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**IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**  
**IN AND FOR THE COUNTY OF CLARK**

JAY BLOOM,

Plaintiff,

vs.

LARRY L. BERTSCH, et al.

Defendants.

CASE NO. : A-15-714007-C  
DEPT. NO.: I

**DEFENDANTS' REPLY IN SUPPORT OF  
MOTION TO DISMISS AND OPPOSITION  
TO COUNTERMOTION FOR  
DECLARATORY JUDGMENT**

Larry L. Bertsch and Larry L. Bertsch, CPA & Associates ("Mr. Bertsch"), through counsel of record, Adam Paul Laxalt, Attorney General of the State of Nevada, Frederick, J. Perdomo, Deputy Attorney General, and James R. Rosenberger of Pico Rosenberger Attorneys at Law, hereby file this Reply in support of Motion to Dismiss and Opposition to Countermotion for Declaratory Judgment. This brief is based on the following memorandum of points and authorities, all papers and pleadings on file, and any oral argument this Court may entertain on this matter.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This action is an improper attempt by Plaintiff Jay Bloom ("Mr. Bloom") (1) to hold a  
4 Special Master, who is considered an arm of the Court, personally liable for actions taken in  
5 his quasi-judicial capacity; (2) to re-litigate factual and legal issues that go to the heart of his  
6 claims in this case and that were finally decided on their merits in Mr. Bertsch's favor in the  
7 *Vion Litigation*; and (3) to assert tort claims against Mr. Bertsch which fail both legally and  
8 factually as a matter of law.

9 First, Mr. Bloom has not provided this Court with any authority or argument, which  
10 pierces Mr. Bertsch's absolute quasi-judicial immunity. As a primary matter, all of the actions  
11 Mr. Bertsch engaged in as Special Master in the *Vion Litigation* were functionally comparable  
12 to a judge and were subject to the procedural safeguards of the litigation process. Mr. Bloom  
13 is only permitted to bring claims against Mr. Bertsch if he clearly acted outside the scope of  
14 his authority and jurisdiction, which was not the case in the *Vion Litigation* since the Court  
15 expressly found that Mr. Bertsch complied in all respects with the Order that appointed him as  
16 Special Master. Mr. Bloom's attempt to re-characterize Mr. Bertsch's role as either a receiver,  
17 accountant, or independent contractor is based on a mischaracterization of the tasks Mr.  
18 Bertsch was directed to complete in the *Vion Litigation* and was contrary to the Vion Court  
19 and the parties perception of Mr. Bertsch's role in that action. Regardless, Mr. Bertsch was  
20 entitled to absolute quasi-judicial immunity even if he was classified in these capacities. Mr.  
21 Bloom's claim that Mr. Bertsch colluded with Vion to create unsubstantiated findings in the  
22 Final Report does not pierce Mr. Bertsch's absolute quasi-judicial immunity as a matter of law.  
23 Mr. Bloom has not cited any controlling legal authority that establishes that absolute quasi-  
24 judicial immunity can be waived, and alternatively, to the extent it can be waived, the standard  
25 to effectuate such waiver. While the Supreme Court has held that requests for injunctive and  
26 declaratory relief are not subject to absolute immunity in Section 1983 actions, Mr. Bloom has  
27 not cited any authority extending this holding to state law tort claims. Nevertheless, to obtain  
28 equitable relief Mr. Bloom was required to show that he lacked a legal remedy, which is

1 impossible for him to establish since he had access to a multitude of legal remedies through  
2 the adversarial litigation process in the *Vion Litigation*. For all of the foregoing reasons, none  
3 of Mr. Bloom's arguments pierce Mr. Bertsch's absolute quasi-judicial immunity and this  
4 action must be dismissed as a matter of law.

5       Second, Mr. Bloom's entire case seeks to re-litigate factual and legal issues related to  
6 alleged impropriety by Mr. Bertsch, as Special Master, in the *Vion Litigation*. Mr. Bloom has  
7 argued that none of the elements of preclusion are present in this action. Mr. Bloom is wrong.  
8 First, all of the factual and legal issues that Mr. Bloom asserted in support of his arguments to  
9 disqualify Mr. Bertsch as Special Master in the *Vion Litigation* and strike his reports from the  
10 record are alleged as the factual and legal underpinnings of his claims in this action. These  
11 factual and legal issues were actually litigated as part of his request to disqualify Mr. Bertsch  
12 and strike his reports from the record in the *Vion Litigation*. The Court rejected his  
13 contentions and arguments and found that Mr. Bertsch was not required to disqualify himself  
14 from the *Vion Litigation*, that he was "fair, impartial, unbiased and highly skilled," and that he  
15 complied with the Order appointing him as Special Master. Nevertheless, Mr. Bloom was still  
16 given a full and fair opportunity to litigate these issues further, conduct limited discovery on  
17 these issues, and potentially seek reconsideration or reversal of the Court's decision.  
18 Instead, Mr. Bloom entered into a court approved settlement, which is considered, as a matter  
19 of law, a final judgment on the merits. While Mr. Bloom claims that Mr. Bertsch was not a  
20 party of privity to the action, this argument misses the point. Mr. Bertsch is asserting that the  
21 Vion Court's adverse rulings bar Mr. Bloom from re-litigating these issues in this action and  
22 bar his claims for relief. Since these adverse rulings are being asserted against Mr. Bloom,  
23 who was a party to the *Vion Litigation* and had a full and fair opportunity to litigate these  
24 issues, he cannot claim that applying these adverse rulings to bar the claims he has asserted  
25 in this action is a violation of his due process rights. Since the Vion Court found in favor of  
26 Mr. Bertsch on all of the factual and legal issues that act as the underpinnings of Mr. Bloom's  
27 claims in this action, Mr. Bloom cannot re-litigate these issues in this action and his claims  
28 necessarily fail as a matter of law.

1 Third, Mr. Bloom's tort claims are still legally deficient. Mr. Bloom's claims for gross  
2 negligence and willful misconduct fail to state a claim for relief because Mr. Bloom has not  
3 identified a legally enforceable duty that Mr. Bertsch owed to him and the factual and legal  
4 findings of the Vion Court extinguish all of the alleged breaches he claims occurred in that  
5 action. Finally, Mr. Bloom cannot show damage because (1) he voluntarily relinquished his  
6 right to challenge Mr. Bertsch's alleged actions by settling the case, (2) the Vion Court found  
7 that Mr. Bertsch acted within his authority and jurisdiction, and (3) Mr. Bertsch was absolutely  
8 privileged in making all of the statements he made in his Final Report.

9 Next, Mr. Bloom's fraudulent concealment claim fails because the alleged facts upon  
10 which this claim is based were not material and were disclosed to Mr. Bloom during the *Vion*  
11 *Litigation*, giving him a full and fair opportunity to litigate these factual and legal issues before  
12 that court. Mr. Bloom did, in fact, litigate these issues as part of a motion to disqualify Mr.  
13 Bertsch and strike his reports from the record, which was denied by the Vion Court. In  
14 denying his motion, the Vion Court found no reason for Mr. Bertsch to disqualify himself, the  
15 Vion Court accepted his report as written, and the Vion Court found that he was "fair,  
16 impartial, and unbiased." Thus, the Court found that Mr. Bloom's contentions that Mr.  
17 Bertsch's independence and impartiality were compromised by his prior attorney client-  
18 relationship with Vion's Counsel's law firm and his alleged ex parte communications with  
19 Vion's Counsel were meritless. Thereafter, Mr. Bloom elected to settle the case as opposed  
20 to further challenging the Final Report either at trial or on appeal, which, as argued above,  
21 completely undermines all of his claims to damages.

22 Mr. Bloom's defamation claim also fails since it is not listed as a potential claim in the  
23 Order appointing Mr. Bertsch as Special Master, there are no allegations in the Complaint  
24 establishing that the statements in the Final Report were false, and Mr. Bertsch's statements  
25 in the Final Report and his alleged publishing of the Final Report were absolutely privileged.

26 There is no basis to assert liability against Mr. Bertsch under an alter ego theory since  
27 Mr. Bertsch, as Special Master, was acting in a quasi-judicial capacity, or as an arm of the  
28 Court, not a professional corporate capacity. In addition, Mr. Bloom has not alleged sufficient



1 facts to establish that Mr. Bertsch is attempting to use Larry L. Bertsch CPA & Associates to  
2 shield himself from personal liability or that Mr. Bertsch and Larry L. Bertsch CPA &  
3 Associates are essentially one in the same for business purposes.

4 Finally, this Court is authorized to decide this motion on its merits without discovery.  
5 All of the records submitted in support of Mr. Bertsch's Motion to Dismiss are court records,  
6 which this Court may judicially notice without converting Mr. Bertsch's Motion to Dismiss to  
7 one for summary judgment. Furthermore, to the extent Mr. Bloom requests discovery in this  
8 action, the discovery he seeks cannot be obtained from Mr. Bertsch who, as Special Master,  
9 enjoyed the same privileges and immunities from discovery and testimony as the judge in the  
10 *Vion Litigation*. In addition, the intrusive nature of Mr. Bloom's requests for discovery further  
11 establish the need to cloak Mr. Bertsch with absolute quasi-judicial immunity in this action.

12 In sum, this lawsuit fails in its entirety on multiple legal grounds. First, Mr. Bertsch was  
13 absolutely immune from suit for all of the actions he was alleged to have taken as Special  
14 Master. Second, the factual and legal issues upon which the claims in this action are based  
15 were extensively litigated in the *Vion Litigation* and finally decided on their merits in Mr.  
16 Bertsch's favor after Mr. Bloom, who was a party to that action, had a full and fair opportunity  
17 to litigate them. Third, Mr. Bloom's tort claims either fail to allege sufficient facts to establish  
18 their essential elements or fail as a matter of law due to the Vion Court's prior rulings on these  
19 factual and legal issues and Mr. Bloom's decision to settle the case. Finally, Mr. Bertsch's  
20 Motion to Dismiss may be decided without discovery since it is based on public records, which  
21 may be judicially noticed by this Court without converting the motion to one for summary  
22 judgment. Mr. Bloom's requests for discovery cannot be obtained from Mr. Bertsch who  
23 enjoys the same judicial privileges and immunities from discovery and testimony as the judge  
24 in the *Vion Litigation*, and Mr. Bloom's discovery requests further establish the need and the  
25 purpose for cloaking quasi-judicial actors, like Mr. Bertsch, with absolute immunity. For these  
26 reasons and those argued more fully below, this action must be dismissed as a matter of law  
27 and the countermotion for declaratory judgment must be denied.

28 ///

1 **II. STATEMENT OF FACTS**

2 Mr. Bertsch incorporates by reference the factual statement articulated in his Motion to  
3 Dismiss. (Motion to Dismiss, p. 4, l. 16 – p. 10, l. 17)

4 In his Opposition Brief, Mr. Bloom states that the Vion Court did not give Mr. Bertsch  
5 authority to make findings of fact or rulings on the merits in the *Vion Litigation*, “but instead  
6 [Mr. Bertsch was] to provide an independent review and accounting of the books and records  
7 of the companies at issue and to assist the court and parties with testimony regarding their  
8 findings.” (Opposition Brief, p. 5, ll. 13-16) However, according to the Order appointing Mr.  
9 Bertsch as Special Master, Mr. Bertsch was directed to provide an accounting consisting of  
10 his findings related to all transactions of cash flow, assets, and capital investments of Murder  
11 Inc. and any movement of Murder Inc.’s assets that were inconsistent with the rights of  
12 Merchant Cash Advance Agreements executed by the Plaintiffs, Mr. Bloom and Murder Inc.  
13 on February 25, 2011 and March 14, 2011. (MTD Exhibit C, Order, § 4, p. 3, l. 24 – p. 4, l. 21)  
14 In addition, Mr. Bertsch was directed to conduct “a forensic accounting of Murder Inc.’s  
15 accounting records, so as to determine their accuracy and veracity.” (*Id.* at p. 3, l. 28, p. 4, l.  
16 1) (emphasis added) Vion, the party that moved for Mr. Bertsch’s appointment, requested  
17 that Mr. Bertsch “be granted possession and powers over all corporate books and records in  
18 order to perform a thorough accounting.” (MTD Exhibit B, p. 27, ll. 22-24) In addition, Vion  
19 requested that Mr. Bertsch “prepare a report documenting the various transactions involving  
20 Murder Inc.’s assets and whether those transactions were legitimate.” (*Id.* at p. 27, l. 27 – p.  
21 28, l. 1)

22 Mr. Bloom’s Opposition Brief also states that “[a]t the time Bertsch accepted  
23 appointment as an ‘independent’ Special Master in the Vion Litigation, LSC was acting as  
24 Bertsch’s agent and legal representative and receiving payments from Bertsch. Therefore,  
25 Bertsch’s impartiality as Special Master was reasonably in question and Bertsch had a duty to  
26 disclose such prejudicial relationship.” (Opposition Brief, p. 5, ll. 21-24) Mr. Bloom also states  
27 that Mr. Bertsch had a duty to disqualify himself from the position of Special Master pursuant  
28 to the Nevada Code of Judicial Conduct. (*Id.* at p. 5, l. 28 – p. 6, l. 1) However, the Vion

1 Court ruled that

2 [Mr. Bertsch] should have made disclosure of his prior attorney-  
3 client relationship with Lionel Sawyer & Collins. The Court does  
4 not find that non-disclosure of such relationship constitutes grounds  
5 for disqualification. [Mr. Bertsch] is 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.  
The reference to Special Master in this case was proper.

6 (MTD Exhibit T, p. 5, l. 26 – p. 6, l. 4)

7 Mr. Bloom's Opposition Brief also identifies correspondence that he alleges showed "a  
8 concerted effort between Bertsch, LSC, and Zmaila to fabricate non-existent facts against  
9 Bloom and his companies." (Opposition Brief, p. 7, l. 3 – p. 8, l. 18) These were the same  
10 communications that Mr. Bloom identified in support of his Motion to Disqualify Larry Bertsch  
11 as Special Master, Strike the Special Master's Reports from the Record and for Monetary  
12 Sanctions. (MTD Exhibit N, p. 5, l. 8 – p. 8, l. 23) That motion was denied by the Vion Court,  
13 and, therefore, the arguments and contentions Mr. Bloom made in support of the motion were  
14 rejected by that court. (MTD Exhibit U)

15 Mr. Bloom's Opposition Brief also states that Mr. Bertsch's Counsel in the Vion  
16 Litigation, as an *ex post facto* admission, offered multiple times to seal the Final Report and  
17 replace it with a version that had the "Ponzi scheme" reference redacted. (Opposition Brief, p.  
18 9, ll. 6-8) However, Mr. Bloom has not identified how this is an *ex post facto* admission when  
19 Mr. Bertsch's Counsel stated on the record that "obviously the Special Master supports his  
20 reports so, there is at least support for the report from the side that drafted it." (MTD Exhibit S,  
21 p. 9, ll. 5-6)

22 Mr. Bloom's Opposition Brief also states that on May 31, 2013, the Vion Court "entered  
23 an order rejecting adoption of the Final Report as finding of fact and conclusions of law, but  
24 instead chose to make determinations of fact and law at the trial solely on the merits of the  
25 case, stating that the Defendants' Final Report was more akin to an expert report for Vion."  
26 (Opposition Brief, p. 9, ll. 16-19) There is no support for this statement in that order. Rather,  
27 that order was amended on September 3, 2013. (MTD Exhibit U) In the Amended Order, the  
28 Court ruled that

1 With respect to approval of Final Report of Special Master, the  
2 Court finds that the failure of Special Master to disclose the prior  
3 attorney-client relationship does not render the Final Report of  
4 Special Master invalid or erroneous. . . The Court, therefore,  
5 accepts the report as written. The Court does not adopt the Final  
6 Report of Special Master as findings of fact or conclusions of law.  
7 The Court will make determinations of fact and law at the trial on  
8 the merits in this case. As such, the Court, in accepting the Final  
9 Report of Special Master as written, did not conduct an analysis as  
10 to whether the findings were clearly erroneous nor a de novo  
11 review of the conclusions. Any party may use the Final Report of  
12 Special Master as such party sees fit. The Court's acceptance of  
13 the Final Report of Special Master does not limit or impair in any  
14 way any party's ability to challenge the report at trial.

15 (MTD Exhibit U, p. 5, ll. 8-20)

16 Contrary to Mr. Bloom's assertion, in its September 11, 2013, Order the Court rejected  
17 the contention that Mr. Bertsch was an expert witness finding that he (1) was not to be treated  
18 as an expert witness for any purpose in the case; and (2) that Mr. Bertsch was appointed as a  
19 special master by the Court under NRCP 53. (Reply Exhibit X, p. 2, ll. 21-24) The Court also  
20 found that "the United States Supreme Court has stated that when a special master accepts  
21 appointment by the court, the special master assumes 'the duties and obligation of the judicial  
22 officer.'" (*Id.* at p. 3, ll. 1-3 (citing multiple cases)) The Court granted Mr. Bloom leave to take  
23 a one hour deposition of Mr. Bertsch. (*Id.* p. 3, ll. 18-25) Finding that Mr. Bertsch, as Special  
24 Master, was cloaked with the same privilege as the Court, the scope of the deposition was  
25 limited to "what were the Special Master's communications with Lionel Sawyer & Collins,  
26 including what information they gave the Special Master, what language they proposed, and  
27 what change did they request." (*Id.*) Mr. Bloom claims that he did not take this deposition  
28 because the case settled. (Opposition Brief, p. 10, ll. 10-11) However, the *Vion Litigation*  
record reflects that the case was dismissed pursuant to a court approved settlement over a  
year after Mr. Bloom was granted leave to take the deposition. (MTD Exhibit W)

### 29 **III. LEGAL STANDARD**

30 Mr. Bertsch incorporates by reference the legal standard of review articulated in his  
31 Motion to Dismiss. (*Id.* at p. 10, l. 18 – p. 11, l. 6)

32 ///

1 **IV. ARGUMENT**

2 **A. Absolute Quasi-Judicial Immunity Protects Mr. Bertsch From this Lawsuit**  
3 **Which Seeks to Hold Him Civilly Liable For Acts Taken within the Scope of**  
4 **His Jurisdiction and Authority as Special Master in the *Vion Litigation*.**

5 “The common law doctrine of absolute immunity extends to all person[s] who are an  
6 integral part of the judicial process.” *Duff v. Lewis*, 114 Nev. 564, 568, 958 P.2d 82, 85 (1998)  
7 (citing *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983)). “[A]bsolute immunity defeats a suit at  
8 the outset of litigation as long as the official’s actions were within the scope of immunity.”  
9 *State v. Second Judicial District Court ex rel. County of Washoe*, 118 Nev. 609, 615, n.9, 55  
10 P.3d 420, 423, n. 9 (2002) (citing *Imbler v. Pachtman*, 424 U.S. 409, 419, n. 13 (1976)).

11 **1. Mr. Bertsch at all times was acting in the capacity of a special**  
12 **master and was therefore shielded from civil liability for all of his**  
13 **quasi-judicial acts.**

14 The “functional approach” is used to determine whether a non-judicial actor is  
15 performing functions similar to a judge.

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

24 *Marvin v. Fitch*, 126 Nev. Ad. Op. 18, 232 P.3d 425, 429-430 (2010) (citing *Roman v. Bible*,  
25 169 F.3d 1182, 1186-87 (9<sup>th</sup> Cir. 1999)). Quasi-judicial immunity applies to special masters  
26 appointed under Rule 53. *Atkinson-Baker & Associates, Inc. v. Kolts*, 7 F.3d 1452, 1454-55  
27 (9<sup>th</sup> Cir. 1993) According to the Ninth Circuit, absolute quasi-judicial immunity extends to  
28 special masters and others whose “judgments are functionally comparable to those of judges  
– that is, because they, too, exercise a discretionary judgment as part of their function.” *Id.* at  
1454 (quoting *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993)).

There can be no doubt that Mr. Bertsch was acting in a quasi-judicial capacity in  
fulfilling the tasks he was appointed to complete as Special Master in the *Vion Litigation*.  
According to the Order appointing Mr. Bertsch as Special Master, Mr. Bertsch was directed to

1 provide an accounting consisting of his findings related to all transactions of cash flow,  
2 assets, and capital investments of Murder Inc. and any movement of Murder Inc.'s assets that  
3 were inconsistent with the rights of Merchant Cash Advance Agreements executed by the  
4 Plaintiffs, Mr. Bloom and Murder Inc. on February 25, 2011 and March 14, 2011. (MTD Exhibit  
5 C, Order, § 4, p. 3, l. 24 – p. 4, l. 21) (emphasis added) In addition, Mr. Bertsch was directed  
6 to conduct “a forensic accounting of Murder Inc.'s accounting records, so as to determine  
7 their accuracy and veracity.” (*Id.* at p. 3, l. 28, p. 4, l. 1) (emphasis added) Vion, the party  
8 that moved for Mr. Bertsch's appointment, requested that Mr. Bertsch “be granted possession  
9 and powers over all corporate books and records in order to perform a thorough accounting.”  
10 (MTD Exhibit B, p. 27, ll. 22-24) In addition, Vion requested that Mr. Bertsch “prepare a report  
11 documenting the various transactions involving Murder Inc.'s assets and whether those  
12 transactions were legitimate.” (*Id.* at p. 27, l. 27 – p. 28, l. 1) (emphasis added)

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

21 The *Vion Litigation* record reflects that Mr. Bertsch was viewed as a Special Master.  
22 While Mr. Bloom's Opposition Brief attempts to characterize Mr. Bertsch as a receiver,  
23 accountant, and an independent contractor, the fact still remains that Mr. Bertsch's  
24 appointment was requested and granted under Rule 53, which is the procedural rule that  
25 permits courts to appoint special masters. (MTD Exhibit B, p. 25, l. 17 – p. 29, l. 21; Exhibit  
26 C, p. 2, ll. 18-20) Mr. Bloom's argument that he was acting in a different capacity is contrary  
27 to *Vion Litigation* record, which shows that the parties, including Mr. Bloom, and the Vion  
28 Court understood Mr. Bertsch to be acting in the capacity of Special Master. (MTD Exhibit D,

1 Preliminary Report of Special Master; Exhibit E, Order on Completion of Special Master's  
2 Final Report; Exhibit G, Final Report of Special Master; Exhibit T, Order re Special Master's  
3 Motion for Order (1) Accepting Special Master's Final Report; and (2) Discharging Special  
4 Master) In fact, Mr. Bloom's counsel made arguments based on Mr. Bertsch's role as a  
5 Special Master in court filings. (MTD Exhibit H, Defendants' Motion to Disqualify and for  
6 Sanctions, p. 4, ll. 14-18, p. 5, ll. 9-16; Exhibit K, Reply in support of Motion to Disqualify and  
7 for Sanctions, p. 4, l. 20- p. 7, l. 4; Exhibit N, Motion to Disqualify Larry Bertsch as Special  
8 Master, Strike the Special Master's Reports from the Record and for Monetary Sanctions;  
9 Exhibit R, Defendants/Third Party Plaintiffs/CounterClaimant's Reply to Special Master's  
10 Opposition to Disqualify Larry Bertsch as Special Master, Strike the Special Master's Reports  
11 from the Record and for Monetary Sanctions) To underscore this point, the Vion Court found  
12 that Mr. Bertsch (1) was not to be treated as an expert witness for any purpose in the case;  
13 and (2) that Mr. Bertsch was appointed as a Special Master by the Court under NRCP 53.  
14 (Reply Exhibit X, p. 2, ll. 21-24) The Court also found that "the United States Supreme Court  
15 has stated that when a special master accepts appointment by the court, the special master  
16 assumes 'the duties and obligation of the judicial officer.'" (*Id.* at p. 3, ll. 1-3 (citing multiple  
17 cases)) Accordingly, Mr. Bloom's attempt to re-characterize Mr. Bertsch's role in the *Vion*  
18 *Litigation* as something other than a Special Master is contrary to the parties and the Vion  
19 Court's understanding of Mr. Bertsch's role in that action.

20 Mr. Bloom's attempt to characterize Mr. Bertsch as an accountant does not change the  
21 character of his duties or functions in the *Vion Litigation*. Specifically, Mr. Bloom argues that  
22 Mr. Bertsch was ordered to prepare an accounting of the books and records of the companies  
23 at issue and to assist the parties with testimony regarding their findings. (Opposition Brief, p.  
24 18, ll. 6-7) In addition, Mr. Bloom argues that Mr. Bertsch was directed to apply his  
25 professional and specialized knowledge and skill in the determination of specific issues of  
26 cash value, but was given no authority to make findings of fact or rulings on the merits. (*Id.* at  
27 ll. 7-10) To the contrary, the Order appointing Mr. Bertsch as Special Master directed him to  
28 provide an accounting consisting of his findings related to all transactions of cash flow,

1 assets, and capital investments of Murder Inc. and any movement of Murder Inc.'s assets that  
2 were inconsistent with the rights of Merchant Cash Advance Agreements executed by the  
3 Plaintiffs, Mr. Bloom and Murder Inc. on February 25, 2011 and March 14, 2011. (MTD  
4 Exhibit C, Order, § 4, p. 3, l. 24 – p. 4, l. 21) (emphasis added) In addition, Mr. Bertsch was  
5 directed to conduct “a forensic accounting of Murder Inc.'s accounting records, so as to  
6 determine their accuracy and veracity.” (*Id.* at p. 3, l. 28, p. 4, l. 1) (emphasis added) Indeed,  
7 Vion requested Mr. Bertsch's appointment to “prepare a report documenting the various  
8 transactions involving Murder Inc.'s assets and whether those transactions were legitimate.”  
9 (*Id.* at p. 27, l. 27 – p. 28, l. 1) (emphasis added) Vion's motion for Mr. Bertsch's appointment  
10 and the Order appointing Mr. Bertsch as Special Master expressly requested and directed Mr.  
11 Bertsch to make findings related to the legitimacy and veracity of Murder, Inc.'s business  
12 transactions and accounting records. Mr. Bloom's attempt to minimize Mr. Bertsch's role is  
13 contrary to Vion's intent in requesting and the express language of the Vion Court's Order  
14 granting his appointment as Special Master in the *Vion Litigation*.

15 Furthermore, characterizing Mr. Bertsch as an accountant does not make him any less  
16 absolutely immune from suit. The *Duff Court* held that a psychologist in a child custody  
17 dispute was entitled to quasi-judicial immunity because ““(1) at least to some extent, his  
18 evaluations and recommendations aided the trial court in determining child custody, and (2)  
19 his services were performed pursuant to court order.” *Duff*, 114 Nev. at 571 (quoting *Lavit v.*  
20 *Superior Ct. in and for County of Maricopa*, 839 P.2d 1141, 1146 (Ariz. 1992). The court  
21 reasoned that “[t]he sine qua non of the exercise of [the court-appointed professional's  
22 discretion] is the freedom to act in an objective and independent manner.” *Id.* at 570 (quoting  
23 *Lythgoe v. Guinn*, 884 P.2d 1085, 1089 (Ak. 1994)). “Exposure to liability could deter their  
24 acceptance of court appointments or color their recommendations.” *Id.* at (quoting *Lavit*, 839  
25 P.2d at 1144). Indeed, such exposure could “produce a chilling effect upon acceptances of  
26 future court appointments.” *Id.* at (quoting *Seibel v. Kemble*, 631 P.2d 173, 180 (Haw.  
27 1981)). The *Duff Court* further recognized that there were procedural remedies and  
28 safeguards to hold court-appointed professionals accountable for their actions, which



1 included “the adversarial process of cross examination and the opportunity ‘to bring the  
2 judges attention to the deficiencies in the evaluation.” *Id.* (quoting *Lythgoe*, 884 P.2d at  
3 1091) In addition, the *Duff* Court also recognized that “the complaining party is “free to seek  
4 appellate review or . . . request a modification of the [trial court’s] order.”” *Id.* (quoting  
5 *Lythgoe*, 884 P.2d at 1091; *LaLonde v. Eissner*, 539 N.E.2d 538, 542 (Mass. 1989)). The  
6 court has discretion and authority to hold these agents accountable for their acts by imposing  
7 sanctions.

8           Although [the agent] would not be civilly liable for the  
9 consequences of their alleged negligent acts, the court is able to  
10 insure that its agents will be accountable for their conduct and  
11 actions. The court, in its discretion, has the authority to impose or  
12 recommend that numerous sanctions be imposed for negligent  
conduct. Some of the sanctions that could be imposed include  
appointing another [agent] to serve . . . , prohibiting the [agent] from  
further service to the court and reporting that [agent’s] behavior to  
the [professional board] for further action.

13 *Id.* (quoting *Seibel*, 631 P.2d at 177 n. 8)

14           Mr. Bertsch was appointed as Special Master to provide evaluations and  
15 recommendations to aid the trial court in resolving the dispute in the *Vion Litigation*, and his  
16 services were performed pursuant to court order. (MTD Exhibit C) Furthermore, allowing this  
17 case to proceed will likely deter future appointments of special masters in this Court and  
18 potentially deter these appointed officials from making potentially contentious findings, like  
19 the ones Mr. Bloom is challenging in this case. Legal remedies were available to Mr. Bloom  
20 through the adversarial litigation process and appellate review. In addition, Mr. Bloom was  
21 entitled to and did in fact seek sanctions against Mr. Bertsch, which were all denied except for  
22 Mr. Bloom receiving limited leave to take Mr. Bertsch’s deposition. Accordingly, even though  
23 civil remedies are not available to Mr. Bloom, he nonetheless could have protected his rights  
24 through utilizing the adversarial procedures that were available to him in the *Vion Litigation*.  
25 Accordingly, even if Mr. Bertsch is characterized as an accountant, or some other court-  
26 appointed professional, he is still entitled to absolute quasi-judicial immunity for his  
27 professional assistance to the Court in his role as Special Master.

28 ///

1 The source of Mr. Bertsch's compensation in the *Vion Litigation* did not change the  
2 character of his role in that action. Mr. Bloom argues that Mr. Bertsch was acting as an  
3 independent contractor since he was being "paid directly by the parties in the Vion Litigation  
4 and not by the State as an employee/contractor." (Opposition Brief, p. 18, ll. 13-16)  
5 However, Rule 53 specifically provides, in relevant part, that "[t]he compensation to be  
6 allowed to a special master shall be fixed by the court, and shall be charge upon such of the  
7 parties or paid out of any fund or subject matter of the action . . ." NRCP 53(a)(1) (emphasis  
8 added). Accordingly, the fact that Mr. Bertsch was compensated by the parties in the *Vion*  
9 *Litigation* does not make him an independent contractor since Rule 53 expressly provides for  
10 compensation in this manner.

11 Mr. Bertsch's function in the *Vion Litigation* was not comparable to a receiver. "A  
12 receiver is an officer or representative of the court, appointed to take the charge and  
13 management of property which is the subject of litigation before it, for the purpose of its  
14 preservation and ultimate disposition according to the final judgment therein." *State v.*  
15 *Second Judicial Dist. Ct. in and for Washoe County*, 49 Nev. 145, 241 P. 317, 321 (1925)  
16 (quoting *Kreling v. Kreling*, 228 Cal. 421, 422, 50 P. 549, 550 (1897)) The Order appointing  
17 Mr. Bertsch as Special Master did not direct him to take charge or manage Murder, Inc.  
18 (MTD, Exhibit C, p. 3, l. 24 – p. 5, l. 21) Rather, Mr. Bertsch was directed to obtain evidence  
19 related to cash flow, assets, capital investments, and accounting records of Murder Inc.; to  
20 analyze that evidence; and to draft a written report consisting of findings related to the  
21 legitimacy and veracity of Murder, Inc.'s business transactions. (*Id.*) Accordingly, the tasks  
22 Mr. Bertsch was assigned to complete were not functionally comparable to a receiver.

23 Regardless, Mr. Bertsch would, nonetheless, be immune from suit under the law  
24 applicable to receivers. As cited in Mr. Bloom's brief, a receiver "may be personally liable if  
25 he or she acts outside the authority granted by the court." *Anes v. Crown P'Ship, Inc.* 113  
26 Nev. 195, 201, 932 P.2d 1067, 1071 (1997) (citing multiple authorities). However, "a receiver  
27 'who faithfully carries out the orders of the appointing judge' shares the judge's judicial  
28 immunity." *Id.* (quoting *Kermit Const. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1<sup>st</sup>

1 Cir. 1976)). To this end, the *Anes Court* held that “a receiver cannot be sued without leave of  
2 the court.” *Id.* at 200 (citing *Barnette v. Wells Fargo Nevada Nat. Bank*, 270 U.S. 438, 439  
3 (1926)). “The purpose of the rule is to accommodate all claims possible in the receivership  
4 action under the supervision of the appointing court, and to render the receiver answerable  
5 solely to that court.” *Id.* (citing *Vitug v. Griffin*, 214 Cal.App.3d 488, 262 Cal.Rptr. 588, 591  
6 (1989)). “Only when the receiver acts beyond the scope of its court-derived authority such  
7 that it may be sued as an individual, leave of the court is unnecessary.” *Id.* (citing 66  
8 Am.Jur.2d Receivers § 465). Mr. Bloom argues that this case is properly before the Court  
9 because Mr. Bertsch acted outside the scope of his authority. However, Mr. Bloom fails to  
10 establish how Mr. Bertsch acted outside the scope of his authority. Mr. Bloom’s conclusory  
11 argument that Mr. Bertsch acted in bad faith, committed gross negligence, and willful  
12 misconduct is not sufficient to establish this fact. (Opposition Brief, p. 17, ll. 11-13)  
13 Furthermore, Mr. Bloom has not explained how Mr. Bertsch could have acted outside the  
14 scope of his authority when the Vion Court expressly found that he “complied in all respects  
15 with the *Order* entered on October 19, 2011,” which was the order that defined the scope of  
16 his authority and jurisdiction. (MTD Exhibit T, p. 6, ll. 23-24) This ruling, under the law  
17 applicable to receivers, has two important results that are detrimental to Mr. Bloom’s case.  
18 First, this finding means that Mr. Bertsch shares in his appointing judge’s immunity. Second,  
19 this finding would require Mr. Bloom to seek leave of the Vion Court to bring this action since  
20 it expressly found that Mr. Bertsch acted within his authority and jurisdiction.

21 Mr. Bloom’s allegation that Mr. Bertsch colluded with Vion to make unsubstantiated  
22 findings that Mr. Bloom’s business practices bore “certain earmarks of a Ponzi scheme” does  
23 not change this result. The Ninth Circuit has held that “a conspiracy between a judge and [a  
24 party] to predetermine the outcome of a judicial proceeding, while clearly improper,  
25 nevertheless does not pierce the immunity extended to judges . . .” *Ashelman v. Pope*, 793  
26 F.2d 1072, 1078 (9<sup>th</sup> Cir. 1986) “[A]llegations that a conspiracy produced a certain decision  
27 should no more pierce the actor’s immunity than allegations of bad faith, personal interest, or  
28 outright malevolence.” *Id.* Based on this authority Mr. Bloom’s conspiracy theory does not

1 make Mr. Bertsch any less absolutely immune from this suit.

2 In sum, Mr. Bertsch was acting in a quasi-judicial capacity during the *Vion Litigation*  
3 and engaged in actions that were functionally similar to a judge. Mr. Bloom's attempt to re-  
4 characterize Mr. Bertsch's role as something other than a Special Master lacks merit, and, is  
5 otherwise not helpful to his attempt to pierce Mr. Bertsch's absolute immunity. For the  
6 aforementioned reasons, Mr. Bertsch requests that this Court find that he is protected by  
7 absolute quasi-judicial immunity.

8 **2. Mr. Bloom has not cited any authority establishing that absolute**  
9 **quasi-judicial immunity may be waived or limited, and, to the extent**  
**it can be waived or limited, the standard to effectuate such a waiver.**

10 Mr. Bloom's Opposition Brief argues that the Court's Order appointing Mr. Bertsch as  
11 Special Master waived or limited Mr. Bertsch's absolute quasi-judicial immunity. (Opposition  
12 Brief, p. 14, ll. 10-22) However, Mr. Bloom did not cite any authority that holds absolute  
13 quasi-judicial immunity can be waived or limited. Rather, Mr. Bloom's only legal citation in this  
14 section of his brief is misleading. Specifically, Mr. Bloom states that "[a]bsolute immunity  
15 defeats a suit at the outset of litigation as long as the official's actions were within the scope  
16 of the immunity." *Marvin*, 232 P.3d at 429, n. 5 (quoting *Imbler*, 424 U.S. at 419, n. 13). The  
17 "scope" of immunity that was being defined in that case pertained whether a state prosecuting  
18 attorney who acted within the scope of his duties in initiating and pursuing a criminal  
19 prosecution was amenable to suit under 42 U.S.C § 1983. See *Imbler*, 424 U.S. at 410.  
20 Nothing in this citation supports Mr. Bloom's theory that the scope of absolute quasi-judicial  
21 immunity may be limited or waived.

22 Public policy supports the position that absolute quasi-judicial immunity cannot be  
23 waived or limited. "Absolute immunity is . . . necessary to assure that judges, advocates, and  
24 witnesses can perform their respective functions without harassment or intimidation." *Id.*  
25 (quoting *Butz v. Economou*, 438 U.S. 478, 512 (1978)).

26 Additional reasons for allowing absolute judicial immunity include:  
27 '(1) the need to save judicial time in defending suits; (2) the need  
28 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.'

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

2           These policy reasons apply equally to court-appointed officials . . .  
3           who assist the court in making decisions. Without immunity, these  
4           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.

5 *Id.* “Immunity removes the possibility that a professional who is delegated judicial duties to  
6 aid the court will become a “lightning rod for litigation” *Id.* (quoting *Acevedo v. Pima County*  
7 *Adult Probation Dept.*, 142 Ariz. 319, 321, 690 P.2d 38, 40 (1984)). These public policy  
8 considerations would not be served if this Court finds that Mr. Bertsch’s absolute quasi-  
9 judicial immunity was waived or limited in any degree by Court order since the purpose for  
10 immunity was and is to insulate Mr. Bertsch completely and fully from all lawsuits.

11           To the extent that this Court is inclined to rule that absolute quasi-judicial immunity can  
12 be waived, Mr. Bloom has not cited any authority as to what the standard is to waive this right.  
13 Indeed, Mr. Bertsch could not find any controlling case law establishing the standard to waive  
14 absolute quasi-judicial immunity. Generally, the issue of governmental waiver of immunity  
15 arises with respect to Eleventh Amendment sovereign immunity. The Supreme Court has  
16 held that the test for determining whether a state has waived its immunity from federal court  
17 jurisdiction is a stringent one. *Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011) (citing  
18 *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675  
19 (1999)). “A State’s consent to suit must be ‘unequivocally expressed’ in the text of the  
20 relevant statute.” *Id.* (citing *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89,  
21 99 (1984)) “Only by requiring this ‘clear declaration’ by the State can [the court] be ‘certain  
22 that the State in fact consents to suit.” *Id.* (quoting *College Savings Bank*, 527 U.S. at 680).  
23 “Waiver may not be implied.” *Id.* (citing *College Savings Bank*, 527 U.S. at 682).

24           Voluntary waiver of absolute quasi-judicial immunity should be subject to the same  
25 strict standard. Absolute judicial and quasi-judicial immunity is vitally important to judicial  
26 autonomy and decision-making since it insulates judicial and quasi-judicial officers from  
27 lawsuits. Therefore, it must be provided the same protections as sovereign immunity with  
28 respect to waiver of this right. In other words, to the extent that absolute immunity can be

1 waived, the waiver should be express an unequivocal. It cannot be implied.

2 Here, Mr. Bloom has argued that “the parties agreed and the Vion Court ordered that  
3 the scope of Defendants’ immunity would not include certain actionable conduct of  
4 Defendants while in their capacity as Special Master.” (Opposition Brief, p. 14, ll. 10-12) Mr.  
5 Bloom has not provided any authority for this bold statement other than the Order appointing  
6 Mr. Bertsch as a Special Master, which states that “[t]he Special Master shall not be  
7 personally liable to any party for acts taken pursuant to the Special Mastership, except in the  
8 event of the Special Master’s gross negligence, fraud, or willful misconduct.” (MTD Exhibit C,  
9 p. 6, § 12) Nothing in the language of this Order constitutes an express and unequivocal  
10 waiver of Mr. Bertsch’s absolute quasi-judicial immunity. At best, Mr. Bloom can argue that  
11 this section of the Order appointing Mr. Bertsch as Special Master in the *Vion Litigation* was  
12 an implied limited waiver of that immunity. Accordingly, even if there was legal validity to Mr.  
13 Bloom’s argument that absolute judicial immunity could be waived or limited, the language of  
14 the Order appointing Mr. Bertsch as Special Master should not be read to effectuate such a  
15 waiver.

16 **3. Mr. Bloom has no basis to seek equitable relief if absolute quasi-**  
17 **judicial immunity shields Mr. Bertsch’s actions from suit.**

18 As Mr. Bloom correctly cites, the United States Supreme Court has held that absolute  
19 judicial immunity does not bar a plaintiff from seeking declaratory and injunctive relief under  
20 42 U.S.C. § 1983. *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984). However, where a judicial  
21 officer meets the pre-requisites for judicial or quasi-judicial immunity from damages, equitable  
22 relief is not available to the plaintiff. *Mullis v. U.S. Bankruptcy Court for Dist. of Nev.*, 828 F.2d  
23 1385, 1392 (9<sup>th</sup> Cir. 1987). To receive equitable relief, the plaintiff must make “a showing of  
24 an inadequate remedy at law and of a serious risk of irreparable harm.” *Pulliam*, 466 U.S. at  
25 537. “Where a [judicial officer] meets the prerequisites for judicial or quasi-judicial immunity  
26 from damages, there will invariably be an adequate remedy through either ordinary appeals or  
27 by extraordinary writ.” *Mullis*, 828 F.2d at 1392.

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1 As a primary matter, the *Pulliam* decision is inapplicable to this case. In that case, the  
2 Court held that judicial immunity does not bar declaratory and injunctive relief in actions under  
3 Section 1983. This decision did not apply to any other legal theories other than tort claims  
4 brought under Section 1983 and the U.S. Constitution. Indeed, Mr. Bloom has not cited any  
5 legal authority applying this holding to state law tort claims, which are the legal claims Mr.  
6 Bloom has asserted in this case. Regardless, even if this holding is applicable to state law  
7 tort claims, Mr. Bloom is still not entitled to declaratory and injunctive relief. Since Mr. Bertsch  
8 is shielded by quasi-judicial immunity in this case, Mr. Bloom had access to legal remedies to  
9 challenge all of Mr. Bertsch's alleged improper actions through the adversarial litigation  
10 process, which included trial, appeal, and extraordinary writ. Given the legal remedies  
11 available to Mr. Bloom in the *Vion Litigation* he cannot show that there was an inadequate  
12 remedy at law and a serious risk of irreparable harm, which are prerequisites for injunctive  
13 relief under *Pulliam*.

14 Ultimately, Mr. Bloom has not presented this Court with any legal arguments, which  
15 pierce Mr. Bertsch's absolute quasi-judicial immunity. First, Mr. Bertsch at all times was  
16 acting in the capacity of Special Master, was acting within the scope of his authority and  
17 jurisdiction, and was taking actions functionally similar to a judge. Second, Mr. Bloom has not  
18 cited any authority establishing that absolute quasi-judicial immunity may be waived or  
19 limited. Alternatively, to the extent absolute quasi-judicial immunity may be waived or limited,  
20 Mr. Bloom has not cited the applicable standard to waive immunity or that the standard to  
21 effectuate such a waiver was met in the *Vion Litigation*. Finally, Mr. Bloom has no basis to  
22 seek equitable relief since Mr. Bertsch meets the pre-requisites for absolute quasi-absolute  
23 judicial immunity and legal remedies were available to Mr. Bloom in the *Vion Litigation* to  
24 challenge Mr. Bertsch's alleged actions. For these reasons and those argued in Mr. Bertsch's  
25 Motion to Dismiss, this action must be dismissed as a matter of law on the basis of absolute  
26 quasi-judicial immunity, and Mr. Bloom's request for declaratory judgment must be denied.

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1           **B. Mr. Bloom Cannot Re-litigate Factual and Legal Issues Finally Decided on**  
2           **Their Merits in the *Vion Litigation*, which were Insufficient to Support**  
3           **Disqualification in that Action and, are, therefore, Equally Insufficient to**  
4           **Support His Claims for Relief in this Action.**

5           Nevada courts apply issue preclusion when: “(1) the issue decided in the prior litigation  
6           is identical to the issue presented in the current action; (2) the initial ruling [was] on the merits  
7           and . . . [became] final; (3) the party against whom the judgment is asserted was a party or in  
8           privity with a party to the prior litigation; and (4) the issue was actually and necessarily  
9           litigated. *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008)  
10          (citing *Univ. of Nevada v. Tarkanian*, 110 Nev. 581, 599, 879 P.2d 1180, 1191 (1994); and  
11          *Executive Mgmt. Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 835, 963 P.2d 465, 473(1998)).

12          Mr. Bloom argues that Mr. Bertsch failed to identify the factual issues that he is  
13          attempting to re-litigate in this case. To be certain, here are specific citations to the *Vion*  
14          *Litigation* record where Mr. Bloom either made arguments related to or acknowledged  
15          completing discovery on the factual and legal issues at the heart of this case.

- 16           • In Mr. Bloom’s Motion to Disqualify and for Sanctions filed against Vion and its  
17           Counsel Mr. Bloom alleged that Mr. Bertsch had a conflict of interest with Vion  
18           and that Mr. Bertsch had engaged in collusion with Vion mandating his recusal  
19           under NCJC 2.11(A)(1). (MTD Exhibit H, p. 4, I. 9 – p. 5, I. 2, p. 5, II. 9-11)
- 20           • In Mr. Bloom’s Reply in support of Motion to Disqualify and for Sanctions, Mr.  
21           Bloom argued that Mr. Bertsch and Vion’s Counsel and his law firm intentionally  
22           concealed their attorney-client relationship, that Mr. Bertsch and Vion had a  
23           clear conflict of interest, that he was not an independent third party, that he was  
24           required to be disqualified under NCJC 2.11(A)(1), and that his report must be  
25           stricken on the same basis. (MTD Exhibit K, p. 3, I. 15 – p. 4, I. 19)
- 26           • In the same reply brief, Mr. Bloom argued that Mr. Bertsch should be  
27           disqualified and his reports should be stricken from the record on the basis that  
28           an alleged conflict of interest existed, that the alleged conflict of interest was not  
            disclosed, that Mr. Bertsch allegedly did not seek discovery from Mr. Bloom  
            during the drafting of the Final Report, and that Mr. Bertsch and Vion allegedly



1 engaged in collusion and ex parte communications during the drafting of the  
2 Final Report. (*Id.* at p. 4, l. 20 – p. 7, l. 4)

- 3 • In the same reply brief, Mr. Bloom acknowledged that in or around September  
4 and October 2012 he conducted several depositions of Vion’s principals and  
5 asked specific questions related to the alleged conflict of interest between Mr.  
6 Bertsch and Vion’s Counsel. (*Id.* at p. 6, ll. 11-14) In addition, Mr. Bloom  
7 acknowledged that he was actively investigating the alleged conflict of interest in  
8 or around September and October 2012. (*Id.* at p. 6, ll. 14-18)
- 9 • In Mr. Bloom’s Motion to Disqualify Larry Bertsch as Special Master, Strike the  
10 Special Master’s Reports from the Record and for Monetary Sanctions, Mr.  
11 Bloom acknowledged that he was permitted by the Vion Court to conduct  
12 discovery related to “all writings, emails correspondence, and documents related  
13 to this case” between Special Master, his counsel, Vion, and its counsel. (MTD  
14 Exhibit N, p. 4, ll. 3-14) According to Mr. Bloom, he “sought the aforementioned  
15 documents in order to uncover the extent of any bias or inappropriate conduct  
16 based on this undisclosed and clear conflict of interest.” (*Id.* at p. 4, ll. 23-24) Mr.  
17 Bloom identified the communications that he received in discovery that he  
18 believed were allegedly inappropriate, and, according to him, showed that Mr.  
19 Bertsch and Vion were allegedly working in concert for the purpose of building a  
20 false and incriminating case against Mr. Bloom. (MTD, Exhibit N, p. 5, l. 6 – p.  
21 8, l. 24, See also Exhibits F, G, H attached in support of the Mr. Bloom’s Motion;  
22 Opposition Brief, p. 7, l. 3 – p. 8, l. 18) Mr. Bloom claimed that Mr. Bertsch was  
23 not an independent Special Master and that the Final Report was reported on by  
24 several news companies who specifically picked up on the allegedly unfounded  
25 and allegedly unprovable “Ponzi scheme” claim that Mr. Bloom alleged was  
26 added to the Final Report by Vion’s Counsel. (MTD Exhibit N, p. 9, ll. 6-14)
- 27 • In that motion, Mr. Bloom argued, based on the aforementioned evidence, that  
28 Mr. Bertsch should be disqualified and his reports should be struck from the

1 record under NRCP 53(a)(2), FRCP 53(2), and NCJC 2.11(A)(1) (*Id.* at p. 10, l.  
2 2 – p. 13, l. 3)

- 3 • Also in that motion, Mr. Bloom argued that Vion’s Counsel should be sanctioned  
4 for allegedly colluding with Mr. Bertsch in drafting the Final report which  
5 contained a reference to a Ponzi scheme. (*Id.* at 13, ll. 4-28)
- 6 • In Mr. Bloom’s Reply to Special Master’s Opposition to Motion to Disqualify  
7 Larry Bertsch as Special Master, Strike the Special Master’s Reports from the  
8 Record and for Monetary Sanctions, Mr. Bloom argued that Mr. Bertsch must be  
9 disqualified based on his allegedly grossly unethical conduct, which included the  
10 alleged non-disclosure of the alleged conflict of interest between Mr. Bertsch  
11 and Vion’s Counsel, the alleged ex parte communications and collusion  
12 between Mr. Bertsch and Vion’s Counsel, Mr. Bertsch’s alleged submittal of the  
13 draft of the Final Report to Vion but not Mr. Bloom, and Mr. Bertsch’s alleged  
14 lack of independence. (MTD Exhibit R, p. 4, l. 14 – p. 6, l. 6)
- 15 • In that reply brief, Mr. Bloom claimed that he could show that Mr. Bertsch relied  
16 on patently false information from Vion’s Counsel which, according to Mr.  
17 Bloom, Mr. Bertsch allegedly failed to independently verify, or review, in coming  
18 to the conclusion that there could have possibly existed “earmarks of a Ponzi  
19 scheme.” (*Id.* at p. 6, ll. 9-12)
- 20 • In that reply brief, Mr. Bloom attempted to refute Mr. Bertsch’s arguments as to  
21 why he did not disclose the attorney-client relationship and argued that the  
22 attorney-client relationship and the potential for bias required disqualification.  
23 (*Id.* at p. 6, l. 25 – p. , l. 14)

24 Ultimately, the Court denied both of Mr. Bloom’s motions, and, therefore, rejected all of  
25 the contentions and arguments Mr. Bloom made in support of disqualifying Mr. Bertsch and  
26 striking his reports from the record. (MTD Exhibit L, p. 2; Exhibit T, p. 8, ll. 8-10, Exhibit U, p.  
27 8, ll. 4-6) Specifically, the Court made the following findings

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1 [Mr. Bertsch] should have made disclosure of his prior attorney-  
2 client relationship with Lionel Sawyer & Collins. The Court does  
3 not find that non-disclosure of such relationship constitutes grounds  
4 for disqualification. [Mr. Bertsch] 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 expertise.  
The reference to Special Master in this case was proper.

5 (MTD Exhibit T, p. 5, l. 26 – p. 6, l. 4)

6 In this case, Mr. Bloom is making the same allegations and arguments that he made in  
7 his motions to disqualify. In particular, Mr. Bloom alleges that the Mr. Bertsch was not  
8 independent and that Mr. Bertsch had a conflict of interest with Vion's Counsel all or which  
9 required disqualification under NRCP 53(a)(2) and NCJC 2.11(A) (Complaint, p. 5, ¶ 19 – p.  
10 6, ¶ 25). Mr. Bloom further alleges that Mr. Bertsch and Vion's Counsel engaged in collusion  
11 through ex parte communications regarding the drafting of the Final Report, which he claims  
12 echoed the testimony given by Vion's principals during their deposition with respect to  
13 references to a Ponzi scheme. (Complaint, p. 6, ¶ 26 – p. 8, ¶ 48) Mr. Bloom also asserts  
14 that these communications were improper under NCJC 2.9(A) and warranted disqualification,  
15 which is an argument that was available to Mr. Bloom in the Vion Litigation based on the  
16 alleged facts he asserted in that case. (Complaint, p. 6, ¶ 30 – p. 7, ¶ 5)

17 Mr. Bloom argues that the factual issues are not identical because this action is  
18 seeking relief for alleged harm caused to Mr. Bloom after the *Vion Litigation* concluded.  
19 (Opposition Brief, p. 20, ll. 27-28) However, the alleged harm that Mr. Bloom is claiming he  
20 suffered after the *Vion Litigation* concluded allegedly resulted from the aforementioned  
21 actions. The Vion Court rejected all of Mr. Bloom's legal and factual arguments. Because Mr.  
22 Bloom ultimately lost on all of these issues, which act as the underlying basis for Mr. Bloom's  
23 claims for relief in this action, Mr. Bloom cannot establish liability against Mr. Bertsch.

24 These factual and legal issues were actually and necessarily litigated and were finally  
25 decided on their merits. Issue preclusion prevents re-litigation of all "issues of fact or law that  
26 were actually litigated and necessarily decided" in a prior proceeding . . . The issue must have  
27 been 'actually decided' after a full and fair opportunity' for litigation." *Robi v. Five Platters,*  
28 *Inc.*, 838 F.2d 318, 322 (9<sup>th</sup> Cir. 1988). The Vion Court entered an Amended Order on

1 September 3, 2013, which denied Mr. Bloom's Motion to Disqualify Larry Bertsch as Special  
2 Master, Strike the Special Master's Reports from the Record and for Monetary Sanction.  
3 (MTD Exhibit T) In that Order, the Court accepted the Final Report as written, but permitted  
4 the parties to either use the report as they see fit and challenge the report at trial. (*Id.* at p. 6,  
5 ll. 10-22) On September 11, 2013, the Court granted Mr. Bloom leave to take a one hour  
6 deposition of Mr. Bertsch. (Reply Exhibit X, p. 3, ll. 18-25) (emphasis added) The scope of  
7 the deposition was limited to "what were the Special Master's communications with Lionel  
8 Sawyer & Collins, including what information they gave the Special Master, what language  
9 they proposed, and what change did they request." (*Id.*) The case was subsequently  
10 removed to federal bankruptcy court on October 17, 2013, and a stipulation to dismiss the  
11 case pursuant to a settlement agreement was entered nearly a year later on October 14,  
12 2014. (MTD Exhibit V, Exhibit W) Mr. Bloom has not provided this Court with any justification  
13 for not taking Mr. Bertsch's deposition other than the case ultimately settled. (Opposition  
14 Brief, p. 21, ll. 3-6)

15 Under Nevada case law, Mr. Bloom could have challenged the Court's decision to deny  
16 his motion to disqualify Mr. Bertsch on multiple grounds. First, Mr. Bloom could have  
17 challenged this decision through a writ of mandamus. *See City of Las Vegas Downtown*  
18 *Redevelopment Agency v. Eighth Judicial Dist. Ct. ex rel. County of Clark*, 111 Nev. 640, 643-  
19 644, 5 P.3d 1059, 1061-1062 (2000) (exercising jurisdiction over a writ of mandamus  
20 challenging a judge's decision to recuse himself from hearing a matter). Second, Mr. Bloom  
21 could have sought reconsideration of this ruling based on newly discovered evidence. NRCP  
22 60(b)(2), FRCP 60(b)(2). The *Vion Litigation* record reflects that the case was resolved over a  
23 year after the Court filed its Amended Order denying Mr. Bloom's motion to disqualify Mr.  
24 Bertsch as Special Master and strike his reports from the record and the Court's Order which  
25 granted him leave to take Mr. Bertsch's deposition. Clearly, Mr. Bloom had a full and fair  
26 opportunity to obtain further review of these issues after they were fully litigated and decided  
27 on their merits by the Vion Court. While Mr. Bloom argues that his decision to settle the case  
28 establishes that litigation related to these issues was not finally decided, Mr. Bloom does not

1 cite any authority in support of this conclusion. However, to this point, a judicially approved  
2 settlement agreement is considered a final judgment on the merits. *Howard v. America*  
3 *Online, Inc.*, 208 F.3d 741, 748 (9<sup>th</sup> Cir. 2000) (citing *Citizens for Open Access to Sand and*  
4 *Tide, Inc. v. Seadrift Ass'n*, 60 Cal. App.4th 1053, 1065, 71 Cal. Rptr.2d 77, 84 (1998)). The  
5 *Vion Litigation* record reflects that the case was resolved pursuant to a court approved  
6 settlement agreement, which, based on this case law, constitutes a final judgment on the  
7 merits. (MTD Exhibit W, Exhibit 1, p. 1, l. 1 – p. 2, l. 14) As such, it is clear that the factual  
8 and legal issues at the heart of this case have been actually, necessarily, and finally decided  
9 on their merits in the *Vion Litigation*.

10 Finally, Mr. Bloom misses the mark with respect to his argument that issue preclusion  
11 cannot apply in this action because Mr. Bertsch was not a party or in privity to a party in the  
12 *Vion Litigation*. (Opposition Brief, p. 21, ll. 8-11) For issue preclusion to apply, the party  
13 against whom the judgment is asserted must have been a party or in privity with a party to the  
14 prior litigation. *Five Star*, 124 Nev. at 1055. To be certain, “[t]here are due process limits to  
15 the concept of privity. ‘It is a violation of due process for a judgment to be binding on a litigant  
16 who was not a party or in privity and therefore has never had an opportunity to be heard.’”  
17 *Hays v. Clark County Nev.*, 2008 WL 2372295 at \* 15 (D. Nev. June 6, 2008) (quoting  
18 *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 (1979). “The Supreme Court has  
19 repeatedly held that ‘it would violate [the] Due Process Clause . . . to bind litigants to a  
20 judgment rendered in an earlier litigation to which they were not parties and in which they  
21 were not adequately represented.’” *Id.* (quoting *Richards v. Jefferson County*, 517 U.S. 793,  
22 794 (1996)) Here, Mr. Bertsch is using the orders and judgment in the *Vion Litigation against*  
23 Mr. Bloom, who was a party to that case and was adequately represented by counsel.  
24 Accordingly, the rulings of the Vion Court are binding on Mr. Bloom in this action.

25 The Court in the *Vion Litigation* rejected Mr. Bloom’s factual and legal arguments and  
26 contentions to disqualify Mr. Bertsch as Special Master and to strike his reports from the  
27 record in that action. These are the same factual and legal arguments that support Mr.  
28 Bloom’s claims for relief in this case. If they were insufficient to support disqualification in that

1 action, they are insufficient to support his claims for relief in this action. Mr. Bloom had a full  
2 and fair opportunity to further challenge the Vion Court's rulings on these issues, which  
3 included multiple avenues and means to seek relief such as writ relief, reconsideration of the  
4 order denying his motion, trial on the merits, and appeal. His decision to settle the case  
5 voluntarily relinquished his rights to further challenge factual and legal issues related to Mr.  
6 Bertsch's disqualification and his reports. The rulings of the Vion Court are binding on Mr.  
7 Bloom and his attempt to re-litigate these issues in this action is improper and requires  
8 dismissal as a matter of law.

9 **C. There is No Evidence in the *Vion Litigation* Record that Mr. Bertsch**  
10 **Engaged in Gross Negligence or Willful Misconduct.**

11 To prevail on a traditional negligence theory, a plaintiff must demonstrate that "(1) the  
12 defendant owed the plaintiff a duty of care, (2) the defendant breached that duty, (3) the  
13 breach was the legal cause of the plaintiff's injuries, and (4) the plaintiff suffered damages."  
14 *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. Adv. Op. 38, 282 P.3d 727, 732  
15 (2012). "Gross negligence is a manifestly smaller amount of watchfulness and circumspection  
16 than the circumstances require of a prudent man." *Hart v. Kline*, 61 Nev. 96, 116 P.2d 672,  
17 674 (1941).

18 Mr. Bloom cannot state a valid claim for relief based on state law tort theories of gross  
19 negligence or willful misconduct. Mr. Bloom essentially restates all of the alleged duties that  
20 he claims Mr. Bertsch violated and argues that the allegations are sufficient to state a claim  
21 for relief. (Opposition Brief, p. 23, ll. 10-23) Mr. Bloom failed to cite any authority establishing  
22 the legal duty upon which these allegations are based. Presumably, Mr. Bloom is asserting  
23 that Mr. Bertsch owed him a legal duty of care under the sections of the NCJC and the  
24 American Institute of Certified Public Accountants ("AICPA") Code of Professional Conduct  
25 cited in the Complaint. (Complaint, p. 3, ¶ 8, p. 5, ¶ 22, pp. 6-7, ¶¶ 31, 32) However, the  
26 NCJC expressly states that "[t]he Code is not designed or intended as a basis for civil . . .  
27 liability." NCJC, Scope, § 7. Indeed, Mr. Bertsch could not find any case law which  
28 established that the provisions of the NCJC could act as a legal basis for a negligence claim,

1 let alone a gross negligence claim. As to Mr. Bloom's reference to the AICPA Code of  
2 Professional Conduct, the Nevada Supreme Court has held that these rules may be relevant  
3 to establish the standard of care that a professional owes to a client. *Mainor v. Nault*, 120  
4 Nev. 750, 769, 101 P.3d 308, 321 (2004); (Complaint, p. 3, ¶ 8). Here, Mr. Bertsch was  
5 acting in a capacity of Special Master, not an accountant, so he did not owe a duty of care to  
6 Mr. Bloom as his client.

7 Mr. Bloom has not established that Mr. Bertsch breached any duty or care that he  
8 allegedly owed to Mr. Bloom. Mr. Bloom argues that Mr. Bertsch breached his duty of care by  
9 (1) failing to disclose his conflict of interest due to a pre-existing attorney/client relationship  
10 LSC and Mr. Bertsch; (2) engaging in ex parte communications; (3) failing to conduct  
11 discovery with anyone other than Vion; (4) failing to disqualify himself as special master; (5)  
12 secretly conspiring with LSC to build a case against Mr. Bloom; (6) permitting LSC to edit  
13 multiple versions of the Final Report; (7) including unsubstantiated and defamatory statement  
14 to be published and disseminated in an unprivileged communication to third parties; and (8)  
15 refusing to retract his false statement or take and further action to mitigate the harm that Mr.  
16 Bloom sustained and continues to sustain. (Opposition Brief, p. 23, ll. 12-22) The first six  
17 allegations<sup>1</sup> were asserted in Mr. Bloom's motion to disqualify Mr. Bertsch as Special Master  
18 and to strike his reports from the record. Mr. Bloom continues to ignore and refuses to accept  
19 the fact that the Vion Court denied his motion and did not find that Mr. Bertsch was required  
20 to disqualify himself in spite of all of Mr. Bloom's salacious allegations against him. (MTD  
21 Exhibit U, p. 5, ll. 23-26, p. 8, ll. 4-6) In addition, Mr. Bloom continues to ignore and refuses to  
22 address the fact that the Vion Court found that Mr. Bertsch was "fair, impartial, unbiased and  
23 highly skilled." (*Id.* at p. 5 l. 28) Finally, Mr. Bloom continues to ignore and refuses to  
24 address the fact that the Court found that Mr. Bertsch "complied in all respects with the Order  
25 entered on October 19, 2011," meaning he acted within his authority and jurisdiction. (*Id.* at  
26 p. 6, ll. 21-22) All of Mr. Bloom's allegations were heard by the Vion Court and they were  
27 rejected by the Vion Court. Accordingly, Mr. Bloom cannot establish that Mr. Bertsch

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<sup>1</sup> Allegations 7 and 8 will be addressed under § E as they pertain to statements made during a judicial proceeding, which are absolutely privileged.

1 breached any alleged duty of care based on these allegations.

2 Finally, there is no evidence that Mr. Bertsch caused Mr. Bloom any damage. Mr.  
3 Bloom claims that he has been damaged as a result of his investors reading Mr. Bertsch's  
4 Final Report and declining to move forward with investments based on the findings in that  
5 report. (Opposition Brief, pp. 23-24, n.10) First, Mr. Bloom cannot establish that he was  
6 harmed as a result of the Final Report because he settled in the Vion Litigation action, and,  
7 therefore, voluntarily elected not to challenge in litigation the allegedly false, defamatory, and  
8 unsubstantiated findings in that report. Second, as argued more fully above, Mr. Bloom  
9 cannot establish that Mr. Bertsch took any action that was outside the scope of his authority  
10 and jurisdiction, which means that he is not personally liable for any alleged harm Mr. Bloom  
11 allegedly suffered as a result of the Final Report. (MTD Exhibit C, p. 6, ¶ 12) In addition, the  
12 allegedly false, defamatory, and unsubstantiated findings in the Final Report cannot act as a  
13 basis for Mr. Bloom to seek relief against Mr. Bertsch because those statements are  
14 absolutely privileged. *Circus Circus Hotels v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101,  
15 104 (1983) (There is a "long-standing common law rule that communications uttered or  
16 published in the course of judicial proceedings are absolutely privileged."). Accordingly, Mr.  
17 Bloom cannot establish that any of Mr. Bertsch's alleged actions caused him harm. Mr.  
18 Bloom's failure to sufficiently allege facts establishing the essential elements of this claim  
19 requires dismissal as a matter of law.

20 **D. Mr. Bloom Cannot State a Fraudulent Concealment Claim Based on**  
21 **Allegedly Improper Conduct Was Disclosed to Mr. Bloom and the Vion**  
**Court Found that it had No Bearing on Mr. Bertsch's Impartiality.**

22 For a plaintiff to establish a valid claim for fraudulent concealment the following  
23 elements must be met

24 (1) the defendant concealed or suppressed a material fact; (2) the  
25 defendant was under a duty to disclose the fact to the plaintiff; (3)  
26 the defendant intentionally concealed or suppressed the fact with  
27 the intent to defraud the plaintiff; that is, the defendant concealed  
28 or suppressed the fact for the purpose of inducing the plaintiff to  
act different than [he] would have [he] had known the fact; (4) the  
plaintiff was unaware of the fact and would have acted differently if  
[he] had known of the concealed or suppressed fact; (5) and, as a



1 result of the concealment or suppression of the fact, the plaintiff  
2 sustained damages.

3 *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1485, 970 P.2d 98, 110 (1998).

4 The record in the *Vion Litigation* is void of any evidence of fraudulent concealment. In  
5 his Opposition Brief, Mr. Bloom argues that Mr. Bertsch intentionally concealed his prior  
6 attorney-client relationship with Vion's Counsel's law firm and his alleged ex parte  
7 communications with Vion's Counsel with the intent to induce Mr. Bloom to either accept or  
8 not object to his appointment as Special Master. (Opposition Brief, p. 25, ll. 4-6) However,  
9 Mr. Bloom fails to address how these facts were intentionally concealed from him when the  
10 existence of the attorney-client relationship and the alleged ex parte communications were  
11 disclosed to him during the *Vion Litigation*. The Vion Court permitted Mr. Bloom to conduct  
12 discovery related to Mr. Bertsch's communications with Vion's Counsel during the drafting of  
13 the Final Report. Mr. Bloom filed a motion to disqualify Mr. Bertsch and strike his reports  
14 from the record in the *Vion Litigation* based on this evidence. In that motion, he argued,  
15 among other things, that Mr. Bertsch lacked impartiality due to his attorney-client relationship  
16 with Vion's Counsel's law firm and that he improperly engaged in ex parte communication  
17 with Vion's Counsel during the drafting of the final report. (MTD Exhibit N, p. 10, l. 2 – p. 13,  
18 l. 3; Exhibit R, p. 4, l. 14 – p. 6, l. 6, p. 6, l. 25 – p. 8, l. 4, p. 8, l. 5 – p. 9, l. 14) The Court  
ultimately rejected all of Mr. Bloom's arguments and contentions.

19 The Vion Court did not find that Mr. Bloom's allegations and contentions called into  
20 question Mr. Bertsch's impartiality. To this point, the Vion Court found that Mr. Bertsch  
21 should have made a disclosure of his prior attorney-client relationship with Vion's Counsel's  
22 law firm. (MTD Exhibit T, p. 5, ll. 26-27) The Vion Court also found that the non-disclosure of  
23 the relationship did not constitute grounds for disqualification. (*Id.* at p. 5, ll. 25-26) With  
24 respect to Mr. Bloom's arguments that Mr. Bertsch lacked independence or was biased, the  
25 Court found the exact opposite specifically finding that Mr. Bertsch was fair, impartial, and  
26 unbiased. (*Id.* at p. 5, ll. 27-28) Based on these findings, Mr. Bloom cannot establish that Mr.  
27 Bertsch's prior attorney-client relationship with Vion's Counsel's law firm and Mr. Bertsch's  
28 alleged ex parte communications with Vion's Counsel during the drafting of the Final Report

1 were material since, according to the Vion Court, they were insufficient to support  
2 disqualification. Accordingly, Mr. Bloom was given the opportunity to object, and his  
3 objections were found to be meritless.

4 In addition, Mr. Bloom fails to address how he was harmed as a result of the alleged  
5 concealment of Mr. Bertsch's prior attorney-client relationship with Vion's Counsel's law firm  
6 and his alleged ex parte communication with Vion's Counsel during the drafting of the Final  
7 Report. The record reflects that the attorney-client relationship and the alleged ex parte  
8 communications were disclosed to Mr. Bloom during the pendency of the *Vion Litigation*. Mr.  
9 Bloom was permitted to move for Mr. Bertsch's disqualification in that action. All of the  
10 arguments he made in support of disqualification are fully encompassed within his allegations  
11 supporting this claim for relief. The Court ultimately rejected his arguments and denied his  
12 motion. Mr. Bloom had multiple procedural avenues to challenge this decision. Instead, he  
13 elected to settle the case. To the extent Mr. Bloom claims he was harmed because of these  
14 alleged actions, his remedy was the litigation process, which he voluntarily abandoned in  
15 favor of settlement.

16 For the foregoing reasons, Mr. Bloom cannot state a valid claim for relief. The record  
17 reflects that the legal and factual issues upon which this claim is based were disclosed to Mr.  
18 Bloom in the *Vion Litigation*, Mr. Bloom was given an opportunity to object to Mr. Bertsch's  
19 appointment, and his objections were found to be meritless. In addition, Mr. Bloom cannot  
20 claim that he was damaged when he was afforded all of the procedural remedies available to  
21 him in the *Vion Litigation* and he ultimately abandoned those remedies in favor of settlement.  
22 For these reasons, this claim must be dismissed as a matter of law.

23 **E. Mr. Bloom Cannot State a Claim for Defamation Based on Statements in**  
24 **the Final Report that Were Made in Mr. Bertsch's Capacity as Special**  
**Master in the *Vion Litigation* and Filed in the Public Record.**

25 To state a claim for defamation, a plaintiff must prove that: a) the defendant made a  
26 false and defamatory statement concerning the Plaintiff, b) the statement was published to a  
27 third party absent any privilege, c) there was fault amounting to at least negligence on the part  
28 of the defendant in publishing the statement, and d) the plaintiff suffered actual or presumed

1 damages.” *Burns v. Mayer*, 175 F.Supp.2d 1259, 1270 (D. Nev. 2001) (citing *Chawdry v.*  
2 *NLVH, Inc.*, 109 Nev. 478, 483 (1993)). There is a “long-standing common law rule that  
3 communications uttered or published in the course of judicial proceedings are absolutely  
4 privileged.” *Circus Circus Hotels*, 99 Nev. at 60. The absolute immunity privilege precludes  
5 liability even where the defamatory statements are published with knowledge of their falsity  
6 and personal ill will toward the [defendant]” *Id.* The immunity privilege still applies when  
7 statements made during judicial proceedings are republished. The Nevada Supreme Court  
8 has held that

9 [i]t is the news media and public’s right to know what transpires in  
10 legal proceedings of this state and that is paramount to the fact  
11 that someone may occasionally make false and malicious  
statements.

12 *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 219, 984 P.2d  
13 164, 168 (1999).

14 First, Mr. Bloom fails to address how he has standing to bring this claim when it is not  
15 identified as a potential claim for relief in the Order appointing Mr. Bertsch as Special Master  
16 in the *Vion Litigation*. (MTD Exhibit C, p. 6, § 12) Because this claim was not identified as a  
17 potential source of liability by the Vion Court, it must be dismissed as a matter of law.

18 Second, Mr. Bloom’s Opposition Brief reasserts all of the allegedly false and  
19 defamatory statements made by Mr. Bertsch in the Final Report of Special Master; however,  
20 Mr. Bloom fails to show *how* these statements were and are allegedly false. (Opposition  
21 Brief, p. 27, ll. 2-16) Mr. Bloom’s conclusory allegation that the statements are false is not  
22 sufficient to state a claim for relief. *See Uranga v. Adams*, 2011 WL 147909 at \*1 (D. Nev.  
23 2011) (citing *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9<sup>th</sup> Cir. 2001)). (“The  
24 court, however, is not required to accept as true allegations that are merely conclusory,  
25 unwarranted deductions of fact, or unreasonable inferences.”) Accordingly, Mr. Bloom has  
26 failed to allege sufficient facts to establish this element of his claim.

27 Third, Mr. Bertsch was absolutely privileged in publishing the statements made in the  
28 Final Report of Special Master. Mr. Bloom’s Opposition Brief does not challenge Mr.

1 Bertsch's position that the statements in the Final Report were absolutely privileged.  
2 (Opposition Brief, p. 27, l. 17 – p. 28, l. 2) Rather, Mr. Bloom asserts that republishing the  
3 Final Report to the media would have been outside the scope of the privilege. However, the  
4 fair report privilege "extends to any person who makes a republication of a judicial proceeding  
5 from material that is available to the general public." *Sahara Gaming Corp*, 115 Nev. at 215.  
6 "A fair and impartial account of the proceedings in a court of justice is, as a general rule, a  
7 justifiable publication." *Thompson v. Powning*, 15 Nev. 195, 1880 WL 4276 at \*6 (1880).  
8 Here, even assuming *arguendo* that Mr. Bloom's allegations are true, Mr. Bertsch's alleged  
9 republication of the Final Report is privileged. The fair report privilege would extend to Mr.  
10 Bertsch's alleged republication of the Final Report so long as the republication was made  
11 after it had been filed in the public record and was fair and impartial. Here, Mr. Bertsch  
12 allegedly republished the Final Report after it had been filed. Mr. Bloom has not alleged that  
13 Mr. Bertsch took any additional action other than providing the report to a reporter at the Las  
14 Vegas Sun, which would have been an accurate account of the proceedings in the *Vion*  
15 *Litigation*. Accordingly, his alleged actions would have been absolutely privileged.

16 Mr. Bloom cannot state a valid defamation claim for three key reasons. First, he does  
17 not have standing to bring the claim under the Order appointing Mr. Bertsch as Special  
18 Master. Second, Mr. Bloom cannot state a valid claim based on conclusory allegations that  
19 certain statements in the Final Report are false. Third, the fair report privilege protects Mr.  
20 Bertsch's alleged republication of the Final Report to a reporter at the Las Vegas Sun.  
21 Accordingly, Mr. Bloom's defamation claim must be dismissed as a matter of law.

22 **F. Mr. Bertsch, in his Capacity as Special Master, was Acting in a Quasi-**  
23 **Judicial Capacity and Not a Corporate Professional Capacity.**

24 A plaintiff seeking to apply the alter ego doctrine must establish the following elements:

25 (1) the corporation must be influenced and governed by the person  
26 asserted to be the alter ego; (2) there must be such unity of interest  
27 and ownership that one is inseparable from the other; (3) the facts  
must be such that adherence to the corporate fiction of a separate  
entity would, under the circumstances, sanction fraud or promote  
injustice.

28 *Polaris Industrial Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987)

1 When determining whether there is unity of interest, the Court may look at the following  
2 factors: "(1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of funds;  
3 (4) treatment of corporate assets as the individual's own; and (5) failure to observe corporate  
4 formalities." *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 845  
5 (2000) (citing *Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884, 887 (1987)).

6 There is no legal basis or reason to assert an alter ego theory of liability in this case.  
7 Mr. Bertsch's duties as a Special Master were quasi-judicial in nature, meaning that he was  
8 acting in a judicial capacity not in a corporate professional capacity. As an arm of the Court,  
9 he was considered part of the Nevada Judiciary and is receiving a defense from the State of  
10 Nevada for serving that branch of government in the *Vion Litigation*.

11 Ignoring Mr. Bertsch's status as an arm of the Court, Mr. Bloom argues that Mr.  
12 Bertsch was the alter ego of Larry L. Bertsch CPA & Associates. Generally, an alter ego  
13 theory is appropriate when a defendant is attempting to use a corporate fiction to avoid  
14 personal liability, or, in other words, sanction a fraud or promote injustice. There is no  
15 evidence in this case that Mr. Bertsch is attempting to use Larry L. Bertsch CPA & Associates  
16 as a sham corporation to avoid the personal liability alleged in this action. For example, Mr.  
17 Bloom has not alleged any facts to establish that Mr. Bertsch commingled funds with Larry L.  
18 Bertsch CPA & Associates, that Larry L. Bertsch CPA & Associates was undercapitalized,  
19 that Larry L. Bertsch CPA & Associates diverted funds in unauthorized manner, that Mr.  
20 Bertsch treated assets of Larry L. Bertsch CPA & Associates as his own assets, or that Larry  
21 L. Bertsch CPA & Associates failed to observe corporate formalities. While the Court  
22 appointed Larry L. Bertsch CPA & Associates as the Special Master, the record reflects that  
23 Mr. Bertsch was acting as the Special Master in the *Vion Litigation*. Accordingly, Mr. Bloom  
24 has not alleged a valid legal or factual basis to assert an alter ego theory in this case and this  
25 claim must be dismissed as a matter of law.

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1           **G.     Discovery is Not Needed to Decide this Motion, and, Alternatively, Mr.**  
2           **Bloom Cannot Obtain Discovery From Mr. Bertsch Related to Facts that**  
3           **Occurred while Mr. Bertsch was Acting as Special Master in the *Vion***  
4           ***Litigation*.**

5           First, this Court is permitted to decide this motion without converting it to a Motion for  
6           Summary Judgment. “A court may take notice of ‘matters of public record’ without converting  
7           a motion to dismiss into a motion for summary judgment.” *Lee v. City of Los Angeles*, 250  
8           F.3d 668, 689 (9<sup>th</sup> Cir. 2001) (citing *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9<sup>th</sup>  
9           Cir.1986)). All of the exhibits submitted to the Court in support of Mr. Bertsch’s Motion to  
10          Dismiss were public records. The Court is permitted to take judicial notice of these public  
11          records without converting Mr. Bertsch’s Motion to Dismiss into a Motion for Summary  
12          Judgment.

13          Second, Mr. Bloom cannot seek discovery in this case from Mr. Bertsch. The Vion  
14          Court found (1) that Mr. Bertsch was not to be treated as an expert witness for any purpose in  
15          the case; and (2) that Mr. Bertsch was appoint as a special master by the Court under  
16          [NRCP] 53. (Reply Exhibit X, p. 2, ll. 21-24) The Vion Court also found that “the United States  
17          Supreme Court has stated that when a special master accepts appointment by the court, the  
18          special master assumes ‘the duties and obligation of the judicial officer.’” (*Id.* at p. 3, ll. 1-3  
19          (citing multiple cases))

20          The circumstances upon which a judge may be called to testify are limited. For  
21          example, testimony from a judge regarding official matters is not permitted except in the  
22          exceptional circumstance where the judge’s testimony is the only source of the evidence in  
23          question. *U.S. v. Frankenthal*, 582 F.2d 1102, 1108 (7<sup>th</sup> Cir. 1978). “Absent a showing of  
24          extraordinary need, a judge may not be compelled to testify about matters observed as a  
25          consequence of the performance of his official duties. This protection allows judges to  
26          vigorously perform their duties without fear of later having to provide explanatory or  
27          observational testimony.” *Hensley v. Alcon*, 197 F.Supp.2d 548, 550 (S.D. W. Va. 2002). “A  
28          judge may only be required to testify if he (1) possesses factual knowledge; (2) that  
29          knowledge is highly pertinent to the jury’s task, and (3) is the only possible source of  
30          testimony on the relevant factual information.” *U.S. v. Roth*, 332 F.Supp.2d 565, 568 (S.D.

1 N.Y. 2004). In addition, “[t]he overwhelming authority . . . makes it clear that a judge may not  
2 be compelled to testify concerning the mental processes used in formulating official  
3 judgments or the reasons that motivated him in the performance of his duties.” *Bliss v.*  
4 *Fisher*, 714 F.Supp.2d 223, 224 (D. Mass. 2010) (quoting *Roth*, 332 F.Supp.2d at 567). “A  
5 judge may not be asked to testify about his mental processes in reaching a judicial opinion.”  
6 *Robinson v. C.I.R.*, 70 F.3d 34, 38 (5<sup>th</sup> Cir. 1995).

7 Here, Mr. Bloom seeks information that deals directly with the thought process of Mr.  
8 Bertsch when performing his duties as Special Master. In particular, Mr. Bloom seeks  
9 information related to:

- 10 • The facts upon which Bertsch relied to conclude that Bloom’s businesses had  
11 “earmarks of a Ponzi scheme” and other defamatory statements.
- 12 • Whether Bertsch’s failure to speak to Bloom, the bookkeepers, or a single  
13 investor of the companies at issue prior to submitting the Final Report,  
14 constitutes gross negligence.
- 15 • Why Bertsch did not disclose his relationship with LSC until ten months after his  
16 appointment as Special Master.
- 17 • Why Bertsch did not disclose his ex-parte communications with LSC to the court  
18 or Bloom.
- 19 • The extent of LSC’s input in the Final Report.

20 (Opposition Brief, p. 30, ll. 10-25)

21 This information goes directly to Mr. Bertsch’s mental thought processes and  
22 deliberations while acting in the capacity of Special Master. As such, this information is  
23 privileged, to the extent it is sought from Mr. Bertsch, and is not discoverable.

24 Second, Mr. Bloom cannot obtain the remaining discovery from Mr. Bertsch. In  
25 particular, Mr. Bloom seeks information related to

- 26 • The extent of Defendants’ relationship with LSC prior to appointment as Special  
27 Master.
- 28 • The extent of Bertsch/Zamaila’s communications with LSC.

- The extent of Bertsch/Zamaila's disclosure of privileged information to LSC.
- The extent of Bertsch/Zamaila's communications with Green at the Las Vegas Sun.
- The extent of Plaintiff's damages.

(*Id.*)

Mr. Bloom can only obtain discovery from Mr. Bertsch if he is the only source of that information. Here, Mr. Bloom concedes that Mr. Bertsch is not the only source this information, which means that the discovery must be sought from those alternative sources.

Finally, Mr. Bloom's discovery requests clearly show why absolute quasi-judicial immunity should apply to Mr. Bertsch in this case. "The purpose behind a grant of absolute immunity is to preserve the independent decision-making and truthfulness of critical judicial participants without subjecting them to the fear and apprehension that may result from a threat of personal liability." *Id.* at 569 (citing *Imbler*, 424 U.S. at 422-24). "Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." *Id.* (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.*, 142 Ariz. 319, 321, 690 P.2d 38, 40 (1984)).

Mr. Bloom is seeking to conduct discovery on matters that were previously litigated in



1 the *Vion Litigation*. There were procedural avenues available to Mr. Bloom in the *Vion*  
2 *Litigation* to challenge the Court's decision to deny his motion to disqualify Mr. Bertsch and  
3 strike his reports from the record. Mr. Bloom elected settle the case instead of pursuing these  
4 procedural remedies. Now, there is a need to bring finality to that lawsuit and these factual  
5 and legal issues. If this case is permitted to proceed and Mr. Bloom is permitted to conduct  
6 discovery into these areas, it will deter future qualified professionals from accepting  
7 appointments as Special Masters due to the risk of being subject to suit and intrusive  
8 discovery. Furthermore, Special Masters, like Mr. Bertsch, would have no choice but to be  
9 cognizant of the fact that the statements they make in their reports could be used as a basis  
10 for personal liability in a subsequent lawsuit thereby discouraging independent action.

11 For the foregoing reasons, this motion should be decided on the merits without  
12 converting it to one for summary judgment since it is based on matters of public record.  
13 Furthermore, the discovery Mr. Bloom seeks in this action is not available from Mr. Bertsch  
14 since he is entitled to the same privileges and immunities as a judicial officer. Finally, Mr.  
15 Bloom's requests for discovery further prove that the reasons for cloaking Mr. Bertsch with  
16 absolute quasi-judicial immunity are all present in this action and Mr. Bertsch should be  
17 shielded from further litigation.

## 18 **V. CONCLUSION**

19 This action must be dismissed in its entirety for three key reasons. First, Mr. Bertsch,  
20 in his capacity as Special Master in the *Vion Litigation*, was acting in a quasi-judicial capacity  
21 making all of his actions taken in that capacity absolutely immune from suit. Second, Mr.  
22 Bloom cannot re-litigate factual and legal issues finally decided on their merits in the *Vion*  
23 *Litigation*. Since these arguments and contentions were insufficient to support disqualification  
24 in that action they are equally insufficient to support his claims for relief in this action. Third,  
25 the conclusory allegations in Mr. Bloom's Complaint, the Vion Court's rulings and findings on  
26 Mr. Bloom's motion to disqualify Mr. Bertsch and strike his reports from the records, and Mr.  
27 Bloom's abandonment of the litigation process in favor of settlement negate essential  
28 elements of his tort claims. For these reasons and those argued more fully above, this action

1 must be dismissed in its entirety as a matter of law and Mr. Bloom's Countermotion for  
2 Declaratory Judgment must be denied.

3 Pursuant to NRS 239B.030, this document does not contain the Social Security  
4 Number of any person.

5 DATED this 27<sup>th</sup> day of May, 2015.

6 ADAM PAUL LAXALT  
7 Attorney General

8 By: \_\_\_\_\_

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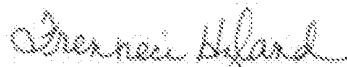
*Attorneys for Defendants Larry L. Bertsch and  
Larry L. Bertsch, CPA & Associates*

1 **CERTIFICATE OF SERVICE**

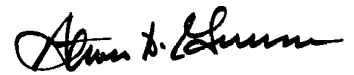
2 I certify I am an employee of the Office of the Attorney General, State of Nevada, and  
3 that on this 27<sup>th</sup> day of May, 2015, I caused to be served a copy of the foregoing **REPLY IN**  
4 **SUPPORT OF MOTION TO DISMISS AND OPPOSITION TO COUNTERMOTION FOR**  
5 **DECLARATORY JUDGMENT**, by the Court's Electronic Filing System to:

6 Attorneys for Plaintiff, Jay L. Bloom:

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CLERK OF THE COURT

**OMD**

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JAY BLOOM, an individual,

Plaintiff,

vs.

LARRY L. BERTSCH, an individual; LARRY  
L. BERTSCH, CPA & ASSOCIATES, LLP, a  
Nevada Limited-Liability Partnership; DOES I  
through X; and ROE ENTITIES I through X,  
inclusive,

Defendants.

Case No.: A-15-714007-C

Dept. No.: I

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS  
AND COUNTERMOTION FOR  
DECLARATORY JUDGMENT**

Hearing Date: May 19, 2015

Hearing Time: 9:00 a.m.

Plaintiff Jay Bloom ("Plaintiff" or "Bloom"), by and through his attorneys of record, the law firm MAIER GUTIERREZ AYON, hereby files this opposition ("Opposition") to defendants Larry L. Bertsch ("Bertsch") and Larry L. Bertsch, CPA & Associates, LLP's ("Bertsch & Associates") (collectively referred to as "Defendants") motion to dismiss ("Motion") and counter motion for declaratory judgment ("Counter motion").

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1 This Opposition and Countermotion is made and based upon the following memorandum of  
2 points and authorities, the papers and pleadings on file and any argument the Court may entertain  
3 at the time of the hearing.

4 DATED this 4<sup>th</sup> day of May, 2015.

5 Respectfully submitted,

6 **MAIER GUTIERREZ AYON**

7 /s/ Joseph A. Gutierrez  
8 JOSEPH A. GUTIERREZ, ESQ.  
9 Nevada Bar No. 9046  
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14 400 South Seventh Street, Suite 400  
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16 *Attorneys for Plaintiff Jay L. Bloom*

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 The instant lawsuit arises out of Defendants' tortious conduct in the litigation entitled, *Vion*  
17 *Operations, LLC v. Bloom, et al.*, case number A-11-646131-C (the "Vion Litigation") – an  
18 extremely contentious lawsuit between Vion Operations, LLC ("Vion") and Bloom, which  
19 continued for over three years until it was finally settled in October of 2014. Prior to settlement,  
20 Vion requested and the court ordered, that Defendants be appointed as Rule 53 Special Master in the  
21 Vion Litigation so as to conduct an accounting of the books and records of the companies involved  
22 therein.

23 However, unbeknownst to Plaintiff, and obscured from the court, Bertsch was an active  
24 client of Vion's counsel, Lionel Sawyer & Collins ("LSC") at the time of Defendants' appointment  
25 to what was to be an independent position. Indeed, Defendants failed to disclose this extremely  
26 salient fact until it was discovered over ten months after their appointment and just weeks before  
27 Defendants issued their "independent" report. Thus, in the interim, Defendants, Vion and LSC  
28 worked in concert to produce a report riddled with unsubstantiated findings calculated to damage

1 Bloom and his businesses. These false and defamatory findings were subsequently provided to  
2 Steven Green at the Las Vegas Sun, who published an article regurgitating Defendants' purportedly  
3 independent and factual findings pertaining to Plaintiff and his businesses. Mr. Green's articles  
4 remain in the public domain and are actively causing harm to Plaintiff.

5 Accordingly, the instant litigation was brought against Defendants for the damages Plaintiff  
6 has incurred, and will continue to incur, due to Defendants' gross negligence, fraudulent  
7 concealment, willful misconduct, and defamation. Additionally, Plaintiff is seeking an order that  
8 Defendants formally retract in writing, any and all previously made and/or disseminated defamatory  
9 statements concerning Bloom as well as a declaration from the Court that the statements made by  
10 Defendants in the final report were false.

11 The primary argument in Defendants' Motion is premised on their claim of absolute quasi-  
12 judicial immunity. Under this argument, Defendants claim that they acted as an arm of the court and  
13 as such, cannot be held liable for their actions in that capacity. However, looking at the nature of  
14 the function Defendants performed, Defendants acted as a receiver, accountant and independent  
15 contractor in the Vion Litigation and may not claim any privilege as a judicial officer. Moreover,  
16 any immunity afforded to Defendants was indisputably limited as the order appointing Defendants  
17 as Special Master specifically carved out claims that could be brought against them in that capacity.  
18 Indeed, there exists no set of facts that would alter the certainty that Plaintiff was permitted to bring  
19 causes of action against Defendants for gross negligence, fraud or willful misconduct, thus  
20 Plaintiff's Countermotion seeks a declaratory judgment on the parameters of Defendants' immunity,  
21 if any is found to exist.

22 Defendants argue next that Plaintiff's complaint must be dismissed based on the doctrine of  
23 issue preclusion. However, the factors determining issue preclusion are inapplicable in this matter  
24 as Defendants were not parties to the Vion Litigation and the issues presented in this litigation were  
25 not addressed in the Vion Litigation, thus no determination on the merits exists and the issues were  
26 not actually litigated. Simply put, there were no causes of action brought against Defendants in the  
27 prior case. Indeed, Defendants' Motion wholly fails to present specific facts supporting issue  
28 preclusion or to even address the requisite factors for application of issue preclusion in this matter.

Defendants' Rule 12(b)(5) argument also fails as it is largely premised on Plaintiff's lack of evidence in support of his claims for relief. However, there exists no evidentiary requirement at the motion to dismiss stage of litigation and the Court must take all statements in Plaintiff's complaint as true and draw all inferences in Plaintiff's favor. *Buzz Stew, LLC vs. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Indeed, Plaintiff's complaint has gone through great lengths to provide an extraordinary amount of detail to support each claim asserted therein. Therefore, at the pleading level, Plaintiff had met the burden of stating its claims for relief.

Lastly, the instant action was initiated less than three months ago and discovery has yet to commence. Thus, if this Court is inclined to consider Defendants' motion to dismiss as one for summary judgment, Plaintiff requests relief under Nev. R. Civ. P. 56(f) so as to allow this case to proceed to discovery before judgment may be issued on any of Plaintiff's causes of action.

## II. PROCEDURAL HISTORY AND STATEMENT OF FACTS

### A. DEFENDANTS APPOINTED AS SPECIAL MASTER TO PROVIDE ACCOUNTING OF BUSINESSES AT ISSUE IN VION LITIGATION

As alleged in Plaintiff's complaint, the Vion Litigation began on August 4, 2011 in the Eighth Judicial District Court of Nevada as case number A-11-646131-C. *See* Complaint, attached hereto as **Exhibit "1"**, at ¶ 11. On September 22, 2011, Vion and its counsel LSC, moved the court for appointment of Bertsch as a Rule 53 Special Master to conduct an independent accounting of the books and records of the companies involved in the Vion Litigation. *See id.* at ¶ 13; *see also* Countermotion for Appointment of Larry Bertsch as Special Master, attached hereto (without exhibits) as **Exhibit "2"**. The rate sheet Vion attached to its countermotion was for Bertsch & Associates as Bertsch is the owner, operator and managing partner of Bertsch & Associates. *See* Curriculum Vitae, Rate Sheet, and List of Assignments, attached hereto as **Exhibit "3"**, at [VION 000304]; *see also* Entity Details, attached hereto as **Exhibit "4"**; Ex. 1 at ¶ 3.

A hearing on Vion's motion for appointment of Bertsch as Special Master was held on September 30, 2011, wherein both Bertsch and his counsel, Anthony Zmaila, Esq. ("Zmaila"), attended. *See* Minutes, attached hereto as **Exhibit "5"**; *see also* Ex. 1 at ¶ 14. Bloom did not object to Bertsch's appointment as Special Master at the hearing or at any time prior to the hearing, as

neither Bertsch nor LSC disclosed to either Bloom or the court any potential conflict of interest or any other grounds for disqualification. *Id.* at ¶ 15.

On October 10, 2011, an order was entered in the Vion Litigation appointing Bertsch’s accounting firm, defendant Bertsch & Associates, as Special Master and ordering Bloom and Vion to equally share the costs incurred by Bertsch & Associates as Special Master. *Id.* at ¶ 16; *see also* Order dated October 11, 2011, attached hereto as **Exhibit “6”**. Moreover, pursuant to this order, “[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.*” *See id.* at p. 6, ¶ 12 (emphasis added)

In their role as Special Master, Defendants were to prepare an accounting and final report consisting of its findings pertaining to payments, transactions, records, security interests, investments, assets, etc., of the companies involved in the Vion Litigation. *Id.* at pp. 3-4; *see also* Ex. 1 at ¶ 17. However, at no point were Defendants given the authority to make findings of fact or rulings on the merits of the Vion Litigation, but instead were to provide an independent review and accounting of the books and records of the companies at issue and to assist the court and parties with testimony regarding their findings. *Id.* at ¶ 18.

Over ten (10) months after Defendants’ appointment as Special Master and after six (6) court appearances wherein Bertsch was personally in attendance, it was finally disclosed in a letter written by LSC to the court on or about August 29, 2012, that Bertsch was a client of LSC “during the second half of 2011.” *See* Letter from Todd Touton, Esq. to Judge Sturman, attached hereto as **Exhibit “7”**. Accordingly, at the time Bertsch accepted appointment as an “independent” Special Master in the Vion Litigation, LSC was acting as Bertsch’s agent and legal representative and receiving payments from Bertsch. Ex. 1 at ¶ 20. Therefore, Bertsch’s impartiality as Special Master was reasonably in question and Bertsch had a duty to disclose such prejudicial relationship. *Id.*

Had Bertsch disclosed his secret financial relationship with LSC (as he was required to do), Bloom would have vehemently objected to the appointment of Bertsch as an “independent” Special Master. *Id.* at ¶ 24. However, not only did Bertsch fail to disclose the active attorney-client relationship between LSC and Bertsch at the time he was appointed as Special Master, but he failed



to disqualify himself from the position pursuant to the Nevada Code of Judicial Conduct (the “NCJC”). *Id.* at ¶ 25.

**B. THE FINAL REPORT OF SPECIAL MASTER AND DISCOVERY OF BERTSCH’S IMPROPER *EX PARTE* COMMUNICATIONS**

Seven weeks after Defendants’ conflict of interest was revealed, the final report of Special Master (the “Final Report”) was filed with the court on or about October 18, 2012. *Id.* at ¶ 26; *see also* Final Report, attached hereto as **Exhibit “8”**. Purporting to be independent and unbiased, Defendants’ Final Report contained numerous unsubstantiated findings calculated to damage Bloom, including statements that Bloom’s actions relating to his companies had “earmarks of a Ponzi scheme.” *Id.* at p. 20:2; *see also* Ex. 1 at ¶ 27. Not only were these defamatory statements not included in Bertsch’s preliminary report submitted to the court on or about November 2, 2011 (*see* Preliminary Report, attached hereto (without exhibits) as **Exhibit “9”**), but at no point prior to completing the Final Report did Bertsch request from Bloom any of the information obtained during the year of discovery completed in the Vion Litigation, including depositions of Bloom, the bookkeepers, or a single one of the forty-two (42) investors of the companies at issue, all of whom were aligned with Bloom and adversarial to Vion. Ex. 1 at ¶ 28.

Without having all the information necessary to perform an unbiased accounting, Bertsch’s insertion of derogatory conclusions and simply parroting back of Vion’s unfounded allegations meant to harass and damage Bloom, coupled with the concealment of his relationship with LSC, led Bloom to believe that Bertsch had been communicating solely with LSC in the formation of his purportedly “independent” findings. *Id.* at ¶ 29. Thus, in order to uncover the extent of any bias, impartiality, and/or inappropriate ex-parte communications, Bloom issued a *subpoena duces tecum* to Bertsch and his counsel, Zmaila, on or about October 19, 2012, for the production of communications between the parties. *Id.* at ¶ 33; *see also* Subpoena Duces Tecum, attached hereto as **Exhibit “10”**. Bertsch subsequently moved for a protective order over disclosure of such information. *See* Motion to Quash, attached hereto (without exhibits) as **Exhibit “11”**. On or about January 2, 2013, the court entered an order requiring Bertsch and Zmaila to produce “all writings, emails correspondence, and documents related to this case” between Bertsch, Zmaila, their

employees, Vion and LSC, and that Bloom could file a motion to depose Bertsch following such disclosure. *See* Order dated January 2, 2013, attached hereto as **Exhibit “12”**, at pp. 4-5.

However, stating that nearly all their communications *on an active matter* have been deleted, Bertsch and Zmaila produced only carefully selected and limited documents, which nonetheless revealed a concerted effort between Bertsch, LSC and Zmaila to fabricate non-existent facts against Bloom and his companies. Ex. 1 at ¶ 35. Specifically, the documents produced by Bertsch and Zmaila revealed the following:

- Zmaila sent an email solely to LSC on or about October 2, 2012, which included a draft of Bertsch’s Final Report and requested LSC’s “review and comment.” *See* October 2, 2012 Email between Zmaila and LSC, attached hereto as **Exhibit “13”** at [AAZ-000136].
- This draft of the Final Report, dated October 1, 2012, which was sent to LSC for their edits, was labeled version number “552564\_16” (or version 16) and did not contain any claims of a “Ponzi scheme.” *See* Draft of Final Report, attached hereto as **Exhibit “14”**. However, the Final Report filed with the court two weeks later on October 18, 2012, labeled version number “552564\_18” (or version 18), contained specific findings that Bloom’s actions had earmarks of a “Ponzi scheme.” *See* Ex. 8 at p. 20:2.
- Thus, not only was the intermediary version 17 of the Final Report not disclosed, but Bertsch failed to disclose any response from LSC to his request for edits or indication as to how he subsequently arrived at the decision to label Bloom’s activities as a “Ponzi scheme.” Ex. 1 at ¶ 38.
- Indeed, evidence has shown that as many as eighteen versions of the Final Report secretly ricocheted between Bertsch, as an “independent” Special Master, and LSC, with no copies or even notice thereof provided to Bloom, and therefore no input from Bloom or his counsel in the Vion Litigation. *Id.* at ¶ 41.

Moreover, numerous other emails were disclosed that revealed LSC, Bertsch and Zmaila worked in concert for the purpose of building a case against Bloom, even meeting separately on several occasions to discuss how to structure the Final Report as a tool for use by and for the benefit of Vion, and to the detriment of Bloom as follows:

- Emails dated October 16, 2011 between Zmaila and Robert Hernquist, Esq. (at LSC), requesting and providing pleadings written by LSC to formulate the chronology of the Special Master’s preliminary report. *See* Emails between Bertsch, Zmaila, and LSC attached hereto as **Exhibit “15”** at [LLBCPA-000181].
- Emails dated November 9, 2011 between Zmaila and Mr. Hernquist regarding their changes and edits to the Order on Special Master’s Report, including a response from Mr. Hernquist to Zmaila stating “I like it.” *Id.* at [AAZ00037]

- Emails dated December 21, 2011 between Zmaila, Bertsch and Mr. Hernquist wherein Zmaila offers suggestions to LSC on how to follow up discovery against Bloom based on his responses. *Id.* at [AAZ00066-67]. Zmaila even tells Mr. Hernquist that he “should have some fun with challenges to individuals’ and business entities’ objections.” *Id.* at [AAZ00066].
- Emails dated December 29, 2011 between Mr. Hernquist and Zmaila/Bertsch regarding a joint investigation into bank records of Defendants. *Id.* at [LLBCPA-000043-44]. Zmaila informs Mr. Hernquist therein that “[w]e can use the cash position of Bloom & Farkas to our advantage. So can Vion when argument comes to who pays Special Master fees.” *Id.*
- Email dated January 5, 2012, from Zmaila to Mr. Hernquist and Todd Touton, Esq. (at LSC) regarding their fraud examiner’s “tip” on Bibliog, LLC. *Id.* at [AAZ00076].
- An email dated February 4, 2012 from Bertsch to Mr. Hernquist regarding other lawsuits involving Bloom that he “[t]hought may be of interest.” *Id.* at [LLBCPA-000052].
- An email dated February 12, 2012 from Mr. Hernquist to Bertsch requesting documents from a prior meeting between them in preparation for a deposition in the Vion Litigation. *Id.* at [LLBCPA-000038].
- An email dated February 15, 2012 from Mr. Hernquist to Bertsch in order to set up a meeting to discuss the Vion Litigation. *Id.* at [LLBCPA-000039].
- An email dated February 22, 2012 from Nick Miller (employee of Bertsch) to attorneys at LSC disclosing bank account information from Defendants and referencing a meeting between Mr. Miller and LSC. *Id.* at [LLBCPA-000203].
- Emails dated May 4, 2012 between Bertsch and Mr. Hernquist to set up a meeting to discuss a business involved in the Vion Litigation. *Id.* at [AAZ00107-110]

Coincidentally, at the deposition of Vion’s CEO, Stacey Schacter, held on October 4, 2012 (just two days after the draft Final Report was sent to LSC, but prior to it being published by Bertsch), Mr. Schacter used the term “Ponzi scheme” on nineteen (19) different occasions to describe Bloom’s alleged conduct, which was the first time this terminology was ever used in the litigation. *See* October 4, 2012 Deposition Transcript of Stacey Schacter, attached hereto as **Exhibit “16”**. Thus, allegations made by Vion in depositions were blindly echoed in later versions of the Final Report that did not exist in Bertsch’s earlier drafts of the Final Report. Ex. 1 at ¶ 40.

Based on the foregoing, the evidence indicates that Defendants’ Final Report was engineered and drafted in part by LSC, but billed to Bloom, for the purpose of building a case against Bloom under the guise of an “independent” report. *Id.* at ¶ 43.

Accordingly, on or about February 12, 2013, Bloom moved the court to disqualify Bertsch as Special Master and to strike the Final Report from the record. *See* Motion to Disqualify, attached hereto (without exhibits) as **Exhibit “17”**. At the hearing on Bloom’s motion held on or about April 4, 2013, the Court entertained Plaintiff’s motion to disqualify as well as Defendants’ motion for an order accepting Special Master’s final report and discharging Special Master. *See* April 4, 2013 Hearing Transcripts, attached hereto as **Exhibit “18”**.<sup>1</sup> At said hearing, Bertsch’s counsel, Zmaila, as an *ex post facto* admission, offered multiple times to seal the Final Report on file and replace it with a new version that had the “Ponzi scheme” reference redacted. *See id.* at p. 9-12. In response, the court stated “I can see why it is an attractive option to Mr. Bloom because he doesn’t want that on the public record. Even if the Court doesn’t reduce it to a finding he doesn’t want it on the public record.” *Id.* at p. 40:12-15. Furthermore, the court, stating that Bertsch and LSC certainly knew of the conflict, continued the several motions to be heard on May 31, 2013, and requested supplemental briefing by the parties on the issue of the Special Master’s fees and costs, Defendants’ motion to depose Zmaila and Bertsch, and Defendants’ countermotion for return of fees and request for sanctions against Special Master, LSC, Zmaila, and Bertsch.

Thereafter, on May 13, 2013, the court entered an order rejecting adoption of the Final Report as findings of fact and conclusions of law, but instead chose to make determinations of fact and law at the trial solely on the merits of the case, stating that Defendants’ Final Report was more akin to an expert report for Vion. *See* Order dated May 13, 2013, attached hereto as **Exhibit “19”**.

On May 31, 2013, the court granted the counter-motion for sanctions and requested additional briefing on the following: (1) The amount of fees and costs incurred from Bertsch’s failure to disclose the conflict of interest; (2) which parties should sanctions be entered against; and (3) Supplemental legal authority for this Court’s ability to award a monetary sanction of attorney fees and costs. *See* May 31, 2013 Hearing Transcript, attached as **Exhibit “20”** at pp. 56:16-25; 58:19-20; 59:11-13.

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<sup>1</sup> If the Court so desires request, a certified version of these transcripts may be ordered and supplemented upon receipt thereof.

In his opposition to Bloom’s supplemental brief on fees and costs filed on July 16, 2013, Bertsch analyzed *In re Mosely*, 102 P. 3d 555, 557-58 (2004) for the premise that only the Nevada Commission on Judicial Discipline has the authority to sanction a judge and that he was not a judge, and therefore not subject to judicial cannons and ethics required of an officer of the court. *See* Special Master Opposition, attached hereto as **Exhibit “21”** at pp. 13-14. Bertsch went on to argue that (1) he is not an attorney, (2) he is a certified public accountant and certified fraud examiner, and (3) he is not a party to the Vion Litigation. *See id.* at pp. 14-15.

On September 11, 2013, the court entered an order permitting Bloom to conduct a deposition of Bertsch and dictated the scope of the deposition therein. *See* Order dated September 11, 2013, attached hereto as **Exhibit “22”** at p. 4. However, the case was removed to bankruptcy court and settled thereafter, thus the deposition was never taken.

**C. CONTENTS OF THE FINAL REPORT ARE PUBLICLY PUBLISHED**

While the Vion Litigation was settled and statistically closed on or about October 23, 2014, the defamatory statements made in the Final Report remain in the public domain and are actively causing harm to Bloom’s reputation. *See* Ex. 1 at ¶ 49. Indeed, on or about October 19, 2012, the day after the Final Report was filed, a reporter for the Las Vegas Sun,<sup>2</sup> Steven Green (“Green”), published an article echoing the false and defamatory findings made about Bloom in the Final Report and attributing the findings to a purportedly independent “court-appointed accountant.” *See* Article dated October 19, 2012, attached hereto as **Exhibit “23”**. Green had previously published articles in favor of Vion’s position, thus the timing of the filing of the Final Report and publication of Green’s article suggest that Bertsch’s Final Report was sent directly to Green by Bertsch and/or LSC. Ex. 1 at ¶ 54.

Specifically, Green’s article states that according to Bertsch, Bloom’s businesses “likely involved a ‘fraudulent transaction’ and ‘the earmarks of a Ponzi scheme’ and that Bertsch also “suggested ... that securities laws weren’t complied with as investors were induced into pumping

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<sup>2</sup> Articles for the Las Vegas Sun are published through its newspaper circulated in the Las Vegas metropolitan area, as well as on its website, [www.lasvegassun.com](http://www.lasvegassun.com), and through its affiliate VEGAS INC’s website, [www.vegasinc.com](http://www.vegasinc.com).

millions of dollars into the project by Las Vegas businessman Jay Bloom.” Ex. 23 at pp. 1, 2. The article further cites to numerous unsubstantiated findings made in the Final Report by Bertsch pertaining to Bloom’s management of his companies’ finances and his improper use of investors’ funds for personal use. *See id.* All such statements made in the Final Report and subsequent publication were false, but the article and report lend a fictional legitimacy by masquerading such allegations as “independent findings.” Ex. 1 at ¶ 53. What the public does not know is that the defamatory statements were systematically placed in Defendants’ Final Report through LSC, Zmaila, and Bertsch’s inappropriate communications and fraudulent conduct.

Despite the Court’s refusal to adopt the deficient and biased Special Master Independent Report, Green’s article remains in the public domain and is readily available through an internet search of Bloom. *Id.* at ¶ 56. Indeed, Bloom’s investors, having read Bertsch’s purportedly “independent” findings in the Final Report, have declined to move forward with investments based on the false and defamatory statements made by Bertsch in furthering the agenda of his attorney’s other client, Vion, under the guise of being independent, regarding Bloom’s professional and business reputation. *Id.* at ¶ 57. Since the Final Report was publicly filed and disclosed to Green, Bloom and his companies have therefore been damaged through the loss of funding from investors influenced by the false and defamatory statements maliciously statements made therein. *Id.* at ¶ 58.

Thus, on February 6, 2015, undersigned counsel on behalf of Bloom sent a letter to Zmaila and Bertsch, requesting that Bertsch retract his false statements, but he has refused to issue a retraction or take any further action to mitigate the harm Bloom has sustained, and continues to sustain on a daily basis, as a result of Defendants’ tortious conduct. *See Demand Letter*, attached hereto (without attachments) as **Exhibit “24”**. Accordingly, Bloom is seeking relief for the damages incurred as a direct and proximate result of Defendants’ tortious conduct.

### III. LEGAL ARGUMENT

#### D. LEGAL STANDARD

##### 1. Motion to Dismiss

Nevada Rule of Civil Procedure 12(b)(5) provides for the dismissal of a complaint where a plaintiff has failed to state a claim upon which relief can be granted. For the purpose of

considering a Rule 12(b)(5) motion, a court must accept the allegations of the complaint as true, and draw all inferences in favor of the non-moving party. *Buzz Stew, LLC vs. City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008). On a motion to dismiss, the trial court “is to determine whether or not the challenged pleading sets forth allegations sufficient to make out the elements of a right to relief.” *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792 (1993). Furthermore, “[a] claim should not be dismissed . . . unless it appears to a certainty that the plaintiff is not entitled to relief under any set of facts which could be proved in support of the claim.” *Pemberton* at 792 (quoting *Hale v. Burkhardt*, 104 Nev. 632, 636, 764 P.2d 866, 868 1988)).

Here, Defendants have failed to show that it appears to a certainty that Plaintiff is not entitled to relief under the complaint, thus dismissal of the complaint pursuant to Nev. R. Civ. P. 12(b)(5) is improper. However, if additional factual allegations are required, this Court should allow Plaintiff leave to amend pursuant to Nev. R. Civ. P. 15 rather than dismiss the complaint. *See Greene v. Dist. Ct.*, 115 Nev. 391, 393-94, 990 P.2d 184, 185 (1999) (The Supreme Court of Nevada interprets its approach to these requests as a “liberal amendment policy”); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th Cir. 1988) (“leave to amend should be granted if underlying facts provide proper grounds for relief or if the complaint can be saved by amendment.”); *Breier v. Northern California Bowling Proprietors’ Ass’n*, 316 F.2d 787, 790 (9th Cir.1963) (quoting 3 Moore, Federal Practice, § 15.10 at 838 (2d ed.1948) (“[L]eave to amend should be granted ‘if it appears at all possible that the plaintiff can correct the defect.’ ”)).

## 2. Motion for Summary Judgment

However, if “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56.” Nev. R. Civ. P. 12(b); *see also Schneider v. Cont’l Assur. Co.*, 110 Nev. 1270, 1271 (1994); *Thompson v. City of North Las Vegas*, 108 Nev. 435, 438, (1992).

In Nevada, “[s]ummary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031

(2005) (citation omitted); *see also* Nev. R. Civ. P. 56(c). “The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant.” *Wood*, 121 Nev. at 731, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). “[C]onclusory statements along with general allegations do not create an issue of fact.” *Yeager v. Harrah’s Club, Inc.*, 111 Nev. 830, 833, 897 P.2d 1093, 1095 (1995). Rather, a genuine issue of material fact exists only where the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Valley Bank of Nevada v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1279 (1989).

The moving party bears the burden to establish the non-existence of a factual dispute. *Torres v. Farmers Insurance Exchange*, 106 Nev. 340, 345, 793 P.2d 839, 842 (1990). The nonmoving party may avoid summary judgment by presenting specific facts, through affidavits or other evidence, that demonstrate the existence of an issue of material fact. *Id.*, *citing* NRCP 56(e). “Although evidence presented in support of a motion for summary judgment must be construed in the light most favorable to the nonmoving party, that party must set forth facts demonstrating the existence of a genuine issue in order to withstand a disfavorable summary judgment.” *Sustainable Growth Initiative Comm. v. Jumpers, LLC*, 122 Nev. 53, 61, 128 P.3d 452, 458 (2006).

Here, Defendants have attached over two-thousand pages of documents, which include pleadings, discovery, orders, and hearing transcripts from the Vion Litigation in support of dismissal. While Defendants provide a solitary footnote referencing a court’s capability to take judicial notice of matters of public record, Defendants fail to provide any specificity as to which facts and materials they are asking the Court to take judicial notice of. *See* Mot. at p. 5, fn 1. Therefore, unless the Court relies solely on the allegations made within Plaintiff’s complaint, Defendants’ Motion must be analyzed as a motion for summary judgment under Rule 56 and numerous facts remain disputed as detailed in § B(4), *infra*.

**E. DEFENDANTS’ MOTION TO DISMISS MUST BE DENIED**

As detailed below, Defendants’ Motion fails because (i) Defendants are not entitled to absolute quasi-judicial immunity; (ii) the doctrine of issue preclusion is inapplicable in this matter; (iii) Plaintiff has alleged valid claims upon which relief may be granted; and (iv) further discovery is



needed on the facts remaining at issue in this litigation.

**1. Defendants are Not Entitled to Absolute Quasi-Judicial Immunity**

***a. The Order Appointing Special Master Specifically Listed Claims that Could be Brought Against Defendants***

Defendants' first argument is premised on the assumption that Bertsch is entitled to absolute quasi-judicial immunity in his capacity as Special Master. "[A]bsolute immunity defeats a suit at the outset of litigation as long as the official's actions were within the scope of the immunity." *Marvin v. Fitch*, 126 Nev. \_\_\_, 232 P.3d 425, 429 (2010) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525–27, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985)).

Here, the parties agreed and the Vion court ordered that the scope of Defendants' immunity would not include certain actionable conduct of Defendants while in their capacity as Special Master. The October 11, 2011 order appointing Special Master 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." *See* Ex. 6 at p. 6 ¶ 12 (emphasis added). Defendants accepted their position in the Vion Litigation under these terms pertaining to liability if they performed their duties with gross negligence, fraud or willful misconduct. Indeed, Defendants specifically requested that counsel be retained on their behalf while acting as Special Master in the Vion Litigation. *Id.* at p. 5, ¶ 7. If the parties, Defendants and the court thought that Defendants were protected by absolute immunity in performing their duties, the appointment of counsel for the Special Master would have been unnecessary and such request would be deemed superfluous. As such, any actions taken by Defendants amounting to gross negligence, fraud or willful misconduct falls outside the scope of Defendants' immunity.

It is clear that any immunity afforded to Defendants in their capacity as Special Master was indisputably limited and therefore not absolute. The claims brought against Defendants are for conduct falling outside the scope of immunity, and Defendants' Motion must be denied.<sup>3</sup>

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<sup>3</sup> *See* additional discussion under § C, *infra*.

***b. Defendants' Role in the Vion Litigation does not Warrant Absolute Quasi-Judicial Immunity***

Even if this Court is to find that the aforementioned carve-out provision within the order Appointing Special Master does not preclude absolute quasi-judicial immunity, an examination of the role Defendants played in the Vion Litigation does. As correctly noted in Defendants' Motion, the purpose behind the grant of absolute immunity for judicial officers is to "preserve the independent decision-making and truthfulness of critical judicial participants."<sup>4</sup> However, Defendants fail to observe that the Nevada Supreme Court has been "'quite sparing' in [their] recognition of absolute immunity, and have refused to extend it any 'further than its justification would warrant.'" *State v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 118 Nev. 609, 617, 55 P.3d 420, 425 (2002) (quoting *Burns v. Reed*, 500 U.S. 478, 486–87, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991)).

In general, nonjudicial officers are protected by qualified immunity instead of absolute immunity in the performance of their duties. *Marvin v. Fitch*, 126 Nev. \_\_\_, 232 P.3d 425, 429 (2010) (citing *Cnty. of Washoe*, 118 Nev. at 617).<sup>5</sup> However, the grant of absolute judicial immunity has been extended "in limited circumstances" to non-judicial participants if the role of the individual in question is "sufficiently comparable to those of officials who have traditionally been afforded absolute immunity at common law." *Cnty. of Washoe*, 118 Nev. at 616, 618 (citing *Butz v. Economou*, 438 U.S. 478, 513-17 (1978)).

By looking to "the nature of the function performed, not the identity of the [individual] who performed it," this "functional approach" considers the following factors: (1) whether the individual is performing many of the same functions as a judicial officer; (2) whether there are procedural safeguards in place similar to a traditional court; (3) whether the process or proceeding is

<sup>4</sup> See Mot. at p. 11 (quoting *Duff v. Lewis*, 114 Nev. 564, 568-9 (1998) (citing *Imbler v. Pachtman*, 424 U.S. 409, 422–24 (1976)))

<sup>5</sup> "Qualified immunity and absolute immunity are distinguishable." *Marvin*, 232 P.3d at 429, fn 5 (citing *Ducharm*, 118 Nev. at 615 n. 9, 55 P.3d at 423 n. 9). "Qualified immunity may also provide immunity from suit so long as the defendant's actions were not in violation of clearly established law." *Id.* (citing *Mitchell v. Forsyth*, 472 U.S. 511, 525–27 (1985)).

adversarial; (4) the ability to correct errors on appeal; and (5) whether there are any protective measures to ensure the constitutionality of the individual's conduct and to guard against political influences. *Marvin*, 232 P.3d at 429 (quoting *Romano v. Bible*, 169 F.3d, 1182, 1186-87 (9th Cir.1999)).

In their Motion, Defendants claim that in his capacity as a Rule 53 Special Master, Bertsch was a quasi-judicial officer and subject to absolute quasi-judicial immunity.<sup>6</sup> However, the reality is that the court denied Bertsch's motion to adopt the final report as findings of fact under Rule 53.<sup>7</sup> *See* Ex. 19 at p. 6. Instead, the Vion Court accepted it as somewhat akin to that of an expert's report. *See id.* at p. 6:20-22 ("The Court's acceptance of the Final Report of Special Master does not limit or impair in any way any party's ability to challenge the report at trial.").

Moreover, the court ordered that Bertsch's function in the Vion Litigation was as follows:

- "[I]n the event that Larry Bertsch is required to hold money of the parties to the Litigation, LLC Receivership, Inc. is appointed as the Special Master's holding company for purposes of depositing, holding and protecting such money, subject to the order of the Court." Ex. 6 at p. 2.
- As an accountant, Bertsch was to prepare an accounting and final report consisting of his findings pertaining to payments, transactions, records, security interests, investments, assets, etc., of the companies involved in the Vion Litigation. *Id.* at pp. 2-4.
- "Special master shall be reasonably compensated for his services as an independent contractor payable equally between Plaintiffs and Defendants..." *Id.* at ¶ 8.

As such, Bertsch was to perform the function of a receiver, accountant and independent contractor in the Vion Litigation, to be compensated by the parties to the litigation and not the State.

In Nevada, "[a] receiver who 'faithfully and carefully carries out the orders of the appointing judge' shares the judge's judicial immunity." *Anes v. Crown P'ship, Inc.*, 113 Nev. 195, 201, 932

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<sup>6</sup> Notably, in the Vion Litigation, Bertsch asserted that he was not a judge and not an attorney, therefore judicial canons and the Nevada Rules of Professional Conduct did not apply to him. *See* Ex. 21. However, in the instant Motion, he's claiming the judicial privileges bestowed on individuals in those positions. Thus, it is clear that Bertsch represents himself in the position that best suits his needs at that particular point in time. Such conduct is entirely counterintuitive to principles of equity and fairness and must not be permitted to continue.

<sup>7</sup> Adoption of a special master's final report is mandatory unless the report is clearly erroneous. Nev. R. Civ. P. 53(e)(2).

P.2d 1067, 1071 (1997) (quoting *Kermit Const. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976)). “Thus, a receiver authorized by the court to continue a business operation, or which is performing duties authorized by the court, ***is not personally liable for any losses incurred when it acts in good faith and its own misconduct or negligence did not cause the loss.***” *Id.* (citing 66 Am.Jur.2d Receivers § 442) (emphasis added). “However, the receiver must not exceed the limits of the authority granted by the court and must act for the benefit of ‘all persons interested in the property.’” *Id.* (quoting *Fullerton*, 111 Nev. at 400, 892 P.2d at 941). “Indeed, a receiver may be personally liable if he or she acts outside the authority granted by the court.” *Id.* (citing *Interlake Co. v. Von Hake*, 697 P.2d 238, 240 (Ut.1985); *Krist v. Aetna Cas. & Sur.*, 667 P.2d 665, 671 (Wyo.1983); accord 2 Clark, § 428; 66 Am.Jur.2d *Receivers* § 367).

Here, as alleged in Plaintiff’s complaint, Defendants, with even less claim to immunity than a receiver, failed to act in good faith in performance of their duties and Plaintiff has sustained substantial losses as a direct result of Defendants’ gross negligence, fraud and willful misconduct. Moreover, by colluding with Vion to make unsubstantiated findings under the guise of being “independent,” including statements that Plaintiff’s actions had earmarks of a “Ponzi scheme,” Defendants exceeded the authority they were granted and may be held personally liable for such conduct. *See Blanchard v. Overton*, 449 F. App’x 862, 864 (11th Cir. 2011) (court held that appraiser acted outside the scope of his authority when order did not grant appraiser with authority to take action and action was not integral to the judicial process).

Likewise, an accountant, in accomplishing a task, acts like an expert or technician retained to apply professional or specialized knowledge and skill in the determination of “specific issues of actual cash value,” much like that of an appraiser. *Levine v. Wiss & Co.*, 97 N.J. 242, 247, 478 A.2d 397, 400 (1984) (quoting 5 *Am.Jur.* 2d “Arbitration & Award” § 3 (1962)). Thus, courts have recognized the distinction between a person engaged because of “special knowledge, technical skill, or expertise,” as opposed to a person appointed to serve in a quasi-judicial capacity, “in whose hands the dispute resolution process is entrusted.” *Id.* (“The appraiser is expected to perform a discrete function involving only the ascertainment of particular facts. This function, which entails neither a hearing nor the exercise of judicial discretion, is not to be confused with the duty of the

arbitrator.”); *see also Sanitary Farm Dairies v. Gammel*, 195 F.2d 106, 113 (8th Cir. 1952) (“where parties to a contract ... provide for a method of ascertaining the value of something related to their dealings, the provision is one for an appraisal and not for an arbitration.”); *Portland Gen. Elec. Co. v. U.S. Bank Trust Nat’l Ass’n*, 218 F.3d 1085, 1089–90 (9th Cir.2000) (interpreting state law, the court noted distinction between appraisal and arbitration).

Here, Defendants were solely ordered to prepare an accounting of the books and records of the companies at issue and to assist the court and parties with testimony regarding their findings. As such, they were to apply professional or specialized knowledge and skill in the determination of specific issues of actual cash value, but were given no authority to make findings of fact or rulings on the merits of the Vion Litigation. Thus, the distinction may be made that because Defendants were not appointed to serve in a quasi-judicial capacity they cannot claim any quasi-judicial immunity.

And lastly, the court specifically designated Bertsch as an independent contractor in the Vion Litigation and as such, he was to act independent of the court and of the state in this role. Bertsch was paid directly by the parties in the Vion Litigation and not by the State as an employee/contractor. Thus while certain officers, employees and/or contractors of the State of Nevada are immune from actions brought against them,<sup>8</sup> “[a]n independent contractor is not in the classified or unclassified service of the State and has none of the rights or privileges available to officers or employees of the State of Nevada.” NRS 333.700(4). Notably, the court could have extended immunity to Defendants, but instead it carved out specific claims which could be brought against them in their capacity. Therefore, no absolute grant of immunity is permitted or warranted herein.

Based on the foregoing, Defendants may not claim an absolute quasi-judicial privilege in his role as Special Master where the nature of the function he performed was that of a receiver, accountant and independent contractor. Thus, Defendants have failed to meet their burden of

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<sup>8</sup> *See* NRS 41.032 (immunity for employees, officers and immune contractors of Nevada); NRS 41.0307 (defines an immune contractor as an independent contractor who provides medical services for the Department of Corrections).

justifying absolute quasi-judicial immunity<sup>9</sup> and Plaintiff's claims against Defendants must be allowed to proceed.

***c. Absolute Quasi-Judicial Immunity Does Not Apply to Claims for Declaratory and Injunctive Relief***

Even if the Court finds that Defendants are entitled to quasi-judicial immunity for damages, this immunity does not apply to Plaintiff's claims for injunctive and declaratory relief. "Absolute immunity is not a bar to injunctive or declaratory relief." *Buckwalter v. Nevada Bd. of Med. Examiners*, 678 F.3d 737, 747 (9th Cir. 2012), *as amended* (June 8, 2012) (citing *Pulliam v. Allen*, 466 U.S. 522, 541-42 (1984)); *see also Shuler v. Swatek*, 465 F. App'x 900, 903 (11th Cir.2012) (noting, in suit against sheriffs acting in quasi-judicial capacity, that "judicial immunity does not bar claims brought under § 1983 seeking injunctive and declaratory relief.").

Here, Plaintiff has asserted equitable claims against Defendants for permanent injunction and declaratory relief. Through such claims, Plaintiff is seeking an order that Defendants formally retract in writing, any and all previously made and/or disseminated defamatory statements concerning Bloom as well as a declaration from the Court that the statements made by Defendants in the Final Report were false. As these claims do not subject Defendants to damages and are equitable in nature, absolute immunity cannot bar such relief.

**2. The Doctrine of Issue Preclusion is Legally Improper in this Matter**

Defendants next argue that Plaintiff's claims must be dismissed based on the doctrine of issue preclusion. However, the Nevada Supreme Court has held that for issue preclusion to apply, the following four factors must be satisfied:

- (1) The issue decided in the prior litigation must be identical to the issue presented in the current action;
- (2) The initial ruling must have been on the merits **and** have become final;

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<sup>9</sup> "Adhering to this functional approach, the Court has concluded that the burden of justifying absolute quasi-judicial immunity rests on the official asserting the claim." *State v. Second Judicial Dist. Court ex rel. Cnty. of Washoe*, 118 Nev. 609, 617, 55 P.3d 420, 425 (2002) (citing *Antoine*, 508 U.S. at 432, 113 S.Ct. 2167; *Harlow*, 457 U.S. at 812, 102 S.Ct. 2727).

- (3) The party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; **and**
- (4) The issue was actually and necessarily litigated.

*Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008).

Thus, “issue preclusion only applies to issues that were ***actually and necessarily litigated*** and on which there was a final decision on the merits.” *Id.* (emphasis added). A party asserting issue preclusion bears the burden of providing a record which will indicate “the controlling facts and pinpoint the exact issues litigated in the prior action.” *In re U.S.H. Corp. of New York*, 280 B.R. 330, 336 (Bankr. S.D.N.Y. 2002) (“this Court must refer to the relevant Nevada law which would give preclusive effect to the decision and judgment, and decide if the required elements have been satisfied.”); *see also Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1321 (9th Cir. 1992) (“The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment”); *United States v. Lasky*, 600 F.2d 765, 769 (9th Cir.), cert. denied, 444 U.S. 979 (1979) (“It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated.”).

Here, as a threshold matter, Defendants neglect to cite to the record or pinpoint the exact issues litigated and decided in the Vion Litigation. Moreover, while the *Five Star* factors are cited in Defendants’ Motion, Defendants wholly fail to apply such factors to the instant litigation. Indeed, it is clear that upon a straightforward application of the decision, Defendants’ argument is fatally flawed.

First, Defendants argue that the doctrine of issue preclusion applies because Plaintiff is “attempting to re-litigate factual and legal issues that he previously argued and lost **in an effort to obtain disqualification of Vion’s counsel and Mr. Bertsch** in the Vion Litigation.” *See* Mot. at p. 13 (emphasis added). Thus, as admitted in Defendants’ Motion, only issues of disqualification and sanctions were sought in the Vion Litigation, which is not being sought in the instant action. Instead, Plaintiff is seeking injunctive relief and damages for the injuries Bertsch’s actions and omissions have caused Plaintiff subsequent to the Vion Litigation settling. As such, the issues

1 decided in the prior litigation are far from being identical to the issue presented in the current action  
2 and Defendants have failed to satisfy the first *Five Star* factor.

3 Second, the decisions cited by Defendants in the Vion Litigation were not on the merits and  
4 were not final. Instead, the Vion Court reserved the right to hear evidence at trial on the Special  
5 Master's bias and permitted Bloom to take Bertsch's deposition, which never occurred due to  
6 settlement of the case. *See* Ex. 22. As such, no final decision was ever entered on the issues raised  
7 in this litigation and the second factor also fails.

8 Third, Bertsch was not a party to or in privity with a party in the Vion Litigation. Indeed, by  
9 the very nature of his purported role as and "independent" Special Master, he was to act impartially  
10 and not in privity with any of the parties involved. As such, Defendants cannot satisfy the third *Five*  
11 *Star* factor.

12 Fourth, the issues raised in this litigation were not actually and necessarily litigated. The  
13 court left discovery open on the issues presented in the instant litigation and the causes of action  
14 brought by Plaintiff herein were specifically contemplated by the parties and carved out by order of  
15 the court. *See* Ex. 6 at ¶ 12. Therefore, Plaintiff is not seeking to overrule prior decisions in the  
16 Vion Litigation, but instead seeks to assert his right to bring claims against Defendants as provided  
17 by court order.

18 Based on the foregoing, issue preclusion does not have any applicability in this matter, and  
19 Defendants' Motion must be denied in its entirety.

20 **3. Plaintiff's Claims are Supported with Facts alleged in the Complaint and Must**  
21 **not be Dismissed**

22 In his complaint, Plaintiff has alleged causes of action against Defendants for gross  
23 negligence, fraudulent concealment, willful misconduct, defamation, permanent injunction,  
24 declaratory relief, and alter ego, all of which are supported by factual allegations upon which relief  
25 may be granted.

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*a. Plaintiff Has Alleged Valid Claims for Gross Negligence and Willful Misconduct*

Defendants argue in their Motion that Plaintiff cannot show *evidence* of gross negligence, willful misconduct, or that Plaintiff suffered damages. *See* Mot. at pp. 14-15. However, there exists no evidentiary requirement at the motion to dismiss stage of litigation and the Court must take all statements in Plaintiff’s complaint as true and draw all inferences in Plaintiff’s favor. *Buzz Stew, LLC*, 124 Nev. at 228, 181 P.3d at 672. As such, Plaintiff’s complaint has gone through great lengths to provide an extraordinary amount of detail to support the claims asserted.

In Nevada, “[w]illful misconduct” is defined as “intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with a wanton or reckless disregard of the possible results.” *Davies v. Butler*, 95 Nev. 763, 769, 602 P.2d 605 (1979); *see also Van Cleave v. Kietz–Mill Minit Mart*, 97 Nev. 414, 416, 633 P.2d 1220 (1981) (Willful misconduct is an act “that the actor knows, or should know, will very probably cause harm”). “When analyzing the concept of misconduct, the trier of fact must consider the legal definition ... in context with the factual circumstances surrounding the conduct at issue. Misconduct then becomes a mixed question of law and fact.” *Fremont Hotel & Casino v. Esposito*, 104 Nev. 394, 397, 760 P.2d 122, 124 (1988) (quoting *Garman v. State Employment Sec. Dep’t*, 102 Nev. 563, 565, 729 P.2d 1335, 1336 (1986)).

As alleged in the complaint, Defendants, in an abuse of the trust placed in them by the court and Plaintiff, secretly conspired with LSC for the purpose of building a case against Bloom in the Vion Litigation and included unsubstantiated findings in the Special Master’s Final Report specifically calculated to damage Bloom. Ex. 1 at ¶¶ 93-94. Moreover, Defendants caused their false and defamatory statements to be published by providing the Final Report to Green. *Id.* at ¶ 95. Through such unlawful actions and omissions, Defendants knew, or should have known, that serious injury would result to Bloom or acted with a reckless disregard of the possible results. *Id.* at ¶¶ 96-97. Such alleged conduct is sufficient to establish a claim for willful misconduct.

Likewise, negligence is generally a question of fact and “[a] party’s negligence becomes a question of law only when the evidence will support no other inference.” *Joynt v. California Hotel*

& Casino, 108 Nev. 539, 542, 835 P.2d 799, 801 (1992) (quoting *Shepard v. Harrison*, 100 Nev. 178, 180, 678 P.2d 670, 672 (1984)). Thus, to establish a prima facie showing of negligence, a plaintiff must allege the following: (1) that the defendant had a duty to exercise due care with respect to the plaintiff; (2) that the defendant breached this duty; (3) that the breach was both the actual and proximate cause of the plaintiff's injury; and (4) that the plaintiff was damaged. *Joynt v. California Hotel & Casino*, 108 Nev. 539, 542, 835 P.2d 799, 801 (1992). Gross negligence occurs if the conduct is not willful, but "is substantially and appreciably higher in magnitude and more culpable than ordinary negligence." *Bearden v. City of Boulder City*, 89 Nev. 106, 109, 507 P.2d 1034, 1035 (1973) (quoting *Hart v. Kline*, 61 Nev. 96, 101, 116 P.2d 672, 674 (1941)).

In his complaint, Plaintiff detailed the various duties owed by Defendants and alleged that Defendants breached their duties by, among other things, acting with a reckless disregard for or failing to exercise even a slight degree of care by: (a) failing to disclose the unwaivable 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 continues to sustain, as a result of their conduct. Ex. 1 at ¶ 70. Such conduct is substantially and appreciably higher in magnitude and more culpable than ordinary negligence, therefore constituting gross negligence. *Id.* at ¶ 71.

Plaintiff further alleged damages resulting from Defendants' grossly negligent and willful misconduct, which largely accrued after the Vion Litigation settled.<sup>10</sup> As such, Defendants have

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<sup>10</sup> As alleged in Plaintiff's complaint: "Bloom's investors, having read Bertsch's purportedly "independent" findings in the Final Report, have declined to move forward with investments based on the false and defamatory statements made by Bertsch in furthering the agenda of his attorney's

completely neglected Plaintiff's allegations by falsely concluding that there exists "no evidence of harm since the Vion Litigation ultimately settled." Mot. at p. 15.

Based on the allegations presented in the pleadings, Plaintiff has stated valid claims for gross negligence and willful misconduct. At this state in the litigation, the issues presented by Plaintiff's claims will require the gathering of significant evidence; yet, discovery has yet to begin. See § (B)(4), *infra*. Thus, Defendants' argument is merely a premature cry for evidentiary support prior to the commencement of discovery. Accordingly, Defendants' Motion lacks merit and must be denied.

***b. Plaintiff Has Sufficiently Pled a Claim for Fraudulent Concealment***

Continuing with their inappropriate demand for evidentiary support, Defendants argue that the "record in the Vion Litigation is void of any evidence of fraudulent concealment." Mot. at p. 15. However, as previously noted, there exists no evidentiary requirement at the motion to dismiss stage of litigation and the Court must take all statements in Plaintiff's complaint as true and draw all inferences in Plaintiff's favor. *Buzz Stew*, 124 Nev. at 228.

Moreover, Plaintiff has sufficiently alleged his cause of action for fraudulent concealment. To establish a prima facie case of fraudulent concealment in Nevada, a plaintiff must offer proof that satisfies five elements: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; that is, the defendant concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than she would have if she had known the fact; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; (5) and, as a result of the concealment or suppression of the fact, the plaintiff sustained damages. *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1485, 970 P.2d 98, 110 (1998), overruled in part on other grounds by *GES, Inc. v. Corbitt*, 116 Nev. 265, 271, 21 P.3d 11, 15 (2001).

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other client, under the guise of being independent, regarding Bloom's professional and business reputation." Complaint at ¶ 57. "Since the Final Report was publicly filed and disclosed to Green, Bloom and his companies have therefore been damaged through the loss of funding from investors influenced by the false and defamatory statements maliciously statements made therein." *Id.* at ¶ 58.

Here, Plaintiff has alleged Defendants had a duty to disclose the unwaivable conflict-of-interest due to the attorney/client relationship existing between LSC and Bertsch as well as the *ex parte* communications between Bertsch, Zmaila and LSC, and give Plaintiff an opportunity to respond. *See* Ex. 1 at ¶¶ 75-76. However, said material facts regarding Defendants’ attorney/client relationship and *ex parte* communications were intentionally concealed for the purpose of inducing Plaintiff not to object to Defendants’ appointment or moving for disqualification. *Id.* at ¶ 77. Such defrauding was done in a concerted effort to improve Vion’s position in the Vion Litigation and to damage Bloom and his businesses. *Id.* Moreover, Plaintiff detailed in his complaint the specific exchanges between LSC, Zmaila and Bertsch exemplifying their inappropriate contacts and fraudulent concealments. *Id.* at ¶¶ 79-85. If Plaintiff had known of these material facts, intentionally hidden and omitted by Defendants, he would have vehemently objected to Defendants’ appointment and moved to disqualify Defendants as Special Master before the Final Report was filed and published. *Id.* at ¶ 87. However, because he was deceived by Defendants, he has sustained significant damages resulting from such fraudulent concealment. *Id.* at ¶ 88.

Therefore, at the pleading level, having set for the fundamental basis for a fraudulent concealment cause of action, Plaintiff had met the burden of stating such a claim.

***c. Plaintiff Has Sufficiently Pled a Claim for Defamation***

Next, Defendants claim that Plaintiff’s claim for defamation fails because (1) statements of opinion are protected speech; (2) Plaintiff has not alleged that any false statements were made; and (3) absolute immunity privilege precludes liability even of defamatory statements. *See* Mot. at pp. 16-17.

First, Defendants proffer no explanation as to how the constitutional protection of opinion is applicable in this matter, and indeed Defendants’ argument wholly fails. *See* Mot. at p. 16 (quoting *Lubin v. Kunin*, 117 Nev. 107, 112-13, 17 P.3d 422, 426 (2001) (“Statements of opinion are protected speech under the First Amendment of the United States Constitution and are not actionable at law.”)). “The test for whether a statement constitutes fact or opinion is: ‘whether a reasonable person would be likely to understand the remark as an expression of the source’s opinion or as a statement of existing fact.’” *Id.* (quoting *Nevada Indep. Broad. Corp. v. Allen*, 99 Nev. 404,

1 410, 664 P.2d 337, 342 (1983)).

2 Both the *Lubin* and *Nevada Independent Broadcasting* courts also found that certain  
3 statements are actionable if they are “ambiguous” or a “mixed type,” which is an opinion giving  
4 “rise to the inference that the source has based the opinion on underlying, undisclosed defamatory  
5 facts.” *Id.* (quoting *Nevada Ind. Broad.*, 99 Nev. at 411, 664 P.2d at 342). In *Nevada Independent*  
6 *Broadcasting*, the Nevada Supreme Court offered an example illustrated by the Restatement  
7 (Second) of Torts: Expressions of Opinion Section 566 comment b (1977):

8 it may be actionable to state an opinion that plaintiff is a thief, if the  
9 statement is made in such a way as to imply the existence of information  
10 which would prove plaintiff to be a thief. In such situations, where a  
statement is ambiguous, the question of whether it is a fact or evaluative  
opinion is left to the jury.

11 99 Nev. at 411, 664 P.2d at 342.

12 Here, the entire contents of the Final Report proffers to be based on Defendants’ findings of  
13 fact and Defendants subsequently moved the court in the Vion Litigation to accept it as such. *See*  
14 Ex. 8. Indeed, the very purpose of obtaining a Special Master’s report in non-jury matters, is for a  
15 court to “accept the master’s findings of fact” laid out in its report. Nev. R. Civ. P. 53(e)(2).  
16 Moreover, the order under which Defendants were appointed (and which is quoted in Defendants’  
17 Final Report) stated that upon investigating the financial books, records and receipts at issue, he was  
18 to “prepare and accounting consisting of his findings...” Ex. 6 at p. 3; *see also* Ex. 8 at pp. 2-3. As  
19 such, a reasonable person would not view Defendants’ findings as mere opinion when they were  
20 purportedly based on evidence. Any claim otherwise is an affront to this Court. Therefore, the  
21 constitutional protection for opinion statements is entirely inapplicable in this context.

22 Second, Plaintiff has sufficiently alleged a claim for defamation. In order to establish a  
23 *prima facie* case of defamation, a plaintiff must prove: (1) a false and defamatory statement by  
24 defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault,  
25 amounting to at least negligence; and (4) actual or presumed damages. *Chowdhry v. NLVH, Inc.*,  
26 109 Nev. 478, 483, 851 P.2d 459, 462 (1993) (citing Restatement (Second) of Torts, § 558 (1977)).  
27 “If the defamation tends to injure the plaintiff in his or her business or profession, it is deemed  
28 defamation *per se*, and damages will be presumed.” *Id.* at 483-84 (citing *Nevada Ind. Broad.*, 99

Nev. at 409, 664 P.2d at 341).

Here, Plaintiff alleged in his complaint specific false and defamatory statements, which included Defendants' conclusions that: (a) Bloom mismanaged his companies; (b) Bloom improperly used investor funding for personal use; (c) Bloom's companies engaged in a "fraudulent transaction"; (d) Bloom's conduct had "the earmarks of a Ponzi scheme"; (e) Bloom induced investors into pumping millions of dollars into his projects; and (f) Bloom did not comply with securities laws. *See* Complaint at ¶ 103. Such false and defamatory statements were published as a result of providing the Final Report to Green, a reporter for the Las Vegas Sun, who regurgitated the unsubstantiated statements in articles that are easily accessible by the public, including potential investors in Bloom's businesses. *Id.* at ¶¶ 107, 109. Moreover, Defendants provided the Final Report to Green for publication with knowledge of its falsity and/or reckless disregard as to its truth or falsity and/or negligence as to its truth or falsity. *Id.* at ¶ 108. Damages are presumed as Defendants' statements clearly denigrated Plaintiff's reputation and accused him of engaging in conduct and having traits incompatible with his business and profession as a businessman. *Id.* at ¶ 106. Accordingly, under Nevada law, Plaintiff has unmistakably and sufficiently alleged a cause of action for defamation.

Third, the absolute judicial immunity claimed by Defendants for communications published in judicial proceedings is also inapplicable in this litigation. In Nevada, defamatory statements made in good faith in the context of a judicial proceeding are protected by an absolute privilege; however, Nevada has also adopted the majority view that "statements made to the media are not subject to absolute privilege." *Jacobs v. Adelson*, 130 Nev. \_\_\_, 325 P.3d 1282, 1287 (2014), *reh'g denied* (Aug. 7, 2014). Thus, upon examining the policy considerations underlying the privilege, the Nevada Supreme Court has held, that "protecting speech made during a judicial proceeding does not warrant allowing the dissemination of defamatory communications outside of the judicial proceedings." *Id.*

Here, Plaintiff specifically alleged in his complaint that the defamatory statements were specifically provided to the Las Vegas Sun for the purpose of publication and dissemination. *See* Complaint at ¶¶ 107-109. Thus, because Defendants' defamatory statements were made to the

media, there exists no legal privilege or justification for Defendants' actions. *Id.* at ¶ 112. Accordingly, Defendants' Motion on Plaintiff's defamation claim must be denied.

***d. Plaintiff Has Sufficiently Pled a Claim for Alter Ego***

Lastly, Defendants argue that because Bertsch was not acting in a corporate capacity as a Special Master, thus Plaintiff's claim for alter ego must be dismissed as a matter of law. *See* Mot. at p. 17. However, not only does the order appointing Special Master actually appoint Bertsch & Associates as Special Master,<sup>11</sup> but as a matter of law, Plaintiff's alter ego claim sets forth the requisite elements for an alter ego claim and supports each element with sufficient allegations to pierce the Defendants' corporate veil.

Under Nevada law, "corporations are generally to be treated as separate legal entities" from the persons who own or manage the corporation. *LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896, 902, 8 P.3d 841, 845 (2000). However, "the equitable remedy of 'piercing the corporate veil' may be available to a plaintiff in circumstances where it appears that the corporation is acting as the alter ego of a controlling individual." *Id.*

Thus, to prevail on a claim of alter ego, a plaintiff must show by a preponderance of the evidence that: (1) the corporation was influenced and governed by the person asserted to be its alter ego, (2) there exists such unity of interest and ownership that one is inseparable from the other, and (3) the facts are such that adherence to the fiction of separate entity would, under the circumstances, sanction a fraud or promote injustice." *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 635, 189 P.3d 656, 660 (2008) (quoting *Ecklund v. Nevada Wholesale Lumber Co.*, 93 Nev. 196, 197, 562 P.2d 479, 479-80 (1977)). Moreover, when determining inseparability the Court may look to the following factors: (a) commingling of funds; (b) undercapitalization; (c) unauthorized diversion of funds; (d) treatment of corporate assets as the individual's own; and (e) failure to observe corporate formalities. *LFC Mktg. Group*, 116 Nev. at 904, 8 P.3d at 847.

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<sup>11</sup> The Order states that " 'Larry L. Bertsch, CPA & Associates, LLP' ('Larry Bertsch') is appointed special master in this case pursuant to Rule 53 of the Nevada Rules of Civil Procedure." *See* Ex. 6, at p. 2:18-20.

Here, as alleged in the complaint, Bertsch is the owner, operator and managing partner of Bertsch & Associates. *See* Ex. 1 at ¶ 3; *see also* Ex. 4. Plaintiff further alleged that there exists such a unity of interest such that Bertsch & Associates is inseparable from Bertsch, Defendants acted for each other in connection with the conduct alleged, and each of them performed the acts complained of. Ex. 1 at ¶¶ 131-132. As proof thereof, Vion submitted the rate sheet of Bertsch & Associates upon moving the court to appoint Bertsch as Special Master. *See* Ex. 3 at [VION 000304]. Moreover, Bertsch & Associates was appointed as Special Master in the Vion Litigation even though the name “Larry Bertsch” was used in reference to Bertsch & Associates in that order. *See* Ex. 6, at p. 2:18-20. Indeed, such interchangeable use of the names of Bertsch and Bertsch & Associates further demonstrates the unity of interest and inseparable nature of Defendants.

Therefore, Bertsch & Associates is the alter ego of Bertsch, and visa versa, with such unity of ownership and interest that the debts and obligations of each are the debts and obligations of the other and it would be manifestly unjust to recognize Defendants’ corporate separateness. Plaintiff has established a prima facie claim of alter ego, and the Court may pierce the corporate veil and recognize Bertsch as the alter ego of Bertsch & Associates, thereby imputing liability for the aforementioned damages on all Defendants.

**4. Discovery is Needed Pursuant to Nev. R. Civ. P. 56(f)**

If this Court is inclined to entertain the merits of Defendants’ Motion as one for summary judgment, and agree with Defendants that Plaintiff has not shown “enough evidence” at this stage of the proceedings, Plaintiff requests relief under Nev. R. Civ. P. 56(f) in order to allow this matter to continue to discovery.

Rule 56(f) permits a district court to grant a continuance when a party opposing a motion for summary judgment is unable to present facts in support of its position. *Ameritrade, Inc. v. First Interstate Bank of Nevada*, 105 Nev. 696, 699, 782 P.2d 1318, 1320 (1989). Thus, where cases are in the early stages of proceedings and the non-moving party has been diligent in pursuing the action, the Nevada Supreme Court has found that the denial of a Rule 56 motion is an abuse of discretion. *Id.* at 699–700, 782 P.2d at 1320 (concluding that the district court abused its discretion when summary judgment was granted only eight months after the filing of the complaint); *see also Halimi*



1 *v. Blacketor*, 105 Nev. 105, 770 P.2d 531 (1989) (less than one year had transpired between the time  
2 appellant filed his complaint and the time summary judgment was entered against him);  
3 *Summerfield v. Coca Cola Bottling Co.*, 113 Nev. 1291, 1294–95, 948 P.2d 704, 705–06 (1997)  
4 (holding that district court abused its discretion by denying an NRCP 56(f) motion for continuance  
5 when complaint had been filed two years previous and party was not dilatory in conducting  
6 discovery).

7 Here, Plaintiff's complaint was filed on February 14, 2015 – less than three months ago –  
8 and discovery has yet to commence. Thus, pursuant to Nev. R. Civ. P. 56(f), the following facts and  
9 issues, which cannot be ascertained without discovery, are essential to justify Plaintiff's position:

- 10 • Why Bertsch did not disclose his relationship with LSC until ten months after  
11 Defendants' appointment as Special Master.
- 12 • The extent of Defendants' relationship with LSC prior to appointment as Special  
13 Master.
- 14 • Why Bertsch did not disclose his *ex-parte* communications with LSC to the court or  
15 Bloom.
- 16 • The extent of Bertsch/Zmalia's communications with LSC.
- 17 • The extent of Bertsch/Zmalia's disclosure of privileged information to LSC.
- 18 • The extent of LSC's input in the Final Report.
- 19 • The facts upon which Bertsch relied to conclude that Bloom's businesses had  
20 "earmarks of a Ponzi scheme" and other defamatory statements.
- 21 • The extent of Bertsch/Zmalia's communications with Green at the Las Vegas Sun.
- 22 • Whether Bertsch's failure to speak to Bloom, the bookkeepers, or a single investor of  
23 the companies at issue prior to submitting the Final Report, constitutes gross  
24 negligence.
- 25 • Whether there exists any commingling of funds, undercapitalization, unauthorized  
26 diversion of funds, treatment of corporate assets as the individual's own or failure to  
27 observe corporate formalities to further support Plaintiff's claim for alter ego.
- 28 • The extent of Plaintiff's damages.

See Affidavit of Joseph Gutierrez, Esq., attached hereto as **Exhibit "25."**

As such, this Court must allow this case to proceed to discovery before judgment may be  
issued on any of Plaintiff's causes of action.

1 C. A DECLARATORY JUDGMENT IS NECESSARY PERTAINING TO DEFENDANTS' LACK OF  
2 IMMUNITY IN THIS MATTER

3 Pursuant to NRS 30.030, courts have the power to declare the "rights, status and other legal  
4 relations" in proceedings, despite the absence of such declaratory judgment or decree being prayed  
5 for. "The declaration may be either affirmative or negative in form and effect; and such  
6 declarations shall have the force and effect of a final judgment or decree." NRS 30.030. NRS  
7 30.040 further provides that:

8 Any person interested under a deed, written contract or other writings  
9 constituting a contract, or whose rights, status or other legal relations are  
10 affected by a statute, municipal ordinance, contract or franchise, may have  
11 determined any question of construction or validity arising under the  
12 instrument, statute, ordinance, contract or franchise and obtain a  
13 declaration of rights, status or other legal relations thereunder.

12 NRS 30.040(1).

13 The declaratory relief afforded under NRS 30.010 to 30.160, is remedial, thus the purpose  
14 is "to settle and afford relief from uncertainty and insecurity with respect to rights, status and other  
15 legal relations." NRS 30.140. The trial judge has discretion to make the determination, and the  
16 determination will not be disturbed on appeal absent abuse. *See El Capitan Club v. Fireman's*  
17 *Fund Ins. Co.*, 89 Nev. 65, 506 P. 2d 426 (1973); *see also* NRS 30.080 ("The court may refuse to  
18 render or enter a declaratory judgment or decree where such judgment or decree, if rendered or  
19 entered, would not terminate the uncertainty or controversy giving rise to the proceeding.").

20 Here, the Court must determine as a matter of law that Defendants are not immune from  
21 liability pursuant to the order entered in the Vion Litigation on October 10, 2011. The order  
22 appointing Special Master specifically listed which claims could be brought against Defendants as  
23 follows: "[t]he Special Master shall not be personally liable to any party for acts taken pursuant to  
24 the Special Mastership, **except** in the event of the Special Master's gross negligence, fraud or  
25 willful misconduct." *See* Ex. 6 at p. 6, ¶ 12 (emphasis added). Thus, as previously argued in  
26 section B(1)(a) herein, any actions taken by Defendants amounting to gross negligence, fraud or  
27 willful misconduct falls outside the scope of Defendants' immunity, if any exists.

28 ///

1 The language in this order was specifically agreed to by the parties, accepted by  
2 Defendants, and ordered by the court. Moreover, this language was never overruled by any  
3 subsequent order in the Vion Litigation. It is clear that any immunity afforded to Defendants in  
4 their capacity as Special Master was indisputably limited and therefore not absolute. Therefore,  
5 there exists no set of facts that would alter the certainty that Plaintiff was permitted to bring causes  
6 of action against Defendants for gross negligence, fraud or willful misconduct.

7 This legal determination is necessary to define which claims may be allowed to proceed  
8 against Defendants. Therefore, this Court may establish, by operation of law, the extent of  
9 Defendants' immunity in the instant litigation, if any is found to exist.

#### 10 IV. CONCLUSION

11 For the foregoing reasons, Plaintiff Jay Bloom respectfully requests that the Court deny  
12 Defendants' motion to dismiss in its entirety and enter a declaratory judgment concerning  
13 Defendants' immunity as a matter of law.

14 DATED this 4th day of May, 2015.

15 Respectfully submitted,

16 **MAIER GUTIERREZ AYON**

17 /s/ Joseph A. Gutierrez  
18 JOSEPH A. GUTIERREZ, ESQ.  
19 Nevada Bar No. 9046  
20 LUIS A. AYON, ESQ.  
21 Nevada Bar No. 9752  
22 MARGARET E. SCHMIDT, ESQ.  
23 Nevada Bar No. 12489  
24 400 South Seventh Street, Suite 400  
25 Las Vegas, Nevada 89101  
26 *Attorneys for Plaintiff Jay L. Bloom*  
27  
28

**CERTIFICATE OF SERVICE**

Pursuant to Administrative Order 14-2, a copy of **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND COUNTERMOTION FOR DECLARATORY JUDGMENT** was electronically filed on the 4<sup>th</sup> day of May, 2015 and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List and/or by depositing a true and correct copy of the same, enclosed in a sealed envelope upon which first class postage was fully prepaid, in the U.S. Mail at Las Vegas, Nevada, addressed as follows:

Adam Paul Laxalt  
Frederick J. Perdomo  
Bureau of Litigation  
Public Safety Division  
100 N. Carson Street  
Carson City, Nevada 89701

-and-

James R. Rosenberger, Esq.  
PICO ROSENBERGER  
3291 E. Warm Springs Road, Suite 400  
Las Vegas, Nevada 89120  
*Attorneys for Defendants Larry L. Bertsch and Larry L. Bertsch, CPA & Associates*

/s/ Charity Barber  
An Employee of MAIER GUTIERREZ AYON

# **EXHIBIT 10**

# **EXHIBIT 10**

**SUBP**

JOSEPH A. GUTIERREZ, ESQ.

Nevada Bar No. 9046

JASON R. MAIER, ESQ.

Nevada Bar No. 8557

**MAIER GUTIERREZ AYON PLLC**

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*Attorneys for Defendants, Counter-claimants and  
Third-Party Plaintiffs Jay Bloom, Carolyn Farkas,  
Eagle Group Holdings, LLC, A.D.D. Productions,  
LLC, and Order 66 Entertainment, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

VION OPERATIONS LLC, a Nevada limited  
liability company; and STRATEGIC  
FUNDING SOURCE, INC. a New York  
corporation,

Plaintiffs,

vs.

JAY L. BLOOM, an individual; CAROLYN  
FARKAS, an individual; EAGLE GROUP  
HOLDINGS, LLC, a Nevada limited liability  
company; EAGLE GROUP MARKETING,  
LLC, a Nevada limited liability company;  
A.D.D. Productions, LLC; a Nevada limited  
liability company; ORDER 66  
ENTERTAINMENT, LLC., a Nevada limited  
liability company; DOES I through X; and ROE  
CORPORATIONS I through X,

Defendants.

JAY L. BLOOM, an individual; CAROLYN  
FARKAS, an individual; EAGLE GROUP  
HOLDINGS, LLC, a Nevada limited liability  
company; ORDER 66 ENTERTAINMENT,  
LLC, a Nevada limited liability company,

Counter-claimants,

vs.

Case No.: A-11-646131-C

Dept. No.: XXVI

**SUBPOENA DUCES TECUM**

VION OPERATIONS LLC, a Nevada limited liability company; and STRATEGIC FUNDING SOURCE, INC. a New York corporation,

Counter-defendants.

JAY L. BLOOM, an individual; CAROLYN FARKAS, an individual; EAGLE GROUP HOLDINGS, LLC, a Nevada limited liability company; ORDER 66 ENTERTAINMENT, LLC, a Nevada limited liability company,

Third-Party Plaintiffs,

vs.

LOUIS VENTRE, an individual; ANDREW REISER, an individual; STRATEGIC CAPITAL MANAGEMENT, LLC, a New York limited liability company; STACEY SCHACTER, an individual; BARBARA ANDERSON, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Third-Party Defendants.

**THE STATE OF NEVADA SENDS GREETINGS TO:**

**Larry L. Bertsch, CPA  
LARRY L. BERTSCH, CPA & ASSOCIATES, LLP  
265 E. Warm Springs Rd. #104  
Las Vegas, Nevada 89119**

YOU ARE COMMANDED that all and singular, business and excuses set aside, you produce and permit inspection, copying, testing, or sampling of the documents, electronically stored information or tangible things designated below. You shall produce such documents, electronically stored information or tangible things by the 6<sup>th</sup> day of November, 2012 at the hour of 4:00 p.m. at the law offices of MAIER GUTIERREZ AYON PLLC, 2500 W. Sahara Avenue, Suite 106, Las Vegas, Nevada 89102.

///

///

1 If you fail to attend or produce documents, you may be deemed guilty of contempt of Court  
2 and liable to pay all losses and damages caused by your failure to appear. Please see Exhibit "A"  
3 attached hereto for information regarding the rights of the person subject to this Subpoena.

4 **ITEMS TO BE PRODUCED**

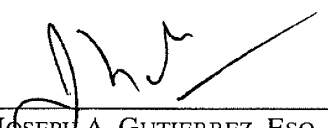
5 YOU ARE REQUIRED TO BRING WITH YOU AT THE TIME OF YOUR  
6 APPEARANCE any items set forth hereinafter.

7 1. Any and all documents, emails, and communications with any and all parties to this  
8 litigation.

9 DATED this 19<sup>th</sup> day of October, 2012.

10 Respectfully submitted,

11 **MAIER GUTIERREZ AYON PLLC**

12   
13 \_\_\_\_\_  
14 JOSEPH A. GUTIERREZ, ESQ.  
15 Nevada Bar No. 9046  
16 JASON R. MAIER, ESQ.  
17 Nevada Bar No. 8557  
18 2500 West Sahara Avenue, Suite 106  
19 Las Vegas, Nevada 89102  
20 *Attorneys for Defendants, Counter-claimants*  
21 *and Third-Party Plaintiffs Jay Bloom, Carolyn*  
22 *Farkas, Eagle Group Holdings, LLC, A.D.D.*  
23 *Productions, LLC, and Order 66*  
24 *Entertainment, LLC*  
25  
26  
27  
28



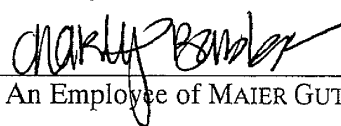
**CERTIFICATE OF SERVICE**

I do hereby certify that on the 19<sup>th</sup> day of October, 2012, I served a copy of the foregoing  
**SUBPOENA DUCES TECUM** via electronic mail and depositing a true and correct copy of the  
same, enclosed in a sealed envelope upon which first class postage was fully prepaid, in the U.S.  
Mail at Las Vegas, Nevada, addressed as follows:

Todd M. Touton, Esq.  
Robert Hernquist, Esq.  
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*Attorneys for Vion Operations LLC  
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ANTHONY A. ZMAILA LIMITED PLLC  
265 E. Warm Springs Rd.  
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Las Vegas, Nevada 89119

  
An Employee of MAIER GUTIERREZ AYON PLLC

**AFFIDAVIT OF SERVICE**

STATE OF NEVADA       )  
  ) ss:  
COUNTY OF CLARK       )

\_\_\_\_\_, being duly sworn says: That at all times herein  
Affiant was over 18 years of age, not a party to nor interested in the proceeding in which the  
affidavit is made. That affiant received the Subpoena on the \_\_\_\_ day of \_\_\_\_\_, 2012,  
and served the same on the \_\_ day of \_\_\_\_\_, 2012, by delivering a copy to the witness at:

\_\_\_\_\_  
\_\_\_\_\_.

I declare under penalty and perjury under the law of the State of Nevada that the foregoing is  
true and correct.

EXECUTED this \_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
Signature of person making service

EXHIBIT "A"  
NEVADA RULES OF CIVIL PROCEDURE

**Rule 45**

(c) Protection of Persons Subject to Subpoena.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was used shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party of an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (i) fails to allow reasonable time for compliance;
- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
- (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
- (iv) subjects a person to undue burden.

(B) If a subpoena

- (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonable compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

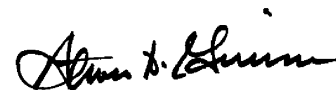
(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

# **EXHIBIT 11**

# **EXHIBIT 11**

ORIGINAL

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11/13/2012 03:29:40 PM



CLERK OF THE COURT

**MOT**

Anthony A. Zmaila (NV Bar No. 2319)

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*Attorneys for Larry L. Bertsch, Special Master*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

VION OPERATIONS, LLC, a Delaware  
limited liability company; and STRATEGIC  
FUNDING SOURCE, INC., a New York  
corporation,

Plaintiff,

v.

JAY L. BLOOM, an individual; CAROLYN S.  
FARKAS, an individual; EAGLE GROUP  
HOLDINGS, LLC, a Nevada limited liability  
company; A.D.D. PRODUCTIONS, LLC, a  
Nevada limited liability company; ORDER  
66 ENTERTAINMENT, LLC, a Nevada  
limited liability company; DOES I through X;  
and ROE CORPORATIONS I through X,

Defendants.

JAY L. BLOOM, an individual; CAROLYN S.  
FARKAS, an individual; EAGLE GROUP  
HOLDINGS, LLC, a Nevada limited liability  
company; ORDER 66 ENTERTAINMENT,  
LLC, a Nevada limited liability company,

Counter-claimants,

v.

VION OPERATIONS, LLC, a Delaware  
limited liability company; and STRATEGIC  
FUNDING SOURCE, INC., a New York  
corporation,

Counter-defendants.

Case No. A-11-646131-C  
Dept. XXVI

**SPECIAL MASTER'S MOTION (1) TO  
QUASH NOTICES OF DEPOSITION; AND  
(2) FOR PROTECTIVE ORDER ON AN  
EX PARTE APPLICATION FOR AN  
ORDER SHORTENING TIME**

FILE WITH  
MASTER CALENDAR

1 JAY L. BLOOM, an individual;  
2 CAROLYN S. FARKAS, an individual;  
3 EAGLE GROUP HOLDINGS, LLC, a  
4 Nevada limited liability company;  
5 ORDER 66 ENTERTAINMENT, LLC, a  
6 Nevada limited liability company,

7 Third-Party Plaintiffs,

8 v.

9 LOUIS VENTER, an individual;  
10 ANDREW REISER, an individual;  
11 STRATEGIC FUNDING SOURCE, INC.,  
12 a New York corporation; STRATEGIC  
13 CAPITAL MANAGEMENT, LLC, a New  
14 York limited liability company; STACEY  
15 SCHACTER, an individual; BARBARA  
16 ANDERSON, an individual; DOES I  
17 through X; and ROE CORPORATIONS I  
18 through X,

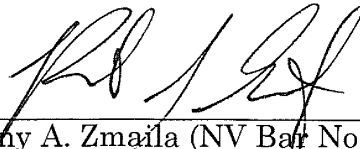
19 Third-Party Defendants.

20 Special Master Larry L. Bertsch ("Special Master") files "Special Master's Motion  
21 (1) to Quash Notices of Depositions and (2) for Protective Order on an Ex Parte  
22 Application for an Order Shortening Time" ("Motion").

23 This Motion is made and based on the papers and pleadings on file, the attached  
24 memorandum of points and authorities, together with such other and further evidence  
25 and argument as may be presented and considered by this Court at any hearing on this  
26 Motion.

27 Dated this 6th day of November, 2012.

28 **ANTHONY A. ZMAILA LIMITED PLLC**



Anthony A. Zmaila (NV Bar No. 2319)  
Peter J. Goatz (NV Bar No. 11577)  
265 East Warm Springs Rd., Suite 100  
Las Vegas, Nevada 89119

*Attorneys for Larry L. Bertsch, Special Master*

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**ORDER SHORTENING TIME**

Upon good cause shown, please take notice that the hearing before the above-entitled Court on the **Special Master's Motion (1) to Quash Notices of Deposition and (2) for Protective Order** is shortened to the 2<sup>1ST</sup> day of November, 2012 at 9:00 AM, or as soon thereafter as counsel can be heard, in Department XXVI located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155.

This Order Shortening Time shall be served on parties who have appeared in this action no later than 11/13/12.

The parties who have appeared in this action may file a response or opposition no later than 11/15/12.

Special Master must file a reply to any filed response or opposition no later than 11/19/12.

Dated this 13 day of November, 2012.

  
DISTRICT COURT JUDGE

GA

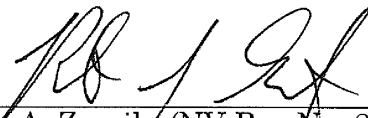
1                   **Ex Parte Application for an Order Shortening Time**

2           EDCR 2.26 permits the Court to shorten the time for a hearing on motions  
3 presented to the Court. EDCR 2.26 requires that such a request be supported by a  
4 declaration of counsel that describes the circumstances claimed to constitute good  
5 cause to justify shortening time. EDCR 2.26 requires that “[i]f a motion to shorten time  
6 is granted, it must be served upon all parties promptly.” If a motion to shorten time is  
7 granted, the “order which shortens the notice of a hearing to less than 10 days may not  
8 be served by mail.” Finally, the Court is prohibited from shortening the notice of the  
9 hearing of a motion to less than one full judicial day. EDCR 2.26.

10          As demonstrated by the following declaration of counsel, good cause exists to  
11 shorten the notice and hearing time in this matter. Plaintiffs and Defendants have also  
12 consented to have the Motion heard on shortened time. Special Master asks that this  
13 Court enter an order granting this application for an order shortening time and set a  
14 briefing schedule on the motion which is proposed to be heard on shortened time.

15          Dated this 6th day of November, 2012.

16                                   **ANTHONY A. ZMAILA LIMITED PLLC**

17                                   

18                                   \_\_\_\_\_  
19 Anthony A. Zmaila (NV Bar No. 2319)  
20 Peter J. Goatz (NV Bar No. 11577)  
21 265 East Warm Springs Rd., Suite 100  
22 Las Vegas, Nevada 89119

23                                   *Attorneys for Larry L. Bertsch, Special Master*  
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**DECLARATION OF PETER J. GOATZ IN SUPPORT  
OF ORDER SHORTENING TIME**

I, Peter J. Goatz, state under penalty of perjury declare:

(1) I am an attorney licensed in the State of Nevada and in good standing.

(2) I am an associate of the law firm of Anthony A. Zmaila Limited PLLC, attorneys for Special Master Larry L. Bertsch.

(3) I make this Declaration in support of the Ex Parte Application for an Order Shortening Time.

(4) On October 18, 2012, approximately two hours after Special Master filed his final report, Defendants Jay Bloom, Carolyn Farkas, Eagle Group Holdings, LLC, A.D.D. Productions, LLC and Order 66 Entertainment, LLC ("Defendants") filed "Motion to Disqualify and For Sanctions" ("Sanctions Motion") A hearing on the motion is scheduled for November 21, 2012 at 9:00am.

(5) On October 19, 2012, Defendants issued Subpoena Duces Tecum directed at Special Master and Special Master's counsel demanding that they produce by November 6, 2012: "Any and all documents, emails, and communications with any and all parties to this litigation." Exs. A and B.

(6) On October 19, 2012, Defendants noticed the deposition of Special Master Larry L. Bertsch. The notice purports to command Special Master to appear for a deposition to be conducted on November 20, 2012 at 10:00am. Ex. C.

(7) On October 23, 2012, Defendants noticed the deposition of Special Master Larry L. Bertsch's counsel Anthony A. Zmaila. The notice purports to command Special Master's counsel to appear for a deposition to be conducted on November 27, 2012 at 10:00am. Ex. D.

(8) On November 2, 2012, our office sent to Defendants' counsel a letter objecting to the subpoenas pursuant to NRCP 45. Ex. E.

(9) On November 3, 2012, I spoke with Defendants' counsel regarding Special Master and his counsel's response to the subpoenas. No resolution was reached. Ex. F.

1 (10) On November 6, 2012, I spoke with Defendants' counsel via telephone  
2 pursuant to EDCR 2.34 regarding the noticed depositions and the issued subpoenas.  
3 No resolution was reached. Defendants' counsel stated his consent for a hearing on the  
4 Motion on shortened time because he does not wish to move the depositions past the  
5 hearing date scheduled for the Sanctions Motion.

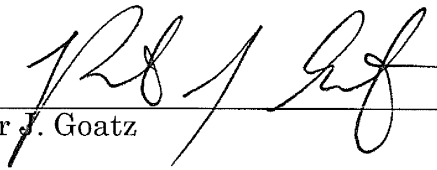
6 (11) Also on November 6, 2012, I spoke with Plaintiffs' counsel who expressed  
7 consent to have this Motion heard on shortened time.

8 (12) The resolution of the Motion in the normal course will not provide Special  
9 Master with relief prior to the proposed deposition date of November 20, 2012.

10 (13) This request for an order shortening time is made in good faith and  
11 without dilatory motive.

12 I declare that the foregoing is true and correct, to the best of my knowledge.

13 Dated this 6th day of November, 2012.

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16 Peter J. Goatz  
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1 **Points and Authorities**

2 **I. Introduction**

3 Defendants Jay Bloom, Carolyn Farkas, Eagle Group Holdings, LLC, A.D.D.  
4 Productions, LLC and Order 66 Entertainment, LLC (“Defendants”) seek to depose  
5 Special Master and his counsel in connection with the performance of Special Master’s  
6 judicial duties in this case. Defendants do not formally state their interest in the  
7 discovery sought to be elicited from Special Master and his counsel at the noticed  
8 depositions. In conversations with Defendants’ counsel, however, the stated reason  
9 appears to be related to the Sanctions Motion and the disqualification of both Special  
10 Master and Plaintiffs’ counsel. Such a reason does not demonstrate extraordinary  
11 cause for subjecting Special Master and his counsel to discovery. As such, the Court  
12 should quash the notices of deposition of Special Master and his counsel and enter a  
13 protective order against frivolous discovery requests by the parties unless good cause is  
14 shown.

15 **II. Statement of Facts**

16 On October 10, 2011, the Court entered an *Order* appointing Larry L. Bertsch as a  
17 special master in this case pursuant to Nevada Rule of Civil Procedure 53. Pursuant to  
18 the *Order*, Special Master was granted broad authority to investigate the activities of  
19 the parties to the litigation and to make a report on his findings to the Court for  
20 adoption.

21 On August 29, 2012, Plaintiffs’ counsel informed the Court and the parties of a prior  
22 relationship with Special Master. No party filed a motion to disqualify Special Master  
23 or withdraw the reference.

24 On October 18, 2012, Special Master filed his Final Report containing his findings  
25 in response to the questions the Court directed him to answer in the *Order*. Special  
26 Master’s duties in this case are now complete.

1 On October 18, 2012, approximately two hours after Special Master filed his Final  
2 Report, Defendants filed "Motion to Disqualify and For Sanctions" ("Sanctions Motion")  
3 A hearing on the motion is scheduled for November 21, 2012 at 9:00am.

4 On October 19, 2012, Defendants noticed the deposition of Special Master. The  
5 notice purports to command Special Master to appear for a deposition to be conducted  
6 on November 20, 2012 at 10:00am. Ex. C.

7 Also on October 19, 2012, Defendants issued Subpoena Duces Tecum directed at  
8 Special Master and Special Master's counsel demanding that they produce by  
9 November 6, 2012:

10 Any and all documents, emails, and communications with  
11 any and all parties to this litigation.

12 Exs. A and B.

13 On October 23, 2012, Defendants noticed the deposition of Special Master's counsel  
14 Anthony A. Zmaila. The notice purports to command Special Master's counsel to  
15 appear for a deposition to be conducted on November 27, 2012 at 10:00am. Ex. D.

16 On November 2, 2012, Special Master and his counsel objected to the issued  
17 subpoenas. Ex. E.

18 On November 5, 2012, Special Master filed "Special Master's Statement Regarding  
19 Defendants' Motion to Disqualify and for Sanctions" wherein he explains the alleged  
20 disqualifying event which forms the basis of the Sanctions Motion and Defendants'  
21 request that Lionel Sawyer and Collins be disqualified from the case.

22 Between November 3 and November 6, 2012, Special Master and Defendants  
23 attempted to resolve their discovery disputes without the need of the Court's  
24 intervention. No resolution, however, was reached.

### 25 **III. Defendants Have Not Shown Good Cause for their Discovery**

26 Defendants wish to subject Special Master and his counsel to discovery. The exact  
27 reason has not been formally presented to the Court. Special Master is informed that  
28 Defendants discovery requests are geared toward the Sanctions Motion and not the

1 prosecution or defense of their positions in this case. Defendants reasons, whatever  
2 they may ultimately be, do not give rise to the extraordinary measure of subjecting a  
3 judicial officer to discovery.

4 The Nevada Supreme Court has never addressed the issue of whether a special  
5 master can be subjected to discovery in a case in which they are appointed. Courts that  
6 have addressed the issue, however, uniformly treat a special master as a judicial officer  
7 and apply a high level of scrutiny to a discovery request directed at a special master.

8 The Supreme Court has stated that when a special master accepts an appointment  
9 by the court, the special master assumes "the duties and obligations of a judicial  
10 officer." *In re Gilbert*, 276 U.S. 6, 9 (1928); *see also York Int'l Bldg., Inc. v. Chaney*, 527  
11 F.2d 1061, 1068 (9th Cir. 1975). Courts recognize that judicial officers do not enjoy  
12 immunity from subpoena, and that they can be subjected to discovery requests, but it is  
13 clear that such officers, while performing their decision-making processes, are not  
14 generally subject to discovery. *US v. Morgan*, 313 U.S. 409, 422 (1941); *Gary W. v.*  
15 *State of Louisiana Dept. of Health & Human Resources*, 861 F.2d 1366, 1369 (5th Cir.  
16 1988); *Cobell v. Norton*, 237 F.Supp.2d 71, 100 (D.D.C. 2003); *Alford v. Aaron Rents,*  
17 *Inc.*, 2010 WL 3522804, \*2 (S.D. Ill. 2010) (special master serves in a judicial capacity  
18 and "is not subject to discovery of his mental processes").

19 In Nevada, the Legislature has saw to deem judges incompetent to testify as a  
20 witness in a case where the judge is presiding over a trial. NRS 50.055. This law  
21 conforms to the uniform prohibition against judicial testimony. Courts, however, have  
22 noted that when a judicial officer is called to testify regarding actions taken in his  
23 judicial capacity, the court should carefully scrutinize the grounds set forth for  
24 requiring his testimony. *US v. Dowdy*, 440 F.Supp. 894 (W.D. Va. 1977). Only in the  
25 most extraordinary of cases, such as a strong showing of bad faith or improper behavior  
26 or where circumstances were such to overcome the presumption of regularity as to the  
27 acts of the decision maker, may a judicial official be questions as to matter within the  
28 scope of his adjudicative duties. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S.

1 402, 420, 91 S.Ct. 814 (1971); *Cobell*, 237 F.Supp.2d at 100. Mere allegations of bias do  
2 not justify compelling a judicial officer to testify regarding his mental processes.  
3 *McGoldrick v. Koch*, 110 F.R.D. 153, 156 (S.D.N.Y. 1986).

4 The policy against subjecting judicial officers to discovery is strong. In quashing a  
5 subpoena directed towards a judge to appear at a perjury trial, the *Dowdy* court  
6 cautioned against the issuance of a subpoena. The court stated that “[s]hould a judge  
7 be vulnerable to subpoena as to the basis of every action taken by him, the judiciary  
8 would be open to ‘frivolous attacks upon its dignity and integrity . . .’” *Dowdy*,  
9 440 F.Supp. at 896. The court went on to state the general rule that courts should not  
10 issue subpoenas for oral testimony of the decision-makers as to the basis for their  
11 opinions absent extreme and extraordinary circumstances.” *Id.*

12 In the Seventh Circuit, the court has stated the rule that there is a general  
13 prohibition against judicial testimony. *US v. Frankenthal*, 582 F.2d 1102, 1108 (7th  
14 Cir. 1978). To have a judge testify, the court must determine that (1) the judge  
15 possesses factual knowledge; (2) that knowledge is highly pertinent to the jury’s task;  
16 and (3) the judge’s testimony is the only possible source of testimony on the relevant  
17 factual information. *US v. Roth*, 332 F.Supp.2d 565, 568 (S.D.N.Y. 2004)(restating the  
18 test); *State v. Comprehensive Health of Planned Parenthood of Kansas & Mid-Missouri,*  
19 *Inc.*, 291 Kan. 322, 364, 241 P.3d 45, 73 (2010)(adopting the *Roth* rule). In no case,  
20 however, may the questioning delve into the mental processes employed by the judicial  
21 officer in reaching his decision. *Standard Packaging v. Curwood, Inc.*, 365 F.Supp. 134,  
22 135 (N.D. Ill. 1973).

23 Courts have also noted that “[i]n many instances, the party seeking the discovery  
24 has access to the sought after information through alternative sources. In other  
25 instances, the information is cumulative, unnecessary, or does not lead to the discovery  
26 of admissible evidence.” *Beam v. Dept. of the Air Force*, 139 F.R.D. 309, 310 (D. Md.  
27 1996).

# **EXHIBIT 12**

# **EXHIBIT 12**

ORIGINAL

*Alvin D. Quinn*

CLERK OF THE COURT

1 **ORDR**

2 Anthony A. Zmaila (NV Bar No. 2319)

3 Email: tony@aaznevada.com

4 Peter J. Goatz (NV Bar No. 11577)

5 Email: peter@aaznevada.com

6 **ANTHONY A. ZMAILA LIMITED PLLC**

7 265 East Warm Springs Rd., Suite 100

8 Las Vegas, Nevada 89119

9 Telephone: (702) 614-8800

10 Facsimile: (702) 614-8700

11 *Attorneys for Larry L. Bertsch, Special Master*

12 **DISTRICT COURT**

13 **CLARK COUNTY, NEVADA**

14 VION OPERATIONS, LLC, a Delaware  
15 limited liability company; and STRATEGIC  
16 FUNDING SOURCE, INC., a New York  
17 corporation,

18 Plaintiffs,

19 v.

20 JAY L. BLOOM, an individual; CAROLYN S.  
21 FARKAS, an individual; EAGLE GROUP  
22 HOLDINGS, LLC, a Nevada limited liability  
23 company; A.D.D. PRODUCTIONS, LLC, a  
24 Nevada limited liability company; ORDER  
25 66 ENTERTAINMENT, LLC, a Nevada  
26 limited liability company; DOES I through X;  
27 and ROE CORPORATIONS I through X,

28 Defendants.

JAY L. BLOOM, an individual; CAROLYN S.  
FARKAS, an individual; EAGLE GROUP  
HOLDINGS, LLC, a Nevada limited liability  
company; ORDER 66 ENTERTAINMENT,  
LLC, a Nevada limited liability company,

Counter-claimants,

v.

VION OPERATIONS, LLC, a Delaware  
limited liability company; and STRATEGIC  
FUNDING SOURCE, INC., a New York  
corporation,

Counter-defendants.

Case No. A-11-646131-C  
Dept. XXVI

**ORDER GRANTING IN PART SPECIAL  
MASTER'S MOTION (1) TO QUASH  
NOTICES OF DEPOSITION; AND (2) FOR  
PROTECTIVE ORDER ON AN EX PARTE  
APPLICATION FOR AN ORDER  
SHORTENING TIME**

Date of Hearing: November 21, 2012  
Time of Hearing: 9:00am



1 JAY L. BLOOM, an individual;  
2 CAROLYN S. FARKAS, an individual;  
3 EAGLE GROUP HOLDINGS, LLC, a  
4 Nevada limited liability company;  
5 ORDER 66 ENTERTAINMENT, LLC, a  
6 Nevada limited liability company,

Third-Party Plaintiffs,

v.

7 LOUIS VENTER, an individual;  
8 ANDREW REISER, an individual;  
9 STRATEGIC FUNDING SOURCE, INC.,  
10 a New York corporation; STRATEGIC  
11 CAPITAL MANAGEMENT, LLC, a New  
12 York limited liability company; STACEY  
13 SCHACTER, an individual; BARBARA  
14 ANDERSON, an individual; DOES I  
15 through X; and ROE CORPORATIONS I  
16 through X,

Third-Party Defendants.

17 This Matter came before the Court on Special Master Larry L. Bertsch's ("Special  
18 Master") "Special Master's Motion (1) to Quash Notices of Depositions and (2) for  
19 Protective Order on an Ex Parte Application for an Order Shortening Time" ("Motion").

Special Master gave appropriate notice of the Motion.

20 On November 15, 2012, Jay Bloom, Carolyn Farkas, Eagle Group Holdings, LLC,  
21 A.D.D. Productions, LLC and Order 66 Entertainment, LLC (collectively "Defendants")  
22 filed "Defendants' Opposition to Special Master's Motion for Protective Order"  
23 ("Opposition").

On November 19, 2012, Special Master filed "Reply to Defendants' Opposition to  
Special Master's Motion for Protective Order" ("Reply").

24 On November 20, 2012, Special Master filed "Errata to Reply to Defendants'  
25 Opposition to Special Master's Motion for Protective Order" correcting various  
26 scrivener's errors contained in the Reply.

1 On November 21, 2012, the Court conducted a hearing on the Motion. Anthony A.  
2 Zmaila, Esq. and Peter J. Goatz, Esq. appeared for Special Master, who was also  
3 present; Todd M. Touton, Esq., Robert Hernquist, Esq., and Christopher Mathews, Esq.  
4 appeared for Vion Operations, LLC; and Joseph A. Gutierrez, Esq. and Jeffrey R.  
5 Albregts, Esq. appeared on behalf of Defendants. Jay L. Bloom was also present.

6 Mr. Goatz argued to narrow the scope of the discovery sought by Defendants in  
7 their subpoenas duces tecum directed at Special Master and his counsel, Anthony A.  
8 Zmaila. Mr. Gutierrez argued that the scope of the production of documents requested  
9 by Defendants was narrowed to include emails, documents and correspondence from  
10 any of the parties to the action, third parties to the case, and any attorney representing  
11 any party that was not otherwise privileged, and that Defendants would accept a list of  
12 all documents and information Special Master reviewed in forming his reports.  
13 Mr. Gutierrez further argued that Special Master should be treated as an expert  
14 witness and that Special Master's entire file should be discoverable.

15 Mr. Goatz argued that Special Master should be treated as a third-party neutral  
16 and extension of the Court, and any proposed discovery would be subject to the  
17 limitations outlined in the order appointing Special Master. He also argued that  
18 Special Master's thought processes and formulations in rendering his reports are not  
19 subject to discovery. Thus, Special Master should be treated as a third party neutral  
20 and discovery should be limited in scope to those matters directly related to  
21 Defendants' allegations of bias based upon an undisclosed attorney-client relationship  
22 between Special Master and Lionel Sawyer & Collins on an unrelated matter. Further,  
23 Mr. Goatz argued that Special Master's counsel should not be deposed.

24 The Court read and considered the papers and pleadings on file in connection with  
25 the Motion, and considered the arguments of counsel.

26 The Court finds and concludes that

27 (1) Special Master is not to be treated as an expert witness in this matter.  
28

1 (2) The scope of Defendants' subpoenas duces tecum directed at Special Master and  
2 his counsel are tailored pursuant to the terms of this Order.

3 (3) There is no basis for Defendants to take the deposition of Special Master's  
4 counsel, Anthony A. Zmaila.

5 (4) The Court reserves ruling on whether to quash the deposition of Special Master.

6 (5) Production of documents by Special Master is limited pursuant to this Order.

7 Good cause appearing,

8 **IT IS ORDERED** that Special Master's Motion is granted in part.

9 **IT IS FURTHER ORDERED** that the Court reserves ruling on Special Master's  
10 request to quash the notice of deposition directed at Special Master.

11 **IT IS FURTHER ORDERED** that the notice of deposition directed at Anthony A.  
12 Zmaila is quashed.

13 **IT IS FURTHER ORDERED** that the subpoena duces tecum directed at Special  
14 Master and his counsel are modified and limited to a request for all writings, emails,  
15 correspondences, and documents related to this case between Special Master and his  
16 counsel, and their employees, and Vion Operations, LLC and Strategic Funding Source,  
17 Inc. and their counsel, Lionel Sawyer & Collins, for the period between August 1, 2011  
18 and December 17, 2012.

19 **IT IS FURTHER ORDERED** that on or before December 21, 2012, Special Master  
20 is to produce to Defendants all writings, emails, correspondences, and documents  
21 related to this case, which are not otherwise privileged or work product, that Special  
22 Master, his agents, employees, and/or counsel, received from or sent to Vion  
23 Operations, LLC and/or Strategic Funding Source, Inc. their agents, employees, and  
24 counsel, between August 1, 2011 and December 17, 2012.

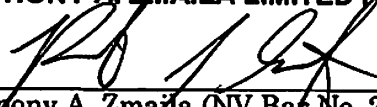
1       **IT IS FURTHER ORDERED** that if after production of the documents required to  
2 be given to Defendants pursuant to this Order, Defendants wish to depose Special  
3 Master, they must file a motion demonstrating the need to take Special Master's  
4 deposition and the scope of topics the deposition is intended to cover.

5       Dated this 28<sup>th</sup> day of December, 2012.

6  
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8         
DISTRICT COURT JUDGE       

9       Prepared and submitted by:


10       **ANTHONY A. ZMAILA LIMITED PLLC**

11         
12       Anthony A. Zmaila (NV Bar No. 2319)  
13       Peter J. Goatz (NV Bar No. 11577)  
14       265 East Warm Springs Road, Suite 100  
15       Las Vegas, Nevada 89119

16       *Attorneys for Larry L. Bertsch, Special Master*

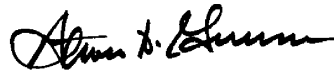
17       Reviewed by:

18       **MAIER GUTIERREZ AYON PLLC**

19         
20       Joseph A. Gutierrez (NV Bar No. 9046)  
21       Jason B. Maier (NV Bar No. 8557)  
22       2500 West Sahara Avenue, Suite 106  
23       Las Vegas, Nevada 89102

24       *Attorneys for Defendants*  
25  
26  
27  
28

## EXHIBIT “21”



CLERK OF THE COURT

**OPPM**

Anthony A. Zmaila (NV Bar No. 2319)

Email: tony@aaznevada.com

Peter J. Goatz (NV Bar No. 11577)

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*Attorneys for Larry L. Bertsch, CPA & Associates, LLP, Special Master*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

VION OPERATIONS, LLC, a Delaware  
limited liability company; and  
STRATEGIC FUNDING SOURCE, INC.,  
a New York corporation,

Plaintiffs,

v.

JAY L. BLOOM, an individual;  
CAROLYN S. FARKAS, an individual;  
EAGLE GROUP HOLDINGS, LLC, a  
Nevada limited liability company;  
EAGLE GROUP HOLDINGS, LLC, a  
Nevada limited liability company; A.D.D.  
PRODUCTIONS, LLC, a Nevada limited  
liability company; ORDER 66  
ENTERTAINMENT, LLC, a Nevada  
limited liability company; DOES I  
through X; and ROE CORPORATIONS I  
through X,

Defendants.

AND ALL RELATED CLAIMS.

Case No. A-11-646131-C  
Dept. XXVI

**SPECIAL MASTER'S OPPOSITION TO  
DEFENDANTS'/COUNTERCLAIMANTS'/  
THIRD PARTY PLAINTIFFS'  
SUPPLEMENTAL BRIEF**

Hearing Date: July 19, 2013

Hearing Time: 10:00am

Special Master Larry L. Bertsch, CPA & Associates, LLP ("Special Master") files  
this "Opposition to Defendants' Supplemental Brief and Memorandum of Fees and  
Costs in Support of Countermotion for Sanctions" ("Defendants' Supplement")  
("Opposition").

1 This Opposition<sup>1</sup> is made and based on the papers and pleadings on file, the  
2 attached memorandum of points and authorities, together with such other and further  
3 evidence and argument as may be presented and considered by this Court at any  
4 hearing on this matter.

## 5 Points and Authorities

### 6 I. Introduction

7 The question put to Jay Bloom, Carolyn Farkas, Eagle Group Holdings, LLC (“Eagle  
8 Group”), A.D.D. Productions, LLC (“ADD”) and Order 66 Entertainment, LLC (“Order  
9 66”)<sup>2</sup> (collectively “Defendants”) is whether any statute, rule or case law supports an  
10 award of attorney’s fees and costs as a sanction against a special master who  
11 successfully defends against an untimely attack and which does not result in the Court  
12 ruling ordering a special master’s recusal.

13 Defendants have failed to answer the Court’s question truthfully and honestly.  
14 Rather than own up to their failure to find such authority, Defendants put forth a  
15 demonstrably untenable argument that is predicated on a baseless notion that  
16 Defendants somehow, some way, prevailed in its motion to disqualify Special Master.

17 Defendants’ argument flows from the flawed premise that Defendants prevailed.  
18 This predicate leads them down an untenable path where Defendants do not find any

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19 <sup>1</sup> Special Master incorporates and adopts, by this reference, “Special Master’s Opposition to  
20 Motion to Disqualify Larry Bertsch as Special Master, Strike the Special Master’s Reports from  
21 the Record and for Monetary Sanctions” filed March 18, 2013; “Special Master’s Omnibus  
22 Reply in Support of Fourth Joint Application for Allowance of Fees and Costs of Special Master  
23 and Special Master’s Counsel for the Period February 13, 2012 through December 31, 2012 and  
24 Motion to Re-Allocate Payment of Special Master’s Compensation and to Reduce Outstanding  
25 Unpaid Compensation to Judgment” filed March 27, 2013, and “Motion for Order: (1) Accepting  
26 Special Master’s Final Report; and (2) Discharging Special Master, filed March 27, 2013” filed  
27 February 12, 2013; and “Supplement to: Fourth Joint Application for Allowance of Fees and  
28 Costs of Special Master and Special Master’s Counsel for the Period February 13, 2012 through  
October 17, 2012 and; Motion to Re-Allocate Payment of Special Master’s Compensation to  
Judgment” filed May 2, 2013; and “Special Master’s Opposition to  
Defendants’/Counterclaimants’/Third Party Plaintiffs’ Supplemental Brief” filed on May 24,  
2013.

<sup>2</sup> According to the Nevada Secretary of State’s website, Eagle Group Holdings, LLC is in  
default status and A.D.D. Productions, LLC and Order 66 Entertainment, LLC have been  
revoked.

1 applicable authority for sanctioning Special Master. Defendants' reliance on Nevada  
2 Code of Judicial Conduct ("NCJC"), NRS 18.010(2) and EDCR 7.60(b)(2) is of no  
3 moment.

4 Defendants brazenly and with impunity misstate the facts and this Court's rulings  
5 to support their misguided quest for sanctions against Special Master. The  
6 misstatements related to their unfounded and failed attempt to "disqualify" Special  
7 Master. In turn, the unfounded and failed attempt to disqualify is based upon their  
8 allegation that Special Master's prior attorney-client relationship with a member of  
9 Lionel Sawyer & Collins ("LSC") Reno firm created an impermissible conflict requiring  
10 Special Master's recusal. Of course, the Court did not even reach the issue tardily  
11 raised by Defendants because Defendants rested on their laurels and waited until  
12 Special Master rendered his Final Report before taking any action against Special  
13 Master related to the alleged conflict. Because they waited, the Court found that  
14 *Venetian* applied and that disqualification was not appropriate. Rather, the Court  
15 found that Special Master had completed his work and discharged him subject to final  
16 matters of compensation.

17 Defendants, despite their duplicative and vexatious litigation tactics, failed to  
18 obtain any of their requested relief against Special Master. Yet, incredibly, after losing  
19 each and every one of their motions related to Special Master, Defendants seek  
20 reimbursement of their attorney's fees and costs as a sanction against<sup>3</sup> Special Master  
21 for successfully defending off their spurious attacks.

22 Defendants failed to show a basis upon which an award can be made against  
23 Special Master. Their request should be denied.

## 24 **II. Statement of Facts**

25 The Court is intimately familiar with the facts of this case relating to Special  
26 Master's appointment, the reports made to the Court, Defendants repeated attempts to  
27

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28 <sup>3</sup> Defendants only seek sanctions against Special Master and LSC.



1 sanction Vion's counsel and Special Master, and the lengthy hearings conducted on  
2 April 4, 2013 and May 31, 2013 which sought to resolve, finally, the issues related to  
3 Special Master.

4 Special Master highlights for the Court certain relevant facts.

### 5 **A. Defendants' Filings**

6 On October 18, 2012, Defendants' filed "Motion to Disqualify and for Sanctions."  
7 This filing was the first time Defendants attempted to raise an objection related to the  
8 prior attorney-client relationship between Special Master and LSC. The motion,  
9 however, was untimely and defective for three reasons.

10 First, Defendants sought disqualification of LSC as counsel for Vion, which, as the  
11 Court noted,

12 The *Venetian* case seems to indicate that in -- unless you object prior to  
13 -- as they say, you can't lay in wait. That you have to raise your  
14 objection right away so that's the -- the problem that we have here is  
15 where the motion to disqualify which I -- I appreciate Mr. Goatz'  
16 problem with the service. He's got a point but [Defendants] --  
[Defendants] made an effort to seek disqualification. I would posit with  
the wrong person because I think that where they had a separate issue  
with respect to the disqualification of counsel, whether that is good or  
valid or not.

17 April 4, 2013 Hr'g Draft Tr. at 5:6-12.

18 Second, Defendants did not seek any relief against Special Master. In fact, as  
19 confirmed by the Certificate of Service attached to the motion, Defendants did not even  
20 bother to serve Special Master with their motion.

21 Finally, Defendants filed their motion to disqualify Special Master after Special  
22 Master rendered his Final Report. As the Court recognized, "[i]f [Defendants] were  
23 really seeking to stop this report then they needed to do something, you know, right  
24 away." April 4, 2013 Hr'g Draft Tr. at 5:12-13.

25 Despite a ruling that Defendants untimely sought disqualification, Defendants  
26 frivolously proceeded to request, in no less than three motions, sanctions against  
27 Special Master. (See "Motion to Disqualify Larry Bertsch as Special Master, Strike the  
28 Special Master's Reports from the Record and for Monetary Sanctions" filed

1 February 12, 2013; “Defendants, Counterclaimants, and Third-Party Plaintiffs’  
2 Opposition to Special Master’s Motion to Re-Allocate Payment of Special Master’s  
3 Compensation and Opposition to Fourth Joint Application for Fees and Costs of Special  
4 Master and Counter-Motion for Return of Fees” filed March 18, 2013; and  
5 “Defendants/Counterclaimants/Third Party Plaintiffs’ Supplemental Brief and  
6 Opposition to: Fourth Joint Application for Allowance of Fees and Costs of Special  
7 Master and Special Master’s Counsel for the Period February 13, 2012 through  
8 October 17, 2012 and Motion to Re-Allocate Payment of Special Master’s Compensation  
9 and to Reduce Outstanding Unpaid Compensation to Judgment” filed May 16, 2013.)

10 It was not until February 12, 2013, several months after losing their first bid to  
11 disqualify LSC, that Defendants sought to disqualify Special Master predicated on the  
12 non-disclosure of Special Master’s prior attorney-client relationship with LSC when  
13 Defendants filed “Motion to Disqualify Larry Bertsch as Special Master, Strike the  
14 Special Master’s Reports from the Record and for Monetary Sanctions.”

### 15 **B. Special Master’s Filings**

16 On October 18, 2012, Special Master rendered his “Final Report of Special Master.”

17 On November 13, 2012, Special Master filed “Special Master’s Motion (1) to Quash  
18 Notices of Deposition; and (2) for Protective Order on an Ex Parte Application for Order  
19 Shortening Time” in response to a subpoena duces tecum directed at Special Master  
20 and his counsel.

21 On February 12, 2013, Special Master filed “Motion for Order: (1) Accepting Special  
22 Master’s Final Report; and (2) Discharging Special Master and “Fourth Joint  
23 Application for Allowance of Fees and Costs of Special Master and Special Master’s  
24 Counsel for the Period February 13, 2012 through December 31, 2012 and Motion to  
25 Re-Allocate Payment of Special Master’s Compensation and to Reduce Outstanding  
26 Unpaid Compensation to Judgment” seeking discharge, acceptance of his Final Report,  
27 and compensation.

1 On May 2, 2013, Special Master filed "Supplement to: Fourth Joint Application for  
2 Allowance of Fees and Costs of Special Master and Special Master's Counsel for the  
3 Period February 13, 2012 through October 17, 2012 and; Motion to Re-Allocate  
4 Payment of Special Master's Compensation to Judgment" based on the Court's rulings  
5 at the April 4, 2013 hearing.

6 In stark contrast to Defendants' filings, Special Master did not pursue duplicative  
7 motions or advance arguments previously ruled upon by the Court. Each of the  
8 forgoing motions were granted and relief ordered in Special Master's favor.  
9 Respectively, the Court entered:

10 *Order from April 4, 2013 Hearing ("April Order")* entered on May 13, 2013;

11 *Order Granting in Part Special Master's Motion (1) To Quash Notices of Deposition;*  
12 *and (2) For Protective Order on an Ex Parte Application for an Order Shortening Time*  
13 *("Protective Order")* entered on January 2, 2013; and

14 *Order Granting Fourth Joint Application for Allowance of Fees and Costs of Special*  
15 *Master and Special Master's Counsel for the Period February 13, 2012 through*  
16 *October 17, 2012; and Motion to Re-Allocate Payment of Special Master's Compensation*  
17 *and to Reduce Outstanding Unpaid Compensation to Judgment ("May Order")* entered  
18 on July 9, 2013.

### 19 **C. April 4, 2013 Rulings**

20 On April 4, 2013, the Court conducted a thorough hearing on motions related to the  
21 Special Master. The Court made important rulings with respect to those motions.

#### 22 **i. Discharge of Special Master**

23 In its oral ruling regarding discharging Special Master, the Court stated:

24 THE COURT: . . . . As I said throughout this thing. And I -- putting  
25 aside all the allegations about all the individuals here. That -- and I  
26 think I said this from the very beginning. The Court has the greatest  
respect for Mr. Bertsch. The Court has dealt with Mr. Bertsch in the  
past on cases. This is a unique area in which he is highly skilled.

27 And among the most knowledgeable people in this community and  
28 the best person for this job. Nobody disputes any of that. The problem I  
have here is that the *Venetian* case seems to imply to me that the

1 standard that we have to evaluate the duties of a special master are  
those that you would apply to a judicial officer.

2 April 4, 2013 Hr'g Draft Tr. at 3:4-13. The Court continued:

3 And in this particular case I think that we -- the issue that we have  
4 here is 2.1(c) (sic) which is a judge who may be subject to  
disqualification has to make this kind of a disclosure. As I said before  
5 it probably isn't grounds for disqualification. I don't think it would be  
and that's what kind of what the *Ivy* (sic) case says is that, you know,  
6 these kinds of things probably aren't actually going to give rise to a  
disqualification, but nobody can ever challenge it if you make the  
disclosure.

7 So the problem that we have here is not that there was a conflict  
because I don't think we even really need to go there. The *Venetian*  
8 case indicates where -- by the time the issue is finally raised the  
relationship is over. That's significant because we -- because the timing  
9 that we have here is -- is that -- and taking everybody at their good  
faith -- best word that when Counsel for Vion recommended  
10 Mr. Bertsch for this position I had no reason to dispute it because as  
Mr. Bertsch makes available his resume of all the times he's served as  
11 special master. He's been special master for everybody in the  
courthouse. You couldn't find somebody. That's not the basis for a  
12 disqualification, it absolutely is not.

13 Mr. Bertsch works for everybody because this is what he does. He is  
a fair and impartial and unbiased and highly skilled forensic  
14 accountant, and this is his area of expertise. He's perfectly suited to  
this. Mr. Touton requested it and the Court granted it because the  
15 Court felt at that point and time, given the allegations that the parties  
were making that early on -- because early -- early relief was sought in  
16 the case. . . .

17 April 4, 2013 Hr'g Draft Tr. at 3:14-4:9.

18 [THE COURT:] . . . [Special Master's relationship with Lionel  
Sawyer & Collins] wasn't disclosed until August of 2011 -- 10 months  
19 into this thing. Fine. At that point we have our disclosure. And  
Mr. Gutierrez' position is: I didn't immediately file a motion. I tried to  
20 work it out, they wouldn't withdraw so I -- so then I filed this motion  
and it crossed the mail with this final report.

21 The *Venetian* case seems to indicate that in -- unless you object  
prior to -- as they say, you can't lay in wait. That you have to raise  
22 your objection right away so that's the -- the problem that we have  
here is where the motion to disqualify which I -- I appreciate  
23 Mr. Goatz' problem with the service. He's got a point but they -- they  
made an effort to seek disqualification. I would posit with the wrong  
24 person because I think that where they had a separate issue with  
respect to the disqualification of counsel, whether that is good or valid  
25 or not. If they were really seeking to stop this report then they needed  
to do something, you know, right away.

26  
27 April 4, 2013 Hr'g Draft Tr. at 5:1-13. The Court continued:

1 . . . . All we have for guidance is the *Venetian* case. It doesn't give us a  
2 lot of information on how the Venetian got the information about  
3 Ms. Turner's firm being counsel but, it indicates you got to act with  
4 alacrity or I think reasonable and so the question that comes down to  
5 you, is this reasonable or not?

6 And so the question it comes down to: Is this reasonable or not?  
7 Here's my -- my view of this that, whatever they did they -- whether  
8 they did it properly or not, when they filed the motion to disqualify the  
9 law firm, from that point forward, I would agree they're off the hook  
10 because they've raised their objection. So anything subsequent to that  
11 point and time I would think they'd be really from.

12 The problem that we have is then when we get to the other motion  
13 which is one: Does this mean that this special master is entirely  
14 disqualified in this case? And that's -- and the other -- the other side  
15 which is accept the report and -- and enter a fee. Here's my -- here's my  
16 problem with this. I think the rule has changed from the Venetian case  
17 to the present day and I -- and I think that the disclosures that are  
18 here in the canons of ethics are relevant to this. . . .

19 April 4, 2013 Hr'g Draft Tr. at 6:19–7:9. The Court ultimately ruled:

20 THE COURT: Special master is discharged. . . .

21 April 4, 2013 Hr'g Draft Tr. at 14:24.

## 22 ii. Written Order

23 On May 13, 2013, the Court entered its written order memorializing its rulings. The  
24 April Order, in pertinent part, states:

25 A disclosure of Special Master's prior attorney-client relationship  
26 with Lionel Sawyer & Collins was not made to the parties until  
27 August 29, 2012. Defendants failed to take any action to prevent  
28 Special Master from issuing a final report prior to October 18, 2012  
when Special Master filed "Final Report of Special Master." On  
October 18, 2012, Defendants sought disqualification of Lionel  
Sawyer & Collins. Because Defendants failed to timely object prior to  
the issuing the Final Report of Special Master, Defendants objections  
to the Court accepting Special Master's final report and their  
objections to discharging Special Master are overruled. *Venetian  
Casino Resort, LLC v. Dist. Ct.*, 118 Nev. 124, 41 P.3d 327, 330 (2002).

The Court finds applicable to Special Master NCJC 2.11(C), which  
requires Special Master to disclose certain relationships and business  
dealings<sup>4</sup>. Based on NCJC 2.11(C), Special Master should have made a

<sup>4</sup> Special Master submits that the Canon itself does not require such disclosure. However, one  
Comment to the Canon provides: "A judge should disclose on the record information that the  
judge believes the parties or their lawyers might reasonably consider relevant to a possible  
motion for disqualification, even if the judge believes there is no basis for disqualification. A  
judge making such a disclosure should, where practicable, follow the procedure set forth in  
Rule 2.11(C)." NCJC 2.11, Comment 5. At that, Comments to the Canons "provide guidance  
regarding the purpose, meaning, and proper application of Rules," and "identify aspirational  
goals for judges." NCJC, Scope, ¶¶3-4. NCJC 2.11, Comment 5 directs a judge back to  
Rule 2.11(C), which is not an obligatory, but a permissive disclosure (using the term "may  
disclose").

1 disclosure of his prior attorney-client relationship with Lionel  
2 Sawyer & Collins. The Court does not find that non-disclosure of such  
3 relationship constitutes grounds for disqualification. NRCP 53(a)(2);  
4 *See Ivey v. Dist. Ct.*, 129 Nev. Adv. Op. 16 (2013); *Venetian Casino*  
5 *Resort, LLC v. Dist. Ct.*, 118 Nev. 124, 41 P.3d 327 (2002). Special  
6 Master is a fair, impartial, unbiased and highly skilled forensic  
7 accountant, and the matters in this case to which the Court made its  
8 reference are in his area of expertise. The reference to Special Master  
9 in this case was proper.

10 The Court does not reach the issue of whether the relationship  
11 between Special Master and Lionel Sawyer & Collins created an  
12 impermissible conflict in this case requiring Special Master's recusal  
13 because the alleged conflict no longer existed at the point that  
14 Defendants raised the issue before the Court. As such, Defendants'  
15 Motion to Disqualify, and Intervening Plaintiffs' Joinder thereto, are  
16 denied.

17 With respect to approval of Final Report of Special Master, the  
18 Court finds that the failure of Special Master to disclose the prior  
19 attorney-client does not render the Final Report of Special Master  
20 invalid or erroneous. The Court finds that no party raised a formal  
21 objection to Special Master's report, but that the parties various other  
22 filings can be considered as an objection to the report. The Court,  
23 therefore, accepts the report as written. The Court does not adopt the  
24 Final Report of Special Master as findings of fact or conclusions of law.  
25 The Court will make determinations of fact and law at the trial on the  
26 merits in this case. As such, the Court, in accepting the Final Report of  
27 Special Master, did not conduct an analysis as to whether the findings  
28 were clearly erroneous nor a de novo review of the conclusions. Any  
party may use the Final Report of Special Master as such party sees  
fit. The Court's acceptance of the Final Report of Special Master does  
not limit or impair in any way any party's ability to challenge the  
report at trial.

The Court finds that Special Master has complied in all respects  
with the *Order* entered on 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  
the completion of those final items contained in this Order, and the  
resolution and payment of Special Master's compensation.

Further, because of Special Master's failure to disclose, coupled  
with Defendants attempt to disqualify Lionel Sawyer & Collins, the  
Court finds that Defendants should not be responsible for Special  
Master's compensation from October 18, 2012 forward. With respect  
[to] the previously entered orders regarding Special Master's  
compensation, *Order Granting Joint Application (First) for Allowance*  
*of Fees and Costs of Special Master and Special Master's Counsel for*  
*the Period September 28, 2011 through October 31, 2011* entered on  
January 6, 2012; *Order Granting Joint Application (Second) for*  
*Allowance of Fees and Costs of Special Master and Special Master's*  
*Counsel for the Period November 1, 2011 through November 30, 2011*  
entered on January 13, 2012; and *Order Granting Joint Application*  
*(Third) For Allowance of Fees and Costs of Special Master and Special*  
*Master's Counsel for the Period December 1, 2011 Through*  
*February 12, 2012* entered on April 25, 2012, those orders remain in  
full force and effect.

April Order at 5:15 – 7:13.

1       **D. May 31, 2013 Hearing**

2       On May 31, 2013, the Court conducted a continued hearing on motions related to  
3 the Special Master based on supplemental filings made by the parties. The Court  
4 finally resolved the issue of Special Master's compensation and dispensed with other  
5 matters.

6       **i.   Alleged Collusion**

7       With respect to collusion alleged by Defendants, the Court stated:

8             ... the whole issue of were they colluding, you know, that's for another  
9             day. **I didn't find that the record clearly showed that there had**  
10            **been any collusion by Vion, and Lionel Sawyer, and Mr. Zmaila,**  
              **and the special master to trump up this report.**

11      May 31, 2013 Hr'g Tr. at 56:17-21 (emphasis added). The Court continued

12      **ii.   Request for Attorney's Fees**

13      Contrary to Defendants' interpretation of the Court's oral rulings on May 31, 2013,  
14 the following took place:

15            THE COURT: We're talking about the motion to disqualify.

16            MR. GUTIERREZ: Thank you.

17            THE COURT: **But not the other issues you had with the special**  
18            **master's report and all the issues you've raised with the special**  
              **master's -**

19            MR. GUTIERREZ: Okay.

20            THE COURT: -- report. We're talking about the issue of the  
21            disqualification. I think that was a valid point. And we spent three  
              hours on it. Clearly it was a big deal. And -

22            ...

23            THE COURT: **The disqualification. That to me is an issue that I**  
24            **would take under to consider an award of fees and costs for the**  
25            **motion to disqualify.** Not this whole other issue about - I appreciate  
26            all your arguments on that, but like I said, I think it's all to be brought  
              up at the time of trial with respect to the basis of the report. I'm not -  
              it's just the motion for - motion to disqualify and today include that,  
              Mr. Gutierrez.

27      May 31, 2013 Hr'g Tr. at 57:17-58:13 (emphasis added). In clarifying the Court's ruling,  
28 the following colloquy took place:

1 MR. GOATZ: Your Honor, first, is the basis the judicial canon that  
2 you're awarding fees on? And is it against special master? So two  
questions if you could clarify?

3 THE COURT: I guess that's a good question. So if we – if you can  
4 indicate – file some sort of supplement that tells us exactly what the  
5 fees and costs are on that issue and who it would be most  
6 appropriately assessed to because I mean, my problem is I don't really  
know that Vion, I mean, the client had any notice. And that's why I  
asked, specifically asked about Mr. Zmaila. Mr. Zmaila didn't have any  
notice of it.

7 So it's just a question of, is this appropriately something that is  
8 assed to the law firm and Mr. Bertsch. And then you have an  
9 opportunity to file something in response. But I would – that I would  
consider. I do think that's appropriate to grant something for that.

10 MR. GOATZ: Is that under the statue, or is it under the judicial canon?

11 THE COURT: That's what we –

12 MR. GOATZ: Oh, and they'll brief that?

13 THE COURT: I want them to –

14 MR. GOATZ: Okay, perfect.

15 THE COURT: -- tell me what their fees and costs are and the basis  
upon which they are seeking to an award of those fees and costs.

16 May 31, 2013 Hr'g Tr. at 58-14-59:13.

17 Importantly, the Court recognized:

18 THE COURT: Because we have the – you know, the *Venetian* case and  
19 I think that that's kind of the basis of what I've been acting under. So  
20 if there's something to be assessed how does that fall under the  
*Venetian* case and whose responsibility is it. I think there's merit there  
21 to that argument. **I don't find that with respect to the whole  
other thing about the whole allegation that the whole scheme  
of the special master's whole involvement over a year. I'm just  
22 – sorry, I'm not going to go there. But the disqualification issue  
I think we should take a look at. . . .**

23 May 31, 2013 Hr'g Tr. at 59:15-24 (emphasis added).

24 **iii. Written Order**

25 In its written order entered on July 9, 2013, the Court stated:

26 There is **no clear evidence of collusion** by Vion, Lionel Sawyer &  
27 Collins, and Mr. Zmaila, and Special Master in drafting Final Report of  
Special Master.

28 May Order at 5:15-17 (emphasis added).



1 In ruling on Defendants' request for sanctions, the Court stated:

2 Defendants' Countermotion and request for reimbursement of  
3 attorney's fees and costs related to the motion to disqualify Special  
4 Master is something the Court will defer for later consideration,  
5 provided that Defendants file a supplement to the Countermotion, on  
6 or before July 1, 2013, stating, with specificity, (a) the amount of  
7 requested attorney's fees and costs related to disqualification;  
8 (b) against whom an award, if any, of such attorney's fees and costs  
9 should be made; and (c) the statute, rule, or case law that supports an  
10 award of attorney's fees and costs.

11 May Order at 5:18-24.

### 12 **E. Defendants' Supplement**

13 On July 1, 2013, Defendants filed "Defendants' Supplemental Brief and  
14 Memorandum of Fees and Costs in Support of Countermotion for Sanctions"  
15 ("Supplement"). Their Supplement is littered with misstatements. The most egregious  
16 misstatement is that . . . this Court granted Defendants' counter-motion for sanctions  
17 and requested additional briefing on the following:" Supp. at 4:10-11. Most errors in the  
18 Supplement flow from that misstatement.

### 19 **III. Defendants' Request for Sanctions Does Not Lie**

20 The Court provided Defendants an opportunity to demonstrate on what basis they  
21 would be entitled to sanctions in this case. The Court did not award sanctions against  
22 any party. In giving Defendants an opportunity to be heard on the issue, Defendants  
23 were required to

24 stat[e], with specificity, (a) the amount of requested attorney's fees and  
25 costs related to disqualification; (b) against whom an award, if any, of  
26 such attorney's fees and costs should be made; and (c) the statute, rule,  
27 or case law that supports an award of attorney's fees and costs.

28 May Order at 7:24-27.

Although Defendants have complied with the Court's directive that they provide an  
amount of attorney's fees and costs, and that they seek such an award only from  
Special Master and LSC, Defendants have failed to show on what basis the Court could  
award them attorney's fees and costs.

Defendants' failure should result in an order denying their request for sanctions.

## A. This Court Lacks Jurisdiction to Discipline Special Master

Defendants point to *In re Mosley* for this Court's power to discipline Special Master. Despite Defendants acknowledgment that they are aware of this case, Defendants stubbornly seek monetary sanctions against Special Master knowing full well that the only body that may initially discipline a judge, including a special master, by imposing monetary sanctions based on a violation of the NCJC is the Nevada Commission on Judicial Discipline ("Commission"). NRS 1.425 – NRS 1.4695 et seq.

The Commission exercises coextensive jurisdiction with the Supreme Court over the disciplining of judges. NRS 1.440(1). Judges under the purview of the Commission include "[a]ny officer of the Judicial Branch of this State, whether or not the officer is an attorney, who presides over judicial proceedings, including . . . a . . . special master . . ." NRS 1.428(5). After an initial determination by the Commission with respect to discipline of a judge, the Supreme Court, on appeal, is authorized to reverse the Commission's determination or take alternative action. Nev. Const. Art. 6, § 21(1). The district courts do not have similar coextensive jurisdiction with respect to NCJC allegations.

In *In re Mosley*, the Commission – the body charged with initially investigating and prosecuting violations of the NCJC – brought charges against a sitting judge for *inter alia* violating NCJC 2 for the judge's delay in recusing himself from the criminal case he presided over after discovery that the defendant's wife testified in the judge's child custody case. *In re Mosley*, 102 P.3d 555, 557-58 (2004). On appeal, the judge challenged the Commission's findings that he delayed in recusing himself because NCJC does not require a particular time to do so and that recusal was not required "unless a clear and valid reason exists for doing so." *Id.* at 564. The Court cited to *Ham v. Dist. Ct.*, 93 Nev. 409, 414, 566 P.3d 420, 423 (1977) for the proposition that "[a] judge has a discretion to disqualify himself as a judge in a case if he feels he cannot properly hear the case because his integrity has been impugned." *Id.* at 564 n. 13.

1 Despite the discretion granted to a judge in determining whether recusal is proper,  
2 the Court rejected the judge's arguments. The Court stated that the judge should have  
3 recused himself immediately after he learned that the defendant and his wife had  
4 information regarding his ongoing child custody case and that the defendant's case had  
5 been assigned to him for sentencing. *Id.* at 564. The Court reasoned that "there is a  
6 danger that a judge's failure to immediately recuse himself would lead others to  
7 conclude that the judge was not going to do so. A reasonable, objective observer could  
8 conclude that the judge was using his position for personal advantage, thereby  
9 diminishing public confidence in the integrity and impartiality of the judiciary." *Id.* For  
10 his violation, the Court approved the Commission's imposition of a \$5,000 monetary  
11 penalty as a sanction to be paid to the Clark County library or a related library  
12 foundation. *Id.* at 566.

13 Here, Defendants request sanctions against Special Master based on an alleged  
14 violation of NCJC. This Court does not, however, have the power to monetarily  
15 sanction Special Master for an alleged violation of NCJC. Only the Commission has the  
16 power to investigate and pursue charges of a violation of the NCJC with the Supreme  
17 Court being the final arbiter of appropriate sanctions. Defendants' basis for sanctions  
18 against Special Master premised on a violation of NCJC does not lie.

### 19 **B. NRS 18.010 and EDCR 7.60 Do Not Form a Basis for Sanctions**

20 As discussed above, this Court lacks jurisdiction to discipline Special Master based  
21 on a violation of NCJC. Being aware of this fact, Defendants' claim that they are  
22 entitled to attorney's fees and costs pursuant to NRS 18.010 and EDCR 7.60.  
23 Defendants' proffered alternative predicates, NRS 18.010(2) and EDCR 7.60(b)(2), are  
24 unavailing.

25 As the Court knows, Special Master is not an attorney; he is a certified public  
26 accountant and certified fraud examiner. He is also not a party to this action. It would  
27 be an abuse of the Court's discretion to award Defendants attorney's fees and costs as a  
28

1 sanction against Special Master under the provisions cited by Defendants after having  
2 successfully defend against Defendants' motion to disqualify him in this action.

3 **i. NRS 18.010 is Not a Predicate for Sanctions in this Case**

4 Defendants identify NRS 18.010 as an alternative predicate for an entitlement to  
5 attorney's fees **and costs**. However, the statute only speaks to an award of attorney's  
6 fees in favor of a prevailing party, not costs.

7 Defendants' acknowledge that NRS 18.010 only applies to awarding attorney's fees  
8 to a "**prevailing party**." Supp. at 10:15-16. Yet, they argue that it can also form the  
9 basis for an award of sanctions to a defeated party.

10 NRS 18.010, in pertinent part, states:

11 In addition to the cases where an allowance is authorized by specific  
12 statute, the court may make an allowance of attorney's fees to a  
**prevailing party**:

13 . . .  
14 (b) Without regard to the recovery sought, when the court finds that  
15 the claim, counterclaim, cross-claim or third-party complaint or  
16 defense of the opposing party was brought or maintained without  
reasonable ground or to harass the **prevailing party**. The court shall  
liberally construe the provisions of this paragraph in favor of awarding  
attorney's fees in all appropriate situations. . .

17 NRS 18.010(2) (emphasis added). As the Court recently explained, "NRS 18.010(2)(b)  
18 permits a district court to award **attorney fees** to a **prevailing party** when the  
19 district court determines a claim of the opposing party was brought without reasonable  
20 grounds or to harass the **prevailing party**." *Stubbs v. Strickland*, 129 Nev. \_\_\_, 297  
21 P.3d 326, 330 (2013)(emphasis added). For purposes of the statute, "a claim is frivolous  
22 or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna*  
23 *Company, LLC*, 125 Nev. 578, 216 P.3d 793, (2009). The district court will abuse its  
24 discretion if there is no "finding that the claim or defense was unreasonable or brought  
25 to harass." *Bower v. Harrah's Laughlin*, 125 Nev. 470, 215 P.3d 709, 726 (2009)  
26 modified on other grounds in *Garcia v. Prudential Ins. Co. of America*, 129 Nev. \_\_\_,  
27 293 P.3d 869 (2013).

1 The death knell of Defendants' argument is that Defendants were not the  
2 prevailing party. The Court never entered an order requiring Special Master's  
3 recusal. Nor did the Court enter an order granting Defendants' motion to disqualify  
4 Special Master. In fact, the Court did not even reach the issue of a conflict of interest  
5 because Defendants were dilatory in raising their concerns.

6 Importantly, the Court ruled:

7 The Court does not reach the issue of whether the relationship  
8 between Special Master and Lionel Sawyer & Collins created an  
9 impermissible conflict in this case requiring Special Master's recusal  
10 because the alleged conflict no longer existed at the point that  
Defendants raised the issue before the Court. As such, Defendants'  
Motion to Disqualify, and Intervening Plaintiffs' Joinder thereto, are  
denied.

11 April Order at 6:1-5. Defendants' utterly failed in their efforts to disqualify Special  
12 Master; NRS 18.010(2) provides them no opportunity to be reimbursed for their wasted  
13 attorney's fees.

14 Further, even if Defendants were considered a prevailing party, all of Special  
15 Master's arguments in successful defense of Defendants' motion to disqualify him  
16 were grounded in the facts and law. The same cannot be said for Defendants instant  
17 request for sanctions. As such, Special Master should not be sanctioned for his  
18 successful efforts in fending off Defendants' vicious and spurious attacks.

19 **ii. EDCR 7.60 is Not a Predicate for Sanctions in this Case**

20 Defendants next argue that EDCR 7.60(b)(2) warrants the imposition of sanctions  
21 upon Special Master in this case. Supp. at 16:11. Defendants are incorrect.

22 The applicable provision of EDCR 7.60 cited by Defendants states:

23 (b) The court may, after notice and an opportunity to be heard, impose  
24 upon an attorney or a party any and all sanctions which may, under  
25 the facts of the case, be reasonable, including the imposition of fines,  
costs or attorney's fees when an attorney or a party without just cause:

26 (2) Fails to prepare for a presentation.

27 EDCR 7.60(b)(2).  
28

1 In this case, Special Master has been more than prepared to present his position to  
2 the Court. At best, Defendants' argument does not apply to Special Master at all, but  
3 rather to his counsel. Because Defendants only seek sanctions against Special Master,  
4 and not his counsel, this provision does not support Defendants' misguided attempt at  
5 sanctions. Defendants' request for attorney's fees and costs under EDCR 7.60(b)(2)  
6 should be denied.

#### 7 **IV. Defaulted and Revoked Defendant Entities**

8 Defendants request an award of attorney's fees and costs as a sanction against  
9 Special Master. If the Court is to consider awarding a party fees, however, it must first  
10 determine who is the real party in interest among the defendant entities to make an  
11 award. This analysis is necessary because the entities appear to be revoked by the  
12 Nevada Secretary of State and, as such, Special Master, or any other party to be  
13 sanctioned, does not know who the proper entity to pay on such an award. Exhibits A-  
14 C. Special Master suggests that the entities should likely be identified by their  
15 respective trustees.

16 Defendants Eagle Group, ADD and Order 66 should be ordered to pursue  
17 reinstatement of their respective charters or, alternatively, that they each be ordered  
18 to correctly identify the real party in interest, whoever that may be, that is seeking  
19 sanctions against Special Master.

20 In *AA Primo Builders*, the Nevada Supreme Court addressed the issue of whether a  
21 limited liability company ("LLC") chartered in Nevada may continue litigating a  
22 pending suit once its charter has been revoked. *AA Primo Builders v. Washington*, 126  
23 Nev. \_\_\_, 245 P.3d 1190 (2010). There, AA Primo Builders, a Nevada LLC, appealed the  
24 district court's decision to dismiss its case against Bertral and Cheri Washington after  
25 it had asked the court to stay dismissal so that it could reinstate its charter. The Court  
26 held that unless an LLC's business is litigation, the entity's right to sue and be sued  
27 survives revocation. The Court stated that the risk of the members attempting to  
28 prosecute a suit in the name of a defunct LLC carries with it individual liability for

1 those members. Further, the Court found that dismissal is a harsh remedy when the  
2 policy, compliance with Nevada's fee and filing statutes, can be satisfied through a  
3 stay.

4 The Court decided *AA Primo Builders* in the context of a summary judgment  
5 motion. The Court suggested that lack of capacity and/or substitution of parties would  
6 be the more appropriate method to remedy the situation where an LLC's charter was  
7 revoked. *AA Primo Builders*, 126 Nev. at \_\_\_ n. 1, 245 P.3d at 1192 n. 1. It cited, with  
8 seeming approval, *Robert Pierce Co. v. Sherman Gardens Co.*, 82 Nev. 395, 400-01, 419  
9 P.2d 781, 784-85 (1966) for the analogy that a dissolved LLC may continue with  
10 pending suits in the same manner as dissolved corporation.

11 In *Robert Pierce*, the parties never made the district court aware of Robert Pierce's  
12 dissolution. *Id.* Defendants filed a suggestion of corporate dissolution in accordance  
13 with NRS 78.615 requiring that such a statement be filed along with the names of the  
14 trustees or receivers of the dissolved corporation. *Id.* The Court stated that upon  
15 dissolution of the corporation, the corporation's directors could have been substituted  
16 as trustees from the corporation or they could appoint a receiver. *Id.* A dissolved  
17 corporation must name the real party in interest in pending litigation, and there is  
18 analogous language found in NRS Chapter 86.

19 Nevada law provides:

20 At the time of the filing of the articles of dissolution with the Secretary  
21 of State, upon a later date and time as specified in the articles, which  
22 date must not be more than 90 days after the date on which the  
23 articles are filed or, if the articles filed pursuant to this section specify  
24 a later effective date but do not specify an effective time, at 12:01 a.m.  
25 in the Pacific time zone on the specified later date, whichever is  
26 applicable, the existence of the company ceases, except for the purpose  
27 of suits, other proceedings and appropriate action as provided in this  
28 chapter. The manager or managers in office at the time of dissolution,  
or the survivors of them, are thereafter trustees for the members and  
creditors of the dissolved company and as such have authority to  
distribute any property of the company discovered after dissolution,  
convey real estate and take such other action as may be necessary on  
behalf of and in the name of the dissolved company.

1 NRS 86.541(2). Although the Secretary of State revoked ADD and Order 66's charters,  
2 and Eagle Group is in default status, the remaining members of the entities have not  
3 taken steps to wind up the business such as seeking a decree from a court of competent  
4 jurisdiction that the LLC's existence is not reasonably practicable to carry on nor have  
5 they sought to distribute assets to the members of entities. NRS 86.495; NRS 86.521.

6 As it stands now, neither the Court nor Special Master knows who is the real party  
7 in interest acting on behalf of the entities that seeks an award of sanctions.

8 Pursuant to NRCP 17, every action must be commenced by the real party in  
9 interest. NRCP 17(a). One of the purposes of the rule is to assure a party "the finality  
10 of the judgment and that he will be protected against another suit by the real party at  
11 interest on the same matter." *Painter v. Anderson*, 96 Nev. 941, 943, 620 P.2d 1254,  
12 1256 (1980) (quoting *Celanese Corp. of America v. John Clark Industries*, 214 F.2d 551,  
13 556 (5th Cir. 1954)). Eagle Group, ADD and Order 66, by operation of law, are no  
14 longer real parties in interest. They should be ordered to identify the real party in  
15 interest, and who has the capacity to sue and be sued, before the Court consider  
16 awarding the entities any attorney's fees and costs as a sanction against any party, but  
17 especially Special Master and his counsel. NRCP 17(a) and (b).

18 If appropriate, Eagle Group, ADD and Order 66 should then be ordered to  
19 substitute in their respective real party in interest pursuant to Nevada Rule of Civil  
20 Procedure 25. *See Dunmore v. U.S.*, 358 F.3d 1107, 1112 (9th Cir. 2004); *See also*  
21 *FDIC v. Deglau*, 207 F.3d 153, 159 (3d Cir. 2000) (FRCP 17(a) addresses who may  
22 bring a suit at the time of filing; it considers transfers of interest that occur prior to  
23 filing; however, once a party files a case, the impact of a post-filing transfer is governed  
24 by Rule 25(c)).

## 25 **V. Defendants' Attorney's Fees and Costs are Unreasonable**

26 The Court stated that it would entertain a very limited requested for an award of  
27 attorney's fees and costs related solely to Defendants' unsuccessful attempts to  
28 disqualify Special Master as a sanction.



1 For the inch given by the Court, Defendants, unsurprisingly, take a mile and  
2 request that the Court award them their attorney's fees and costs related to almost  
3 everything related to Special Master.

4 Much of the time incurred by Defendants' counsel was not related to their motion to  
5 disqualify Special Master, duplicative, and unnecessary. Further, Defendants seek  
6 reimbursement of mailing and photocopying costs that were unnecessary and self-  
7 inflicted.

8 Defendants were required to narrowly tailor their request to that work done in  
9 relation to their prosecution of untimely motion to disqualify Special Master. They  
10 have not done so and, as such, their request is patently unreasonable.

#### 11 **A. Attorney's Fees are Unreasonable**

12 Defendants do not narrowly tailor and limit their request for attorney's fees to their  
13 failed prosecution of their February 12, 2013 "Motion to Disqualify Larry Bertsch as  
14 Special Master, Strike the Special Master's Reports from the Record and for Monetary  
15 Sanctions" as the Court directed.

16 At the May 31, 2013 hearing, the Court stated:

17 **THE COURT: The disqualification. That to me is an issue that I**  
18 **would take under to consider an award of fees and costs for the**  
19 **motion to disqualify.** Not this whole other issue about – I appreciate  
20 all your arguments on that, but like I said, I think it's all to be brought  
up at the time of trial with respect to the basis of the report. I'm not –  
it's just the motion for – **motion to disqualify and today** include  
that, Mr. Gutierrez.

21 May 31, 2013 Hr'g Tr. at 57:17-58:13 (emphasis added).

22 Instead, Defendants puff up their request for attorney's fees by including time  
23 related to: (a) their efforts to seek discovery from Special Master and his counsel;  
24 (b) their misguided effort to disqualify LSC as Vion's counsel; and (c) their unsuccessful  
25 attempts to (i) oppose acceptance of Special Master's Final Report; (ii) oppose Special  
26 Master's compensation; and (iii) oppose Special Master's discharge. Indicative of  
27 Defendants' efforts to increase the costs of litigation, Defendants sought oral argument  
28 on matters originally set for a chambers hearing. Special Master actively opposed

1 Defendants' request in order to mitigate expenses. Exhibit D. The hearing on April 4,  
2 2013 not only was on Defendants' motion to disqualify Special Master, but also on  
3 various motions brought by Special Master seeking acceptance of his Final Report,  
4 compensation, and discharge. Special Master's position was that the Court could rule  
5 on the papers and save the parties needless expense for showing up to a hearing that  
6 had already been fully briefed.

7 Attached as Exhibits E and F are charts showing the attorney's fees that were  
8 requested that do not relate to the motion to disqualify or contain a description that  
9 relates to an issue other than the motion to disqualify. For time spent on multiple  
10 items, including the motion to disqualify, Special Master did not undertake to guess at  
11 how much time was spent on each task and included the whole amount as an  
12 unreasonable charge.

13 In total, \$24,404.75 should be deducted from Defendants' request.

#### 14 **B. Mailing and Copying Costs are Unreasonable**

15 As noted above, Defendants do not cite authority supporting an award of costs.  
16 However, if the Court did find that EDCR 7.60(b)(2) permits an award of costs, such  
17 costs sought by Defendants are unreasonable.

18 Despite EDCR's clear commands that parties who use the electronic filing service  
19 consent to electronic service, Defendants consistently refused to serve Special Master  
20 electronically increasing Defendants' costs. As required by EDCR 8.05,

21 (d) Other than the service of a summons or subpoena, users who  
22 register with the electronic filing system are deemed to consent to  
23 receive service electronically. A party may also agree to accept  
24 electronic service by filing and serving a notice. The notice must  
include the electronic notification address(es) at which the party  
agrees to accept service.

25 EDCR 8.05(d). Instead, Defendants resort to photocopying and mailing all of their  
26 papers to Special Master. Special Master should not have to pay for their failure to use  
27 less costly required means for service.

1 Here, Defendants only properly note four e-filing fees charged related to Defendants  
2 motion to disqualify Special Master as they were directed by the Court. One charge  
3 incurred on February 12, 2013 for filing the initial motion, and two charges incurred  
4 for filing replies to Special Master and Plaintiff's opposition to Defendants' motion to  
5 disqualify Special Master. The final charge was related to the May 31, 2013 hearing  
6 and was incurred on May 16, 2013 for Defendants' filing their opposition and  
7 counter-motion to Special Master's request for compensation. The remaining filing fees  
8 relate not to Defendants' failed prosecution of their motion seeking Special Master's  
9 disqualification, but rather related to their attempt to disqualify LSC and Special  
10 Master's motion for a protective order.

11 As such, the following charges should be deducted from any request the Court is  
12 inclined to make:

Description	Amount
Efiling	\$10.50
Photocopying	\$532.75
Postage	\$103.08
<b>Total</b>	<b>\$646.33</b>

13  
14  
15  
16  
17 In their place, the Court should add \$8.00 to Defendants' costs. The additional costs  
18 represents what Defendants should have been charged for each e-file notation related  
19 to their motion to disqualify Special Master because it would have cost defendants an  
20 extra \$2.00 to e-file and serve their papers on the parties – which would have avoided  
21 the costs for copying and postage.

22 The Court should **deduct \$638.33** for copying, postage, and unrelated E-filing costs  
23 from the total amount of costs sought by Defendants as a sanction.

## 24 **VI. Conclusion**

25 Defendants failed to address how *Venetian* applies in the situation before the Court.  
26 Defendants also failed to provide the Court with a basis on which to award attorney's  
27 fees and costs to them. As has been pointed out before, NCJC **"is not designed or**  
28 **intended as a basis for civil . . . liability. Neither is it intended to be the basis**

1 for litigants to seek collateral remedies against each other or to obtain  
2 tactical advantages in proceedings before a court.” NCJC Scope ¶7 (emphasis  
3 added). Further, NRS 18.010 and EDCR 7.60(b)(2) do not authorize an award of  
4 attorney’s fees and costs as a sanction to a party who does not prevail on its claims.

5 Special Master, therefore, asks that this Court deny Defendants’ request for  
6 sanctions.

7 Dated this 15th day of July, 2013.

8 **ANTHONY A. ZMAILA LIMITED PLLC**

9 

10 Anthony A. Zmaila (NV Bar No. 2319)  
11 Peter J. Goatz (NV Bar No. 11577)  
12 265 East Warm Springs Rd., Suite 100  
13 Las Vegas, Nevada 89119

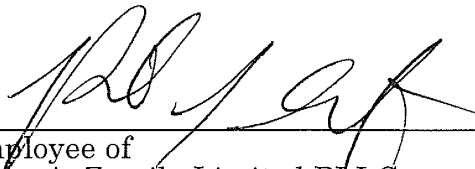
14 *Attorneys for Larry L. Bertsch, CPA &*  
15 *Associates, LLP, Special Master*

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**Certificate of Service**

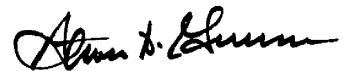
I hereby certify that, on the date and time of the electronic service, a copy of the foregoing **Special Master’s Opposition to Defendants’/Counterclaimants’/Third Party Plaintiffs’ Supplemental Brief** was sent via electronic means to the following at their last known email addresses, pursuant to EDCR 8.05(a):

<b>Name</b>	<b>Email Address</b>
See attached	

  
\_\_\_\_\_  
An employee of  
Anthony A. Zmaila Limited PLLC

# **EXHIBIT 22**

# **EXHIBIT 22**



CLERK OF THE COURT

**ORDR**

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*Attorneys for Larry L. Bertsch, CPA & Associates, LLP, Special Master*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

VION OPERATIONS, LLC, a Delaware  
limited liability company; and  
STRATEGIC FUNDING SOURCE, INC.,  
a New York corporation,

Plaintiffs,

v.

JAY L. BLOOM, an individual;  
CAROLYN S. FARKAS, an individual;  
EAGLE GROUP HOLDINGS, LLC, a  
Nevada limited liability company;  
EAGLE GROUP MARKETING, LLC, a  
Nevada limited liability company; A.D.D.  
PRODUCTIONS, LLC, a Nevada limited  
liability company; ORDER 66  
ENTERTAINMENT, LLC, a Nevada  
limited liability company; DOES I  
through X; and ROE CORPORATIONS I  
through X,

Defendants.

**AND ALL RELATED CLAIMS.**

Case No. A-11-646131-C  
Dept. XXVI

**ORDER ON:**

**(A) MOTION TO CONDUCT DISCOVERY  
ON SPECIAL MASTER LARRY  
BERTSCH AND ANTHONY ZMAILA,  
ESQ.;**

**(B) COUNTERMOTION TO QUASH  
NOTICE OF DEPOSITION OF SPECIAL  
MASTER; AND**

**(C) SPECIAL MASTER'S MOTION FOR  
NRCP 11 SANCTIONS AGAINST  
DEFENDANTS AND THEIR COUNSEL**

Hearing Date: August 15, 2013

Hearing Time: 9:00am

This matter came before the Court on: (a) Jay Bloom, Carolyn Farkas, Eagle Group Holdings, LLC, A.D.D. Productions, LLC and Order 66 Entertainment, LLC (collectively "Defendants") "Motion to Conduct Discovery on Special Master Larry Bertsch and Anthony Zmaila, Esq." ("Defendants' Motion") filed on July 3, 2013; (b) Larry L. Bertsch's ("Special Master") "Countermotion to Quash Notice of Deposition

1 of Special Master" ("Countermotion") filed on July 23, 2013; and (c) Special Master's  
2 "Special Master's Motion for NRCP 11 Sanctions against Defendants and Their  
3 Counsel" ("Rule 11 Motion") filed on August 8, 2013.

4 The respective parties gave appropriate notice of their motions and countermotion.

5 On August 15, 2013, the Court conducted a hearing in this matter. Anthony A.  
6 Zmaila and Peter J. Goatz, Esq. appeared for Special Master, who was also present;  
7 Todd M. Touton, Esq. and Robert Hernquist, Esq. appeared for Vion Operations, LLC;  
8 and Joseph A. Gutierrez, Esq. and Jeffrey R. Albregts, Esq. appeared on behalf of  
9 Defendants.

10 The Court finds and concludes that:

11 Defendants' Motion is properly before the Court, rather than the discovery  
12 commissioner, due to the Court's previous rulings regarding the Special Master.

13 The Court views Defendants' Motion to conduct discovery on Special Master and  
14 Mr. Zmaila as two completely different issues. One is, what is the possible legal  
15 authority to permit Defendants to inquire of an attorney? The second is, what  
16 questions, if any, Defendants are allowed to ask a special master at a deposition?

17 With respect to the first issue, the Court does not find any basis on which  
18 Mr. Zmaila can be deposed. The Court does not find that NRCP 53(e)(5) applies to a  
19 special master's counsel. Therefore Defendants are not permitted to take the deposition  
20 of Mr. Zmaila.

21 With respect to the second issue, Special Master is not to be treated as an expert for  
22 any purpose in this case. Mr. Bertsch was appointed by the Court as a special master  
23 under Nevada Rule of Civil Procedure 53 and has been subsequently discharged from  
24 his duties.

25 The Court finds that Defendants cannot inquire into Special Master's thought  
26 processes in formulating his work product or conclusions in this case. How and why  
27 Special Master prepared, drafted, analyzed, formulated and reached his conclusions in  
28 his reports, including drafts of his reports, is protected from inquiry and is not



1 discoverable. The United States Supreme Court has stated that when a special master  
2 accepts an appointment by the court, the special master assumes "the duties and  
3 obligations of a judicial officer." *In re Gilbert*, 276 U.S. 6, 9 (1928); *see also York Int'l*  
4 *Bldg., Inc. v. Chaney*, 527 F.2d 1061, 1068 (9th Cir. 1975). The Court recognizes that  
5 judicial officers do not enjoy immunity from discovery and that they can be subjected to  
6 discovery requests, but it is clear that such officers, while performing their decision-  
7 making processes, are not generally subject to discovery. *US v. Morgan*, 313 U.S. 409,  
8 422 (1941); *Gary W. v. State of Louisiana Dept. of Health & Human Resources*, 861 F.2d  
9 1366, 1369 (5th Cir. 1988); *Cobell v. Norton*, 237 F.Supp.2d 71, 100 (D.D.C. 2003);  
10 *Alford v. Aaron Rents, Inc.*, 2010 WL 3522804, \*2 (S.D. Ill. 2010) (a special master  
11 serves in a judicial capacity and "is not subject to discovery of his mental processes.").  
12 The Court notes that when a judicial officer is called to testify regarding actions taken  
13 in his judicial capacity, the Court should carefully scrutinize the grounds set forth for  
14 requiring his testimony. *US v. Dowdy*, 440 F.Supp. 894 (W.D. Va. 1977). In no case,  
15 however, may the questioning delve into the mental processes employed by the judicial  
16 officer in reaching his decision. *Standard Packaging v. Curwood, Inc.*, 365 F.Supp. 134,  
17 135 (N.D. Ill. 1973).

18 However, non-privileged communications that occurred between Special Master and  
19 any third party regarding his report, including specific requests made to put anything  
20 into his report, are not protected from inquiry and are discoverable. The permissible  
21 inquiry is, simply, what were Special Master's communications with Lionel Sawyer &  
22 Collins, including what information they gave the Special Master, what language they  
23 proposed, and what changes did they request. As such, Special Master, under the  
24 authority of NRCP 53, shall attend and answer these categories of questions at a one  
25 (1) hour deposition to be scheduled at a mutually convenient time.

26 If there are any discovery disputes during the deposition of Mr. Bertsch, counsel for  
27 the parties are to bring those issues before the Discovery Commissioner telephonically  
28

1 during the deposition. The time it takes to resolve any discovery disputes during the  
2 deposition of Mr. Bertsch will not count towards the hour time limitation.

3 With respect to Special Master's Countermotion to quash notice of deposition of  
4 Special Master is denied. However, the deposition of Mr. Bertsch is subject to the  
5 limitations identified in this Order.

6 The Court views the NRCP 11 Motion as an ethical issue. The Court does not find  
7 any ethical violations at this time. Therefore the NRCP 11 Motion is denied.

8 All other relief requested by Defendants or Special Master in connection with  
9 Defendants' Motion, the Countermotion and the Rule 11 Motion is denied.

10 Good cause appearing,

11 **IT IS ORDERED** that Defendants' Motion is granted in part and denied in part.

12 **IT IS FURTHER ORDERED** that Defendants will be allowed to take the  
13 deposition of Larry Bertsch for a maximum duration of one (1) hour. The scope of the  
14 deposition shall be limited to: (1) non-privileged communications between Larry  
15 Bertsch and Lionel Sawyer & Collins; (2) what information, if any, was given to Larry  
16 Bertsch by Lionel Sawyer & Collins; (3) whether Lionel Sawyer & Collins proposed  
17 language to be used in the Final Report; (4) what changes, if any, Lionel Sawyer &  
18 Collins requested to be made to the Final Report; (5) why there was communication  
19 between Larry Bertsch and only counsel for Vion and not counsel for Defendants; and  
20 (6) whether Larry Bertsch personally communicated with Lionel Sawyer & Collins or  
21 whether those conversations were through his counsel. Defendants are not permitted to  
22 inquire into the Special Master's thought processes in formulating his work product or  
23 conclusions in this case. How and why Special Master prepared, drafted, analyzed,  
24 formulated and reached his conclusions in his reports, including drafts of his reports, is  
25 protected from inquiry and is not discoverable. If there are any discovery disputes  
26 during the deposition of Mr. Bertsch, counsel for the parties are to bring those issues  
27 before the Discovery Commissioner telephonically during the deposition. The time it  
28

1 takes to resolve any discovery disputes during the deposition of Mr. Bertsch shall not  
2 count towards the hour time limitation.

3 **IT IS FURTHER ORDERED** that Defendants' Motion to conduct discovery on  
4 Anthony A. Zmaila, Esq. is denied.

5 **IT IS FURTHER ORDERED** that Special Master's Countermotion is denied  
6 subject to the limitations on Special Master's deposition identified in this Order.

7 **IT IS FURTHER ORDERED** that Special Master's Rule 11 Motion is denied.


8 **IT IS FURTHER ORDERED** that all other relief not specifically addressed in this  
9 Order related to Defendants' Countermotion is denied.

10 Dated this 10th day of September, 2013.

11  
12   
13 DISTRICT COURT JUDGE  
14 

14 Prepared and submitted by:

15 **ANTHONY A. ZMAILA LIMITED PLLC**

16   
17 Anthony A. Zmaila (NV Bar No. 2319)  
18 Peter J. Goatz (NV Bar No. 11577)  
19 265 East Warm Springs Rd., Suite 100  
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21 *Attorneys for Larry L. Bertsch, CPA & Associates, LLP, Special Master*  
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28

# EXHIBIT 23

# EXHIBIT 23

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October 16, 2014

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VIA HAND DELIVERY

The Honorable Gloria Sturman  
Regional Justice Center  
200 Lewis Avenue  
Las Vegas NV 89155

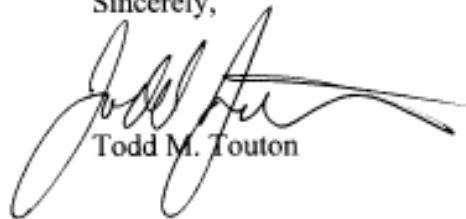
Re: Vion Operations, LLC v. Jay L. Bloom, et al.,  
District Court, Clark County, Nevada, Case No. A-11-646131-C

Dear Judge Sturman:

Please note the matter referred to above has been dismissed in full following effective removal to Bankruptcy Court. A copy of the stipulation and the two Bankruptcy Orders are enclosed.

Thank you for your consideration to this matter.

Sincerely,



Todd M. Touton

Enc.

cc: Joseph A. Gutierrez, Esq.  
Jeffrey R. Albregts, Esq.  
Bill Noall, Esq.  
Brian D. Shapiro, Esq.

A-11-646131-C  
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Rodney M. Jean, #1395  
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Todd M. Touton, #1744  
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*Attorneys for Vion Operations LLC  
and MHR Fund Management LLC*

Electronically filed on October 14, 2014

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:  
MURDER INC., LLC,  
Debtor.

Case No.: 11-26317-GS  
Chapter 11

VION OPERATIONS LLC,  
Plaintiff,

STIPULATION TO DISMISS WITH  
PREJUDICE

v.  
JAY BLOOM, et al.,  
Defendants.

Adversary No. 13-1193-GS

And Related Claims

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), made applicable to this proceeding by Fed. R. Bankr. P. 7041, it is hereby stipulated by and between adversary plaintiffs Vion Operations LLC and MHR Fund Management LLC, by and through their attorneys, Lionel Sawyer & Collins and Rodney M. Jean and Todd M. Touton, on the one hand; and adversary defendants Jay Bloom; Carolyn Farkas; Eagle Group Holdings, LLC; A.D.D. Productions LLC; and Order 66 Entertainment, LLC (the "Bloom Parties") by and through their attorneys, Cotton, Driggs,

Walch, Holley, Woloson & Thompson and Jeffrey R. Albregts and Maier Gutierrez Ayon PLLC and Joseph A. Gutierrez and Natchez Morice, James Klodt, Joe Randazzo, Keith Cooper, Kris Thondapu, Ron Lewis, Travis Cubley, Glenda Tuttle, Albert Ramirez, Howard Puterman, Warren Best, Susan Best, Larry Dematteo, Linda Dematteo, Patrick O'Laughlin, Sandy O'Laughlin, Ken Kefalas, Terry Bombard, Glen Tuttle, David Zacharias, Joseph Giorgianni, Barry Lewisohn, Vinny Mannino, Sandro Carnivale, Michael Regan, Tim Allen, Carlos Cardenas, Benson Riseman, Delinda Crampton, Gray Crampton, Ron Tulak, Zbras Investments, Keith Burhdoff, Cliff Stout, Mark Hellner, Jessica Guyer, L.S. Marlow Trust, John C. Morgando, April Morgando, Morgando Family Trust, and John Peter Morgando (the "Intervening Plaintiffs"), by and through their attorneys, Maier Gutierrez Ayon PLLC and Joseph A. Gutierrez, on the other hand, that this action be dismissed with prejudice, subject to the provisions of paragraph III(3)(d) of the Bloom/Vion Settlement Agreement as to the parties to that agreement, including but not limited to the Adversary Proceeding being dismissed with prejudice concerning any claims that have been brought or that could have been brought by or against the Trustee, the Trust, the Bloom Parties and the Vion Parties, and the provisions of paragraph III(3)(d) of the Bloom/Vion Settlement Agreement applying only to the non-derivative claims in the Adversary Proceeding, with each party to bear its own costs and attorneys' fees.

A true and correct copy of the of the Order is attached hereto as Exhibit 1.

Accordingly, the parties hereto hereby request entry of this stipulation and order.

STIPULATED AND AGREED TO BY:

Dated: October 14, 2014

Dated: October 14, 2014

/s/ Rodney M. Jean

Rodney M. Jean, NSB #1395  
Todd M. Touton, NSB #1744  
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*Attorneys for Vion Operations LLC  
and MHR Fund Management LLC*

/s/ Joseph A. Gutierrez

Joseph A. Gutierrez, NSB #9046  
MAIER GUTIERREZ AYON PLLC  
2500 West Sahara Avenue, Suite 106  
Las Vegas, NV 89102  
Telephone: 702-629-7900  
Telecopy: 702-629-7925  
*Attorneys for the Bloom Parties  
and the Intervening Plaintiffs*

Dated: October 14, 2014

/s/ Jeffrey R. Albregts

Jeffrey R. Albregts, NSB #66  
COTTON, DRIGGS, WALCH, HOLLEY,  
WOLOSON & THOMPSON  
400 S. 4<sup>th</sup> Street, 3<sup>rd</sup> Fl.  
Las Vegas, NV 89101  
Telephone: 702-791-0308  
Telecopy: 702-791-1912  
*Attorneys for Jay Bloom, Carolyn Farkas,  
Eagle Group Holdings, LLC, A.D.D.  
Productions, LLC, and Order 66 Entertainment,  
LLC*



# EXHIBIT 1

Rodney M. Jean  
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Telephone: 702-383-8888  
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*Attorneys for Vion Operations LLC  
and MHR Fund Management LLC*

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

In re:

MURDER INC., LLC,

Debtor.

VION OPERATIONS LLC,

Plaintiff,

v.

JAY BLOOM, et al.,

Defendants.

And Related Claims

Case No.: 11-26317-gs  
Chapter 11

ORDER TO DISMISS ADVERSARY  
PROCEEDING WITH PREJUDICE

Adversary No. 13-1193-gs

Date:  
Time:

1 Adversary plaintiff Vion Operations LLC ("Vion") and counterdefendant MHR Fund  
2 Management, LLC together with adversary defendants Jay Bloom; Carolyn Farkas; Eagle Group  
3 Holdings, LLC; A.D.D. Productions LLC; and Order 66 Entertainment, LLC (the "Bloom  
4 Parties") and Natchez Morice, James Klodt, Joe Randazzo, Keith Cooper, Kris Thondapu, Ron  
5 Lewis, Travis Cubley, Glenda Tuttle, Albert Ramirez, Howard Puterman, Warren Best, Susan  
6 Best, Larry Dematteo, Linda Dematteo, Patrick O'Laughlin, Sandy O'Laughlin, Ken Kefalas,  
7 Terry Bombard, Glen Tuttle, David Zacharias, Joseph Giorgianni, Barry Lewisohn, Vinny  
8 Mannino, Sandro Carnivale, Michael Regan, Tim Allen, Carlos Cardenas, Benson Riseman,  
9 Delinda Crampton, Gray Crampton, Ron Tulak, Zbros Investments, Keith Burdoff, Cliff Stout,  
10 Mark Hellner, Jessica Guyer, L.S. Marlow Trust, John C. Morgando, April Morgando,  
11 Morgando Family Trust, and John Peter Morgando (the "Intervening Plaintiffs") have stipulated  
12 that the above captioned action may be dismissed with prejudice, subject to certain limitations  
13 set forth in a settlement agreement previously approved by this court and specifically referenced  
14 in the stipulation to dismiss.

15 The Stipulation provides that each party shall bear his or its own court costs, attorneys'  
16 fees, and expenses associated with this litigation.

17 The Court has considered the Stipulation and finds that the relief requested therein is  
18 appropriate under the circumstances.

19 Now therefore, good cause appearing:

20  
21 *It is hereby ordered* that the Stipulation is approved and this adversary proceeding is  
22 dismissed with prejudice, subject to the terms and conditions of the aforementioned settlement  
23 agreement.  
24  
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28

1 Respectfully submitted by:

2 Lionel Sawyer & Collins

3 By: /s/ Rodney M. Jean

4 Rodney M. Jean, NSB #1395

5 Todd M. Touton, NSB #1744

6 Robert Hernquist, NSB #10616

7 Kevin Hejmanowski, NSB #10612

8 *Attorneys for Vion Operations LLC and*  
9 *MHR Fund Management LLC*

10 Approved by:

11 By: /s/ Joseph A. Gutierrez

12 Joseph A. Gutierrez, NSB #9046

13 MAIER GUTIERREZ AYON PLLC

14 2500 W. Sahara Ave., Ste. 106

15 Las Vegas, NV 89102

16 Telephone: 702-629-7900

17 Telecopy: 702-629-7925

18 *Attorneys for Jay Bloom, Carolyn Farkas,*  
19 *Eagle Group Holdings, LLC, A.D.D.*  
20 *Productions, LLC, and Order 66 Entertainment, LLC*  
21 *and the Intervening Plaintiffs*

22 Approved by:

23 By: /s/ Jeffrey R. Albregts

24 Jeffrey R. Albregts, NSB #66

25 COTTON, DRIGGS, WALCH, HOLLEY,

26 WOLOSON & THOMPSON

27 400 S. 4<sup>th</sup> Street, 3<sup>rd</sup> Fl.

28 Las Vegas, NV 89101

Telephone: 702-791-0308

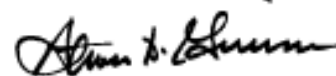
Telecopy: 702-791-1912

*Attorneys for Jay Bloom, Carolyn Farkas,*  
*Eagle Group Holdings, LLC, A.D.D.*  
*Productions, LLC, and Order 66 Entertainment, LLC*

###

# EXHIBIT 22

# EXHIBIT 22



CLERK OF THE COURT

Todd M. Touton, Nevada Bar No. 1744  
*ttouton@lionelsawyer.com*  
Robert Hernquist, Nevada Bar No. 10616  
*rhernquist@lionelsawyer.com*  
Steven Anderson, Nevada Bar No. 11901  
*sanderson@lionelsawyer.com*

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(702) 383-8855 (Telephone)  
(702) 383-8845 (Fax)

*Attorneys for Vion Operations LLC  
and MHR Fund Management LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

VION OPERATIONS LLC, a Delaware  
limited liability company,

Plaintiff,

v.

JAY L. BLOOM, an individual; CAROLYN S.  
FARKAS, an individual; EAGLE GROUP  
HOLDINGS, LLC, a Nevada limited liability  
company; A.D.D. PRODUCTIONS, LLC; a  
Nevada limited liability company; ORDER 66  
ENTERTAINMENT, LLC., a Nevada limited  
liability company; DOES I through X; and  
ROE CORPORATIONS I through X

Defendants.

AND ALL RELATED CLAIMS

Case No. A-11-646131-C

Department XXVI

**NOTICE OF REMOVAL TO UNITED  
STATES BANKRUPTCY COURT**

PLEASE TAKE NOTICE that on October 17, 2013, Brian Shapiro, Liquidating Trustee of  
the Murder Inc., LLC, Liquidating Trust, and Plaintiff Vion Operations LLC removed the above-  
referenced case to the United States Bankruptcy Court, District of Nevada, as Case No. 13-01193-

1 mkn, by filing a Notice of Removal of State Court Civil Action with the United States Bankruptcy  
2 Court pursuant to 28 U.S.C. § 1452(a) and Rule 9027 of the Federal Rules of Bankruptcy  
3 Procedure (the "Notice of Removal"). A true and correct copy of the Notice of Removal is  
4 attached hereto as "Exhibit 1."

5 DATED this 17<sup>th</sup> day of October, 2013.

6 LIONEL SAWYER & COLLINS

7 By: /s/ Todd M. Touton

8 Todd M. Touton, NBN 1744

9 Robert Hernquist, NBN 10616

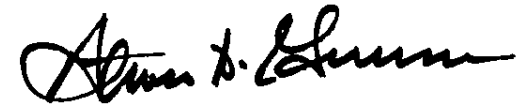
10 Steven Anderson, Nevada Bar No. 11901

11 *Attorneys for Plaintiff Vion Operations LLC*  
12 *and MHR Fund Management LLC*  
13  
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# EXHIBIT 21

# EXHIBIT 21





CLERK OF THE COURT

**AMOR**

Anthony A. Zmaila(NV Bar No. 2319

Email: tony@aaznevada.com

Peter J. Goatz (NV Bar No. 11577)

Email: peter@aaznevada.com

**ANTHONY A. ZMAILA LIMITED PLLC**

265 East Warm Springs Rd., Suite 100

Las Vegas, Nevada 89119

Telephone: (702) 614-8800

Facsimile: (702) 614-8700

*Attorneys for Larry L. Bertsch, CPA & Associates, LLP, Special Master*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

VION OPERATIONS, LLC, a Delaware  
limited liability company; and  
STRATEGIC FUNDING SOURCE, INC.,  
a New York corporation,

Plaintiffs,

v.

JAY L. BLOOM, an individual;  
CAROLYN S. FARKAS, an individual;  
EAGLE GROUP HOLDINGS, LLC, a  
Nevada limited liability company; A.D.D.  
PRODUCTIONS, LLC, a Nevada limited  
liability company; ORDER 66  
ENTERTAINMENT, LLC, a Nevada  
limited liability company; DOES I  
through X; and ROE CORPORATIONS I  
through X,

Defendants.

JAY L. BLOOM, an individual;  
CAROLYN S. FARKAS, an individual;  
EAGLE GROUP HOLDINGS, LLC, a  
Nevada limited liability company;  
ORDER 66 ENTERTAINMENT, LLC, a  
Nevada limited liability company,

Counter-claimants,

v.

VION OPERATIONS, LLC, a Delaware  
limited liability company; and  
STRATEGIC FUNDING SOURCE, INC.,  
a New York corporation,

Counter-defendants.

Case No. A-11-646131-C  
Dept. XXVI

**AMENDED ORDER FROM APRIL 4, 2013  
HEARING**

Date of Hearing: April 4, 2013  
Time of Hearing: 10:00am

1 JAY L. BLOOM, an individual;  
2 CAROLYN S. FARKAS, an individual;  
3 EAGLE GROUP HOLDINGS, LLC, a  
4 Nevada limited liability company;  
5 ORDER 66 ENTERTAINMENT, LLC, a  
6 Nevada limited liability company,

7 Third-Party Plaintiffs,

8 v.

9 LOUIS VENTRE, an individual;  
10 ANDREW REISER, an individual;  
11 STRATEGIC FUNDING SOURCE, INC.,  
12 a New York corporation; STRATEGIC  
13 CAPITAL MANAGEMENT, LLC, a New  
14 York limited liability company; STACEY  
15 SCHACTER, an individual; BARBARA  
16 ANDERSON, an individual; DOES I  
17 through X; and ROE CORPORATIONS I  
18 through X,

19 Third-Party Defendants.

20 KEITH BURHDOFF, an individual;  
21 CLIFF STOUT, an individual; MARK  
22 HELLNER, an individual; JAMES  
23 KLODT, an individual; JESSICA  
24 GUYER, an individual; JOE  
25 RANDAZZO, an individual; KEITH  
26 COOPER, an individual; KRIS  
27 THONDAPU, an individual; L.S.  
28 MARLOW TRUST, JOHN C.  
MORGANDO and APRIL MORGANDO  
as Trustees; MORGANDO FAMILY  
TRUST, JOHN PETER MORGANDO as  
Trustee; RON LEWIS, an individual;  
TRAVIS CUBLEY, an individual; JOHN  
CHRIS MORGANDO, an individual;  
GLENDA TUTTLE, an individual;  
ALBERT RAMIREZ, an individual;  
HOWARD PUTERMAN, an individual;  
WARREN BEST, an individual; SUSAN  
BEST, an individual; LARRY  
DEMATTEO, an individual; PATRICK  
O'LAUGLIN, an individual; SANDY  
O'LAUGLIN, an individual; KEN  
KEFALAS, an individual; TERRY  
BOMBARD, an individual; TERRY  
KROLL, an individual; BULLER  
FAMILY HOLDINGS, LLC, a Nevada  
limited liability company; GLEN  
TUTTLE, an individual; DAVID  
ZACHARIAS, an individual; ZBROS  
INVESTMENTS, a California

corporation; RON TULAK, an individual;  
JOSEPH GEORGIANO, an individual;  
BARRY LEWISOHN, an individual;  
VINNY MANNINO, an individual;  
SANDRO CARNIVALE, an individual;  
MICHAEL REGAN, an individual; TIM  
ALLEN, an individual;  
LINDENMUTH & ASSOCIATES, INC.,  
a Texas corporation; CARLOS  
CARDENAS, an individual; and  
BENSON RISEMAN, an individual,

Intervening Plaintiffs,

v.

VION OPERATIONS LLC, a Nevada  
limited liability company; MHR FUND  
MANAGEMENT, LLC, a Delaware  
limited liability company; BARBARA  
ANDERSON, an individual; STACEY  
SCHACTER, an individual; DOES I  
through X; and ROE CORPORATIONS I  
through X, inclusive,

Intervening Defendants.

This matter came before the Court on Special Master Larry L. Bertsch's ("Special Master") (ii) Special Master's "Fourth Joint Application for Allowance of Fees and Costs of Special Master and Special Master's Counsel for the Period February 13, 2012 through December 31, 2012 and Motion to Re-Allocate Payment of Special Master's Compensation and to Reduce Outstanding Unpaid Compensation to Judgment" ("Fourth Application"); and (ii) Jay Bloom, Carolyn Farkas, Eagle Group Holdings, LLC, A.D.D. Productions, LLC and Order 66 Entertainment, LLC (collectively "Defendants") "Defendants, Counterclaimants, and Third-Party Plaintiffs' Opposition to Special Master's Motion to Re-Allocate Payment of Special Master's Compensation and Opposition to Fourth Joint Application for Fees and Costs of Special Master and Counter-Motion for Return of Fees."

Special Master and Defendants gave appropriate notice of their respective motions.

Pursuant to *Stipulation and Order to Consolidate Hearings* entered on March 4, 2013, the parties established a modified briefing schedule and agreed to have Special

1 Master's Motion, Fourth Application, and Motion to Disqualify heard along with other  
2 related motions on April 3, 2013.

3 On March 12, 2013, Intervening Plaintiffs filed "Intervening Plaintiffs' Joinder to  
4 Motion to Disqualify Larry Bertsch as Special Master, Strike the Special Master's  
5 Reports from the Record and for Monetary Sanctions."

6 On March 18, 2013, Jay Bloom, Carolyn Farkas, Eagle Group Holdings, LLC,  
7 A.D.D. Productions, LLC and Order 66 Entertainment, LLC (collectively "Defendants")  
8 filed "Defendants, Counterclaimants, and Third-Party Plaintiffs' Opposition to Special  
9 Master's Motion to Re-Allocate Payment of Special Master's Compensation and  
10 Opposition to Fourth Joint Application for Fees and Costs of Special Master and  
11 Counter-Motion for Return of Fees;" Special Master filed "Special Master's Opposition  
12 to Motion to Disqualify Larry Bertsch as Special Master, Strike the Special Master's  
13 Reports from the Record and for Monetary Sanctions" and Vion Operations, LLC filed  
14 "Plaintiff's Opposition to Defendants' Motion to Disqualify Larry Bertsch As Special  
15 Master, Strike the Special Master's Reports From The Record and For Monetary  
16 Sanctions."

17 On March 21, 2013, Vion Operations, LLC filed "Plaintiff's Opposition to  
18 Defendants' Counter-Motion for Return of Fees and Request for Sanctions."

19 On March 27, 2013, Special Master filed "Special Master's Omnibus Reply in  
20 Support of Fourth Joint Application for Allowance of Fees and Costs of Special Master  
21 and Special Master's Counsel for the Period February 13, 2012 through December 31,  
22 2012 and Motion to Re-Allocate Payment of Special Master's Compensation and to  
23 Reduce Outstanding Unpaid Compensation to Judgment and Motion for Order:  
24 (1) Accepting Special Master's Final Report; and (2) Discharging Special Master"  
25 Defendants filed "Defendants/Third Party Plaintiffs/Counter-Claimant's Reply to  
26 Special Master's Opposition to Motion to Disqualify Larry Bertsch as Special Master,  
27 Strike the Special Master's Reports from the Record and for Monetary Sanctions."  
28

1 On April 4, 2013, the Court conducted a hearing on the Special Master's Motion, the  
2 Fourth Application and Motion to Disqualify . Anthony A. Zmaila, Esq. and Peter J.  
3 Goatz, Esq. appeared for Special Master, who was also present; Todd M. Touton, Esq.,  
4 Robert Hernquist, Esq., and Christopher Mathews, Esq. appeared for Vion Operations,  
5 LLC; and Joseph A. Gutierrez, Esq. and Jeffrey R. Albregts, Esq. appeared on behalf of  
6 Defendants and Intervening Plaintiffs. Jay L. Bloom was also present.

7 The Court read and considered the papers and pleadings on file in connection with  
8 Special Master's Motion, the Fourth Application, the Motion to Disqualify, and counter-  
9 motions related thereto, and considered the arguments of counsel.

10 The Court makes the following findings and conclusions:

11 A disclosure of Special Master's prior attorney-client relationship with Lionel  
12 Sawyer & Collins was not made to the parties until August 29, 2012. Defendants failed  
13 to take any action to prevent Special Master from issuing a final report prior to  
14 October 18, 2012 when Special Master filed "Final Report of Special Master." On  
15 October 18, 2012, Defendants sought disqualification of Lionel Sawyer & Collins.  
16 Because Defendants failed to timely object prior to the issuing the Final Report of  
17 Special Master, Defendants objections to the Court accepting Special Master's final  
18 report and their objections to discharging Special Master are overruled. *Venetian*  
19 *Casino Resort, LLC v. Dist. Ct.*, 118 Nev. 124, 41 P.3d 327, 330 (2002).

20 The Court also noted the fact that NRCP 53 does not contain the same language as  
21 FRCP 53(a)(2).

22 The Court finds applicable to Special Master NCJC 2.11(C), which requires Special  
23 Master to disclose certain relationships and business dealings. Based on NCJC 2.11(C),  
24 Special Master should have made a disclosure of his prior attorney-client relationship  
25 with Lionel Sawyer & Collins. The Court does not find that non-disclosure of such  
26 relationship constitutes grounds for disqualification. NRCP 53(a)(2); *See Ivey v. Dist.*  
27 *Ct.*, 129 Nev. Adv. Op. 16 (2013); *Venetian Casino Resort, LLC v. Dist. Ct.*, 118 Nev.  
28 124, 41 P.3d 327 (2002). Special Master is a fair, impartial, unbiased and highly skilled

1 forensic accountant, and the matters in this case to which the Court made its reference  
2 are in his area of expertise. The reference to Special Master in this case was proper.

3 The Court does not reach the issue of whether the relationship between Special  
4 Master and Lionel Sawyer & Collins created an impermissible conflict in this case  
5 requiring Special Master's recusal because the alleged conflict no longer existed at the  
6 point that Defendants raised the issue before the Court. As such, Defendants' Motion to  
7 Disqualify, and Intervening Plaintiffs' Joinder thereto, are denied.

8 With respect to approval of Final Report of Special Master, the Court finds that the  
9 failure of Special Master to disclose the prior attorney-client does not render the Final  
10 Report of Special Master invalid or erroneous. The Court finds that no party raised a  
11 formal objection to Special Master's report, but that the parties various other filings  
12 can be considered as an objection to the report. The Court, therefore, accepts the report  
13 as written. The Court does not adopt the Final Report of Special Master as findings of  
14 fact or conclusions of law. The Court will make determinations of fact and law at the  
15 trial on the merits in this case. As such, the Court, in accepting the Final Report of  
16 Special Master, did not conduct an analysis as to whether the findings were clearly  
17 erroneous nor a de novo review of the conclusions. Any party may use the Final Report  
18 of Special Master as such party sees fit. The Court's acceptance of the Final Report of  
19 Special Master does not limit or impair in any way any party's ability to challenge the  
20 report at trial.

21 The Court finds that Special Master has complied in all respects with the *Order*  
22 entered on October 19, 2011. Special Master's duties in this matter are complete;  
23 subject to those final items contained in this Order. Therefore, it is proper for Special  
24 Master to be discharged upon the completion of those final items contained in this  
25 Order, and the resolution and payment of Special Master's compensation.

26 Further, because of Special Master's failure to disclose, coupled with Defendants  
27 attempt to disqualify Lionel Sawyer & Collins, the Court finds that Defendants should  
28 not be responsible for Special Master's compensation from October 18, 2012 forward.

1 With respect the previously entered orders regarding Special Master's compensation,  
2 *Order Granting Joint Application (First) for Allowance of Fees and Costs of Special*  
3 *Master and Special Master's Counsel for the Period September 28, 2011 through*  
4 *October 31, 2011* entered on January 6, 2012; *Order Granting Joint Application*  
5 *(Second) for Allowance of Fees and Costs of Special Master and Special Master's*  
6 *Counsel for the Period November 1, 2011 through November 30, 2011* entered on  
7 January 13, 2012; and *Order Granting Joint Application (Third) For Allowance of Fees*  
8 *and Costs of Special Master and Special Master's Counsel for the Period December 1,*  
9 *2011 Through February 12, 2012* entered on April 25, 2012, those orders remain in full  
10 force and effect.

11 Finally, based on the rulings contained in this Order, the parties shall supplement  
12 the record with respect to their positions regarding the following matters:

13 (a) Fourth Joint Application for Allowance of Fees and Costs of Special Master and  
14 Special Master's Counsel for the Period February 13, 2012 through December 31, 2012  
15 and Motion to Re-Allocate Payment of Special Master's Compensation and to Reduce  
16 Outstanding Unpaid Compensation to Judgment;

17 (b) Defendants' Countermotion for Return of Fees and Request for Sanctions; and

18 (c) Whether any additional relief should be granted with respect to the Final Report  
19 of Special Master.

20 Good cause appearing,

21 **IT IS ORDERED** that Special Master's Motion for Order: (1) Accepting Special  
22 Master's Final Report; and (2) Discharging Special Master is granted in part. The  
23 Court accepts Special Master's final report, but does not adopt such report as findings  
24 of fact or conclusions of law. The Court's acceptance of the Final Report of Special  
25 Master does not limit or impair in any way any party's ability to challenge the report at  
26 trial.

27 **IT IS FURTHER ORDERED** that the Special Master is otherwise discharged  
28 from his duties in this case subject to those final matters outlined in this Order, and

1 the resolution and payment of Special Master's compensation. Nothing in this Order  
2 shall be construed to limit or impair Special Master's ability to be awarded  
3 compensation or to enforce any order.

4 **IT IS FURTHER ORDERED** that Defendants' Motion to Disqualify Larry Bertsch  
5 as Special Master, Strike the Special Master's Reports from the Record and for  
6 Monetary Sanctions is denied.

7 **IT IS FURTHER ORDERED** that the parties shall file and serve supplements  
8 with respect to: (a) Fourth Joint Application for Allowance of Fees and Costs of Special  
9 Master and Special Master's Counsel for the Period February 13, 2012 through  
10 December 31, 2012 and Motion to Re-Allocate Payment of Special Master's  
11 Compensation and to Reduce Outstanding Unpaid Compensation to Judgment;  
12 (b) Defendants' Countermotion for Return of Fees and Request for Sanctions; and  
13 (c) whether any additional relief should be granted with respect to the Final Report of  
14 Special Master on or before May 2, 2013. Any oppositions, responses, or statements to  
15 the supplemental filings shall be filed and served no later than May 16, 2013. Replies  
16 shall be filed and served no later than May 24, 2013. A hearing on these matters shall  
17 occur on May 31, 2013 at 10:00am.

18 **IT IS FURTHER ORDERED** that this Order is a nunc pro tunc order correcting  
19 the prior *Order From April 4, 2013 Hearing* entered on May 13, 2013.

20 Dated this 27<sup>th</sup> day of August, 2013.

21  
22   
DISTRICT COURT JUDGE 

23 Prepared and submitted by:

24 **ANTHONY A. ZMAILA LIMITED PLLC**  
25 

26 Anthony A. Zmaila (NV Bar No. 2319)  
27 Peter J. Goatz (NV Bar No. 11577)  
28 265 East Warm Springs Road, Suite 100  
Las Vegas, Nevada 89119

*Attorneys for Larry L. Bertsch, Special Master*



# EXHIBIT 20

# EXHIBIT 20

  
CLERK OF THE COURT

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**ORDR**

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

VION OPERATIONS, LLC, a Delaware  
limited liability company; and  
STRATEGIC FUNDING SOURCE, INC.,  
a New York corporation,

Plaintiffs,

v.

JAY L. BLOOM, an individual;  
CAROLYN S. FARKAS, an individual;  
EAGLE GROUP HOLDINGS, LLC, a  
Nevada limited liability company; A.D.D.  
PRODUCTIONS, LLC, a Nevada limited  
liability company; ORDER 66  
ENTERTAINMENT, LLC, a Nevada  
limited liability company; DOES I  
through X; and ROE CORPORATIONS I  
through X,

Defendants.

JAY L. BLOOM, an individual;  
CAROLYN S. FARKAS, an individual;  
EAGLE GROUP HOLDINGS, LLC, a  
Nevada limited liability company;  
ORDER 66 ENTERTAINMENT, LLC, a  
Nevada limited liability company,

Counter-claimants,

v.

VION OPERATIONS, LLC, a Delaware  
limited liability company; and  
STRATEGIC FUNDING SOURCE, INC.,  
a New York corporation,

Counter-defendants.

Case No. A-11-646131-C  
Dept. XXVI

**ORDER FROM APRIL 4, 2013 HEARING**

Date of Hearing: April 4, 2013  
Time of Hearing: 10:00am

1 Master does not limit or impair in any way any party's ability to challenge the report at  
2 trial.

3 **IT IS FURTHER ORDERED** that the Special Master is otherwise discharged  
4 from his duties in this case subject to those final matters outlined in this Order, and  
5 the resolution and payment of Special Master's compensation. Nothing in this Order  
6 shall be construed to limit or impair Special Master's ability to be awarded  
7 compensation or to enforce any order.

8 **IT IS FURTHER ORDERED** that Defendants' Motion to Disqualify Larry Bertsch  
9 as Special Master, Strike the Special Master's Reports from the Record and for  
10 Monetary Sanctions is denied.

11 **IT IS FURTHER ORDERED** that the parties shall file and serve supplements  
12 with respect to: (a) Fourth Joint Application for Allowance of Fees and Costs of Special  
13 Master and Special Master's Counsel for the Period February 13, 2012 through  
14 December 31, 2012 and Motion to Re-Allocate Payment of Special Master's  
15 Compensation and to Reduce Outstanding Unpaid Compensation to Judgment;  
16 (b) Defendants' Countermotion for Return of Fees and Request for Sanctions; and  
17 (c) whether any additional relief should be granted with respect to the Final Report of  
18 Special Master on or before May 2, 2013. Any oppositions, responses, or statements to  
19 the supplemental filings shall be filed and served no later than May 16, 2013. Replies  
20 shall be filed and served no later than May 24, 2013. A hearing on these matters shall  
21 occur on May 31, 2013 at 10:00am.

22 Dated this 9th day of May, 2013.

23   
24 DISTRICT COURT JUDGE  
25   
26  
27  
28

1 Prepared and submitted by:

2 **ANTHONY A. ZMAILA LIMITED PLLC**

3   
4 Anthony A. Zmaila (NV Bar No. 2319)  
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6 265 East Warm Springs Road, Suite 100  
7 Las Vegas, Nevada 89119

8 *Attorneys for Larry L. Bertsch, Special Master*

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

District Court No. A-15-714007-C

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

Electronically Filed  
Dec 16 2015 01:17 p.m.

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LARRY L. BERTSCH; AND LARRY L. BERTSCH CPA & Associates, LLC  
Tasick, 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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**PETITIONER'S APPENDIX**  
**VOLUME II OF III**

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DATE	DOCUMENT/COURT	PAGE NOS.
05/13/13	Exhibit 20 – Order from April 4, 2013 Hearing / Eighth Judicial District Court	PA 0239 – PA 0242
09/03/13	Exhibit 21 – Amended Order from April 4, 2013 Hearing / Eighth Judicial District Court	PA 0243 – PA 0251
10/17/13	Exhibit 22 – Notice of Removal to United States Bankruptcy Court / Eighth Judicial District Court	PA 0252 – PA 0254
10/16/14	Exhibit 23 – Letter to the Honorable Gloria Sturman re Dismissal of Case	PA 0255 –
05/04/15	Plaintiff's Opposition to Defendants' Motion to Dismiss and Countermotion for Declaratory Judgment / Eighth Judicial District Court	PA 0264 – PA 0351
06/01/15	Defendants' Reply in Support of Motion to Dismiss and Opposition to Countermotion for Declaratory Judgment / Eighth Judicial District Court	PA 0352 – PA 0390

RESPECTFULLY SUBMITTED this 16th day of December, 2015.

ADAM PAUL LAXALT  
Attorney General

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## **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, **PETITIONER'S APPENDIX VOLUME II OF III**, 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

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An employee of the  
Office of the Attorney General