IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY L. BERTSCH; AND LARRY L. BERTSCH CPA & ASSOCIATES, Petitioners, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE, Respondents, and JAY BLOOM, Real Party in Interest.	Case No.: 69381 District Court Case No.: A-15-714007-C

REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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I. STATEMENT OF THE CASE

This matter arises from a petition for writ of mandamus filed by petitioners Larry Bertsch and Larry Bertsch CPA & Associates (collectively, "Bertsch") on December 16, 2015. Bertsch's petition is in response to the District Court's order denying Bertsch's motion to dismiss, filed October 9, 2015.

On January 13, 2016, this Court filed an order directing real party in interest Jay Bloom ("Bloom") to file an answer against issuance of the requested writ.

Bloom now files this answer to Bertsch's petition for writ of mandamus.

II. ISSUES PRESENTED FOR REVIEW

Although the Petition frames four issues to be reviewed, its sole request is for this Court to issue a writ ordering the District Court to find that Bertsch was entitled to *absolute* quasi-judicial immunity, and that therefore the District Court must dismiss the action in its entirety.

The four issues which this Court is faced with are as follows:

1. Whether, when all parties stipulate to the terms of a special master's appointment including only qualified immunity, the District Court's order is effective in limiting the special master's potential immunity.
2. If the District Court's order is not binding here, whether Bertsch's duties as a non-judicial officer were functionally dissimilar to a judicial officer, such that he was not entitled to quasi-judicial immunity;
3. If quasi-judicial immunity applies, whether a special master's intentional acts of fraud, willful misconduct, and/or gross negligence were entirely outside the scope of actions that would be protected by absolute quasi-judicial immunity.
4. Whether absolute quasi-judicial immunity would bar both claims for monetary and prospective relief.

III. STATEMENT OF THE FACTS

A. FACTUAL HISTORY

The case arises out of Petitioners, Larry L. Bertsch ("Bertsch") and Larry L. Bertsch, CPA & Associates, LLP's ("Bertsch & Associates") (collectively referred to as "Petitioners") tortious conduct in the litigation entitled, *Vion Operations, LLC v. Bloom, et al.*, case number A-11-646131-C (the "Vion Litigation") – a contentious lawsuit between Vion Operations, LLC ("Vion") and Jay Bloom ("Bloom"), which continued for over three years until it was finally settled in October of 2014.

In the Vion Litigation, Vion requested and the district court ordered, that Petitioners be appointed as Rule 53 Special Master to conduct an accounting of the books and records of the companies involved therein.

Unbeknownst to Bloom, and obscured from the court, Bertsch was an active client of Vion's counsel, Lionel Sawyer & Collins ("LSC") at the time of his appointment to what was to be an independent position. Petitioners failed to disclose this fact until it was discovered over ten months after his appointment and just weeks before he issued his "independent" report.

In the interim, Petitioners, Vion and LSC worked in concert to produce a report riddled with unsubstantiated findings calculated to damage Bloom and his businesses.

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

B. PROCEDURAL HISTORY OF THE VION LITIGATION

The Vion Litigation began on August 4, 2011 in the Eighth Judicial District

Court of Nevada as case number A-11-646131-C. (PA Vol. I 0043).

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. (PA Vol. I 0049-0053).

The rate sheet Vion attached to its countermotion was for Bertsch & Associates as Bertsch is the owner, operator and managing partner of Bertsch & Associates. (PA Vol. I PA0056).

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. (PA Vol. I 0058-0063); *see also* (RPI00103-RPI00104); and (RPI00038 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. (RPI00038 at ¶ 15).

C. BERTSCH WAS APPOINTED AS SPECIAL MASTER TO PROVIDE ACCOUNTING OF BUSINESSES AT ISSUE IN VION LITIGATION

On October 10, 2011, an order was entered in the Vion Litigation appointing Petitioners as Special Master and ordering Bloom and Vion to equally share the costs incurred by Petitioners as Special Master and his counsel. (RPI00038 at ¶ 16); see also (RPI00107- RPI00111).

The district court also approved the employment of Zmaila as counsel for Petitioners, with the costs to be split by Bloom and Vion. *See* PA0058-0063. The district court order also waived the requirement for Petitioners to give security for "payment of such costs and damages as may arise from the appointment of Bertsch as Special Master." *Id*. at PA0063.

Most importantly, the district court order appointing Petitioners as Special Master stated: "[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.*" *Id*. at p. 6, ¶ 12 (emphasis added).

In their role as Special Master, Petitioners 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* (RPI000038 at ¶ 17).

At no point were Petitioners 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 Petitioners' appointment as Special Master and after six (6) court appearances wherein Bertsch was personally in attendance along with his counsel, 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." (RPI00113).

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. (RPI000038 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. (RPI000040 at ¶ 24).

Not only did Petitioners 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"). (RPI000040 at ¶ 25).

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

Seven weeks after Petitioners' 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. (RPI000040 at ¶ 26); *see also* (RPI00115-00138).

Purporting to be independent and unbiased, Petitioners' 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* (RPI000040 at ¶ 27).

Not only were these defamatory statements not included in Petitioners' preliminary report submitted to the court on November 2, 2011 (RPI00140-00171), 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. (RPI000040 at ¶ 28).

Without having all the information necessary to perform an unbiased accounting, Petitioners' 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. (RPI000040 at ¶ 29).

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. (RPI000041 at ¶ 33); *see also* (PA Vol. II 0298-0303). Bertsch subsequently moved for a protective order over disclosure of such information. (PA Vol. II 0305-0314).

On or about January 2, 2013, the district 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. (PA Vol. II 0316-0320).

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. (RPI000041 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." (RPI00197).

- 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." (RPI00199-218). 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." (RPI00134).

- 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." (RPI000041 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.

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. (RPI00220).

- 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." (RPI00222).

- 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. (RPI00226-00227). Zmaila even tells Mr. Hernquist that he "should have some fun with challenges to individuals' and business entities' objections." (RPI00226).

- Emails dated December 29, 2011 between Mr. Hernquist and Zmaila/Bertsch regarding a joint investigation into bank records of Defendants. (RPI00228-00229). 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. (RPI00230).

- An email dated February 4, 2012 from Bertsch to Mr. Hernquist regarding other lawsuits involving Bloom that he "[t]hought may be of interest." (RPI00233).

- 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 (RPI00234).

- 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 (RPI00235).

- 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. (RPI00236).
- Emails dated May 4, 2012 between Bertsch and Mr. Hernquist to set up a meeting to discuss a business involved in the Vion Litigation. (RPI00237-00240).

Coincidently, 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 Vion Litigation. (RPI00246-00282).

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. (RPI000042 at ¶ 40).

Based on the foregoing, the evidence indicates that Petitioners' 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. (RPI000042 at ¶ 43).

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. (RPI00284-00299).

At the hearing on Bloom's motion held on April 4, 2013, the court entertained Bloom's motion to disqualify as well as Vion's motion for an order accepting Special Master's final report and discharging Special Master. (RPI00301-00343).

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. *Id*. at p. 9-12. In response, the district 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.

On May 13, 2013, the district 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. (RPI00345-00353).

On May 31, 2013, the district 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. (RPI00410-00413).

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. (PA Vol. II 0322-0325).

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. (PA Vol. II 0334-0336).

On September 11, 2013, the district court entered an order permitting Bloom to conduct a deposition of Bertsch and dictated the scope of the deposition therein. (PA Vol. II 0347-0351). However, the case was removed to bankruptcy court and settled thereafter, thus the deposition was never taken.

E. CONTENTS OF THE FINAL REPORT ARE PUBLICLY PUBLISHED

On October 23, 2014, (while the Vion Litigation was settled and statistically closed), the defamatory statements made in the Final Report remained in the public domain and are actively causing harm to Bloom's reputation. *See* Ex. 1 at ¶ 49.

On or about October 19, 2012, the day after the Final Report was filed, a reporter for the Las Vegas Sun, 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." (RPI00453-00457). 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. (RPI000043 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 millions of dollars into the project by Las Vegas businessman Jay Bloom." (RPI00453-00454). 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." (RPI000043 at ¶ 53). What the public does not know is that the defamatory statements were systematically placed in Petitioners' Final Report through LSC, Zmaila, and Bertsch's inappropriate communications and fraudulent conduct.

Despite the district 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. (RPI000043 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. (RPI000043-44 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. (RPI000044 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. (RPI00459-00462).

F. BLOOM BRINGS THE INSTANT LITIGATION AGAINST PETITIONERS

On February 17, 2015, Bloom filed his complaint against Petitioners for the damages he has incurred, and will continue to incur, due to Petitioners' gross negligence, fraudulent concealment, willful misconduct, and defamation. *See* PA0002-0020.

Additionally, Bloom sought injunctive and equitable relief requiring Petitioners to formally retract 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 Petitioners in the Final Report were false. *Id*.

G. PETITIONERS' MOTION TO DISMISS IS DENIED BY THE DISTRICT COURT

On April 15, 2015, Petitioners filed a motion to dismiss, wherein they argued that Bloom's claims were barred by (1) absolute quasi-judicial immunity; (2) issue preclusion, and (3) under NRCP 12(b)(5). (PA Vol. I 0021-0039).

Bloom filed an opposition to Petitioners' motion to dismiss and countermotion for declaratory relief on May 4, 2015, and argued that the scope of any immunity Bertsch may have had was limited to Judge Sturman's order appointing him as Special Master. Further, Bloom argued that issue preclusion did not apply because Bertsch was not a party to or in privity with any party in the Vion Litigation and the issues at hand were not actually and necessarily litigated. (RPI00001-RPI00465).

Petitioners filed a reply in support of the motion to dismiss and opposition to the countermotion on June 1, 2015. (PA Vol. II 0352-0390).

The district court held a hearing on June 6, 2015. (PA Vol. III 0391-0524). After taking argument on the motion to dismiss and countermotion, the district court declined to say whether a special master enjoys qualified immunity in every case but did find as follows:

> THE COURT: I doubt that either the common law or statutes really indicate that a Special Master enjoys absolute liability for all of his actions. There is some boundary beyond which if he goes in his conduct he must be held accountable.

(PA Vol. III 0486).

Although the district court did not base its ultimate findings in denying the motion to dismiss on the issue of immunity, the court provided guidance on its positon by stating that its initial determination would be that Bersch had "qualified immunity" and that quasi-judicial immunity would require some level of discovery before an entry of summary judgment. (PA Vol. III 0490).

On October 9, 2015, the district court entered an order denying Petitioners' motion to dismiss and denying Bloom's countermotion for declaratory relief. (PA Vol. III 0391-0524).

Following the district court's order, Bloom began to conduct discovery, however, Petitioners filed a petition for writ of mandamus and a request to stay discovery pending the resolution of the writ petition. Mr. Bloom now responds as the real party in interest.

IV. ARGUMENT

A writ of mandamus is used to compel the performance of an act that the law requires, or to control an arbitrary or capricious exercise of discretion, when the ordinary course of the law does not provide for a "plain, speedy, and adequate remedy." NRS 34.160–.170. The act mandated must be one which the law requires of the officer as a duty stemming from the office itself. *See id.; State ex rel. Lawton v. Public Service Comm. Of Nevada*, 44 Nev. 102 (1920). "Mandamus will not lie to control discretionary action … unless discretion is *manifestly abused* or is exercised arbitrarily or capriciously." *Round Hill General Imp. Dist. v. Newman*, 97 Nev. 601, 603–04 (1981) (emphasis added).

When the Court agrees to consider a petition, the petitioner bears the burden of showing that an extraordinary writ is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228 (2004). Therefore, a petitioner requesting a writ of mandamus in relation to a District Court order must show an actual omission by the District Court, and that the District Court was required to perform the act.

This Court "generally decline[s] to consider writ petitions that challenge interlocutory district court orders denying motions to dismiss." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197 (2008). These writ petitions "often disrupt district court case processing, and consume an 'enormous amount' of this Court's resources." *Id.* (quoting *State ex rel. Dep't of Trans. v. Thompson*, 99 Nev. 358, 361–62 (1983)). For these reasons, this Court has stated it will only consider a petition at the motion to dismiss stage if

> (1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule, or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition.

Int'l Game Tech, Inc., 124 Nev. at 197–98.

Through his writ of mandamus, Bertsch is seeking a ruling that would eliminate any accountability on his part despite his agreement with the district court order detailing the terms and conditions of Bertsch's appointment as special master. Bertsch has not sufficiently shown that the District Court was required to find that a special master is entitled to *absolute* quasi-judicial immunity. A writ of mandamus is unwarranted here because (1) generally speaking, special masters should not be granted complete quasi-judicial immunity when their functions are subject to fewer safeguards than actual judicial officers; (2) a District Court specifically ordered that Bertsch was not entitled to absolute immunity; and (3) a factual dispute exists as to Bloom's allegations of Bertsch's intentional misconduct, which, when taken as true at the motion to dismiss stage, support personal liability regardless of any immunity.

A. THE VION COURT'S ORDER OF APPOINTMENT SPECIFICALLY LIMITS BERTSCH'S IMMUNITY, AND NO GROUNDS EXIST TO OVERTURN THAT ORDER.

As a preliminary matter, the underlying acts of which Bertsch is accused were subject to a court order in the Vion Litigation specifically allowing personal liability. PA 63. Bertsch cannot now challenge that order more than four years after it was entered, especially when the Petition only raised issue with the underlying Order, stemming from a different case and by a different Honorable District Court Judge. Accordingly, Bertsch bears the burden of proving to this Court that the underlying Order was a manifest abuse of discretion when it was based on a previously entered court order, which was stipulated to by the parties and not objected to despite Bertsch being represented by counsel. Bertsch simply cannot meet this burden, so the Petition should be denied.

All parties to the Vion litigation, including Bertsch, agreed to the Vion Court's order of appointment which specifically sets out the limitations of Bertsch's immunity. PA at 58–63. The Order contained the following provision: "The 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*." *Id.* ¶ 12 (emphasis added). Bertsch was represented by counsel at this time, and offered no objection to these terms. *See* PA at 62, ¶ 7. Bloom, Vion, and Bertsch himself were therefore fully aware of the consequences of the order, and proceeded in the Vion Litigation with this carve-out in mind. The Vion Court would not have approved of this limitation if, as Bertsch now contends, a special master is always entitled to absolute quasi-judicial immunity.

On the contrary, such a limitation is *vital* to the parties' safety, considering the perfect storm of authority and non-accountability which comes with appointment as a special master. Bertsch was placed in a position where his individual opinions, which may or may not have been based on his professional experience, were lauded as "independent" and therefore carry the connotation of

honesty and integrity—something of which Bloom has repeatedly provided evidence to the contrary. Further, as a court-appointed officer, these misleading and fraudulent opinions are made public record in their purest form, as his report is not subject to rebuttal, cross-examination, or even appeal.

At most, had the Vion Court come to a conclusion based on Bertsch's report (which it specifically did not adopt, *see* PA at 249–50) Bloom may have had a right to appeal an order based on the erroneous report, but no such order was issued. Instead, Bertsch was allowed to publish malicious and untrue comments about Bloom to the public record, and then to a major news outlet, and now he seeks to avoid all accountability for these acts. Meanwhile, Bloom is left with the mark of "Ponzi scheme" on his name, with no grounds for defending himself.

In regard to the underlying Order at issue in this Petition, the Honorable Judge Cory recognized the authority of the Vion Court's order of appointment, and expressed concern in making a ruling that would essentially overturn another district court's order. *See* PA at 474–75. If nothing else, because one district court has no authority to second-guess another district court, the underlying Order was in no way an abuse of discretion, much less was it an omission of any act "required by law." For these reasons alone, the Petition should be denied.

1. Bertsch Has Not Met His Burden of Proof Regarding the Possibility of Waiver of Quasi-Judicial Immunity.

In a desperate attempt to avoid enforcement of the Vion Court's order, the Petition asks this Court to rule that waiver of even limited quasi-judicial immunity is impossible, solely on the basis that there appears to be no case law explicitly allowing it. Petition at 24–28.

However, Petitioner bears the burden of *proving* that the District Court failed to take an action which it was legally required to take. *See State ex rel. Lawton*, 44 Nev. at 102 ("It is incumbent on the relator to show, not only that the respondent

has failed to perform the required duty, but that the performance thereof is actually due from him at the time of the application.") (quoting *State v. Gracey*, 11 Nev. 223 (1876)).

As the Petition makes abundantly clear, Bertsch has found no such authority, and instead can only argue that on public policy grounds. Therefore, Bertsch cannot evade the binding nature of the Vion Court's order, as he has not met his burden of showing some authority that contradicts the Vion Court's order limiting Bertsch's personal immunity.

2. Partial Waiver of Quasi-Judicial Immunity is Allowed in These Circumstances.

Although this line of argument is futile on account of the burden of proof, to any extent that this Court considers issuing a new rule on the possibility of waiver here, it should be noted that the little authority which does exist supports waiver in certain circumstances such as these. While it may be true that, when assessing waiver of immunity in the context of the Eleventh Amendment, courts often find that the legislature did not intend to waive immunity, the basic premise remains that even immunity explicitly granted by the United States Constitution *can be waived*. Judicial and quasi-judicial immunities are functionally similar to sovereign immunity, and similarly can be waived in certain circumstances.

Here, Bertsch was fully aware that his special mastership was subject to a limited waiver of any quasi-judicial immunity he would normally enjoy, on account of an exceedingly specific court order. The court order first specifically states that Bertsch has some measure of immunity from personal liability, and then specifically declares an exception to that immunity for acts constituting "gross negligence, fraud, or willful misconduct." PA at 63 ("The 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."). Not only was the waiver itself clear, but Bloom's subsequent action which is currently being scrutinized specifically alleges gross negligence, fraud, and willful misconduct. PA 11–16.

The Petition attempts to persuade this Court that the waiver could instead be interpreted as a "belt and suspenders"-type of limitation, meant as an *additional* protection for acts in absence of all jurisdiction (which are normally not protected by immunity), on top of the judicial immunity which Bertsch assumes he deserves. Petition at 27. This argument assumes that the parties and the District Court intended something contrary to the plain meaning of the sentence. Such a reading cannot be upheld over the plain language absent some additional evidence of intent. Because no such evidence exists, the plain meaning should prevail—Bertsch is specifically personally liable for *any* acts of gross negligence, fraud, or willful misconduct, regardless of whether they were within his jurisdiction.

Additionally, Bertsch specifically requested that counsel be retained on his behalf while acting as special master in the Vion Litigation. PA at 62 ¶ 7. If the parties, Bertsch, and the Vion 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 superfluous.

Finally, Bertsch erroneously claims that the public policy of granting absolute judicial immunity also contradicts the possibility that a non-judicial officer could waive his limited quasi-judicial immunity. Petition at 25. As a preliminary matter, the policy concerns supporting absolute immunity for judges were incorporated with the "functional" approach outlined in *Marvin v. Fitch*, 12 years

after the policy discussion Bertsch cites from *Duff v. Lewis*.[1] Just as the numerous differences between Bertsch's function and that of an actual judge support only limited quasi-judicial immunity in this case, the differences also contradict any argument suggesting that public policy discourages waiver in a case such as this.

In particular, Bertsch cites to the following policy considerations as why waiver should not be allowed: (1) judges do not have time to defend themselves; (2) the need for finality in the resolution of disputes; (3) to prevent deterring competent persons from taking office; (4) to allow independent action without fear of individual retaliation; and (5) the existence of adequate procedural safeguards such as change of venue and appellate review. Petition at 25.

As exhaustively detailed below, the nature of a special master's position does not lend itself to the same policy considerations as would affect a judge's immunity. First, requiring Bertsch to take responsibility for his acts does not waste "judicial time," because he is a Certified Public Accountant, not a judge. Second, there is no concern that the world faces a shortage of competent special masters, and the limited liability based on gross negligence, fraud, and willful misconduct would only deter those individuals who actually intend to behave in such a manner. Similarly, when immunity is only waived on account of evidenced malicious collusive action, such waiver does not deter independent action, but rather encourages it. Finally, zero procedural safeguards apply to a special master in Bertsch's position, as Bloom could take no appeal, had no chance to cross-examine or depose Bertsch, and had no opportunity to produce a rebuttal expert after Bertsch's conflict and collusion were exposed.

In short, even if a special master is able to enjoy quasi-judicial immunity to

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[1] The "functional" approach from *Marvin v. Fitch* and its application to Bertsch are addressed in detail in section B, *infra*.

some extent, a waiver limited to gross negligence, fraud, and willful misconduct does not violate any binding authority or public policy concerns. Just as a court may require an unequivocal waiver of sovereign immunity in legislation, this Court should acknowledge the unequivocal waiver which occurred in the Vion Litigation, and deny Bertsch's Petition.

B. BERTSCH'S DUTIES IN THE VION LITIGATION WERE NOT COMPARABLE TO THOSE OF A JUDICIAL OFFICER, SO HE CANNOT ENJOY ABSOLUTE QUASI-JUDICIAL IMMUNITY.

Even if the Court chooses not to apply the Vion Court's specific terms allowing personal liability for Bloom's claims against Bertsch, the case law on applying quasi-judicial immunity does not support granting immunity to Bertsch in this case.

"Immunity is a matter of public policy that balances the social utility of the immunity against the social loss of being unable to attack the immune defendant." *Martin v. Fitch*, 126 Nev. 168, 174 (2010) (quoting *State of Nevada v. Dist. Ct. (Ducharm)*, 118 Nev. 609, 617 (2002)). Further, absolute immunity should only be applied sparingly, on account of its extremely broad protections. *Id.* at 170. Accordingly, nonjudicial officers are generally afforded only qualified immunity. *Id.* at 174. Under these public policy considerations, absolute immunity should only be granted to officers whose decisions are subject to traditional appellate review—judges themselves. *See id*. ("Absolute immunity protects judicial officers from collateral attack and recognizes that appellate procedures are the appropriate method for correcting judicial error.").

With these concerns established, this Court has adopted the "functional" approach to evaluating quasi-judicial immunity, dictating that an officer is only entitled to quasi-judicial immunity if the *function the individual performed* is

similar to that of a traditional judge. *Id.* at 174–75. In making this determination, several factors should be considered, including:

> whether the individual is performing many of the same functions as a judicial officer, whether there are procedural safeguards in place similar to a traditional court, whether the process or proceeding is adversarial, the ability to correct errors on appeal, and whether there are any protective measures to ensure the constitutionality of the individual's conduct and to guard against political influences.

Id. at 175.

Here, examination of these factors shows that Bertsch did not perform a function similar to that of a judicial officer. Bertsch provided an independent review that was not adopted by the District Court, and had no authority to make findings of fact or conclusions of law. Although the underlying proceedings were adversarial, Bertsch's acts were undertaken far from scrutiny, and he was never subject to cross-examination or deposition. PA at 273. Bertsch participated in repeated ex parte communication with one party—a party which Bertsch was simultaneously employing for his personal affairs—and allowed that same party to make changes to the "independent" report drafts without seeking any review from Bloom. PA at 6–9.[2] Further, Bertsch was fully aware that a special master's report is not subject to appeal.

1. Bertsch Performed None of the Same Functions as a Judicial Officer.

The simple truth of Bertsch's role in the Vion Litigation is that he used his position to simultaneously appease his personally retained attorneys and to cause harm to Bloom's personal reputation.

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[2] Any attempt by Bertsch to minimize the egregious nature of his communications with LSC should be ignored, as all of Bloom's factual allegations must be accepted as true at the motion to dismiss stage. *See, e.g. Buzz Stew, LLC vs. City of North Las Vegas*, 124 Nev. 224, 228 (2008).

Looking at the nature of the function Bertsch performed, Bertsch acted as a receiver, accountant and independent contractor in the Vion Litigation and may not claim any privilege as a judicial officer. Bertsch was hired as a forensic accountant and receiver to use his own knowledge and experience to report an accounting of a party's financial transactions, not to formulate an opinion based on the legality of the party's actions. *See* PA at 60–61. The District Court acknowledged Bertsch's report as mere evidence, rather than adopting Bertsch's report as findings of fact. *See* PA at 249–50.

Further, Bertsch should not be viewed as "an arm of the Court" as the Petition argues. Petition at 19 (citing *Venetian Casino Resort, LLC v. District Court*, 118 Nev. 124, 131 (2002). In *Venetian Casino*, the special master at issue was a licensed attorney who was given authority to preside over hearings and determined the validity of claims. *Id.* at 127, 129. In contrast, Bertsch is not a licensed attorney, never held hearings, never assessed the validity of legal claims, and in fact only reviewed factual documents to form an opinion as to the propriety of the party's accounting. PA at 60–61. Accordingly, the *Venetian Casino* special master served an entirely different function than Bertsch, and in fact offers an apt comparison of how *little* Bertsch's function resembled a judicial officer, or even a "typical" special master.

Bertsch, as an accountant, acted 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 (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 appraisement 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).

Accordingly, Bertsch cannot be viewed as having performed functions similar to a judicial officer. At best, Bertsch served as an appraiser, ascertaining only particular facts with no relation to legal consequences.

2. Insufficient Procedural Safeguards Prevented Bertsch's Willful and Fraudulent or Grossly Negligent Behavior.

In regard to the remaining factors, the Petition fails to offer any more than a conclusory statement that the traditional litigation setting "establishes that there were procedural safeguards in place through the adversarial process." *See* Petition at 21. This statement glosses over the truth—the adversarial process never applied to Bertsch, he was never subject to cross-examination, he was never deposed, and no other evidence or argument was allowed to rebut his opinions.

Even if there was some semblance of truth-finding by way of the adversarial process in relation to Bertsch's wrongful acts, no amount of cross-examination or rebuttal witnesses would prevent Bertsch from disseminating his report to the new media as an "independent" accounting, including allusion to a "Ponzi scheme." Further, the dissemination of his report was not preceded by any required notice as a traditional judicial action would be. *See Marvin v. Fitch*, 126 Nev. 168, 177 (2010).

Instead, the only safeguard to prevent Bertsch's wrongful acts was the

specific limitation of immunity in the Vion Court's order of appointment.

3. Bertsch's Involvement Did Not Produce Any Appealable Orders or Dispositions.

A special master's report, much like an expert report, is not subject to appeal unless it is adopted by a court as findings of fact. *See* NRAP 3A. As stated above, the Vion Court expressly declined to adopt Bertsch's report, therefore producing no appealable order or disposition.

4. No Other Protective Measures Ensured that Bertsch Acted in Accordance with the Constitution, or that Bertsch was Free from Political Influence.

In addition to the complete lack of a right to appeal, the truth-finding benefit of the adversarial process, or any procedural safeguards, no other protective measures ensured that Bertsch acted properly. The Vion Court did not even require a bond from Bertsch, although he had authority to act as a receiver, and court-appointed receivers are typically required to post a bond as security for the chance of injury caused by their error.

In summary, Bertsch's involvement in the Vion Litigation did not resemble that of a traditional judicial officer. His actual functions resembled an expert witness, but without the normal benefit of admitted bias or rebuttal. Further, his "independent" report was disseminated to the public with no advance notice or opportunity to review by Bloom. Even if this function would normally entitle him to immunity, his report was never adopted as an appealable order, so no other avenue of protection or redress is available to an individual who is harmed by Bertsch's intentional acts. If the Vion Court's specific exemption from immunity is insufficient to allow the underlying denial of Bertsch's motion to dismiss, then Bertsch is still not deserving of quasi-judicial immunity by virtue of his function in the Vion Litigation.

C. BERTSCH'S INTENTIONAL AND WRONGFUL CONDUCT WAS OUTSIDE THE SCOPE OF HIS JURISDICTION, GIVING RISE TO PERSONAL LIABILITY REGARDLESS OF ANY QUASI-JUDICIAL IMMUNITY.

Even if quasi-judicial immunity were to apply to a special master, Bertsch's malicious acts would not be subject to whatever immunity a special master enjoys. Nevada grants quasi-judicial immunity when a court-appointed officer "faithfully and carefully carries out the order of the appointing judge . . . ." *Anes v. Crown Partnership, Inc.*, 113 Nev. 195, 201 (1997).

In this case, no reasonable observer could state that Bertsch "faithfully and carefully carrie[d] out the order of the appointing judge," and therefore Bertsch cannot share the judge's judicial immunity, because his acts were not independent, and were in fact calculated to *cause* damage to one of the parties. *Id.*

A faithful and careful independent accounting would have required that Bertsch's report be either (1) entirely isolated from influence of either party, or (2) constructed after thorough and equal input from both parties. On the contrary, Bertsch's report was based on several drafts that were sent only to LSC, and the influence of both Vion and Vion's counsel is nakedly apparent on the final report. Further, emails between Bertsch and Vion (but not disclosed to Bloom until he obtained a subpoena for the emails) explicitly show Bertsch's intentional—or at least grossly negligent—suggestions as to how the report could cause *more damage to Bloom*.

Because these unfair and malicious acts were not contemplated in the order of appointment, Bertsch acted outside of his jurisdiction and is subject to personal liability. *See id.* at 202.

Bertsch confusingly asserts that Bloom's allegations of improper conduct must be supported with evidence, therefore requiring discovery to overcome judicial quasi-immunity that may apply. *See* Petition at 22. This position entirely

ignores the fact that the Vion Court *did allow discovery* of Bertsch's involvement with Vion's counsel, and that, although Bloom was never able to depose Bertsch, Bloom did receive communications between Bertsch and Vion's counsel showing blatantly improper (not to mention ex parte) collusion between them.

Furthermore, all of the authority cited in the Petition is in relation to actual judicial officers, not individuals who may enjoy quasi-judicial immunity. *See id.* Accordingly, those cases did not allow allegations of corruption to pierce *actual judicial immunity,* considering the other procedural and appellate safeguards at play with *an actual judge*. As detailed above, none of these safeguards apply to Bertsch's "independent" report, so personal liability is appropriate.

V. CONCLUSION

In total, Bertsch has not met his burden of proving that the Honorable Judge Cory manifestly abused his discretion by denying the motion to dismiss. The order of appointment by the Vion Court specifically limited immunity with respect to acts of gross negligence, fraud, or willful misconduct. Even if that limitation is ineffective, Bertsch's function as special master does not resemble that of a judicial officer so as to entitle him to absolute quasi-judicial immunity. Finally, even if Bertsch did have absolute quasi-judicial immunity, the malicious collusion and publication of Bertsch's report, with the intent of damaging Bloom personally, were outside of any jurisdiction as a special master, and therefore not subject to quasi-judicial immunity. Accordingly, the Petition should be denied.

DATED this 12th day of February, 2016.

By: */s/ Joseph A. Gutierrez*
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this answer to petition for rehearing, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, and in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman. I further certify that this brief complies with the page limitations of NRAP 40 because it does not exceed 10 pages. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of February, 2016.

By: */s/ Joseph A. Gutierrez*
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CERTIFICATE OF SERVICE

I do hereby certify that on the 12th day of February, 2016, I served a copy of the foregoing **REAL PARTY IN INTEREST'S ANSWER TO PETITION FOR REHEARING** 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:

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