by Defendants. The Court should grant summary judgment on this claim.

19 **5. The Court Should Grant Summary Judgment on Sylver’s Claims for**
20 **Damages, Fees, Costs, and Interest.**

21 As previously stated, each of Sylver’s four claims is unavailing. Under Nevada law,
22 then, his entitlement to any damages, punitive damages, attorneys’ fees, costs, and interest
23 consequently vanishes. The Court should dispose of these elements of damages and grant
24 Defendants’ motion for summary judgment.

25 **IV. Conclusion and Prayer**

26 The Court should grant Defendants’ Margaret Mathis, individually and as a partner of the
27 Mathis Family Limited Partnership, and Harold Mathis, Jr., individually and as a partner of the
28 Mathis Family Limited Partnership’s Motion for Summary Judgment.

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Respectfully submitted,

HAYS, McCONN, RICE & PICKERING, P.C.

By: /s/ David V. Wilson II, Esq

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PARTNERSHIP, AND HAROLD MATHIS, JR.,
INDIVIDUALLY AND AS A PARTNER OF THE
MATHIS FAMILY LIMITED PARTNERSHIP**

1 **CERTIFICATE OF SERVICE**

2 David V. Wilson II, Esq., hereby certifies that on the seventh day of October, 2010, he
3 served a true and correct copy of the Motion for Summary Judgment on all counsel of record
4 via CM/ECF, as follows:

5 ***Via CM/ECF***
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10 /s/ David V. Wilson II, Esq.
11 David V. Wilson II, Esq.