

No. \_\_\_\_\_

District Court No. A-15-714007-C

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**IN THE SUPRME COURT OF THE STATE OF NEVADA**

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LARRY L. BERTSCH; AND LARRY L. BERTSCH CPA & ASSOCIATES

Tracie K. Lindeman  
Clerk of Supreme Court

Petitioner,

v.

THE HONORABLE KENNETH CORY, DISTRICT COURT JUDGE,  
EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR  
COUNTY OF CLARK,

Respondent,

and

JAY BLOOM,

Real Party in Interest.

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**PETITION FOR WRIT OF MANDAMUS**

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JAMES R. ROSENBERGER, ESQ.  
Nevada Bar No. 1047  
PICO ROSENBERGER  
3291 E Warm Springs Road  
Suite #400  
Las Vegas, NV 89120  
T: (702) 382-1110  
F: (702) 382-1173  
Email: [jrosenberger@prlawlv.com](mailto:jrosenberger@prlawlv.com)  
Attorneys for Petitioners,  
Larry L. Bertsch and Larry L.  
Bertsch CPA & Associates

ADAM PAUL LAXALT  
Attorney General  
FREDERICK J. PERDOMO  
Senior Deputy Attorney General  
Nevada Bar No. 10714  
Division of Public Safety  
100 North Carson Street  
Carson City, Nevada 89701-4717  
T: (775) 684-1250  
Email: [fperdomo@ag.nv.gov](mailto:fperdomo@ag.nv.gov)  
Attorneys for Petitioners,  
Larry L. Bertsch and Larry L.  
Bertsch CPA & Associates

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## **I. INTRODUCTION**

COMES NOW, Petitioners, Larry L. Bertsch and Larry L. Bertsch CPA & Associates (“Special Master Bertsch”), through counsel, Adam Paul Laxalt, Attorney General of the State of Nevada, Frederick J. Perdomo, Senior Deputy Attorney General, and James R. Rosenberger of Pico Rosenberger Attorneys at Law and hereby submit the following Petition for Writ of Mandamus pursuant to Nevada Rule of Appellate Procedure 21 and NRS 34.150 through 34.310. Special Master Bertsch requests that this Court issue a writ of mandamus directed to the Honorable District Court Judge Kenneth Cory ordering his Honor to find that Special Master Bertsch is entitled to absolute quasi-judicial immunity from suit in the underlying action *Jay Bloom v. Larry L. Bertsch, et al.*, Eighth Judicial District Court Case Number A-15-714007-C and further ordering his Honor to dismiss the action in its entirety on this basis.

## **II. STATEMENT OF JURISDICTION**

The Nevada Supreme Court has original jurisdiction to issue extraordinary writ relief under the Nevada Constitution, Article 6, Section 4. *Employers Ins. Co. of Nevada v. State Bd. of Examiners*, 117 Nev. 249, 252, 21 P.3d 628, 630 (2001). NRS 34.160 provides, in relevant part, that a “writ may be issued by the Supreme Court . . . to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled and from which the party is unlawfully precluded by such inferior tribunal . . .” To justify the issuance of a writ of mandamus to enforce the performance of an act by a public officer, the act must be one the performance of which the law requires as a duty

resulting from the office, and there must be an actual omission on the part of the officer to perform it. *State ex rel. Lawton v. Public Service Comm. of Nevada, et al.*, 44 Nev. 102, 190 P. 284, 285 (1920). A writ of mandamus is available under NRS 34.160 and shall issue in all cases where there is no “plain, speedy, and adequate remedy in the ordinary course of law.” NRS 34.170.

Special Master Bertsch was appointed to the position of special master under NRCP 53 in a prior state court case titled *Vion Operations, LLC, et al. v. Jay L. Bloom, et al.*, Case No. A-11-646131-C (“Vion Litigation”). In the underlying action, Mr. Bloom personally sued Special Master Bertsch for alleged acts taken within the course and scope of his duties as special master in the Vion Litigation. (Petitioner’s Appendix “PA” Vol. I 0001–20). Mr. Bloom’s action seeks both monetary relief and injunctive relief. (PA Vol. I 0019–20). Special Master Bertsch filed “Defendants’ Motion to Dismiss” seeking, in part, to dismiss the underlying action in its entirety on the basis of absolute quasi-judicial immunity from suit. (PA Vol. I 0021–40). The Honorable District Court Judge denied Special Master Bertsch’s motion in its entirety. (PA Vol. III 0525–28). The District Court’s “Order Denying Defendants’ Motion to Dismiss and Plaintiff’s Countermotion for Declaratory Judgment” found that Special Master Bertsch was entitled qualified immunity, as opposed to absolute quasi-judicial immunity, based upon the Order of appointment in the Vion Litigation, which indicated that Special Master Bertsch could be held personally liable for actions taken pursuant to his Special Mastership that constituted gross negligence, fraud, or willful misconduct. (PA Vol. III 0526). In so ruling, the

Honorable District Court Judge found, without any citation to controlling or persuasive authority, that absolute quasi-judicial immunity is a defense that may be waived. (*Id.*).

Mandamus relief is appropriate because absolute quasi-judicial immunity is not and should not be a defense that may be waived in any degree and absolute quasi-judicial immunity bars continued litigation against Special Master Bertsch in the underlying action. There is no plain, speedy, and adequate remedy in the ordinary course of litigation, as the “Order Denying Defendants’ Motion to Dismiss and Plaintiff’s Countermotion for Declaratory Judgment” is not a final order that may be immediately appealed and absolute immunity is a complete bar to the claims and requests for relief asserted by Mr. Bloom in the underlying action.

### **III. STATEMENT OF ISSUES PRESENTED**

1. Whether Special Master Bertsch’s duties as special master in the Vion Litigation involved discretionary judgment and were therefore functionally comparable to a judicial officer for the purpose of establishing a right to the defense of absolute quasi-judicial immunity.
2. Whether Mr. Bloom’s salacious claims of collusion, ex parte communications, and concealment directly relate to Special Master Bertsch’s duties in the Vion Litigation such that they fall within the scope of actions which are protected from suit by absolute quasi-judicial immunity.

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3. Whether there is any legal and policy support for Mr. Bloom's arguments and the District Court's findings that absolute quasi-judicial immunity is defense that may be implicitly waived.
4. Whether absolute quasi-judicial immunity bars both claims for monetary and prospective relief under state and federal law.

#### **IV. STATEMENT OF THE CASE**

Mr. Bloom commenced the underlying civil action by filing a Complaint on February 17, 2015. (PA Vol. I 0001–20). On April 15, 2015, Special Master Bertsch filed “Defendants’ Motion to Dismiss” seeking, in part, to dismiss the underlying action in its entirety on the basis of absolute quasi-judicial immunity. (PA Vol. I 0021–40). Mr. Bloom filed his “Opposition to Defendants’ Motion to Dismiss and Countermotion for Declaratory Judgment” on May 4, 2015, and Special Master Bertsch filed a “Reply In Support of Motion Dismiss and Opposition to Countermotion for Declaratory Judgment” on June 1, 2015. (PA Vol. II 0264–51, 352–90). The motion and countermotion were heard and denied by the Honorable District Court Judge on June 10, 2015. (PA Vol. III 0391–524). The District Court’s “Order Denying Defendants’ Motion to Dismiss and Plaintiff’s Countermotion for Declaratory Judgment” and the “Notice of Entry of Order” were filed on October 9 and October 12, 2015, respectively. (PA Vol. III 0525–28, 0529–35).

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## V. STATEMENT OF THE FACTS

The underlying action arises from events that occurred in a prior civil action before the Eighth Judicial District of the State of Nevada and the U.S. Bankruptcy Court, District of Nevada. On August 4, 2011, Vion Operations, LLC (“Vion”) and Strategic Funding Source, Inc. filed a Complaint against Jay Bloom and others in the Eighth Judicial District Court of the State of Nevada in and for Clark County, titled *Vion Operations, LLC, et al. v. Jay L. Bloom, et al.*, Case No. A-11-646131-C. (PA Vol. I 0040–44).<sup>1</sup> On September 22, 2011, Vion moved for Larry L. Bertsch CPA & Associates<sup>2</sup> appointment under NRCP 53. (PA Vol. I 0048–53). On October 11, 2011, the Court entered an Order appointing Special Master Bertsch as special master in the Vion Litigation. (PA Vol. I 0058–63).

In that Order, the Court directed Special Master Bertsch to provide an accounting consisting of his findings related to all transactions of cash flow, assets, and capital investments of Murder Inc. and any movement of Murder Inc.’s assets that were

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<sup>1</sup> In the interest of brevity, Petitioner’s Appendix included the caption page, signature page, and certificate of service for documents which are not substantively relevant to the arguments in the petition and in excess of 3 pages and the entire document, exclusive of exhibits, for documents that are substantively relevant to the petition. To the extent this Court requires that certain documents be provided in their entirety, Special Master Bertsch requests leave to supplement Petitioner’s Appendix.

<sup>2</sup> The record from the Vion Litigation reflects that Special Master Bertsch was referred to as both Larry L. Bertsch, individually, and as Larry L. Bertsch CPA & Associates. For the purpose of this brief, “Special Master Bertsch” includes all references to Larry L. Bertsch, individually, and/or Larry L. Bertsch CPA & Associates.

inconsistent with the rights of Merchant Cash Advance Agreements executed by the Plaintiffs, Mr. Bloom and Murder Inc. on February 25 and March 14, 2011. (PA Vol. I 0060–61). In addition, Special Master Bertsch was directed to conduct “a forensic accounting of Murder Inc.’s accounting records, so as to determine their accuracy and veracity.” (*Id.*). Vion, the party that moved for Special Master Bertsch’s appointment, requested that Special Master Bertsch “be granted possession and powers over all corporate books and records in order to perform a thorough accounting.” (PA Vol. I 0051). In addition, Vion requested that Special Master Bertsch “prepare a report documenting the various transactions involving Murder Inc.’s assets and whether those transactions were legitimate.” (PA Vol. I 0051–52). The Order appointing Special Master Bertsch included a provision which stated that “[t]he Special Master shall not be personally liable to any party for acts taken pursuant to the Special Mastership, except in the event of the Special Master’s gross negligence, fraud or willful misconduct.” (PA Vol. I 0063).

On November 2, 2011, Anthony Zmaila, Special Master Bertsch’s attorney in the Vion Litigation, filed the “Preliminary Report of Special Master.” (PA Vol. I 0065–67). On May 8, 2012, the Vion Court filed its “Order on Completion of Special Master’s Final Report” which authorized and directed Special Master Bertsch to complete a final report in accordance with its Order of appointment. (PA Vol. I 0069–70).

On August 29, 2012, counsel for Vion sent a letter to the Court, which disclosed that his firm, Lionel, Sawyer, & Collins (“LSC”), had represented Special Master Bertsch

during the second half of 2011 in connection with a sales and use tax matter of an LLC in which Special Master Bertsch had been a member. (PA Vol. I 0072–73). According to the letter, the legal services were provided through LSC’s Reno office. (*Id.*). The letter further stated that the issues related to Special Master Bertsch’s representation were unrelated to the issues in the Vion Litigation. (*Id.*).

On October 18, 2012, Mr. Zmaila, on behalf of Special Master Bertsch, filed the “Final Report of Special Master” in compliance with the Vion Court’s May 8, 2012, Order. (PA Vol. I 0075–97). Following an unsuccessful attempt to disqualify Vion’s Counsel based on the content of the August 29, 2012, letter and other allegations, Mr. Bloom filed a “Motion to Disqualify Larry Bertsch as Special Master, Strike the Special Master’s Reports from the Record, and for Monetary Sanctions” on February 12, 2013. (PA Vol. I 0100–01, 0103–04, 0106–21). In the briefing of that motion, Mr. Bloom alleged that Special Master Bertsch engaged in various unethical conduct which included accepting appointment in spite of a conflict of interest with Vion as a result of his prior attorney-client relationship with LSC, engaging in ex parte communication with Vion regarding the “Final Report of Special Master,” colluding and collaborating with Vion in drafting the “Final Report of Special Master” and building a case against Mr. Bloom. (PA Vol. I 0115–18, 0181–86). Mr. Bloom further alleged that Special Master Bertsch failed to request information from Mr. Bloom or his counsel during the drafting of the “Final Report of Special Master,” permitted Vion to make revisions to the “Final Report of Special Master” but failed to request input from Mr. Bloom, and permitted Vion’s

Counsel to insert a reference to a “Ponzi Scheme” in the “Final Report of Special Master” based on the deposition of Vion’s President, Stacey Schacter (“Ms. Schacter”), taken on October 4, 2013. (*Id.*). Based on these allegations, Mr. Bloom argued that Special Master Bertsch should be disqualified and his reports should be struck from the record under NRCP 53(a)(2), FRCP 53(2), and NCJC 2.11(A)(1). (*Id.*).

Vion filed an “Opposition to Defendants’ Motion to Disqualify Larry Bertsch as Special Master, Strike the Special Master’s Reports from the Record, and for Monetary Sanctions” on March 18, 2013. (PA Vol. I 0138–50). In that brief, Vion cited to portions of the court record where Mr. Bloom was informed of and did not object to one-on-one communication between Vion and Special Master Bertsch and/or his counsel. (PA Vol. I 0140–45). Vion provided emails and billing records showing ex parte communications between Mr. Bloom and Special Master Bertsch, which included an in person meeting and email communication for the purpose of scheduling meetings and disclosing documents. (*Id.*). Vion identified ex parte communications where Mr. Bloom attempted to influence Special Master Bertsch’s opinion about other parties in the litigation and to edit Special Master Bertsch’s initial report. (PA Vol. I 0143). Finally, Vion admitted to receiving one draft of the “Final Report of Special Master” from Special Master Bertsch’s counsel, but denied responding or making any edits to the draft. (PA Vol. I 0145).

Vion’s brief argued that Mr. Bloom could not disqualify Special Master Bertsch for ex parte communications with Vion and its counsel when Mr. Bloom knew about the

communications and failed to object to them and when Mr. Bloom initiated and participated in the same type of communications. (PA Vol. I 0145–47). Vion further argued that Mr. Bloom could not disqualify Special Master Bertsch based on allegations that Vion’s Counsel influenced the “Final Report of Special Master” as Mr. Bloom was permitted to conduct discovery on this issue and failed to produce evidence to support the allegation. (PA Vol. I 0145). Vion also argued that Mr. Bloom’s suggestion that Vion’s Counsel inserted the term “Ponzi Scheme” into the “Final Report of Special Master” was conjecture as Ms. Schacter’s deposition testimony differed from the findings in the “Final Report of Special Master.” (PA Vol. I 0146). Vion finally argued that Mr. Bloom’s claim that Special Master Bertsch did not interview him prior to making this finding was untrue as the billing records and emails showed that Mr. Bloom and Special Master Bertsch met privately on October 5, 2011, and Mr. Bloom subsequently thanked Special Master Bertsch via email for his “indulgence, patience, and open mindedness in understanding the facts.” (*Id.*).

Special Master Bertsch filed “Special Master’s Opposition to Motion to Disqualify Larry Bertsch as Special Master, Strike the Special Master’s Reports from the Record and for Monetary Sanctions” on the same day as Vion filed its brief. (PA Vol. I 0152–76). In that opposition, Special Master Bertsch argued, in pertinent part, that Mr. Bloom waived his right to seek disqualification by waiting five months after the alleged disqualifying event to file the motion and that in any event the alleged conflict of interest no longer existed at the time Special Master Bertsch filed the “Final Report of Special Master” as

his attorney-client relationship with LSC ended on November 7, 2011. (PA Vol. I 0165–66). Special Master Bertsch also argued that Mr. Bloom’s allegations of collusion and corruption were unfounded and speculative, that there was no procedural basis under NRCP 53(a)(2) that required disqualification under the circumstances, and that there was no evidence of bias or prejudice to require disqualification under NCJC 2.11. (PA Vol. I 0166–69). On the last point, Special Master Bertsch referred to portions of the record, which reflected that Special Master Bertsch had requested information from the parties for the purpose of drafting the report, subsequently informed the parties during a hearing on November 23, 2011, what information he still needed, and thereafter informed the Vion Court and the parties during a hearing on December 22, 2011, that he received all the information that he needed to take the Preliminary Report to Final Report. (PA Vol. I 0170–71).

Special Master Bertsch argued that the absence of any further requests for information was not evidence of a plot against Mr. Bloom but rather evidence of Special Master Bertsch’s stated position that he had sufficient evidence to draft the “Final Report of Special Master.” (PA Vol. I 0171). Special Master Bertsch also indicated that his findings could not be related to Ms. Schacter’s testimony as Special Master Bertsch and his counsel were not present for the deposition and did not receive or review the deposition transcript prior to drafting the “Final Report of Special Master.” (*Id.*). Finally, Special Master Bertsch argued that Mr. Bloom had not identified any communications with Vion or its Counsel that allegedly influenced the findings in the

“Final Report of Special Master,” that were not permitted under the Order of appointment, or that were hidden from Mr. Bloom. (PA Vol. I 0172–73). Rather, Special Master Bertsch argued that the communications were all disclosed to Mr. Bloom as part of his billing invoices and reports to the Vion Court of his activities at various hearings. (PA Vol. I 0173).

Mr. Bloom’s motions were heard by the Vion Court on April 4, 2013. (PA Vol. I 0193–238). After hearing argument, the Vion Court denied Mr. Bloom’s motions. (PA Vol. I 0193–94). The Vion Court filed an initial order denying Mr. Bloom’s motion on May 13, 2013. (PA Vol. II 0240–42). The order was subsequently amended on September 3, 2013, by “Amended Order from April 4, 2013 Hearing.” (PA Vol. II 0244–51). With respect to Mr. Bloom’s arguments for disqualification, the Vion Court found as follows:

The Court finds applicable to Special Master NCJC 2.11(C), which requires Special Master to disclose certain relationships and business dealings. Based on NCJC 2.11(C), Special Master should have made disclosure of his prior attorney-client relationship with [LSC]. The Court does not find that non-disclosure of such relationship constitutes grounds for disqualification. Special Master is a fair, impartial, unbiased and highly skilled forensic accountant, and the matters in this case to which the Court made its reference are in his area of his expertise. The reference to Special Master in this case was proper.

(PA Vol. II 0248–49) (internal citations omitted).

The Vion Court rejected any notion that Special Master Bertsch acted outside the scope of his authority. On this issue, the Vion Court ruled as follows:

The Court finds that Special Master has complied in all respects with the Order entered October 19, 2011. Special

Master's duties in this matter are complete; subject to those final items contained in this Order. Therefore, it is proper for Special Master to be discharged upon completion of those final items contained in this Order, and the resolution and payment of Special Master's compensation.

(PA Vol. II 0249) (emphasis added).

Following the April 4, 2013, hearing, Mr. Bloom argued that Special Master Bertsch's role should be redefined for the purpose of subjecting Special Master Bertsch to discovery. In particular, Mr. Bloom filed a "Motion to Conduct Discovery on Special Master Larry Bertsch and Anthony Zamalia, Esq." on July 3, 2013, which argued the Special Master Bertsch should be treated as an expert witness who is subject to discovery. (PA Vol. II 0347–48). On September 11, 2013, the Vion Court filed an Order, which found that Special Master Bertsch (1) was not to be treated as an expert witness for any purpose in the case; (2) was appointed as a special master under NRC 53; (3) assumed the duties and obligations of a judicial officer; and (4) enjoyed the same immunities from discovery as a judge. (PA Vol. II 0348–49).

The Vion Litigation was subsequently removed to the U.S. Bankruptcy Court for the District of Nevada on October 17, 2013. (PA Vol. II 253–254). On October 14, 2014, the parties to that action, including Mr. Bloom, filed a stipulation to dismiss with prejudice as the result of a settlement agreement that had been approved by the Court. (PA Vol. II 0256–63).

Mr. Bloom's Complaint in the underlying action relies on the same allegations and arguments previously set-forth in his "Motion to Disqualify Larry Bertsch as Special

Master, Strike the Special Master's Reports from the Record, and for Monetary Sanctions" and rejected by the Vion Court. For example, Mr. Bloom's Complaint asserts a gross negligence claim, which alleges that Special Master Bertsch breached his duty of care by

(a) failing to disclose a conflict of interest due to the attorney/client relationship existing between LSC and Bertsch; (b) participating in prohibited *ex parte* communications; (c) failing to conduct discovery with any party other than Vion (including Bloom, the 42 investors, or any vendor) in gathering information for their "Independent Report"; (d) failing to disqualify themselves as Special Master; (e) secretly conspiring with LSC to build a case against Bloom; (f) permitting LSC to edit multiple versions of the Final Report; (g) including unsubstantiated and defamatory findings in the Special Master's final report pertaining to Bloom; (h) causing their false and defamatory statements to be published and disseminated in an unprivileged communication to third parties; and (i) refusing to retract their false statement or take any further action to mitigate the harm Bloom has sustained, and continued to sustain, as a result of their conduct.

(PA Vol. I 0012).

Mr. Bloom's Complaint also asserts claims under the state law theories of fraudulent concealment, willful misconduct, and defamation, which are based, in part or in whole, on these allegations. (PA Vol. I 0013–17). In response, Special Master Bertsch filed "Defendants' Motion to Dismiss," which argued, in part, that he was entitled to absolute quasi-judicial immunity from suit and that the case should be dismissed in its entirety. (PA Vol. I 0021–40). The District Court denied the motion finding that Special Master Bertsch was only entitled to qualified immunity based on the Vion Court's Order or appointment which stated that Special Master Bertsch could be held personally liable

for acts taken pursuant to his Special Mastership that constituted gross negligence, fraud, willful misconduct. (PA Vol. III 0525). The District Court Order did not cite any authority supporting its finding that Special Master Bertsch was only entitled to qualified immunity, as opposed to absolute quasi-judicial immunity, based on the aforementioned provision in the Order of appointment. (*Id.*). Special Master Bertsch requests that this Court issue a Writ of Mandamus declaring that Special Master Bertsch is entitled to absolute quasi-judicial immunity for the acts alleged in the Complaint and ordering the Honorable District Court Judge to dismiss the underlying action in its entirety on this basis.

## **VI. SUMMARY OF THE ARGUMENT**

The underlying action is an improper attempt to pursue a civil action against Special Master Bertsch based on quasi-judicial acts taken within the scope of his special mastership in the Vion Litigation. As the Vion Court recognized, when Special Master Bertsch was appointed special master in the Vion Litigation, Special Master Bertsch assumed the same duties and obligations as a judicial officer. Therefore, Special Master Bertsch should be entitled to the same immunity that protects a judicial officer from suit in a subsequent civil action, which is absolute immunity.

In determining whether a non-judicial officer is entitled to absolute quasi-judicial immunity, this Court uses the functional approach, which questions whether the individual was performing functions similar to a judicial officer. In other words, this Court questions whether the individual exercised discretionary judgment as part of his or

her function. There is no doubt that Special Master Bertsch's function in the Vion Litigation was comparable to a judicial officer as his order of appointment directed him to receive evidence, analyze it, and render a final report consisting of his findings on the evidence. These actions required considerable discretionary judgment and are judicial in nature, which means they are cloaked with absolute quasi-judicial immunity.

There are only two recognized exceptions to absolute quasi-judicial immunity. In particular, absolute immunity does not apply to acts that are not judicial in nature, or acts, though judicial in nature, that are taken in complete absence of all jurisdiction. In the underlying action, Mr. Bloom claimed that Special Master Bertsch allegedly engaged in a number of unethical acts in the Vion Litigation; however, all of the acts, such as communicating with the parties, rendering a final report, and making a decision on whether or not to recuse himself from the action, were directly related to his duties as special master and are immune from suit. Mr. Bloom's inflammatory allegations, without more, are simply not enough under the law to pierce Special Master Bertsch's immunity.

Absolute quasi-judicial immunity is not a defense that should be waivable. The Honorable District Court Judge found that Special Master Bertsch was entitled to qualified immunity, as opposed to absolute quasi-judicial immunity, based on a provision in the Order of appointment which stated that the Special Master Bertsch may be personally liable for acts taken pursuant to his Special Mastership which constitute gross negligence, fraud, or willful misconduct. However, the Honorable District Court Judge

failed to cite to any authority, either in this State or any other jurisdiction, which permits a judicial or quasi-judicial officer to waive the defense of absolute immunity. Special Master Bertsch did not find and is not aware of any controlling or persuasive authority supporting this position, which suggests that this defense may not be waived.

The policy underlying absolute immunity suggests that the defense is not one that should be waivable. First, the defense protects the proper functioning of the judiciary by shielding judges from lawsuits that might impede the performance of their duties by way of harassment or intimidation, prevent them from taking independent action, and consume their time in defending lawsuits. Second, the defense serves to prevent continuous litigation by bringing finality to disputes. In general, these public policy considerations would not be served if this Court finds that absolute immunity is a waivable defense. More specific to this case, the underlying policy considerations would not be served by permitting the underlying action to proceed as absolute immunity should insulate Special Master Bertsch completely and fully from a lawsuit such as this, which seeks to challenge Special Master Bertsch's decisions and judgments in the Vion Litigation and to continue litigating underlying issues related to disqualification.

To the extent that the defense is waivable, the test for determining whether this defense has been waived should be stringent. On this score, the U.S. Supreme Court has held that a State's consent to suit must be unequivocally expressed and cannot be implied. Voluntary waiver of absolute quasi-judicial immunity should be subject to the same strict standard, as this defense is vital to judicial autonomy and decision-making.

The language of the Order of appointment which indicated that Special Master Bertsch may be held personally liable for acts taken pursuant to his Special Mastership that constitute gross negligence, fraud, or willful misconduct is, at best, an implied waiver of immunity, which should not be sufficient to waive this defense.

The defense applies to all claims and requests for relief, including prospective equitable relief. In the underlying action, Mr. Bloom argued that absolute judicial immunity did not apply to his claims for injunctive relief. Mr. Bloom's argument relied on the U.S. Supreme Court's holding in *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984), which held that the defense of absolute quasi-judicial immunity did not bar civil rights actions for equitable relief. This ruling has been abrogated by a Congressional amendment to 42 U.S.C. § 1983, which sought to fully restore the doctrine of judicial immunity to the status it occupied prior to *Pulliam*. Special Master Bertsch is not aware of any legal authority in Nevada which applies the holding in *Pulliam* to state law causes of action. Given the aforementioned legal history, there is no basis to extend the holding in *Pulliam* to the state law claims for relief in the underlying action.

For the foregoing reasons and those argued more fully below, Special Master Bertsch respectfully requests that this Court grant this Petition for Writ Mandamus and direct the Honorable District Court Judge to dismiss the underlying action on the basis of absolute quasi-judicial immunity.

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**VII. THE UNDERLYING ACTION MUST BE DISMISSED AS SPECIAL MASTER BERTSCH IS CLOAKED WITH ABSOLUTE QUASI-JUDICIAL IMMUNITY FROM ALL SUBSEQUENT CIVIL ACTIONS SEEKING TO HOLD HIM LIABLE FOR ACTS TAKEN WITHIN THE SCOPE OF HIS JURISDICTION AND AUTHORITY AS SPECIAL MASTER.**

**A. Special Master Bertsch's Duties in the Vion Litigation Were Functionally Comparable to a Judge and Therefore Enjoyed the Protection of Absolute Quasi-Judicial Immunity.**

“The common law doctrine of absolute immunity extends to all person[s] who are an integral part of the judicial process.” *Duff v. Lewis*, 114 Nev. 564, 568, 958 P.2d 82, 85 (1998). “[A]bsolute immunity defeats a suit at the outset of litigation as long as the official’s actions were within the scope of immunity . . .” *State v. District Court*, 118 Nev. 609, 615, n.9, 55 P.3d 420, 423, n. 9 (2002).

The “functional approach” is used to determine whether a non-judicial actor is performing functions similar to a judge and is entitled to the judge’s immunity.

The “functional approach” takes into consideration various factors including: whether the individual is performing many of the same functions as a judicial officer, whether there are procedural safeguards in place similar to a traditional court, whether the process or proceeding is adversarial, the ability to correct errors on appeal, and whether there are any protective measures to ensure the constitutionality of the individual's conduct and to guard against political influences.

*Marvin v. Fitch*, 126 Nev. Ad. Op. 18, 232 P.3d 425, 429-430 (2010). Using this approach, this Court has specifically held that certain court-appointed professionals enjoy absolute quasi-judicial immunity. *See e.g. Duff*, 114 Nev. at 571 (quoting *Lavit v. Superior Ct.*, 839 P.2d 1141, 1146 (Ariz. App. 1992)) (holding that a court appointed psychologist was entitled to absolute immunity because “(1) at least to some extent, his

evaluations and recommendations aided the trial court in determining child custody, and (2) his services were performed pursuant to court order.”); *Anes v. Crown Partnership, Inc.*, 113 Nev. 195, 201, 932 P.2d 1067, 1071 (1997) (quoting *Kermit Const. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976)) (holding that receiver appointed by the court acts as an officer of the court and shares in the judges immunity if he or she “faithfully and carefully carries out the orders of the appointing judge.”).

While there is no published decision by this Court granting a special master absolute immunity, this Court views a special master as an arm of the Court. Specifically, in *Venetian Casino Resort, LLC v. District Court*, this Court stated that the Nevada Code of Judicial Conduct expressly applied to Special Masters. *Venetian Casino Resort, LLC v. District Court*, 118 Nev. 124, 131, 41 P.3d 327, 331 (2002). The U.S. Court of Appeals for the Ninth Circuit also views special masters as arms of the Court who are entitled to the protections of absolute quasi-judicial immunity. *Atkinson-Baker & Assoc., Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9th Cir. 1993). The *Atkinson* Court reasoned that the special master was cloaked with absolute quasi-judicial immunity because he exercised discretionary judgment as part of his function. *Id.*

The Vion Court viewed Special Master Bertsch as a quasi-judicial officer. In the Vion Litigation, Mr. Bloom attempted to characterize Special Master Bertsch as an expert witness in order to avoid immunity protections afforded judicial and quasi-judicial officers related to requests for discovery. (PA Vol. II 0348–49). The Vion Court rejected this position and found that Special Master Bertsch was not to be treated as an

expert witness for any purpose in the case. (PA Vol. II 0348). Relying on U.S. Supreme Court precedent, the Vion Court also found that when Special Master Bertsch accepted appointment as a special master he assumed the duties and obligations of a judicial officer. (PA Vol. II 0349). In so holding, the Vion Court applied legal immunities afforded to a judicial officer in protecting Special Master Bertsch from Mr. Bloom's request for discovery. (*Id.*). In the underlying action, Mr. Bloom attempted to circumvent Special Master Bertsch's immunity by characterizing Special Master Bertsch's function in the Vion Litigation as similar to a receiver, accountant, or an independent contractor. (PA Vol. II 0278–82). Based on the legal and factual findings of the Vion Court, Special Master Bertsch acted in no other capacity than a special master, which was a position akin to a judicial officer.

This result is supported through application of the “functional approach” test. According to the Order of appointment, Special Master Bertsch was directed to provide an accounting consisting of his findings related to all transactions of cash flow, assets, and capital investments of Murder Inc. and any movement of Murder Inc.'s assets that were inconsistent with the rights of Merchant Cash Advance Agreements executed by the Plaintiffs, Mr. Bloom and Murder Inc. on February 25 and March 14, 2011. (PA Vol. I 0060–61). In addition, Special Master Bertsch was directed to conduct “a forensic accounting of Murder Inc.'s accounting records, so as to determine their accuracy and veracity.” (*Id.*). Vion, the party that moved for Special Master Bertsch's appointment, requested that Special Master Bertsch “be granted possession and powers over all

corporate books and records in order to perform a thorough accounting.” (PA Vol. I 0051). In addition, Vion requested that Special Master Bertsch “prepare a report documenting the various transactions involving Murder Inc.’s assets and whether those transactions were legitimate.” (PA Vol. I 0051–52).

The process to receive evidence related to cash flow, assets, capital investments, and accounting records of Murder Inc.; to analyze that evidence; and to draft a written report consisting of findings related to the legitimacy and veracity of these business transactions required considerable discretionary judgment. The fact that all of these actions took place in a traditional litigation setting establishes that there were procedural safeguards in place through the adversarial process to ensure the integrity and constitutionality of this process. Accordingly, the record before this Court establishes that under the “functional approach,” Special Master Bertsch was acting in a quasi-judicial capacity.

In sum, Special Master Bertsch was acting in a quasi-judicial capacity in his role as special master in the Vion Litigation. Therefore, Special Master Bertsch should be cloaked with absolute quasi-judicial immunity from suit.

**B. Absolute Quasi-Judicial Immunity Bars All Claims for Relief in the Underlying Litigation As They Challenge Acts Special Master Bertsch is Alleged to Have Committed Within the Course and Scope of his Duties as Special Master in the Vion Litigation.**

There are two recognized exceptions to judicial immunity. Generally, judges may be held liable for acts that are not judicial in nature or acts, though judicial in nature,

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that are “taken in complete absence of all jurisdiction.” *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991).

In Nevada, the jurisdiction of a court-appointed officer is defined by the order of appointment. To this end, if a court appointed officer “faithfully and carefully carries out the order of the appointing judge’ [he or she] shares the judge’s judicial immunity.” *Anes*, 113 Nev. at 201 (quoting *Kermit*, 547 F.2d at 3). On the other hand, a court appointed officer may be personally liable if he or she acts outside the authority granted by the court. *Id.* at 202.

However, “judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial.” *Mireles*, 502 U.S. at 11. Moreover, judicial immunity is not pierced by allegations of corruption. *Pierson v. Ray*, 386 U.S. 547, 554 (1967); *see also, Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986) (“[A] conspiracy between a judge and prosecutor to predetermine the outcome of a judicial proceeding, while clearly improper, nevertheless does not pierce the immunity extended to judges and prosecutors.”); *Nystedt v. Nigro*, 700 F.3d 25, 31 (1st Cir. 2012) (Ex parte contact between a discovery master and a party, without more, does not establish that the nature of the communication was not inextricably intertwined with the judicial function. “The fact that a court appointed discover master performs a judicial function in an imperfect (or even unethical) way does not, by itself, dissolve his quasi-judicial immunity.”).

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The allegations in Mr. Bloom's Complaint do not pierce Special Master Bertsch's immunity. Specifically, Mr. Bloom has alleged that Special Master Bertsch (1) failed to disclose a conflict of interest resulting from a pre-existing attorney/client relationship LSC; (2) engaged in ex parte communications; (3) failed to conduct discovery with anyone other than Vion; (4) failed to disqualify himself as special master; (5) secretly conspired with Vion to build a case against Mr. Bloom; (6) permitted Vion's counsel to edit multiple versions of the Final Report; (7) included unsubstantiated and defamatory statements in the Final Report and published and disseminated these statements to third parties; and (8) refused to retract his false statement or take any further action to mitigate the harm that Mr. Bloom sustained and continues to sustain. (PA Vol. I 0012). Each of these allegations relate to actions intimately intertwined with the performance of Special Master Bertsch's functions as special master in Vion Litigation, which included deciding the content of the "Final Report of Special Master," determining the scope and purpose of communications with the parties related to obtaining information for the "Final Report of Special Master," and judging the merits of Mr. Bloom's requests for recusal or disqualification. While Mr. Bloom has alleged that Special Master Bertsch engaged in unethical acts related to his performance of these functions, these allegations, without more, are not sufficient to fall within a recognized exception to absolute quasi-judicial immunity.

Mr. Bloom cannot establish that Special Master Bertsch acted outside the scope of his authority under the Order of appointment. The allegations in the Complaint in the

underlying action are similar to the allegations and arguments asserted in Mr. Bloom's "Motion to Disqualify Larry Bertsch as Special Master, Strike the Special Master's Reports from the Record, and for Monetary Sanctions." In denying Mr. Bloom's motion, the Vion Court specifically found (1) that while Special Master Bertsch should have made disclosure of his prior attorney-client relationship with LSC, the non-disclosure of the relationship was not grounds for disqualification; (2) that Special Master Bertsch was a fair, impartial, unbiased and highly skilled forensic accountant, and the matters in this case to which the Court made its referenced are in his area of expertise; and (3) that Special Master Bertsch complied in all respects with the Order appointing him as Special Master in the Vion Litigation. (PA Vol. II 0248–49). Given these findings by the Vion Court, there is no basis to find that Special Master Bertsch took any action that was in complete absence of his jurisdiction or authority.

For the foregoing reasons, Mr. Bloom's Complaint failed to allege facts sufficient to establish that the underlying action falls within a recognized exception to the defense of absolute quasi-judicial immunity.

**C. Mr. Bloom and the Honorable District Court Judge Failed to Cite Authority Establishing that Absolute Quasi-Judicial Immunity May Be Waived or Limited, and, To The Extent It May Be Waived or Limited, The Standard to Effectuate Such a Waiver.**

In the underlying action, the Honorable District Court Judge adopted Mr. Bloom's argument that Special Master Bertsch was entitled to qualified immunity, as opposed to absolute quasi-judicial immunity, based on a provision in the Order of appointment which stated that Special Master Bertsch could be held personally liable for acts taken

pursuant to the Special Mastership which constituted gross negligence, fraud, or willful misconduct. (PA Vol. II 0277, Vol. III 0526). In other words, Mr. Bloom argued and the Honorable District Court Judge found that absolute quasi-judicial immunity is a defense that may be waived or limited. However, Mr. Bloom's argument and the Honorable District Court Judge's Order failed to cite controlling or persuasive authority in support of this position. (*Id.*). Special Master Bertsch could not find and is not aware of any authority supporting this position, which suggests that this defense is not waivable.

Public policy supports the position that absolute quasi-judicial immunity cannot be waived or limited in any manner or in any degree. “‘Absolute immunity is . . . necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation.’” *Duff*, 114 Nev. at 568 (quoting *Butz v. Economou*, 438 U.S. 478, 512 (1978)).

Additional reasons for allowing absolute judicial immunity include: ‘(1) the need to save judicial time in defending suits; (2) the need for finality in the resolution of disputes; (3) to prevent deterring competent persons from taking office; (4) to prevent the threat of lawsuit from discouraging independent action; and (5) the existence of adequate procedural safeguards such as change of venue and appellate review.’

*Id.* (quoting *Lavit*, 839 P.2d at 1144).

These policy reasons apply equally to court-appointed officials . . . who assist the court in making decisions. Without immunity, these professionals risk exposure to lawsuits whenever they perform quasi-judicial duties. Exposure to liability could deter their acceptance of court appointments or color their recommendations.

*Id.* ““Immunity removes the possibility that a professional who is delegated judicial duties to aid the court will become a “lightning rod for litigation””” *Id.* (quoting *Acevedo v. Pima County Adult Probation Dept.*, 690 P.2d 38, 40 (Ariz. 1984)).

There is no doubt that these public policy considerations would be undermined by a finding that absolute judicial immunity may be waived. More specific to this case, these underlying policy considerations would not be served by permitting the underlying action to proceed as absolute immunity should insulate Special Master Bertsch completely and fully from a lawsuit such as this, which seeks to challenge Special Master Bertsch’s decisions and judgments in the Vion Litigation and to continue litigating underlying issues related to disqualification.

To the extent absolute judicial immunity may be waived, the test for determining if a waiver has occurred should be strict. Generally, the issue of governmental waiver of immunity arises with respect to Eleventh Amendment sovereign immunity. The Supreme Court has held that the test for determining whether a state has waived its immunity from federal court jurisdiction is a stringent one. *Sossamon v. Texas*, 563 U.S. 277, 284 (2011). “A State’s consent to suit must be ‘unequivocally expressed’ in the text of the relevant statute.” *Id.* “Only by requiring this ‘clear declaration’ by the State can [the court] be ‘certain that the State in fact consents to suit.’” *Id.* (quoting *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 680 (1999)). “Waiver may not be implied.” *Id.*

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Voluntary waiver of absolute quasi-judicial immunity should be subject to the same strict standard. Absolute judicial and quasi-judicial immunity is indispensable to judicial autonomy and decision-making since it insulates judicial and quasi-judicial officers from lawsuits. Therefore, it must be provided the same protections as sovereign immunity with respect waiver of this defense. In other words, to the extent that absolute immunity can be waived, the waiver should be express and unequivocal.

The Order of appointment does not expressly and unequivocally waive absolute quasi-judicial immunity. The Order states, in relevant part, that “[t]he Special Master shall not be personally liable to any party for acts taken pursuant to the Special Mastership, except in the event of the Special Master’s gross negligence, fraud, or willful misconduct.” (PA Vol. I 0063). At best, Mr. Bloom may argue that this section of the Order of appointment was an implied limited waiver of that immunity. However, this argument is tenuous as this provision could be equally read as limiting Mr. Bloom’s potential claims for acts taken by Special Master Bertsch outside the scope of his jurisdiction, which absolute quasi-judicial immunity would not protect. Thus, even if there was legal validity to Mr. Bloom’s argument that absolute judicial immunity could be waived or limited, the language in the Order of appointment should not be read to effectuate such a waiver.

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**D. There is No Legal Basis for Mr. Bloom to Seek Equitable Relief Against Special Master Bertsch If Special Master Bertsch is Cloaked With Absolute Quasi-Judicial Immunity From Suit.**

In the underlying action, Mr. Bloom argued that absolute-judicial immunity did not apply to prospective relief. In support of this position, Mr. Bloom cited to *Pulliam v. Allen*, in which the U.S. Supreme Court held that absolute judicial immunity did not bar a plaintiff from seeking declaratory and injunctive relief in an action brought under 42 U.S.C. § 1983. *Pulliam*, 466 U.S. at 541–42. Congress has since abrogated the ruling in *Pulliam* and its progeny through an amendment to 42 U.S.C. § 1983. The amended statute now provides, in relevant part, the following: “except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.” *See* 42 U.S.C. § 1983 (amended Oct. 19, 1996). According to the Senate Report, the amendment fully “restores the doctrine of judicial immunity to the status it occupied prior to the Supreme Court’s decision in [*Pulliam v. Allen*]” because *Pulliam* created a departure from “400 years of common law tradition and weakened judicial immunity protections.” Senate Report 104-366, at 36–37, 1996 U.S.C.C.A.N. 4202, 4216–17. This Court has not carved out similar exception to absolute judicial immunity, as described in *Pulliam*, for actions brought under state law seeking prospective relief. Based on the current state of federal law, Mr. Bloom cannot argue for this Court to adopt this exception when it is no longer recognized pursuant to the amendments to 42 U.S.C. § 1983. Accordingly, to the extent that Special Master

Bertsch is cloaked with absolute quasi-judicial immunity from suit, this protection would extend to Mr. Bloom's claims for prospective relief.

### **VIII. CONCLUSION**

For the foregoing reasons, Special Master Bertsch respectfully requests that this Court grant this Petition for Writ of Mandamus declaring that Special Master Bertsch is entitled to absolute quasi-judicial immunity from suit and ordering the Honorable District Court Judge to dismiss the underlying action in its entirety on this basis.

RESPECTFULLY SUBMITTED this 16th day of December, 2015.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Frederick J. Perdomo  
FREDERICK J. PERDOMO  
Deputy Attorney General  
Nevada Bar No. 10714  
Division of Public Safety  
100 North Carson Street  
Carson City, Nevada 89701-4717  
T: (775) 684-1250  
Email: [fperdomo@ag.nv.gov](mailto:fperdomo@ag.nv.gov)  
Attorney for Petitioners,  
Larry L. Bertsch and Larry L. Bertsch CPA  
& Associates

By: /s/ James R. Rosenberger  
JAMES R. ROSENBERGER, ESQ.  
Nevada Bar No. 1047  
Pico Rosenberger  
3291 E. Warm Springs Road, Ste. 400  
Las Vegas, NV 89120  
T: (702) 382-1110  
F: (702) 382-1173  
E-Mail: [jrosenberger@prlawlv.com](mailto:jrosenberger@prlawlv.com)  
Attorneys for Petitioners,  
Larry L. Bertsch and Larry L. Bertsch CPA  
& Associates

**VERIFICATION**

STATE OF NEVADA    )  
                                  )  
COUNTY OF CLARK    )

I, Larry L. Bertsch, individually and as a representative of Larry L. Bertsch CPA & Associates, hereby declare under penalty of perjury of the laws of Nevada, that I am the Petitioner named in the foregoing Petition for Writ of Mandamus and know the contents thereof; the pleading is true of my own knowledge, except as to those matters stated on information and belief, and that as to such matters, I believe them to be true.

Executed this 11<sup>th</sup> day of December, 2015.

  
\_\_\_\_\_  
Larry L. Bertsch

## **CERTIFICATE OF COMPLIANCE**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 10, in 14 pitch, Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either proportionately spaced, has a typeface of 14 points or more, and contains 7,779 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on

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is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 16th day of December, 2015.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Frederick J. Perdomo  
FREDERICK J. PERDOMO  
Deputy Attorney General  
Nevada Bar No. 10714  
Division of Public Safety  
100 North Carson Street  
Carson City, Nevada 89701-4717  
T: (775) 684-1250  
Email: [fperdomo@ag.nv.gov](mailto:fperdomo@ag.nv.gov)  
Attorney for Petitioners,  
Larry L. Bertsch and Larry L. Bertsch CPA  
& Associates

By: /s/ James Rosenberger  
JAMES R. ROSENBERGER, ESQ.  
Nevada Bar No. 1047  
Pico Rosenberger  
3291 E. Warm Springs Road, Ste. 400  
Las Vegas, NV 89120  
T: (702) 382-1110  
F: (702) 382-1173  
E-Mail: [jrosenberger@prlawlv.com](mailto:jrosenberger@prlawlv.com)  
Attorneys for Petitioners,  
Larry L. Bertsch and Larry L. Bertsch CPA  
& Associates

## **CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General, State of Nevada, and that on this 16th day of December, 2015, I caused to be deposited for mailing, a true and correct copy of the foregoing, **PETITION FOR WRIT OF MANDAMUS**, to the following:

The Honorable Kenneth Cory  
Eighth Judicial District Court  
Department 1  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas, NV 89155  
Dept01lc@clarkcountycourts.us

### **Attorneys for Plaintiff, Jay L. Bloom:**

Joseph A. Gutierrez. Esq.  
Luis A. Ayon, Esq.  
Margaret E. Schmidt, Esq.  
Maier Gutierrez Ayon  
400 South Seventh Street, Suite 400  
Las Vegas, NV 89101  
T: (702) 629-7900  
F: (702) 629-7925  
E-Mail Addresses:  
[jag@mgalaw.com](mailto:jag@mgalaw.com)  
[laa@mgalaw.com](mailto:laa@mgalaw.com)  
[mes@mgalaw.com](mailto:mes@mgalaw.com)  
[agh@mgalaw.com](mailto:agh@mgalaw.com)  
[cmb@mgalaw.com](mailto:cmb@mgalaw.com)  
[jrm@mgalaw.com](mailto:jrm@mgalaw.com)  
[klb@mgalaw.com](mailto:klb@mgalaw.com)  
[ndv@mgalaw.com](mailto:ndv@mgalaw.com)

/s/ Allison Johnson  
An employee of the  
Office of the Attorney General