No. 18-17270

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FAST TRAK INVESTMENT COMPANY, LLC,
a Delaware limited liability company,

Plaintiff/Appellee,

v.

RICHARD PHILIP SAX, individually and as principal for
The Law Offices of Richard Sax;
Law Offices of Richard Sax

Defendant/Appellant.

On Appeal from the United States District Court
for the Northern district of California
No. 4:17-cv-00257-KAW
The Honorable Kandis A. Westmore,
Presiding Magistrate Judge

APPELLEE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellee Fast Trak Investment Company, LLC is a member-managed Delaware limited liability company. It has no parent company, and no publicly owned corporation owns 10% or more of its shares.

Date:July 10, 2019

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INTRODUCTION

The Opening Brief submitted by Appellant/Defendant Richard Sax does nothing to show that the district court's decision should be reversed in any respect. It most assuredly does not provide any basis for this Court to review the only two documents cited in Sax's Notice of Appeal. That Notice stated Sax was appealing Dockets 78 and 79, "Motion to Enter Judgment on Award of Damages" and "Order Awarding Damages", respectively. Sax did not include Docket 79 in his Excerpts of Record, and despite the opportunity to do so, Sax failed to object to the entry of judgment. E.R. (Vol. 6) 551, *et seq*. As he did in response to Fast Trak's detailed pleading regarding damages in the district court, Sax's Opening Brief stands silent on any analysis of damages. *See,* Appellee's Supplemental Excerpts of Record ("Supp. E.R."), filed concurrently. Supp. E.R. 578; *see also* Supp. E.R. 573-575 (Transcript, [573:17-575:10]); E.R. 13 (13:9-11).[1]

The only issues argued in Sax's Opening Brief relate to his affirmative defenses. Despite these arguments being fully considered

[1] Sax also failed to include Fast Trak's Supplemental Brief re Damages, Docket 75, which carefully set forth the basis for the award.

and rejected by the district court, and despite Sax taking the benefit of the bargain, Sax now continues to argue the contracts underlying this action are "unenforceable" due to usury or champerty. Neither applies to these agreements.

The contracts affirm the Agreements were not loans. E.R. 61 (Vol. I) ("This is a nonrecourse purchase agreement. There is no obligation for seller to make payment except from the proceeds of the matter/litigation"); E.R. 61 (Vol. II) [¶1(a)] ("Seller intends this transaction to be and agrees this transaction is a purchase and sale and not a loan"); E.R. (Vol. 2) 78 [¶8] ("Waiver of Claims. Seller hereby releases and waives any and all claims or causes of action that this transaction is other than a purchase and sale."). Not only did Sax affirm that the agreements were not loans, he affirmed the transaction was a purchase. E.R. 20 (Vol. 1) [20:18-19]); E.R. 63 (Vol. II) [¶¶ 5, 8].

The district court found that the Agreements lacked the hallmarks of loans. E.R. 27 (Vol. I) [27:5-6]. First, the contracts were non-recourse and Fast Trak's investment was dependent on Defendants' recovery, such that repayment was not absolute. E.R. 26 (Vol. I) [26:20-21]; E.R. 61 (Vol. II) ("This is a nonrecourse purchase agreement. There is no

obligation for seller to make payment except from the proceeds of the matter/litigation."). Second, there was no definite time for repayment. E.R. 27 (Vol. I) [27:5-6]. "Since the Agreements are assignments of the sale or proceeds rather than loans, there could be no usury." E.R. 27 (Vol. I) [27:18-19]. The district court found that "the Agreements are enforceable as purchase agreements and were not loans". E.R. 31 (Vol. I) [31:2-3].

The agreements cannot be deemed champertous. Fast Trak never brought suit on any case that was the subject of the contracts between Fast Trak and Sax. The reason is simple: The contracts did not assign the right to bring suit. The assignments were limited to a portion of the proceeds from completed litigation. With no assignment of the claim and no right to step into the shoes of the seller, there can be no champerty. Richard Sax made no other arguments before the district court. He did not oppose or object to either Docket 78 or 79. E.R. 13 (Vol. I) [13:9-11]); E.R. 551-559.

Sax makes no argument and briefs no law that would militate in favor of altering the summary judgment ruling or damages award in this case. At times, he even cites to excerpts of the record that have no

correlation to the point he seems to be trying to make. "As the Seventh Circuit observed in its now familiar maxim, 'judges are not like pigs, hunting for truffles buried in briefs.'" *Indep. Towers of Wash. v. Washington* (9th Cir. 2003) 350 F.3d 925, 929. The same applies to metaphysical nuggets that cannot be located in the excerpts of the record.

With no legal argument and no citations to supporting facts, Sax's appeal should be denied. This Court should affirm the district court's well-reasoned order granting summary adjudication and the award of damages.

JURISDICTIONAL STATEMENT

Jurisdiction in the United States district court, Northern district of California, was appropriate pursuant to 28 USCS § 1332(a), which states, in pertinent part, that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between citizens of different states. Fast Trak is a Delaware limited liability company with its domicile at time of suit in New York. E.R. 444, (Vol. V) [444:7-20]. Attorney Richard Sax is domiciled in California, and his law practice, the Law Offices of Richard Sax, has its principal place of business in Santa Rosa, California. E.R. 1; E.R. 392 (Vol. V) [392:14]. By contract, New York law applies to this case. E.R. 28, (Vol. I) [25:5-10].

Judgment was entered in this case on October 26, 2018. E.R. 5, (Vol. I) [5:13-21]. Appellant/Defendant Sax filed a notice of appeal on November 26, 2018. E.R. 1 (Vol. I).

STATUTORY AND REGULATORY AUTHORITIES

Any relevant statutory authority appears in the Appendix to this Answering Brief.

ISSUES PRESENTED

1. Whether contracts for the Assignment, Sale, Springing Assignment and/or Equitable Lien ("Purchase Agreement") can implicate champerty where the purchaser exerts no control over any litigation, and has no say in whether litigation is, or is not, pursued by a personal injury attorney making his living prosecuting litigation on a contingency basis?

2. Whether a non-recourse and open-ended Purchase Agreement can be classified as a loan despite the significant risk that the investor may lose the entire investment, the lack of any deadline for "repayment" and the clear language that the contracts are non-recourse such that if the underlying plaintiff and/or filing attorney do not succeed on the case, nothing ever becomes due on the Purchase Agreement?

3. Whether Appellant Sax presented credible evidence in the district court to raise a triable question of fact as to champerty or usury under the circumstances of this case?

4. Whether appellant waived any and all other arguments by failing to raise them in the district court?

5. Whether this Court may address any issue raised by Sax's Opening Brief where his Notice of Appeal stated he was appealing Docket Nos. 78 and 79 (motion for damages and entry of order re damages) despite failing to address any issue regarding the amount of damages either in the district court or his Opening Brief?

STATEMENT OF THE CASE

I. THE NATURE OF THE UNDERLYING CONTRACTS.

Fast Trak is a litigation funding company. E.R. 9 (Vol. I) [9:25]; E.R. 37 (Vol. I) [37:5-7]. The company provides funds to either plaintiffs or plaintiffs' attorneys through "Assignment, Sale, Springing Assignment, and Equitable Liens" ("Agreements"). E.R. 61 (Vol. II) [Disclosure Statement]; E.R. 69 (Vol. II) [Section A1. The Agreement Part 1)]). Fast Trak invests in a case by purchasing a portion of the hoped-for proceeds either realized by the underlying plaintiff (Primary Agreement) as a verdict or settlement (E.R. 37 (Vol. I) [37:14-24]); E.R. 61-68 (Vol. II). or by the plaintiff's attorney (Secondary Agreement) as attorney's fees. E.R. 38 (Vol. I) [38:11-16]). With Secondary Agreements, the attorney typically pledged his fees from multiple underlying primary case as an inducement for Fast Trak to invest. E.R. 69-75, (Vol. II).

Proceeds are defined as "judgment, settlement or other recovery from primary cases, and attorney's fees and disbursements from secondary cases." E.R. 432 (Vol. III) [18-20]; E.R. 459 (Vol. 6) ["Any monetary sums recovered pursuant to the Litigation, through

settlement, verdict, judgment, arbitration, statutory schedule or otherwise, if any, shall hereinafter be referred to as (the 'Proceeds')"]; E.R. 453 (Vol. VI) [Section A2. The Agreement Part 2(a) ("'Proceeds' is defined as any sums of money which is to be paid to, or retained by the firm known as The Law Offices of Richard A. Sax. Or Richard A. Sax, Esq., as and for reimbursement of case related disbursements, or as and for legal fees in connection therewith.")]. Under the definitions, it is clear that no money or "proceeds" can be available to Fast Trak unless and until the litigation is resolved.

Every Agreement made through Fast Trak is a non-recourse investment. E.R. 139 (Vol. II) ("This is a nonrecourse purchase agreement. There is no obligation for seller to make payment except from the proceeds of the matter/litigation"). If the plaintiff's case failed with neither the plaintiff nor the attorney obtaining any money from the underlying litigation, Fast Trak receives nothing. E.R. 20 (Vol. I) [20:27-28 fn. 2]. If the plaintiff wins, Fast Trak is entitled to its investment back plus a profit depending on how long Fast Trak's money is invested. E.R. 13 (Vol. I) [13:17-18]. The payment is set forth in a

clear schedule in each Primary and Secondary Agreement. E.R. 12 (Vol. I [1:4-10]; E.R. 61; E.R. 70.

A. THE AGREEMENTS BETWEEN FAST TRAK AND SAX.

Sax entered into a series of such Agreements with Fast Trak. E.R. 20 (Vol. I) [20:1-4]. Fast Trak provided Sax with at least $132,000 beginning in 2013. E.R. 20-21 (Vol. I) [20:25-21:2]; E.R. 155 (Vol. II). When Sax sought more than Fast Trak felt comfortable investing, Fast Trak asked Sax to pledge the proceeds from additional cases to bolster the chances that Fast Trak would eventually get its money back and make a profit. E.R. 21 (Vol. I) [21:5-6]; E.R. 53 (Vol. I) [53:12-14]; E.R. 56 (Vol. I) [56:5-7]; E.R. 67 (Vol. II) [Exhibit 1 to Declaration of Kira A. Schlesinger in Support of Motion for Summary Adjudication]. There was no guarantee any of the cases – whether the original primary case or the additional pledged secondary cases – would result in proceeds. There was always a risk of loss. E.R. 26, (Vol. 1) [26:19-21] ("repayment was contingent on Defendants' recovery, such that repayment could not be considered absolute.").

Some of the cases that Fast Trak invested in did not result in proceeds. E.R. 20 (Vol. I) [20:27-28, fn. 2]). Specifically, "the *Monigan*

case resulted in a defense verdict, while the *Pacheco* case was abandoned, and . . . in accordance with the terms of the Agreements, no payment is due on those cases." E.R. 29 (Vol. I) [29:21-23]; E.R. 180 (Vol. III) [180:10-13]; *Cf.* E.R. 187 (Vol. III) [187:11-14]. Fast Trak lost its entire investment. E.R. 26, *supra.* The matter before the district court dealt only with cases where Sax and his clients realized proceeds. *Id.*

In those cases that had a favorable outcome, Fast Trak was entitled to a graduated payment so that the amount to be paid by Sax or his client increased over time. E.R. 61, (Vol. 2) [Disclosure Statement]; *see also* E.R. 12 (Vol. I) [12:4-10]). There was no fixed time by which any money was required to be paid to Fast Trak. E.R. 27 (Vol. I) [27:5-7]); E.R. 61.

Sax acknowledged in writing that "Purchaser [Fast Trak] has no influence, power or control over any matter relating to the Litigation." E.R. 20 (Vol. I) [20:20-23]) (citing E.R. 56 [Schlesinger Decl. ¶ 5(c)] and E.R. 61-62 (Vol. II) [Ex. 1 to Declaration of Schlesinger, at ¶¶1-2 (Representations and Warranties of Seller, § l(r))]).

Sax also agreed that he would act as Fast Trak's fiduciary on Primary Agreements. E.R. 67 (Vol. II) [67, Exhibit "B", Acknowledgment by Counsel, ¶ 2] ("I will honor the assignment by Seller to Purchaser as contemplated under the Agreement, including without limitation: (a) holding, as fiduciary for Purchaser, any Proceeds (as defined in the Agreement), together with any permitted fees and costs…"). He contractually agreed to fiduciary duties that included notifying Fast Trak of any favorable outcome on a case, and holding, as Fast Trak's fiduciary, the amount due to Fast Trak. E.R. 67 (Vol. II) [¶ 2(a) and (b)]; E.R. 112-113 (Vol. II).

The district court found that Sax breached the first cause of Action (Breach of Contract) and the third cause of action (Breach of Fiduciary Duty). E.R. 29 (Vol. I) [29:4-5].

1. Arguments of Parties Below.

Sax made two primary arguments in opposition to Fast Trak's motion for summary adjudication in the district court.[2] First, he argued

[2] Sax also argued that California law, and not the contractual choice of New York law, should apply. E.R. 23-24 (Vol. I) [27-27:11]. The district court held the choice of law clause enforceable, and Sax has abandoned the argument on appeal. E.R. 25 (Vol. I) [25:9-10]; Dkt. 5 [7].

the contracts were unenforceable as usurious loans. Second, he argued that the contracts were unenforceable as violating laws against champerty. E.R. 27 (Vol. I) [27:14-23]).

2. Sax's Argument of Usury Fails.

Sax argued that the contracts were usurious loans rather than the stated Assignment, Sale, Springing Assignment & Equitable Lien Agreement set forth in the contracts, and acknowledged by Sax. [E.R. 106 (Vol. II); E.R. 116-117 (Vol. II) [¶¶ 2(a)(i) and (ii)]. The contracts contained a specific provision stating that "Seller intends this transaction to be and agrees that this transaction is a purchase and sale agreement and not a loan". *See, e.g.,* E.R. 61, (Vol. II) [¶(1)(a)]); E.R. 20 (Vol. I) [20:18-19].

Sax stated in opposition to the motion for summary adjudication that he "realized in retrospect that the loans were, and are, usurious." E.R. 396 (Vol. V) [396:25-26]. Sax argued unpersuasively that the collateralization of the purchase contracts transformed them into "recourse loans":

> Plaintiffs loan [sic] was secured by other cases, so that unless Defendant lost each and every case, Plaintiff still had the right to collect from the

> 'Secondary Cases.' To lose each and every case would be highly unlikely.

E.R. 399 (Vol. V) [399:8-10].

Under New York law, there is a presumption that a transaction is not usurious. "As a result, claims of usury must be proven by clear and convincing evidence, a much higher standard than the usual preponderance". *NY Capital Asset Corp. v F & B Fuel Oil Co., Inc. (N.Y. Capital)* (Sup.Ct.) 2018 NY Slip Op 50310(U), ¶ 5 [58 Misc.3d 1229(A), 98 N.Y.S.3d 501].

The district court noted the risk of Fast Trak losing its investment was not eliminated: "Here, despite Defendants' protestations to the contrary, repayment was contingent on Defendants' recovery, such that repayment could not be considered absolute". E.R. 26, (Vol. I) [26:19-21]). "Where repayment is not absolute, the transaction is sufficiently risky such that it cannot be considered a loan a matter of law." *Id.* (Vol I) [26:14-15] (citing *N.Y. Capital*, *supra*). The Agreements state that "there is no obligation for seller to make payment except from the proceeds of the matter/litigation." E.R. 61 (Vol. II).

The court also found that a "quintessential factor" for determining if a contract was actually a loan was whether 'the agreement has a

finite term or not.'" E.R. 27, (Vol. I) [27:2-3] (citing *NY Capital, supra,* at *7 (citing *K9 Bytes, Inc. v Arch Capital Funding, LLC* (Sup.Ct.) 2017 NY Slip Op 27166, ¶ 6 [56 Misc.3d 807, 817, 57 N.Y.S.3d 625, 633]). Essentially, when payment is not set at a fixed time, "the hallmark of a loan is missing." *Id.* at 27:5-6; *see also* E.R. 12 (Vol. I) [12:7-10]. The district court found that the "contracts at issue are each non-recourse contracts, and as such, are not subject to usury laws, either under New York law, which is the choice of law designated in the contracts, or under California law. The only contracts relevant to Fast Trak's claims do not have any of the earmarks of a loan." E.R. 382 (Vol. IV) [382:4-7].

3. Sax's Argument of Champerty Fails.

Sax's argument that the Agreements were "champertous" was rejected by the district court. Sax stated in his opposition to the motion for summary adjudication that "after the litigation commenced, [he] realized that the loans by Plaintiff may constitute champerty". E.R. 399 (Vol. 5) [399:3-4].

As stated by the district court, "[c]hamperty requires that Fast Trak exert some level of control over the primary or secondary litigation. It does not apply where litigation is either ongoing or will be

undertaken regardless of the contract at issue." E.R. 27 (Vol. I) [27:21-23]). The Agreements make it clear that only proceeds from cases were sold or assigned.

> In order to induce FAST TRAK to enter the aforementioned MONIGAN AGREEMENT with MONIGAN and for other good and valuable consideration, SAX hereby assigns to FAST TRAK the entirety of SAX's attorneys fees and disbursements that may be recovered from the client litigation matters ("cases") listed in Exhibit "A" hereof (and which are currently being litigated by SAX) and shall pay these attorneys fees and disbursements to FAST TRAK in the manner set forth as follows. . .

Sax is a personal injury attorney who makes his living filing cases for a percentage of his clients' awards and settlements. E.R. 417 (Vol. V) [417:3-5; 9-10]); E.R. 10 (Vol. I) [10:8-9]. Fast Trak is a group of investors purchasing a portion of the proceeds from those cases. E.R. 37 (Vol. I) [37:10-12]. The Agreements specifically stated, and Sax acknowledged, that "[p]urchaser has no influence, power or control over any matter relating to the [underlying] Litigation." E.R. 62, (Vol. II) [(1)(r)]. If the case is lost, Fast Trak is owed nothing. E.R. 44 (Vol. I) [44:20-21]); E.R. 61 (Vol. II). The same result occurred if Sax opted to not pursue a case. In at least one instance, Sax decided his firm would

"no longer carry this litigation", and Fast Trak was owed nothing. E.R. 349 (Vol. IV); E.R. 391 (Vol. V) [391:16-17].

Any proceeds only become available to Fast Trak when the litigation is complete, and the attorney's client has been provided an accounting. *See, e.g.,* E.R. 317 (Vol. IV). "In each of the primary Agreements, the required condition precedent was a *judgment or settlement* in resulting in proceeds to the sellers" or, on secondary cases, "Fast Trak would only be paid from attorney's fees realized by Sax as *proceeds from litigation*." E.R. 21 (Vol. I) [31:3-7]) (emphasis added). In other words, Fast Trak only was paid once litigation was over. In the event the plaintiff obtained no award, Fast Trak investors lost the entire amount invested. E.R. 37 (Vol. I) [37:20-23]); E.R. 351-352; E.R. 20 (Vol. I) [20:27-28, fn. 2]).

B. SAX ABANDONED HIS CHOICE OF LAW ARGUMENT.

The only other argument Sax made in the district court was that California law applied notwithstanding the choice of law clause in the contracts. The district court rejected that argument, finding that the contractual choice of law was enforceable. "[F]ederal courts generally 'hold parties to their contractual promises to litigate in a specified

forum, and apply the same reasoning to contractual choice of law clauses.' The Court agrees." E.R. 24 (Vol. I) [24:4-7]). Sax failed to show that New York law violated any fundamental policy, or that there was any significant difference in the two states' protections against usury and champerty. E.R. 24-25 (Vol. I) [24:17-25:4]. Moreover, "the contract containing the choice-of-law provision must govern the claim that is alleged to arise from it." E.R. 25 (Vol. I) [25:5-6]. On appeal, Sax has abandoned his choice-of-law argument.

Sax's defenses to summary adjudication – usury, champerty and choice of law – were soundly rejected by the district court in a well-reasoned opinion. E.R. 19-29 (Vol. I). This Court should affirm the district court's rulings in their entirety.

SUMMARY OF ARGUMENT

I. THE COURT APPLIED THE CORRECT STANDARD.

Sax made only limited arguments in opposition to the motion for summary adjudication. Sax's arguments in the court below, and in this Court, are based on the affirmative defenses of champerty and usury. As affirmative defenses, Sax had the burden of proof at trial. E.R. 23

(Vol. I) [23:3-7]). With that in mind, the court viewed the evidence in the light most favorable to Sax as the non-moving party. *Id.* [26:21-23].

II. UNDER THE APPLICABLE STANDARD, FAST TRAK DEMONSTRATED THAT THE CONTRACTS ARE ENFORCEABLE.

Sax failed to negate any element of Fast Trak's breach of contract or breach of fiduciary duty claims. The elements for each cause of action are well established. Sax did not dispute that there was a written contract, that Fast Trak performed its obligations under the contract, and that he failed to perform causing damages. E.R. 25 (Vol. I) [25:13-21]); E.R. 28 (Vol. I) [28:3-7]); [28:27-28]).

Sax's argued the contracts were unenforceable because of either usury or champerty. The record shows that neither defense applied.

Champerty failed because Sax failed to show that Fast Trak had purchased a "claim", or had any entitlement to pursue the underlying litigation, much less any intent to pursue such litigation. Fast Trak purchased proceeds, which by definition only came into being, if at all, when the underlying case was resolved. No "claim" transferred, and

Fast Trak never filed any suit until this action to enforce its contractual rights.

Sax also failed to show that the contracts at issue were other than purchase agreements. The contracts had no deadline by which any proceeds had to be paid, and if the case was lost, Fast Trak received nothing. With Fast Trak's investment at risk, the contracts cannot be characterized as loans.

Having carried its burden of production in the district court, Fast Trak was entitled to summary judgment. Sax failed to support his affirmative defenses with any credible evidence. Mere assertions unsupported by facts could not raise a triable issue of fact. The district court's well-reasoned opinion should not be disturbed.

ARGUMENT

I. STANDARD OF REVIEW.

The motion for summary adjudication before the Honorable Kandis Westmore was a mixed question of law and fact. "The meaning of contract provisions is a question of law over which [courts of appeal] exercise de novo review." *Chassman v. Shipley* (2d Cir. 2017) 695 F.App'x 630, 632 (citing *Photopaint Techs., LLC v. Smartlens Corp.* (2d

Cir. 2003) 335 F.3d 152, 160); *Klamath Water Users Protective Ass'n v. Patterson* (9th Cir. 1999) 204 F.3d 1206, 1210 (citing *O'Neill v. United States* (9th Cir. 1995) 50 F.3d 677, 682). Applicable here, the determination of whether contract language is ambiguous is a question of law. *Id.*

Sax cites *Triton Energy Corp. v. Square D Co.* (9th Cir. 1995) 68 F.3d 1216, for the proposition that "[t]he test is whether the opposing part 'has come forward with sufficiently 'specific' facts from which to draw reasonable inferences about other material facts that are necessary elements of the (opposing party's) claim." Dkt. 5 (21). In the district court and again in this Court, Sax failed to point to any "sufficient specific facts" that would support his affirmative defenses. While "[t]he mere existence of a scintilla of evidence in support of the nonmoving party's position is not sufficient", Sax has not even provided that. Triton Energy Corp., *supra*, 68 F.3d at 1221.)

Triton Energy actually supports Appellee's position. That case was a battle of experts in a product defect case following a fire. *Triton Energy Corp., supra*, 68 F.3d at 1219-1220. Defendant brought a motion for summary judgment primarily on the grounds of spoliation of

evidence. "The district court, without addressing the spoliation issue, ruled that Triton had failed to show a genuine issue of material fact with regard to whether the defect in the circuit breaker existed when it left the Square D plant." *Triton Energy Corp., supra*, 68 F.3d at 1220.

The Ninth Circuit affirmed the court below stating:

> At best, neither party has succeeded in establishing that its version of the facts is more probable than not.
>
> The issue thus is whether the plaintiff Triton, *upon whom the burden of proof rests*, is entitled to present its case to the jury. To succeed before the jury, it must establish by a preponderance of the evidence that a circuit breaker, not in evidence, was shipped from the Square D plant more than two decades ago in a defective condition. At best its evidence merely suggests this is a weak possibility.

Triton v. Square D Co. (9th Cir. 1995) 68 F.3d 1216, 1221. (emphasis added).

While the appropriate standard of review mandates that the court decide all reasonable factual disputes in favor of the non-moving party, the court need not – and should not – give credence to mere assertions where the non-moving party will carry the burden at trial. Where there is a "challenge [to] the legal sufficiency of an affirmative defense – on which the defendant bears the burden of proof at trial – a plaintiff may

satisfy its Rule 56 burden by showing that there is an absence of evidence to support an essential element of the non-moving party's case." *Lifeguard Licensing Corp. v. Ann Arbor T-Shirt Co.* (S.D.N.Y. July 9, 2018) 2018 U.S.Dist.LEXIS 113798, at *4.) (citing, *inter alia, FDIC v. Giammettei* (2d Cir. 1994) 34 F.3d 51, 54; *Celotex Corp. v. Catrett* (1986) 477 U.S. 317, 323 [106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273]). The nonmoving party must show more some metaphysical doubt as to the material facts." *Id.* *(citing* *Matsushita Elec. Indus. Co. v. Zenith Corp.* (1986) 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538).

Here, Fast Trak demonstrated all elements for breach of contract and breach of fiduciary duty. E.R. 25 (Vol. I) [25:24-26]; E.R. 27 (Vol. I) [27:18-19]); E.R. 28 (Vol. I) [28:3-8]. Sax asserted affirmative defenses upon which he had the burden at trial. He provided no facts, much less credible facts, to carry his burden of production or persuasion sufficient to defeat summary judgment.

Sax failed to introduce any credible evidence to support his affirmative defenses of champerty or usury. Nowhere in the Sax's opposition to summary adjudication, or in the course of oral argument,

did he introduce any evidence the contracts meant anything other than what they said: They were non-recourse purchase agreements, with Fast Trak having no interest in, or control over, any litigation. E.R. 61, 62. Any other affirmative defenses and arguments are waived. *International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.* (9th Cir. 1985) 752 F.2d 1401, 1405-1406.

II. THE LAW CITED BY SAX DOES NOT SUPPORT HIS AFFIRMATIVE DEFENSES.

Sax has cited various cases in hope of establishing champerty. These cases, however, are unavailing. By citing to cases that are inapposite to the one before this Court, Sax demonstrates a fundamental misunderstanding of New York's champerty laws. "[T]he purpose of New York's champerty statute 'was to prevent attorneys and solicitors from purchasing debts, or other things in action, for the purpose of obtaining costs by a prosecution thereof, and [it] was never intended to prevent the purchase for the honest purpose of protecting some other important right of the assignee'" *Trust for the Certificate Holders of the Merrill Lynch Mortg. Investors v. Love Funding Corp.*, 2009 NY Slip Op 7323, ¶ 5 [13 N.Y.3d 190, 199, 890 N.Y.S.2d 377, 382,

918 N.E.2d 889, 894] (citing *Baldwin v. Latson* (N.Y. 1847) 2 Barb.Ch. 306, 308.).

The New York Court of Appeals held as early as 1882, "a mere intent to bring a suit on a claim purchased does not constitute the offense; the purchase must be made for the very purpose of bringing such suit, and this implies an exclusion of any other purpose." *Moses v. McDivitt* (1882) 88 N.Y. 62, 65 ; *see also In re Lynn* (Bankr.S.D.N.Y. 2002) 285 B.R. 858, 863.

Sax makes much of the case of *Justinian Capital SPC v. WestLB AG, N.Y. Branch*, 2016 NY Slip Op 07047 [28 N.Y.3d 160, 43 N.Y.S.3d 218, 65 N.E.3d 1253] stating "the New York Court of Appeal held that a financial transaction in which the plaintiff had purchased securities *for the purpose of filing suit* violated New York's champerty statute." Dkt. 5 [25] (emphasis added). As the *Justinian* court stated, "Justinian's business plan, in turn, was acquiring investments that suffered major losses in order to sue on them, and it did so here within days after it was assigned the notes." *Justinian*, ¶ 5 [28 N.Y.3d at 167, 43 N.Y.S.3d at 222, 65 N.E.3d at 1257].

Everything else in *Justinian,* despite the page length devoted to it by Sax, is irrelevant. This is borne out by the *Justinian* court's conclusion that "Justinian had not made a bona fide purchase of the notes and was, therefore, suing on a debt it did not own." E.R. 5 (29). In *Justinian,* "the lawsuit was not merely an incidental or secondary purpose of the assignment, but its very essence. Justinian's sole purpose in acquiring the notes was to bring this action and hence, its acquisition was champertous." *Justinian*, ¶ 6 [28 N.Y.3d 160, 168, 43 N.Y.S.3d 218, 222, 65 N.E.3d 1253, 1257].

Justinian is inapposite to this case. Fast Trak did not make any purchase for the purpose of filing suit, and it did not file suit. The facts and averments make that clear. E.R. 10 (Vol. I) [10:8-10]); E.R. 27 (Vol. 1) [27:20-23]); E.R. 42 (Vol. I) [42:7-13]) ("Specific averments in the Agreements, which were signed and initialed by Sax, stated: 'SAX acknowledges that FAST TRAK has no influence, power or control over any matter relating to the Litigation" and "SAX has not entered into this Agreement for the sole or primary purpose of bringing litigation or the support thereof. . . . Because . . the purpose, as attested to by Sax, was not to encourage litigation, any claim that the Agreements violate

the ancient doctrine of champerty must fail.'"). *Id.; see also,* E.R. 69 (Vol. II) [Section A1. The Agreement Part 1]; *see also, e.g.,* E.R. 536 (Vol. 6) (reflecting money from settlement went to underlying plaintiff, costs and Sax, but not to Fast Trak). *Justinian* has no application to this case.

Sax – and not Fast Trak – prosecuted claims that were already filed or for which he was already retained as counsel of record. E.R. 137-138 (Vol. II) [Exhibit "A"]. Sax "prosecuted" his clients' claims. Fast Trak, on the other hand, did not buy a "claim", *i.e.,* a right to bring suit. BLACK'S LAW DICTIONARY, BLACK'S LAW DICTIONARY, 100, Garner, B., ed., West Publishing Company (Pocket Edition) (1996). It invested in claims that continued to belong to the underlying plaintiffs. Fast Trak neither prosecuted any case, nor invested for the purpose of prosecuting any case. As the district court stated: "Champerty requires that Fast Trak exert some level of control over the primary or secondary litigation. It does not apply where litigation is either ongoing or will be undertaken regardless of the contract at issue." E.R. 27 (Vol. I) [27:21-23]).

Sax cites to *Trust Certificate Holders*, *supra,* 13 NY3d at 200, for the one line that the "intent and purpose" is usually a question of fact. Dkt. 5 (23-24). Had Sax presented any evidence that Fast Trak had the "intent and purpose" of litigating the cases in which it invested, that could potentially have foreclosed summary judgment. None existed. Thus, under the facts of this case Sax did not – and could not – present any such evidence. *See,* E.R. 137 (Vol. 1); E.R. 133 (Vol. II) ("SAX certifies and represents to FAST TRAK that SAX is the attorney(s) of record on the client litigation matters set forth in "EXHIBIT 'A'").

Fast Trak did not buy a right to sue. Sax in error states that "cases" were pledged. The Agreements make it clear that only proceeds were sold or assigned to Fast Trak. E.R. 61 (Vol. II).

The Primary Contracts, those between Sax's client, the underlying plaintiff, and Fast Trak as Purchaser, stated:

> The Seller represents to Purchaser that Seller is represented by counsel and is the plaintiff in a certain matter/litigation … filed under Appeal Case # A134646.
>
> . . .
>
> Pursuant to the Litigation, Seller may be entitled to monetary sums as compensation for personal injuries …. Any monetary sums recovered

> pursuant to the Litigation, through settlement, verdict judgment, arbitration, statutory schedule or otherwise, if any, shall hereinafter be referred to as (the "Proceeds").
>
> The Seller has requested, and the Purchaser has agreed to purchase from Seller a portion of the Proceeds (the "Purchased Property") for monetary consideration (the "Purchase Price").... **This is a nonrecourse purchase agreement. There is no obligation for seller to make payment except from the proceeds of the matter/litigation.**
>
> . . . .
>
> r. . . . . Additionally, the Seller acknowledges that **Purchaser has no influence, power or control over any matter relating to the Litigation**.
>
> s. Seller has not entered into this Agreement for the sole or primary purpose or bringing Litigation or the support thereof.

E.R. 61; 62(¶ r) and (¶ s) (emphasis added).

The only right that transferred under the primary agreements was the right to certain proceeds if they came into being. That could only occur after litigation was complete.

The secondary agreements, those signed by Sax selling or assigning his attorney's fees, make it equally clear that Sax, and not Fast Trak, controlled the litigation.

> In order to induce FAST TRAK to enter the aforementioned [Client Name Agreement] and for other good and valuable consideration, SAX hereby assigns to FAST TRAK the entirety of **SAX's attorneys' fees and disbursements *that may be recovered from* the client litigation matters** ("cases") listed in Exhibit "A" hereof (and **which are currently being litigated by SAX**) and shall pay these attorneys' fees and disbursements to FAST TRAK in the manner set forth as follows. . . .

E.R. 452, (Vol. VI) [Section A1. The Agreement Part 1 (emphasis added)].

The secondary agreement further stated in the first paragraph the purpose was providing the underlying plaintiff with "financial resources". E.R. 69 (Vol. II). There is no attempt to control what the plaintiff does with the purchase money from Fast Trak in exchange for potential future proceeds.

There was no transfer of any right that would allow Fast Trak to bring litigation in connection with the underlying plaintiff matters. It is clearly not champertous for Fast Trak to enforce its rights following breach of contract and breach of fiduciary duty. Champerty cannot

apply under these circumstances as a matter of law. Without champerty, Sax's citation to *Justinian's* discussion of a "safe harbor" is also irrelevant.

Sax cites to *Zhavoronkin v. Koutmine* (App.Div.) 2008 NY Slip Op 5499, ¶ 2 [52 A.D.3d 597, 598, 860 N.Y.S.2d 561, 562], for the proposition that "the defendant was required to establish usury by clear and convincing evidence". Dkt. 5 [23]. Sax failed to note that *Zhavoronkin* stands for the proposition that "[t]here is a strong presumption against a finding of usury, and, at trial" and, in that case, the court found that defendant had failed to meet her burden. The transaction was deemed not usurious. *Id.*

As he did in the district court, Sax tries to bolster his argument of usury by cherry-picking one line from a 2011 New York ethics opinion. The single quote states only that some "non-recourse loans" may "in certain circumstances" violate usury laws. Dkt. 5 [24]; *Cf.* E.R. 438 (Vol. V) [438:7-439:2]). Sax offers no specifics, and makes no attempt to draw any analogy to the case at bar. Under these circumstances, the reference is meaningless.

No case law cited by Sax supports his claims of champerty or usury. Accordingly, this Court should affirm the judgment.

III. THE UNDISPUTED FACTS DEMONSTRATED IN THE DISTRICT COURT SHOW THE JUDGMENT SHOULD BE AFFIRMED.

Sax stated that he is an experienced attorney. E.R. 431 (Vol. V) [431:3-6]]. He has admitted that he signed the Agreements. *Id.* (38:7-8); *see also* E.R. 198 (Vol. III) [198:5-10] and E.R. 303 (Vol. IV) [303:27-28] (Request for Admission No. 6, and response thereto). In fact, Sax signed multiple Agreements with Fast Trak over the course of time. E.R. 195-199 (Vol. III) [195:11-199:27]) and E.R. 303 (Vol. IV) [303:11-28] (Request for Admission, *e.g.,* No. 3, 4, 5 and 6). Sax was provided funds "in exchange" for the assignment of Sax's interest in attorney's fees from certain matters. E.R. 390 (Vol. V) [11:10-14]). Sax has not disputed he received at least $132,000 from Fast Trak on the first agreement. E.R. 20-21 (Vol. I) [20:24-21:2]). The Agreements "state that 'Sax has not entered into this Agreement for the sole or primary purpose of bringing litigation or the support thereof." E.R. 42 (Vol. I) [42:8-9].

Sax obtained attorney's fees in some of the pledged cases.[3] *See, e.g.,* E.R. 516 (Vol. VI). Sax recovered not less than $79,000 in attorney's fees from a single case. E.R. 520 (Vol. VI). Sax obtained additional recoveries in other cases. *See, e.g.,* E.R. 521 (Vol. VI); E.R. 529 (Vol. VI). Not all of the cases invested in by Fast Trak resulted in proceeds and, as to those cases, Fast Trak was not entitled to any proceeds. E.R. 20 (Vol. I) [20, fn. 2]); E.R. 53 (Vol. I) [53:22-23]); Supp. E.R. 563 (Transcript, [563:17-19]). Sax has not paid Fast Trak the amount owed under the Agreements. E.R. 22 (Vol. I) [22:11-13]; E.R. 53 (Vol. I) [53:15-16].

Sax specifically agreed to act as a fiduciary on behalf of Fast Trak as to Primary Agreements. E.R. 67 (Vol. II) ["Acknowledgement by Counsel" ¶ 2) ("I will honor the assignment by Seller to Purchaser as contemplated under the Agreement, including without limitation: (a) holding as fiduciary for Purchaser, any Proceeds (as defined in the

[3] Erroneously citing to "E.R. 3:3-4", Sax asserts that "17 cases" were pledged. That is not correct. Dkt. 5 (14). First, "E.R. 3" is an attachment to the notice of appeal, not evidence. Second, only proceeds, as defined in the Agreements, were pledged. *See, e.g.,* E.R. 11 (Vol. I) [14:1-3). No "cases" ever transferred to Fast Trak, and Fast Trak never sought or obtained the right to prosecute any case.

Agreement), together with any permitted fees and costs. . . . (b) promptly notifying Purchaser that I have become possessed of any Proceeds. . .")). Sax does not dispute that he signed and acknowledged these provisions. He does not dispute that the "Irrevocable Instructions to Counsel" required him to hold funds from any settlement for the benefit of Fast Trak. E.R. 65 (Vol. I); E.R. 73 (Vol. 1) ["Acknowledgement by Counsel" ¶ 2]). Sax admits he did not hold money for Fast Trak. E.R. 395 (Vol. V) [395:3]) ("Defendant was not holding money for Plaintiff.").

Sax failed to provide anything specific that supported his affirmative defenses of champerty or usury, and he failed to brief any other defenses. E.R. 383-413. Similarly, at oral argument on the motion for summary adjudication, Sax stood mute on all issues. Supp. E.R. 560-577. Because Defendants do not deny that the conditions precedent occurred on the Agreements between Fast Trak and Sax, and sums are owed to Plaintiff, summary judgment properly entered in favor of Fast Trak on the first and third causes of action.

To the degree Sax now argues that the damages award was incorrect, he has once again failed to provide any evidence despite the

notice of appeal specifying only Docket 78 ("Order Awarding Damages Re: Dkt. Nos. 71-76") and 79 ("Motion to Enter Judgment on Award of Damages [Dkt. 78]"). In response to Fast Trak's pleading outlining how the damages were calculated, Sax filed a document captioned "Supplemental Opposition to Plaintiff's Request for Damages". Supp. E.R. 578. That document contained only a single sentence: "Defendants, Richard Sax and The Law Offices of Richard Sax take no position regarding the damages claimed by Plaintiff." Having not disputed the amount of damages claimed, nor raised any issue at the hearing on summary judgment, any argument as to the amount of damages is waived.

A. SAX'S AFFIRMATIVE DEFENSE OF CHAMPERTY FAILS ON THE FACTS.

Nothing in the contracts provides for Fast Trak to bring suit, and nothing in the evidence suggested that was their intent or purpose. Sax argues that because he filed suit in his personal injury clients' names, that is sufficient to show the purpose and intent requirement for litigation. His conclusion turns champerty on its head and ignores the definition of a "claim" as the assertion of an existing right. BLACK'S LAW

DICTIONARY, *supra*. No "claim" transferred to Fast Trak, and none arose until Sax breached the contracts. The contracts specifically state that Fast Trak purchased proceeds for "monetary consideration," and had no "influence, power or control over any matter relating to the Litigation". E.R. 62 (Vol. II) (¶ r). The district court properly rejected Sax's affirmative defense of champerty.

The only other affirmative defense briefed by Sax was usury. But Sax failed to show that the contracts at issue were other than the non-recourse agreements stated in the contract. He argued that mere collateralization using other cases was sufficient to change the agreements into loans. E.R. 405 (Vol. V) [405:17-19]. However, as the district court recognized, "[t]hat the Agreements referenced secondary cases as collateral does not change the fact that recovery in those cases was also required before payment was due. *(See* Defs.' Opp'n at 17-18.) As such, without citing to any legal authority, Defendants seek to impose more risk on the purchase of future proceeds than the law requires." E.R. 26-27 (Vol. I) [26:23-27:1]).

Fast Trak did not purchase a "claim". It did not file, prosecute or control any litigation filed by Sax. E.R. 38 (Vol. I) [38:3-8] ["Seller

acknowledges that Purchaser has no influence, power or control over any matter relating to the Litigation. . . . Defendants agreed there was no reliance on any representation by Plaintiff."]). The Agreement makes it clear that Fast Trak purchased only "proceeds". "Proceeds" only came into being after the litigation was completed, either as an award, settlement, or judgment to underlying plaintiffs, or attorney's fees paid to Sax. E.R. 459 (Vol. VI).

The contracts at issue, referenced as "Agreements", state that Sax "has not entered into this Agreement for the sole or primary purpose of bringing litigation or the support thereof." E.R. 448 (Vol. V) [448:15-16]. Sax adduced no evidence of Fast Trak's intent or purpose that can defeat these facts, particularly since Fast Trak never sued or attempted bring litigation until the contracts were breached by Sax.

B. SAX FAILED TO SUPPORT HIS AFFIRMATIVE DEFENSE OF USURY BECAUSE THE CONTRACTS HAD NO DEFINITE DATE FOR PAYMENT AND WERE NONRECOURSE.

The Agreements state on their face that they are non-recourse agreements. E.R. 459 (Vol. VI) ["This is a non-recourse purchase agreement."]. More importantly, they state: "There is no obligation for

seller to make payment except from the proceeds of the matter/litigation." *Id.* Fast Trak agreed no payment was due on cases that did not result in proceeds. E.R. 20 (Vol. I) [20:27-28 fn. 2]); Supp. E.R. 563 (17-19 ("as to the Monigan case, it is really not at issue because it is undisputed, I believe, that the Monigan case did not result in proceeds.")). The district court also found that the Agreements did not have the earmarks of loans because there was no definite time when repayment was to occur. E.R. 27 (Vol. I) [27:2-12].

Sax did not provide any evidence to support his claim of usury in the district court. He has not pointed to any such evidence in his Opening Brief, and "[i]t is well established in this circuit that 'the general rule is that appellants cannot raise a new issue for the first time in their reply briefs.'" *Eberle v. Anaheim* (9th Cir. 1990) 901 F.2d 814, 818. (citations omitted).

As each of the elements for breach of contract and breach of fiduciary duty were demonstrated in the district court, Appellee Fast Trak Investment Company, LLC respectfully requests that this Court affirm the judgment.

IV. FAST TRAK REQUESTS ATTORNEY'S FEES AND COSTS IN CONNECTION WITH THIS APPEAL.

The contracts at issue provide for reasonable attorney's fees and costs. E.R. 63 (Vol. II) [¶ 6]) ("In the event of a dispute between the parties concerning this Agreement or the transactions contemplated hereby, the prevailing party shall be entitled to recover its costs and expenses, including reasonable attorney's fees, incurred in connection with this dispute.") Federal Rule of Appellate Procedure 38 states: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award as just damages and single or double costs to the appellee.

In this case, Sax merely regurgitated his pleadings below, which pleadings failed to show any basis for his affirmative defenses. All elements of the cause of action had been established, and not seriously disputed. An appeal imposed for an improper purpose is frivolous.

Here, as Appellant Richard Sax presented no facts that could have been overlooked or improperly interpreted by the District Court,

Appellee is left with the strong impression that this appeal was brought merely as a delaying tactic, at best.

This appeal will cost Fast Trak Investment Company, LLC, at a minimum, $ 12,368.00 in additional fees. Costs are not yet known. Pursuant to Rule 38, Appellee urges this Court to permit additional briefing to demonstrate the amounts and appropriateness of a Rule 38 award, including costs, expenses, and attorneys' fees for a frivolous appeal.

CONCLUSION

Appellee/Defendant Richard Sax has not demonstrated to this Court that there was any specific or credible evidence presented to the District Court that could defeat summary adjudication. He has not presented any cases or evidence to this Court that would support reversal or remand. Accordingly, and for all the reasons set forth above, this Court should affirm the District Court's grant of summary

adjudication and damages, and award Appellee attorney's fees and costs on appeal.

Respectfully submitted,

Date: July 8, 2019

SCHLESINGER CONRAD, PLLC

By: /s/ Kira A. Schlesinger
Attorneys for Appellee/Plaintiff
Fast Trak Investment Company, LLC

STATEMENT OF RELATED CASES

No related cases exist to the knowledge of Appellee/Plaintiff Fast Trak Investment Company, LLC.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 7591 words, exclusive of the parts of the brief that are exempted by Fed. R. App. P. 32(f). The word count is based upon the Microsoft Word® system.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(5 and (6) because this brief has been prepared in a proportionately spaced typeface using Word® 2016, Century Schoolbook, a serif 14-point font.

Date: July 8, 2019 **SCHLESINGER CONRAD, PLLC**

/s/ Kira A. Schlesinger
Kira A. Schlesinger
Attorneys for Appellee/Plaintiff
Fast Trak Investment Company, LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

On this same date, I served Appellant/Defendant Richard Sax, individually and as principal for the Law Offices of Richard Sax at 448 Sebastopol Avenue, Santa Rosa, CA 95401, by U.S. Mail, postage fully prepaid. I declare under penalty of perjury that the Certificate of Service is true and correct, and that this averment was made in Phoenix, Arizona on July 8, 2019.

Date:July 8, 2019

SCHLESINGER CONRAD, PLLC

/s/ Kira A. Schlesinger
Kira A. Schlesinger
Attorneys for Appellee/Plaintiff
Fast Trak Investment Company, LLC

ADDENDUM

RELEVANT STATUTES:

§ 1332. DIVERSITY OF CITIZENSHIP; AMOUNT IN CONTROVERSY; COSTS

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $ 75,000, exclusive of interest and costs, and is between--

(1) Citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title [28 USCS § 1603(a)], as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $ 75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title [28 USCS § 1441]--

(1) a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of--

(A) every State and foreign state of which the insured is a citizen;

(B) every State and foreign state by which the insurer has been incorporated; and

(C) the State or foreign state where the insurer has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) (1) In this subsection--

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $

5,000,000, exclusive of interest and costs, and is a class action in which--

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A) (i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $ 5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under [section] 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3) [15 USCS § 77p(f)(3)]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453 [28 USCS § 1453], an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11) (A) For purposes of this subsection and section 1453 [28 USCS § 1453], a mass action shall be deemed to be a class action removable

under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)

(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2) [28 USCS § 1711(2)]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)

(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407 [28 USCS § 1407], or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407 [28 USCS § 1407].

(ii) This subparagraph will not apply--

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

FEDERAL RULE OF CIVIL PROCEDURE 38

Rule 38. Frivolous Appeal—Damages and Costs

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.