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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

---

PETER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND  
GARDNER,

Appellants,

v.

R & O CONSTRUCTION, INC.

Respondent.

---

Appeal from the Eighth Judicial District Court of the State of Nevada, in and for  
County of Clark

---

**JOINT APPENDIX, VOL. I OF III**

---

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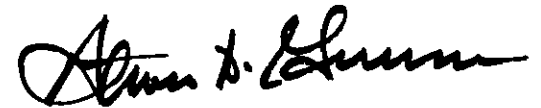
*Counsel for Appellants*

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CLERK OF THE COURT

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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

PETER GARDNER and CHRISTIAN GARDNER, )  
on behalf of minor child, LELAND GARDNER, )

Plaintiffs, )

vs. )

HENDERSON WATER PARK, LLC dba )  
COWABUNGA BAY WATER PARK, a Nevada )  
limited liability company; WEST COAST WATER )  
PARKS, LLC, a Nevada limited liability company; )  
DOUBLE OTT WATER HOLDINGS, LLC, a Utah )  
limited liability company; DOES I through X, )  
inclusive; ROE Corporations I through X, inclusive; )  
and ROE Limited Liability Company I through X, )  
inclusive, )

Defendants. )

A-15-722259-C

Case No.:

Dept. No.:

XXX

**COMPLAINT**

Plaintiffs Peter and Christian Gardner, on behalf of their minor son, Leland Gardner, and  
through their undersigned counsel, hereby complain and allege against Defendants as follows:

.....

.....

.....

## IDENTIFICATION OF THE PARTIES

1. Plaintiff Peter Gardner (“Mr. Gardner”) is an individual and a Nevada resident. Mr. Gardner is married to Christian Gardner and is the father of Leland Gardner (“Leland”), a minor child.

2. Plaintiff Christian Gardner (“Mrs. Gardner”) is an individual and a Nevada resident. Mrs. Gardner is married to Mr. Gardner and is Leland’s mother.

3. Leland Gardner is six (6) years old and a Nevada resident.

4. Defendant Henderson Water Park, LLC dba Cowabunga Bay Water Park is a Nevada limited liability company with its principal place of business in Clark County, Nevada.

5. Defendant West Coast Water Parks, LLC is a Nevada limited liability company that manages and/or owns Defendant Henderson Water Park, LLC dba Cowabunga Bay Water Park and regularly conducts business in Clark County, Nevada.

6. Defendant Double Ott Water Holdings, LLC is a Utah limited liability company that manages and/or owns Defendant Henderson Water Park, LLC dba Cowabunga Bay Water Park and regularly conducts business in Clark County, Nevada.

7. Cowabunga Bay Water Park (“Cowabunga Bay”) is a water park located at 900 Galleria Drive, Henderson, Nevada 89011 and is owned and operated by Defendants Henderson Water Park, LLC dba Cowabunga Bay Water Park, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC (collectively “Defendants”).

8. The true names and capacities, whether individual, corporate, associate, or otherwise, of Doe Defendants I through X, are unknown to Plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs are informed and believe and thereupon allege that each of the defendants designated as a Doe Defendant is responsible in some manner for the events and happenings described herein, including but not limited to the individuals and entities that provide or should have provided lifeguard and safety protection for Leland including but not limited to lifeguards, managers,

9. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants Roe Corporations I through X and Roe Limited Liability Companies I through X, are unknown to Plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs are informed and believe and thereupon allege that each of the defendants designated as a Roe Corporation or Roe Limited Liability Company is responsible in some manner for the events and happenings described herein, including but not limited to the individuals and entities that provide or should have provided lifeguard and safety protection for Leland including but not limited to swimming pool management companies and employment staffing agencies. As such, Plaintiffs will seek leave of the Court to amend this Complaint to insert the true names and capacities of said defendants as they become identified and known to Plaintiff.

10. Whenever it is alleged in this Complaint that a Defendant did any act or thing, it is meant that such Defendant's officers, agents, servants, employees, or representatives did such act or thing and at the time such act or thing was done, it was done with full authorization or ratification of such Defendant or was done in the normal and routine course and scope of business, or with the actual, apparent and/or implied authority of such Defendant's officers, agents, servants, employees, or representatives. Specifically, Defendants are liable for the actions of its officers, agents, servants, employees, and representatives.

11. At all times material to this Complaint, the acts and omissions giving rise to this action occurred in Clark County, Nevada.

12. Cowabunga Bay is a twenty-five (25) acre for-profit water park featuring dozens of water slides and attractions. One of its marquee attractions is the Surf-A-Rama Wave Pool (“the Wave

1 Pool”), which is 35,000 square feet, holds up to 2,619 bathers and produces waves up to four (4) feet  
2 high.

3 13. Before opening its doors to the public, Nevada law required Cowabunga Bay to first  
4 obtain a permit to operate from the Southern Nevada Health District (“SNHD”). Nevada Revised  
5 Statute Chapter 444 governs the operation of public swimming pools and dictates the procedures a  
6 water recreation business such as Cowabunga Bay must follow to obtain such a permit.

7  
8 14. In that regard, NRS 444.080 states that it is “unlawful for any person, firm,  
9 corporation, institution or municipality to construct or to operate or continue to operate any public  
10 swimming pool [ ] within the State of Nevada without a permit to do so from the health authority.”  
11 In order to obtain the requisite permit, the operator must submit an application or “lifeguard plan” to the  
12 health authority clarifying *inter alia* “[t]he lifesaving apparatus and measures to insure safety of  
13 bathers.” *Id.* The health authority will only approve a permit when it determines that the public  
14 swimming pool in question will not constitute a menace to public health. *Id.*

15  
16 15. On February 19, 2014, Cowabunga Bay applied for its permit and submitted a lifeguard  
17 plan to SNHD. In its lifeguard plan, Cowabunga Bay proposed posting only six (6) lifeguards to  
18 monitor the Wave Pool. Due to the woefully deficient lifeguard coverage proposed for this banner  
19 attraction, SNHD denied Cowabunga Bay’s application. In doing so, SNHD specified that seventeen  
20 (17) lifeguards were required to safely operate the Wave Pool.

21  
22 16. Thus, in order to obtain its permit, Cowabunga Bay submitted a revised lifeguard plan  
23 in line with SNHD’s safety requirements for the Wave Pool, *i.e.*, that seventeen (17) lifeguards would  
24 be posted to monitor the Wave Pool at all times. Based on Cowabunga Bay’s revised lifeguard plan,  
25 SNHD granted its request for a permit.

26  
27 17. Cowabunga Bay, however, had no intention of ever providing the lifeguard coverage  
28 required by state law and instead knowingly, intentionally and willfully deviated from the prescribed  
lifeguard plan for its Wave Pool and other attractions. Indeed, despite its public proclamations that

1 safety was its “number one priority,” Cowabunga Bay habitually operated the Wave Pool with an  
2 inadequate amount of lifeguards. In sum, Cowabunga Bay made the necessary representations  
3 regarding lifeguard staffing to obtain the required permit and then summarily disregarded those  
4 representations in order to operate the Wave Pool with the staffing levels that were previously rejected  
5 by SNHD.  
6

7 18. Moreover, Cowabunga Bay did not provide life poles used to rescue a drowning  
8 swimmer, failed to post the appropriate safety signage, and did not maintain water quality in clear  
9 violation of SNHD requirements.

10 19. During the 2014-2015 school year, Leland was a kindergarten student. After school on  
11 May 27, 2015, Leland had a playdate with a classmate that would be hosted by the classmate’s father,  
12 William Ray (“Mr. Ray”), at a “water park.”  
13

14 20. While visiting Cowabunga Bay, Mr. Ray took his son and Leland to the Wave Pool.  
15 There, Leland—who was not wearing a life vest—fell off of his inner tube and was submerged at the  
16 bottom of the Wave Pool for a lengthy period of time. Leland suffered a non-fatal drowning and, as a  
17 result, debilitating injuries that required weeks of hospitalization in the pediatric intensive care unit at  
18 St. Rose Hospital–Siena Campus. Since the incident, Leland has required twenty-four (24) hour care  
19 for his severe neurological impairments and his devastating injuries will necessitate extensive and  
20 ongoing medical treatment and rehabilitative therapy for the rest of his life.  
21

22 21. On May 27, 2015, Cowabunga Bay failed to adequately staff lifeguards at numerous  
23 attractions throughout the water park, including the Wave Pool. Further, Cowabunga Bay failed to  
24 provide safety signage, life poles, clean water with the appropriate levels of visibility, and otherwise  
25 abide by the parameters of its permit. Finally, Cowabunga Bay did not require children of Leland’s age  
26 and size to wear life vests in the Wave Pool.  
27

28 22. On or around 12:10 p.m. on May 29, 2015, SNHD reported to Cowabunga Bay to  
investigate Leland’s non-fatal drowning. SNHD observed that proper safety signage and lifepoles were

1 not present. In addition, although Cowabunga Bay was not scheduled to open for another hour, SNHD  
2 still noted there were only fourteen (14) lifeguards on duty inside Cowabunga Bay at the time when  
3 thirty-five (35) were required by the lifeguard plan.

4 23. SNHD returned to Cowabunga Bay on June 9, 2015 to conduct an additional  
5 investigation while the park was open for business. Despite Cowabunga Bay's May 29, 2015  
6 representations—and its absolute legal obligation to provide adequate staffing of lifeguards—SNHD  
7 found only eight (8) lifeguards on duty at the Wave Pool instead of the seventeen (17) required by the  
8 lifeguard plan. SNHD likewise found lifeguard staffing violations at other attractions in Cowabunga  
9 Bar as well as additional problems with the water quality. SNHD ultimately cited and fined  
10 Cowabunga Bay for its inadequate staffing of lifeguards and other violations of the permitting  
11 requirements.  
12

### 13 FIRST CAUSE OF ACTION

#### 14 (Negligence – All Defendants)

15 24. Paragraphs 1 through 23 are hereby specifically incorporated herein as though fully set  
16 forth.  
17

18 25. Defendants, through their acts and omissions, owed multiple duties to Plaintiffs  
19 including but not limited to:  
20

- 21 a. The duty to keep Leland safe;
- 22 b. The duty to use reasonable care to protect Leland from known dangers such as  
23 drowning;
- 24 c. The duty to adequately staff lifeguards throughout Cowabunga Bay;
- 25 d. The duty to properly train employees, lifeguards and managers/supervisors to  
26 protect customers from dangers such as drowning;
- 27 e. The duty to provide ongoing training to employees, lifeguards and  
28 managers/supervisors to protect customers from dangers such as drowning;

- 1 f. The duty to maintain clean and clear water within Cowabunga Bay;
- 2 g. The duty to use reasonable care in the hiring, supervision, training and retention
- 3 of its employees; and
- 4 h. The duty to act in a matter that does not violate State of Nevada, City of Las
- 5 Vegas and Clark County statutes, laws and ordinances.
- 6

7 26. Defendants breached their duties to Plaintiffs when they failed to provide adequate

8 lifeguard coverage and otherwise failed to take reasonable steps to protect Leland from drowning.

9 27. In addition, Defendants' violations of the law were criminal in nature and constituted

10 negligence *per se* as Leland's injuries are of the type which the statutes, laws, ordinances, and

11 regulations of the United States, State of Nevada—including but limited to NRS 444.080—Clark

12 County, and/or the Cities of Henderson and Las Vegas were intended to prevent.

13

14 28. As a direct and proximate result of Defendants' negligence and brazen violation of

15 the law, Plaintiffs have been damaged in an amount greater than \$10,000.

16 29. The conduct of the Defendants, and each of them, individually and in concert with

17 one another as herein alleged, was grossly negligent, reckless, willful, intentional, oppressive,

18 fraudulent, malicious, and done in reckless disregard of the safety and rights of Plaintiffs thereby

19 warranting the imposition of punitive damages.

20

21 30. Plaintiffs have been forced to retain the services of attorneys to prosecute this action

22 and are entitled to an award of reasonable attorneys' fees and costs.

23 **JURY DEMAND**

24 31. Plaintiff hereby demands a trial by jury for all issues so triable.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

- 27 1. For compensatory damages in excess of \$10,000.00;
- 28 2. For punitive damages to be determined by the jury;

3. For attorneys fees and costs of suit incurred herein;
4. For pre-judgment and post-judgment interest, as allowed by law; and
5. For such other and further relief as is appropriate under the circumstances.

DATED this 28th day of July, 2015.

Respectfully submitted,  
CAMPBELL & WILLIAMS

By /s/ Donald J. Campbell, Esq.

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18 **HENDERSON WATER PARK, LLC dba**  
19 **COWABUNGA BAY WATER PARK,**  
20 **WEST COAST WATER PARKS, LLC and**  
21 **DOUBLE OTT WATER HOLDINGS, LLC**

22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 **PETER GARDNER and CHRISTIAN GARDNER,**  
25 **on behalf of minor child, LELAND GARDNER,**

26 **Plaintiffs,**

27 **vs.**

28 **HENDERSON WATER PARK, LLC dba**  
**COWABUNGA BAY WATER PARK, a Nevada**  
**limited liability company; WEST COAST WATER**  
**PARKS, LLC, a Nevada limited liability company;**  
**DOUBLE OTT WATER HOLDINGS, LLC, a Utah**  
**limited liability company; DOES I through X,**  
**inclusive; ROE CORPORATIONS I through X, and**  
**ROE Limited Liability Company I through X,**  
**inclusive,**

**Defendants.**

**CASE NO. A-15-722259-C**  
**DEPT. NO. XXX**

**ANSWER TO COMPLAINT**

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**ANSWER TO COMPLAINT**

Defendants, HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, WEST COAST WATER PARKS, LLC and DOUBLE OTT WATER HOLDINGS, LLC, by and through their counsel of record, Paul F. Eisinger, Esq. and Philip Goodhart, Esq., of the law firm of THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, do herein answer the Plaintiffs' Complaint on file and admit, deny and allege as follows:

**I. IDENTIFICATION OF THE PARTIES**

1. These answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 1, 2, 3, 5, 6, 7, and 9 of the Complaint and therefore deny same.

2. These answering Defendants deny the allegations contained in paragraphs 8 and 10 of the Complaint.

3. These answering Defendants admit the allegations contained in paragraph 4 of the Complaint.

**II. GENERAL ALLEGATIONS**

4. These answering Defendants deny the allegations contained in paragraphs 11, 17, 18 and 21 of the Complaint.

5. These answering Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 12, 19 and 20 of the Complaint and therefore deny same.

6. These answering Defendants object to paragraphs 13, 14, 15, 16, 22 and 23 of the Complaint on the grounds that said paragraphs call for several legal conclusions. Without waiving said objections, and in a good faith effort to respond, these answering Defendants deny the allegations set forth paragraphs 13, 14, 15, 16, 22 and 23 of the Complaint.

**III. FIRST CAUSE OF ACTION (Negligence-All Defendants)**

7. Answering paragraph 24 of the Complaint, these Defendants reaffirm and incorporate by reference each and every response to the allegations contained in the preceding paragraphs 1 through 23 of the Complaint as though fully set forth herein.

1           8.       These answering Defendants deny the allegations contained in paragraphs 26, 27,  
2 28, 29 and 30 of the Complaint.

3           9.       These answering Defendants object to paragraph 25 of the Complaint on the  
4 grounds that said paragraph calls for several legal conclusions. Without waiving said objections,  
5 and in a good faith effort to respond, these answering Defendants deny the allegations set forth  
6 paragraph 25 of the Complaint.

7 **IV.   JURY DEMAND**

8           10.      These answering Defendants state that Paragraph 31 of the Complaint is the  
9 Plaintiffs' Jury Demand and therefore no formal response is required.

10                   **AFFIRMATIVE DEFENSES**

11                   **FIRST AFFIRMATIVE DEFENSE**

12           Defendants allege that the allegations contained in the Complaint fail to state a claim  
13 against them upon which relief can be granted.

14                   **SECOND AFFIRMATIVE DEFENSE**

15           Defendants state that the Plaintiffs' alleged injuries and damages, if any, were caused in  
16 whole or in part by the negligence of the Plaintiffs.

17                   **THIRD AFFIRMATIVE DEFENSE**

18           Defendants state that the Plaintiffs' alleged injuries and damages, if any, were caused in  
19 whole or in part by the negligence of a third party or parties.

20                   **FOURTH AFFIRMATIVE DEFENSE**

21           Plaintiffs have failed to mitigate their damages, if any.

22                   **FIFTH AFFIRMATIVE DEFENSE**

23           Plaintiffs have failed to name a necessary party.

24                   **SIXTH AFFIRMATIVE DEFENSE**

25           Assuming arguendo that liability is found, these answering Defendants would not be  
26 jointly liable and would be only severally liable (these answering Defendants deny any  
27 negligence) for that portion of Plaintiffs' claim that represents the percentage of negligence  
28 attributable to them.

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Defendants state that an independent intervening force or circumstance caused the incident alleged in the Plaintiffs' Complaint.

## **NINTH AFFIRMATIVE DEFENSE**

### **TENTH AFFIRMATIVE DEFENSE**

## ELEVENTH AFFIRMATIVE DEFENSE

**TWELFTH AFFIRMATIVE DEFENSE**

• • •

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• • •

1 WHEREFORE, Defendants, HENDERSON WATER PARK, LLC dba  
2 COWABUNGA BAY WATER PARK, WEST COAST WATER PARKS, LLC and DOUBLE  
3 OTT WATER HOLDINGS, LLC, pray that Plaintiffs takes nothing by way of their Complaint  
4 on file herein, and that the same be dismissed with prejudice, and that these answering  
5 Defendants be awarded their fees and costs incurred herein.  
6

7 DATED this 26th day of August, 2015.

8 THORNDAL, ARMSTRONG, DELK,  
9 BALKENBUSH & EISINGER

10 /s/ Paul F. Eisinger

11 PAUL F. EISINGER, ESQ.

12 Nevada Bar No. 001617

13 PHILIP GOODHART

14 Nevada Bar No. 005332

15 1100 East Bridger Avenue

16 Las Vegas, NV 89101-5315

17 Attorneys for Defendants,

18 HENDERSON WATER PARK, LLC dba

19 COWABUNGA BAY WATER PARK,

20 WEST COAST WATER PARKS, LLC and

21 DOUBLE OTT WATER HOLDINGS, LLC  
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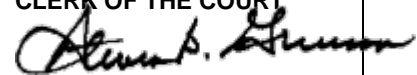
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**CERTIFICATE OF SERVICE**

Pursuant to N.R.C.P. 5(b)(D), I hereby certify that on the 26th day of August, 2015,  
service of the foregoing **ANSWER TO COMPLAINT** was made upon the following parties via  
electronic service through the Eighth Judicial District Court's Odyssey E-File and Service  
System:

Donald J. Campbell, Esq.  
Samuel R. Mirkovich, Esq.  
Philip R. Erwin, Esq. Esq.  
CAMPBELL & WILLIAMS  
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Las Vegas, NV 89101  
Attorneys for Plaintiffs,  
PETER GARDNER and CHRISTIAN  
GARDNER on behalf of minor child,  
LELAND GARDNER

/s/ Terry Kelly-Lamb \_\_\_\_\_  
An Employee of THORNDAL, ARMSTRONG, DELK,  
BALKENBUSH & EISINGER



**MOT**

CAMPBELL & WILLIAMS  
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**DISTRICT COURT  
CLARK COUNTY, NEVADA**

PETER GARDNER and CHRISTIAN GARDNER, )  
individually and on behalf of minor child, LELAND )  
GARDNER, )

Plaintiffs, )

vs. )

HENDERSON WATER PARK, LLC dba )  
COWABUNGA BAY WATER PARK, a Nevada )  
limited liability company; WEST COAST WATER )  
PARKS, LLC, a Nevada limited liability company; )  
DOUBLE OTT WATER HOLDINGS, LLC, a Utah )  
limited liability company; ORLUFF OPHEIKENS, )  
an individual; SLADE OPHEIKENS, an individual; )  
CHET OPHEIKENS, an individual; SHANE )  
HUIH, an individual; SCOTT HUIH, an )  
individual; CRAIG HUIH, an individual; TOM )  
WELCH, an individual; DOES I through X, )  
inclusive; ROE Corporations I through X, inclusive )  
and ROE Limited Liability Company I through X, )  
inclusive, )

Defendants. )

AND ALL RELATED CLAIMS )

Case No.: A-15-722259

Dept. No.: XXX

**MOTION FOR LEAVE TO FILE  
THIRD AMENDED COMPLAINT**

Hearing Date:

Hearing Time:

1 Plaintiffs, by and through their undersigned counsel, hereby submit the following Motion  
2 for Leave to File Third Amended Complaint. This Motion is made and based upon the papers and  
3 pleadings on file herein, the exhibits attached hereto, and the Points and Authorities that follow.

4 **NOTICE OF MOTION**

5 TO: ALL PARTIES and

6 TO: THEIR RESPECTIVE COUNSEL OF RECORD:

7 PLEASE TAKE NOTICE that on **07-25-18** at the hour of **9:00** A.M., or as  
8 soon thereafter as counsel can be heard, Plaintiffs will bring the foregoing motion on for hearing  
9 before the above-entitled Court at the Regional Justice Center, 200 Lewis Avenue, Las Vegas,  
10 Nevada, 89155.  
11

12 DATED this 18th day of June, 2018.

13 CAMPBELL & WILLIAMS

14  
15 By /s/ Donald J. Campbell

16 DONALD J. CAMPBELL, ESQ. (1216)  
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## POINTS AND AUTHORITIES

### **I. INTRODUCTION**

The Court is familiar with the general background of this litigation that arises out of the non-fatal drowning suffered by Leland Gardner in the Wave Pool at Cowabunga Bay on May 27, 2015. Plaintiffs initially filed suit on July 28, 2015 against Henderson Water Park, LLC dba Cowabunga Bay Water Park (“HWP”), Double Ott Water Holdings, LLC and West Coast Water Parks, LLC for negligence.<sup>1</sup> Specifically, Plaintiffs alleged that Defendants intentionally violated Nevada law by only assigning three lifeguards to the Wave Pool on the date of the incident when seventeen lifeguards were required pursuant to the lifeguard plan approved by the Southern Nevada Health District.

Plaintiffs subsequently learned through discovery that HWP was operated by a Management Committee comprised of seven (7) members who were vested with absolute managerial control over Cowabunga Bay.<sup>2</sup> As such, Plaintiffs sought leave to amend to bring direct claims for negligence against the Individual Defendants related to their direction, authorization and participation in the tortious conduct that caused Leland Gardner’s severe injuries. Plaintiffs likewise sought leave to assert claims under the alter ego doctrine against HWP, Double Ott Water Holdings, LLC, and West Coast Water Parks, LLC in order to pierce the corporate veil to reach the assets of the Individual Defendants. The Court denied Plaintiffs’ motion for leave to amend, and Plaintiffs filed a petition for writ of mandamus in the Nevada Supreme Court. On November 22, 2017, the Nevada Supreme Court granted Plaintiffs’ petition for writ of mandamus and confirmed that Plaintiffs were entitled to bring direct claims for negligence against the Individual Defendants and a veil piercing theory

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<sup>1</sup> The Court granted summary judgment on Plaintiffs’ direct claims for negligence against Double Ott Water Holdings, LLC and West Coast Water Parks, LLC on October 10, 2016.

<sup>2</sup> At all relevant times, the Management Committee members were Orluff Opheikens, Slade Opheikens, Chet Opheikens, Tom Welch, Shane Huish, Scott Huish and Craig Huish (collectively referred to as the “Individual Defendants”).

1 against the limited liability companies under the alter ego doctrine. *See Gardner on Behalf of L.G.*  
2 *v. Eighth Judicial District Court*, 405 P.3d 651 (Nev. Nov. 22, 2017).

3 On December 18, 2017, Plaintiffs filed their Second Amended Complaint and immediately  
4 began pursuing discovery related to their claims against the Individual Defendants. Specifically,  
5 Plaintiffs obtained extensive documentation that was previously undisclosed by HWP and conducted  
6 the depositions of the Orluff Opheikens, Slade Opheikens, Tom Welch and Scott Huish. This  
7 discovery conclusively demonstrated that Orluff Opheikens obtained an ownership stake and  
8 managerial control of Cowabunga Bay to protect his primary business, R&O Construction Company  
9 (“R&O”), from the devastating financial losses and severe reputational harm that resulted from the  
10 lack of financing for the construction of Cowabunga Bay.<sup>3</sup> In order to facilitate this plan, R&O loaned  
11 Orluff Opheikens millions of dollars to capitalize the Cowabunga Bay project with the understanding  
12 that those funds would be used to pay R&O’s significant unpaid construction costs and subcontractor  
13 fees. R&O, along with Orluff Opheikens, likewise signed as a borrower and guarantor on a \$12.2  
14 million loan from Bank of Utah that was used to complete the construction of Cowabunga Bay and  
15 fund its operations, the profits from which would flow back to R&O in the form of loan repayments.  
16

17 At all relevant times, Orluff Opheikens governed and influenced his alter ego, R&O, and acted  
18 with a unity of interest and ownership towards the common purpose of making R&O whole and  
19 extricating the company from the “nightmare” situation created by the failed construction of  
20 Cowabunga Bay. Because this arrangement blurred the corporate fiction and allowed R&O to reap  
21 the benefits of a fully constructed and operational Cowabunga Bay while attempting to avoid the  
22 liability caused by the negligent mismanagement of Orluff Opheikens and his fellow Management  
23 Committee members, Plaintiffs seek leave to amend their complaint to pursue a reverse piercing theory  
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<sup>3</sup> R&O was hired as the general contractor for the construction of Cowabunga Bay. Within months  
28 of breaking ground, R&O was forced to halt construction of Cowabunga Bay due to millions of  
dollars in unpaid construction costs that left its subcontractors on the verge of bankruptcy.

1 against Orluff Opheikens and R&O.<sup>4</sup> A copy of Plaintiffs' proposed Third Amended Complaint that  
2 fully details the allegations supporting their reverse piercing theory is attached hereto as Exhibit 1.

3 **II. ARGUMENT**

4 "[A] party may amend its pleading only with...the court's leave" and "[t]he court should  
5 freely give leave when justice so requires." Nev. R. Civ. P. 15(a)(2); *see Gardner*, 405 P.3d at 654  
6 ("NRC P 15(a) provides that leave to amend a complaint should be freely given when justice so  
7 requires."). "The liberality embodied in NRC P 15(a) requires courts to err on the side of caution  
8 and permit amendments that appear arguable or even borderline, because denial of a proposed  
9 amendment amounts to denial of the opportunity to explore any potential merit it might have had."  
10 *Id.* (citing *Nutton v. Sunset Station, Inc.*, 131 Nev. —, —, 357 P.3d 966, 975 (Ct. App. 2015)).

11 "Sufficient reasons to deny a motion to amend a pleading include undue delay, bad faith, or  
12 dilatory motives on the part of the movant." *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828  
13 (2000). A proposed amendment may also be denied as "futile if the plaintiff seeks to amend the  
14 complaint in order to plead an impermissible claim." *Halcrow, Inc. v. Eighth Judicial Dist. Court.*,  
15 129 Nev. Adv. Op. 42, 302 P.3d 1148, 1152 (2013). Nevertheless, the policy for leave to amend  
16 should be "applied with extreme liberality." *Lay v. Treesource Industries, Inc.*, 143 Fed.Appx. 786,  
17 789 (9th Cir. 2005) (citing *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.  
18 2003)).<sup>5</sup> Plaintiffs clearly satisfy this lenient standard here.

19 Plaintiffs filed the instant Motion prior to the deadline to amend pleadings and add parties of  
20 November 8, 2018. Accordingly, Plaintiffs' request for leave to amend is timely and Defendants  
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22  
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24  
25 <sup>4</sup> Plaintiffs also seek leave to conform certain allegations in their Complaint to the facts developed  
26 in discovery.

27 <sup>5</sup> "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority,  
28 because the Nevada Rules of Civil Procedure are based in large part upon their federal  
counterparts." *See Executive Mgmt. v. Ticor Title Ins. Co.*, 188 Nev. 46, 53, 38 P.3d 872, 876  
(2002).

cannot claim undue delay. In that regard, there is no evidence of bad faith or dilatory motive on the part of Plaintiffs as the request for leave to amend simply seeks to name a new party to this litigation under a recognized legal theory and conform the factual allegations in the Complaint to the evidence that was recently developed in discovery. Indeed, this is not a situation where Plaintiffs seek leave to amend in order to surprise Defendants with new and distinct claims at a late stage in discovery. Defendants also cannot claim they will suffer prejudice as a result of Plaintiffs' proposal to add R&O as a defendant.

As they have in the past, Defendants may attempt to claim that Plaintiffs' reverse piercing theory is unsupported by law. But unlike the issues addressed by the Nevada Supreme Court in connection with Plaintiffs' petition for writ of mandamus, Nevada has long recognized that reverse piercing under the alter ego doctrine is a viable legal theory. "While the classic alter ego situation involves a creditor reaching the personal assets of a controlling individual to satisfy a corporation's debt, the 'reverse' piercing situation involves a creditor reaching the assets of a corporation to satisfy the debt of a corporate insider based on a showing that the corporate entity is really the alter ego of the individual." *LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 903, 8 P.3d 841, 845-46 (2000). In *Loomis*, the Nevada Supreme Court explained that "reverse piercing is not inconsistent with traditional piercing in its goal of preventing abuse of the corporate form[;]" holding that "reverse piercing is appropriate in those limited instances where the particular facts and equities show the existence of an alter ego relationship and require that the corporate fiction be ignored so that justice may be promoted." *Id.* at 904, 9 P.3d at 846.<sup>6</sup>

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<sup>6</sup> Nevada law governs this action, but it is worth noting that Utah—the state in which R&O is domiciled—also recognizes reverse piercing as a viable legal theory. *See M.J. v. Wisan*, 371 P.3d 21, 36 (Utah 2016) ("[W]e conclude that our law should allow reverse piercing of the corporate veil.").

To plead a viable reverse piercing theory, Plaintiffs must simply allege facts sufficient to demonstrate the basic elements for finding alter ego under Nevada law. *Id.* More specifically, Plaintiffs must allege that (1) the corporation was influenced and governed by the person asserted to be the alter ego; (2) there was such unity of interest and ownership that one is inseparable from the other; and (3) the facts are such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction a fraud or promote injustice.” *Id.* at 904, 8 P.3d at 846-47. The following factors, though not conclusive, may also indicate the existence of an alter ego relationship: (1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of funds (4) treatment of the corporate assets as the individual’s own; and (5) failure to observe corporate formalities. *Id.* at 904, 8 P.3d at 847.

To be clear, “there is no litmus test for determining when the corporate fiction should be disregarded [as] the result depends on the circumstances of each case.” *Id.* (finding alter ego even though controlling individual did not own a single share of corporate stock); *see also Soule v. High Rock Holdings, LLC*, 514 B.R. 626, 636 (D. Nev. 2014) (“This Court’s view is consistent with that of the Nevada Supreme Court, which has shown its willingness to apply the doctrine to a broad range of factual scenarios and not adopt a litmus test.”). For that reason, it is well settled that the determination of whether the alter ego doctrine applies is a question of fact reserved for the jury. *See, e.g., Runvee, Inc. v. United States*, 2013 WL 1249602, at \*16 (D. Nev. Mar. 26, 2013) (“Whether Plaintiff is the alter ego of Runvee Holdings is essentially a fact question.”); *Oost-Lieverse v. N. Am. Consortium, P.C.*, 969 F.Supp. 874 (S.D.N.Y. 1997) (“[A]ny claim of veil piercing based on an alter ego theory must be left for the jury. Resolution of the alter ego issue is heavily fact-specific.”); *Rd. Sprinkley Fitters Local Union No. 669, U.A., AFL-CIO v. Tristar Fire Protection, Inc.*, 2014 WL 707245, at \*8 (E.D. Mich. Feb. 24, 2014) (“[T]he Court cannot grant any of the parties’ motions for summary judgment with regards to the alter ego question; such an issue is a question of fact for the jury to decide.”).

Here, Plaintiffs pleaded their reverse piercing claim against Orluff and R&O with particularity and clearly alleged the required elements to establish alter ego liability under Nevada law. Moreover, Nevada precedent dictates that there is no litmus test for alter ego liability as the issue of veil piercing is highly fact-specific and reserved for the jury. Accordingly, Defendants cannot seriously claim that Plaintiffs' reverse piercing theory is futile or otherwise subject to dismissal especially where, as here, the evidence developed in discovery plainly supports such a claim. The Court should grant Plaintiffs leave to file their proposed Third Amended Complaint, which is attached hereto as Exhibit 1.

### III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their Motion for Leave to File Third Amended Complaint in its entirety..

DATED this 18th day of June, 2018.

CAMPBELL AND WILLIAMS

By /s/ Donald J. Campbell

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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 18thth day of June, 2018 I caused the foregoing document entitled **Plaintiffs' Motion for Leave to File Third Amended Complaint** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ Lucinda Martinez  
An Employee of Campbell & Williams

# EXHIBIT 1

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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

PETER GARDNER and CHRISTIAN GARDNER, )  
 individually and on behalf of minor child, LELAND )  
 GARDNER, )

Case No.: A-15-722259

Dept. No.: XXX

Plaintiffs, )

vs. )

**THIRD AMENDED COMPLAINT**

HENDERSON WATER PARK, LLC dba )  
 COWABUNGA BAY WATER PARK, a Nevada )  
 limited liability company; WEST COAST WATER )  
 PARKS, LLC, a Nevada limited liability company; )  
 DOUBLE OTT WATER HOLDINGS, LLC, a Utah )  
 limited liability company; ORLUFF OPHEIKENS, )  
 an individual; SLADE OPHEIKENS, an individual; )  
 CHET OPHEIKENS, an individual; SHANE )  
 HUIH, an individual; SCOTT HUIH, an )  
 individual; CRAIG HUIH, an individual; TOM )  
 WELCH, an individual; R&O CONSTRUCTION )  
 COMPANY, a Utah corporation; DOES I through X, )  
 inclusive; ROE Corporations I through X, inclusive; )  
 and ROE Limited Liability Company I through X, )  
 inclusive, )

Defendants. )

AND ALL RELATED CLAIMS )

1 Plaintiffs Peter Gardner and Christian Gardner, individually and on behalf of their minor son,  
2 Leland Gardner, and through their undersigned counsel, hereby complain and allege against  
3 Defendants as follows:

4 **IDENTIFICATION OF THE PARTIES**

5  
6 1. Plaintiff Peter Gardner (“Mr. Gardner”) is an individual and a Nevada resident. Mr.  
7 Gardner is married to Christian Gardner and is the father of Leland Gardner (“Leland”), a minor child.

8 2. Plaintiff Christian Gardner (“Mrs. Gardner”) is an individual and a Nevada resident.  
9 Mrs. Gardner is married to Mr. Gardner and is Leland’s mother.

10 3. Leland Gardner is a Nevada resident, who was six (6) years old at the time of the  
11 incident that is the subject of this litigation.

12 4. Defendant Henderson Water Park, LLC dba Cowabunga Bay Water Park (“HWP”) is  
13 a Nevada limited liability company with its principal place of business in Clark County, Nevada.

14 5. Defendant West Coast Water Parks, LLC (“West Coast”) is a Nevada limited liability  
15 company that owns Defendant Henderson Water Park, LLC dba Cowabunga Bay Water Park and  
16 regularly conducts business in Clark County, Nevada.

17 6. Defendant Double Ott Water Holdings, LLC (“Double Ott”) is a Utah limited liability  
18 company that owns Defendant Henderson Water Park, LLC dba Cowabunga Bay Water Park and  
19 regularly conducts business in Clark County, Nevada.

20 7. Defendant Orluff Opheikens (“Orluff”) is a Utah resident who, at all relevant times,  
21 conducted business in Clark County, Nevada and served as the Chairman of HWP’s Management  
22 Committee.

23 8. Defendant Slade Opheikens (“Slade”) is a Utah resident who, at all relevant times,  
24 conducted business in Clark County, Nevada and served as a member of HWP’s Management  
25 Committee.  
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1           9. Defendant Chet Opheikens (“Chet”) is a Utah resident who, at all relevant times,  
2 conducted business in Clark County, Nevada and served as a member of HWP’s Management  
3 Committee. At times, Orluff, Slade and Chet will be referred to collectively as the “Opheikens  
4 Family.”

5           10. Defendant Shane Huish (“Shane”) is a Nevada resident who, at all relevant times,  
6 served as a member of HWP’s Management Committee.

7           11. Defendant Scott Huish (“Scott”) is a Washington resident who, at all relevant times,  
8 conducted business in Clark County, Nevada and served as a member of HWP’s Management  
9 Committee.

10           12. Defendant Craig Huish (“Craig”) is a Washington resident who, at all relevant times,  
11 conducted business in Clark County, Nevada and served as a member of HWP’s Management  
12 Committee. At times, Shane, Scott and Craig will be referred to collectively as the “Huish Family.”

13           13. Defendant Tom Welch (“Welch”) is a Utah resident who, at all relevant times,  
14 conducted business in Clark County, Nevada and served as a member of HWP’s Management  
15 Committee. At times, Orluff, Slade, Chet, Shane, Scott, Craig, and Welch will be referred to  
16 collectively as the “Individual Defendants.”

17           14. Defendant R&O Construction Company (“R&O”) is a Utah corporation that regularly  
18 conducts business in Clark County, Nevada. Orluff, through his family trust, owns approximately  
19 eighty-five percent (85%) of the outstanding shares in R&O and the remaining shares are owned by  
20 other executives and board members of R&O.

21           15. At all times material to this Complaint, HWP’s Management Committee, through the  
22 Individual Defendants as its members, was a common or joint enterprise and the Individual Defendants  
23 acted in concert with each other and subject to the common nondelegable duties detailed herein. All  
24 actions taken by a member of HWP’s Management Committee, as its agent in furtherance of HWP’s  
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1 business, were done so with the actual or constructive knowledge and authorization of the other  
2 members of HWP's Management Committee.

3 16. Upon information and belief and at all times material to this Complaint, the Individual  
4 Defendants influenced and governed Defendants HWP, West Coast, and Double Ott and were united  
5 in interest and ownership with said entities so as to be deemed inseparable from them. In this regard,  
6 the Individual Defendants (1) undercapitalized these limited liability companies; (2) diverted limited  
7 liability company funds; (3) treated limited liability company assets as their own; and (4) caused the  
8 entities to ignore certain required formalities. The Individual Defendants and Defendants HWP, West  
9 Coast, and Double Ott, therefore, are one and the same and Plaintiffs should be permitted to pierce the  
10 corporate structure veil of Defendants HWP, West Coast, and Double Ott to reach assets belonging to  
11 the Individual Defendants in order to prevent the sanction and/or promotion of an injustice.  
12

13 17. Cowabunga Bay Water Park ("Cowabunga Bay") is a water park located at 900  
14 Galleria Drive, Henderson, Nevada 89011 and is operated by HWP's Management Committee, which  
15 is composed of the Individual Defendants.  
16

17 18. The true names and capacities, whether individual, corporate, associate, or otherwise, of  
18 Doe Defendants I through X, are unknown to Plaintiffs, who therefore sue said defendants by such  
19 fictitious names. Plaintiffs are informed and believe and thereupon allege that each of the defendants  
20 designated as a Doe Defendant is responsible in some manner for the events and happenings described  
21 herein, including but not limited to the individuals and entities that provide or should have provided  
22 lifeguard and safety protection for Leland including but not limited to lifeguards, managers, supervisors,  
23 contractors, other water park personnel, and the individual owners and operators of Cowabunga Bay,  
24 as well as any swimming pool management companies and employment staffing agencies. As such,  
25 Plaintiffs will seek leave of the Court to amend this Complaint to insert the true names and capacities of  
26 said defendants as they become identified and known to Plaintiffs.  
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19. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants Roe Corporations I through X and Roe Limited Liability Companies I through X, are unknown to Plaintiffs, who therefore sue said defendants by such fictitious names. Plaintiffs are informed and believe and thereupon allege that each of the defendants designated as a Roe Corporation or Roe Limited Liability Company is responsible in some manner for the events and happenings described herein, including but not limited to the individuals and entities that provide or should have provided lifeguard and safety protection for Leland including but not limited to lifeguards, managers, supervisors, contractors, other water park personnel, and the individual owners and operators of Cowabunga Bay, as well as any swimming pool management companies and employment staffing agencies. As such, Plaintiffs will seek leave of the Court to amend this Complaint to insert the true names and capacities of said defendants as they become identified and known to Plaintiffs.

20. Whenever it is alleged in this Complaint that a Defendant did any act or thing, it is meant that such Defendant's officers, agents, servants, employees, or representatives did such act or thing and at the time such act or thing was done, it was done with full authorization or ratification of such Defendant or was done in the normal and routine course and scope of business, or with the actual, apparent and/or implied authority of such Defendant's officers, agents, servants, employees, or representatives. Specifically, Defendants are liable for the actions of their respective officers, agents, servants, employees, and representatives.

## GENERAL ALLEGATIONS

21. At all times material to this Complaint, the acts and omissions giving rise to this action occurred in Clark County, Nevada.

*The Original Ownership Structure Behind the Cowabunga Bay Project and  
the “Nightmare” Scenario That Ensued During R&O’s Construction of the Park*

22. In or around September 2012, Splash Management, LLC (“Splash”)—a business entity operated by three individuals named Shawn Hassett, Ben Howell and Marvin Howell—partnered with the Huish Family, through West Coast, to develop Cowabunga Bay.

23. Together, Splash and West Coast formed Cowabunga Las Vegas Land, LLC to hold the land on which Cowabunga Bay would be built. Splash and West Coast likewise formed Cowabunga Las Vegas Operations, LLC to conduct the water park’s operations after the completion of construction.

24. Because Splash and West Coast did not have the ability to independently finance the construction of Cowabunga Bay, Splash and West Coast sought loans from financial institutions and hard money lenders with little to no success. In early November 2012, however, Splash and West Coast obtained a commitment for financing that would close within 90 days and be used to pay for the construction of Cowabunga Bay, which was originally anticipated to cost approximately \$12 to \$15 million.

25. Cowabunga Las Vegas Operations, LLC hired R&O as the general contractor to oversee the construction of Cowabunga Bay. Although the financing for the project was not yet secure, R&O hired subcontractors and immediately began construction of Cowabunga Bay in December 2012 with the goal of opening the park in Spring 2013.

26. The prospective financing arranged by Splash and West Coast fell through just months after R&O started construction. As a result, Cowabunga Las Vegas Operations, LLC failed to pay R&O several millions of dollars in construction costs that had already been incurred by R&O and its various subcontractors. With its subcontractors on the verge of bankruptcy, R&O was forced to halt construction in April 2013.

27. The consequences of R&O overextending itself on the Cowabunga Bay project threatened to cause irreparable harm to the company. First, R&O would lose millions of dollars if its

1 construction costs were not paid. Second, R&O would be forced to default its subcontractors, which  
2 would cause them to declare bankruptcy and ruin R&O's reputation in the Las Vegas construction market.

3 28. Due to this self-described "nightmare" scenario, Orluff became personally involved in  
4 order to salvage the Cowabunga Bay project and rescue R&O from severe harm. Orluff arranged  
5 meetings with Splash and West Coast where it was discussed that Orluff, acting on behalf of R&O, would  
6 make a capital contribution to the Cowabunga Bay project in exchange for an ownership stake in the  
7 business. By doing so, Orluff would provide the funds necessary to pay R&O's costs and those of its  
8 subcontractors such that the construction of Cowabunga Bay could be completed with minimal damage  
9 to R&O's finances and reputation.  
10

11 29. In order to obtain the funds for his capital contribution to the Cowabunga Bay project,  
12 Orluff (as he had on other occasions in the past) requested a personal loan of approximately \$4 million  
13 from R&O. Those same funds would then be funneled through the Cowabunga Bay project and paid to  
14 R&O so the company could compensate the subcontractors and cover its own construction costs. In  
15 exchange for this injection of capital, Orluff would receive an ownership stake in the Cowabunga Bay  
16 project that would eventually generate sufficient funds to make R&O whole and extricate the company  
17 from the "nightmare." R&O's Board of Directors—including Orluff and each of the minority  
18 shareholders in the company—unanimously voted to approve the multi-million dollar loan to Orluff.  
19

20 30. Splash, West Coast and Orluff (acting on behalf of R&O) initially contemplated that  
21 each group would maintain an equity interest in Cowabunga Bay based on their respective capital  
22 contributions. Splash, however, refused to accept a decreased equity interest and instead informed Orluff  
23 and the Huish Family that it would take the project into bankruptcy, which would irreparably harm R&O's  
24 financial health and reputation in the Las Vegas market.  
25

26 31. In the face of a looming fight over ownership between Splash, on one hand, and Orluff  
27 and the Huish Family, on the other, Orluff turned to his close friend and advisor, Tom Welch, for advice  
28 on how to remove Splash from the equation. In anticipation of litigation with Splash, Welch activated

1 his dormant law license and devised a scheme whereby West Coast—which had voting control of  
2 Cowabunga Las Vegas Land, LLC and Cowabunga Las Vegas Operations, LLC—would sell the land  
3 and all of the park’s assets to a new business entity formed by Orluff and the Huish Family. Through the  
4 new business entity, Orluff and the Huish Family would own and operate Cowabunga Bay to the  
5 exclusion of Splash. During this undertaking, Welch represented the interests of R&O, the Opheikens  
6 Family and the Huish Family and each group consented to the plan to remove Splash and form a new  
7 entity to own and operate Cowabunga Bay.  
8

9 32. Welch formed HWP in August 2013 with the express consent of R&O, Orluff and the  
10 Huish Family. Welch drafted HWP’s Operating Agreement, which was likewise reviewed and approved  
11 by R&O’s corporate counsel, Cass Butler, who also served as Orluff’s personal attorney.  
12

13 33. R&O, Orluff and the Huish Family successfully executed the scheme in which HWP  
14 bought the land and assets from Cowabunga Las Vegas Land, LLC and Cowabunga Las Vegas  
15 Operations, LLC and, in turn, removed Splash from the Cowabunga Bay project.  
16

17 34. Upon the formation of HWP, Orluff and the Huish Family sought additional financing  
18 to complete the construction of Cowabunga Bay and fund the park’s operating costs. To that end, Orluff  
19 personally approached Bank of Utah and negotiated a \$12.2 million loan to HWP, R&O, Double Ott,  
20 West Coast, Orluff, Shane Huish, Scott Huish, and other relatives of the Huish Family. In addition to the  
21 other borrowers, Orluff and R&O guaranteed payment on the note to Bank of Utah.  
22

23 35. With the financing from Bank of Utah, Defendants successfully completed the  
24 construction of Cowabunga Bay and opened the park to the public on July 4, 2014.  
25

26 36. As a result of the scheme to insert Orluff as a straw man owner of Cowabunga Bay in its  
27 place, R&O paid its subcontractors and recovered the costs of construction. Nevertheless, R&O did not  
28 make a profit from the construction of Cowabunga Bay and even waived its lucrative general contractor  
fee.

*The Management Committee of HWP Exercises Complete Control  
Over the Operations of Cowabunga Bay*

37. Pursuant to HWP's Operating Agreement, HWP was operated and controlled by its Management Committee. At Orluff's direction, Welch designed the Management Committee to grant Orluff control over the Huish Family in the operations of Cowabunga Bay because Orluff and R&O had a greater amount of money invested in the business and, therefore, more risk. At all relevant times, the Management Committee was comprised of seven (7) members made up of the Opheikens Family, the Huish Family and Welch. Orluff served as Chairman of the Management Committee.

38. HWP's Operating Agreement contains the following provisions pertaining to the Management Committee's absolute control over every aspect of Cowabunga Bay's operations:

6.1 Rights and Powers of Management: Except as otherwise expressly provided in this Operating Agreement, all management rights, powers and authority over the business, affairs and operations of the Company shall be solely and exclusively vested in the Management Committee.

.....

[T]he Management Committee shall have the full right, power and authority to do all things deemed necessary or desirable by it, in its reasonable discretion, to conduct the business, affairs and operations of [Cowabunga Bay].

39. Among numerous other specific powers identified in the Operating Agreement, HWP's Management Committee has direct and absolute control over "the selection and dismissal of employees" and is responsible for "tak[ing] all actions which may be necessary or appropriate to accomplish the purpose of the [Cowabunga Bay]."

40. All actions taken by Cowabunga Bay set forth herein were authorized, directed or participated in by the Individual Defendants in their individual capacity as members of the Management Committee. Additionally, as set forth below, the Individual Defendants knew or should have known that these actions could injure Cowabunga Bay patrons like Leland, but negligently failed to take or order

appropriate action to avoid that harm despite the fact that an ordinarily prudent person, knowing what the Individual Defendants knew at the time, would not have acted similarly under the circumstances.

***Defendants Intentionally Violate Nevada Law by Understaffing Lifeguards at the Wave Pool***

41. Cowabunga Bay consists of a twenty-five (25) acre for-profit water park featuring dozens of water slides and attractions. One of its marquee attractions is the Surf-A-Rama Wave Pool (“the Wave Pool”), which is 35,000 square feet, holds up to 2,619 bathers and produces waves up to four (4) feet high.

42. Before opening its doors to the public, Nevada law required Cowabunga Bay to first obtain a permit to operate from the Southern Nevada Health District (“SNHD”). Nevada Revised Statute Chapter 444 governs the operation of public swimming pools and dictates the procedures a water recreation business such as Cowabunga Bay must follow to obtain such a permit.

43. In that regard, NRS 444.080 states that it is “unlawful for any person, firm, corporation, institution or municipality to construct or to operate or continue to operate any public swimming pool [ ] within the State of Nevada without a permit to do so from the health authority.” In order to obtain the requisite permit, the operator must submit an application or “lifeguard plan” to the health authority clarifying *inter alia* “[t]he lifesaving apparatus and measures to insure safety of bathers.” *Id.* The health authority will only approve a permit when it determines that the public swimming pool in question will not constitute a menace to public health. *Id.*

44. On February 19, 2014, Cowabunga Bay applied for its permit and submitted a lifeguard plan to SNHD. In its lifeguard plan, Cowabunga Bay proposed posting only six (6) lifeguards to monitor the Wave Pool. Due to the woefully deficient lifeguard coverage proposed for this banner attraction, SNHD denied Cowabunga Bay’s application. In doing so, SNHD specified that seventeen (17) lifeguards were required to safely operate the Wave Pool.

45. Thus, in order to obtain its permit, Cowabunga Bay submitted a revised lifeguard plan in line with SNHD’s safety requirements for the Wave Pool, *i.e.*, that seventeen (17) lifeguards would be

1 posted to monitor the Wave Pool at all times. Based on Cowabunga Bay's revised lifeguard plan, SNHD  
2 granted its request for a permit.

3 46. Cowabunga Bay, however, had no intention of ever providing the lifeguard coverage  
4 required by state law and instead knowingly, intentionally and willfully deviated from the prescribed  
5 lifeguard plan for its Wave Pool and other attractions. Indeed, despite its public proclamations that safety  
6 was its "number one priority," Cowabunga Bay habitually operated the Wave Pool with only 5-7  
7 lifeguards. In sum, Cowabunga Bay made the necessary representations regarding lifeguard staffing to  
8 obtain the required permit and then summarily abandoned those representations in order to operate the  
9 Wave Pool with the staffing levels that were previously rejected by SNHD.  
10

11 47. Cowabunga Bay and, more specifically, the Management Committee made the decision  
12 to violate the SNHD-approved lifeguard plan by operating the Wave Pool with only a fraction of the  
13 required amount of lifeguards in order to meet the burdens imposed by the financing obtained by  
14 Defendants from Bank of Utah. Defendants knowingly slashed variable costs including lifeguards at the  
15 Wave Pool in order to meet a strict annual budget that would allow Cowabunga Bay to continue operating  
16 without violating Defendants' loan covenants with the Bank of Utah. Indeed, had Defendants chosen to  
17 comply with the law, HWP, R&O, Double Ott, West Coast, Orluff, Shane Huish, Scott Huish, and other  
18 relatives of the Huish Family would have jeopardized compliance with their loan obligations and been  
19 exposed to severe financial consequences tallying in the tens of millions of dollars. R&O was doubly at  
20 risk because it was not only a borrower on the Bank of Utah loan, but it had also invested millions of  
21 dollars in Cowabunga Bay as a result of the loan to Orluff that now amounts to approximately nine million  
22 dollars (\$9,000,000). Accordingly, rather than subject themselves to these devastating financial  
23 ramifications, Defendants simply chose to violate the law and expose the public to severe bodily harm.  
24

25 48. In addition to not providing an adequate number of lifeguards, Cowabunga Bay also  
26 failed to properly certify and train those lifeguards that it did staff. Moreover, Cowabunga Bay did not  
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28

1 provide life poles for use in the rescue of a drowning swimmer, failed to post the appropriate safety  
2 signage, and did not maintain water quality in clear violation of SNHD requirements.

3 ***Leland Gardner Drowns in the Wave Pool at Cowabunga Bay***  
4 ***When Only Three Lifeguards Were on Duty***

5 49. During the 2014-2015 school year, Leland was a kindergarten student. After school on  
6 May 27, 2015, Leland had a playdate with a classmate that would be hosted by the classmate's father,  
7 William Ray ("Mr. Ray"), at a water park.

8 50. While visiting Cowabunga Bay, Mr. Ray took his son and Leland to the Wave Pool.  
9 There, Leland fell off of his inner tube and was submerged at the bottom of the Wave Pool for a lengthy  
10 period of time. Leland suffered a non-fatal drowning and debilitating injuries that required weeks of  
11 hospitalization in the pediatric intensive care unit at St. Rose Hospital–Siena Campus. Since the incident,  
12 Leland has required twenty-four (24) hour care for his severe neurological impairments, and his  
13 devastating injuries will necessitate extensive and ongoing medical treatment and rehabilitative therapy  
14 for the rest of his life.

15 51. On May 27, 2015, Cowabunga Bay illegally operated its Wave Pool with just three (3)  
16 lifeguards on duty, one of whom was not properly trained or certified pursuant to NRS 444.115. Indeed,  
17 Cowabunga Bay knew it was breaking the law when it understaffed its Wave Pool, but did so anyway.

18 52. Further, on May 27, 2015, Cowabunga Bay failed to provide safety signage, life poles,  
19 clean water with the appropriate levels of visibility, and otherwise chose not to abide by the parameters  
20 of its permit.

21 53. The Individual Defendants, as the members of HWP's Management Committee, knew  
22 or should have known of these hazardous conditions that threatened physical injury to their patrons like  
23 Leland, yet failed to take any action to avoid this harm and, in fact, took action which exacerbated the  
24 risk to patrons like Leland. Indeed, the Individual Defendants knowingly operated Cowabunga Bay and  
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1 the Wave Pool with far less than the required amount of lifeguards in order to meet their strict budgetary  
2 constraints.

3 54. On or around 12:10 p.m. on May 29, 2015, SNHD reported to Cowabunga Bay to  
4 investigate Leland's non-fatal drowning. SNHD observed that proper safety signage and lifepoles were  
5 not present. In addition, although Cowabunga Bay was not scheduled to open for another hour, SNHD  
6 still noted there were only fourteen (14) lifeguards on duty inside Cowabunga Bay at the time when thirty-  
7 five (35) were required by the lifeguard plan.  
8

9 55. SNHD returned to Cowabunga Bay on June 9, 2015 to conduct an additional  
10 investigation while the park was open for business and found only eight (8) lifeguards on duty at the  
11 Wave Pool instead of the seventeen (17) required by the lifeguard plan. SNHD likewise found lifeguard  
12 staffing violations at other attractions in Cowabunga Bay as well as additional problems with the water  
13 quality. SNHD ultimately cited and fined Cowabunga Bay for its inadequate staffing of lifeguards and  
14 other violations of the permitting requirements.  
15

16 56. The tragic incident underlying this litigation is a direct result of Defendants' willful  
17 disregard of their obligations under the law. As a result of his non-fatal drowning arising out of  
18 Defendants' despicable conduct, Leland suffered catastrophic brain injuries that require 24-hour care.  
19 Leland has essentially no motor skills and cannot talk, eat, walk, use his arms, or even sit up.  
20

### 21 FIRST CAUSE OF ACTION

#### 22 (Negligence – Defendant HWP)

#### 23 (Alter Ego Liability Only – Defendants West Coast Water Parks, LLC, Double Ott Water Holding, LLC, and the Individual Defendants)

24 57. Paragraphs 1 through 56 are hereby specifically incorporated herein as though fully set  
25 forth.

26 58. HWP, through its acts and omissions, owed multiple duties to Plaintiffs including but not  
27 limited to:  
28

- a. The duty to keep Leland safe;

- 1                   b.       The duty to use reasonable care to protect Leland from known dangers such as  
2 drowning;  
3  
4                   c.       The duty to adequately staff lifeguards throughout Cowabunga Bay;  
5  
6                   d.       The duty to properly train and certify employees, lifeguards and  
7 managers/supervisors to protect customers from dangers such as drowning;  
8  
9                   e.       The duty to provide ongoing training to employees, lifeguards and  
10 managers/supervisors to protect customers from dangers such as drowning;  
11  
12                   f.       The duty to maintain clean and clear water within Cowabunga Bay;  
13  
14                   g.       The duty to use reasonable care in the hiring, supervision, training and retention  
15 of its employees; and  
16  
17                   h.       The duty to act in a matter that does not violate State of Nevada, City of  
18 Henderson and Clark County statutes, laws and ordinances.

19           59.       HWP breached its duties to Plaintiffs when they failed to provide adequate lifeguard  
20 coverage and otherwise failed to take reasonable steps to protect Leland from drowning.

21           60.       In addition, HWP's violations of the law were criminal in nature and constituted  
22 negligence *per se* as Leland's injuries are of the type which the statutes, laws, ordinances, and regulations  
23 of the United States, State of Nevada—including but limited to NRS 444.080 and 444.115—Clark  
24 County, and/or the Cities of Henderson and Las Vegas were intended to prevent.

25           61.       As a direct and proximate result of HWP's negligence and brazen violation of the law,  
26 Plaintiffs have been damaged in an amount greater than \$15,000.00.

27           62.       The conduct of the HWP was grossly negligent, reckless, willful, intentional,  
28 oppressive, fraudulent, malicious, and done in reckless disregard of the safety and rights of Plaintiffs  
thereby warranting the imposition of punitive damages.

          63.       Plaintiffs have been forced to retain the services of attorneys to prosecute this action  
and are entitled to an award of reasonable attorneys' fees and costs.

**SECOND CAUSE OF ACTION**

**(Negligence – Individual Defendants)**

64. Paragraphs 1 through 63 are hereby specifically incorporated herein as though fully set forth.

65. The Individual Defendants, and each of them, were members of HWP's Management Committee.

66. At all relevant times, HWP's Management Committee had all management rights, powers and authority over HWP's business, affairs and operations and, as a result, the Individual Defendants personally owed multiple common duties to Plaintiffs, including but not limited to:

- a. The duty to keep Leland safe;
- b. The duty to use reasonable care to protect Leland from known dangers such as drowning;
- c. The duty to adequately staff lifeguards throughout Cowabunga Bay;
- d. The duty to properly train and certify employees, lifeguards and managers/supervisors to protect customers from dangers such as drowning;
- e. The duty to provide ongoing training to employees, lifeguards and managers/supervisors to protect customers from dangers such as drowning;
- f. The duty to maintain clean and clear water within Cowabunga Bay;
- g. The duty to use reasonable care in the hiring, supervision, training and retention of its employees; and
- h. The duty to act in a matter that does not violate State of Nevada, City of Henderson and Clark County statutes, laws and ordinances.

67. The Individual Defendants breached their duties to Plaintiffs when they authorized, directed or participated in HWP's unlawful scheme to understaff lifeguards at its Wave Pool and otherwise failed to take reasonable steps to protect Leland from drowning.

68. In addition, the Individual Defendants' violations of the law were criminal in nature and constituted negligence *per se* as Leland's injuries are of the type which the statutes, laws, ordinances, and regulations of the United States, State of Nevada—including but limited to NRS 444.080 and 444.115—Clark County, and/or the Cities of Henderson and Las Vegas were intended to prevent.

69. As a direct and proximate result of the Individual Defendants' negligence and brazen violation of the law, Plaintiffs have been damaged in an amount greater than \$15,000.00.

70. The conduct of the Individual Defendants, and each of them, individually and in concert with one another as herein alleged, was grossly negligent, reckless, willful, intentional, oppressive, fraudulent, malicious, and done in reckless disregard of the safety and rights of Plaintiffs thereby warranting the imposition of punitive damages.

71. Plaintiffs have been forced to retain the services of attorneys to prosecute this action and are entitled to an award of reasonable attorneys' fees and costs.

### **THIRD CAUSE OF ACTION**

#### **(Reverse Veil Piercing Under The Alter Ego Doctrine – Orluff Opheikens and R&O Construction Company)**

72. Paragraphs 1 through 71 are hereby specifically incorporated herein as though fully set forth.

73. Orluff founded R&O in 1982 and, through his family trust, owns eighty-five percent (85%) of the outstanding shares in R&O. At all relevant times, Orluff served as the Chairman of the Board of Directors of R&O. During the same time period, Orluff's son, Slade, served as the Chief Executive Officer of R&O—a position previously held by Orluff for decades—and acted at the direction of Orluff. According to Slade, Orluff is R&O.

74. When R&O was faced with the prospect of heavy monetary losses and severe damage to its reputation resulting from the failed construction of Cowabunga Bay, Orluff immediately stepped in to personally represent R&O's interests and save the project from failure. To that end, Orluff

1 determined that he would personally assume an ownership stake in Cowabunga Bay to ensure that  
2 R&O recouped its costs and paid its debts. In doing so, Orluff directed R&O's course of conduct and  
3 acted for the benefit of the company and in furtherance of its interests.

4         75. In that regard, R&O and Orluff were represented by Welch in the plan to exclude  
5 Splash from Cowabunga Bay by selling the land and all of the park's assets to HWP. In furtherance of  
6 the scheme, Welch acted at Orluff's direction and represented the interests of R&O, Orluff, and the Huish  
7 Family. Cass Butler, R&O's corporate counsel and Orluff's personal attorney, was equally involved in  
8 the formation of HWP and Orluff's plan to assume an ownership interest in Cowabunga Bay for the  
9 benefit of R&O.  
10

11         76. In keeping with Orluff's practice of obtaining loans from R&O for non-corporate  
12 purposes, Orluff obtained a personal loan from R&O in the approximate amount of \$4 million to fund  
13 his capital contribution to the Cowabunga Bay project. At Orluff's direction, R&O's Board of  
14 Directors, including Orluff himself and the other minority shareholders of the company, unanimously  
15 approved the loan with knowledge that the funds would be invested in the Cowabunga Bay project  
16 and used to recoup R&O's unpaid costs and pay the company's debts to subcontractors. With R&O's  
17 consent, Orluff treated corporate assets as his own and otherwise commingled funds for the purpose  
18 of ensuring R&O did not suffer severe monetary and reputational harm as a result of the Cowabunga  
19 Bay project.  
20

21         77. At Orluff's direction, R&O also signed as a borrower on the \$12.2 million loan from  
22 Bank of Utah that was used to complete the construction of Cowabunga Bay and fund its operations.  
23 R&O, therefore, exposed itself to extreme financial risk to salvage the prospects of the Cowabunga  
24 Bay project and allow Orluff to eventually make R&O whole. R&O likewise declined to collect a  
25 profit from the construction of Cowabunga Bay and waived its lucrative general contractor fee.  
26

27         78. Based on the foregoing, Orluff governed and influenced R&O on a day-to-day basis  
28 and, in particular, with respect to the Cowabunga Bay project. Moreover, there was such unity and

1 identity of interest and ownership between R&O and Orluff that one was inseparable from the other  
2 especially as it related to the Cowabunga Bay project.

3 79. The facts of this case are such that adherence to the corporate fiction of R&O as a  
4 separate entity from Orluff would, under the circumstances, promote injustice. In addition to the  
5 undercapitalization of HWP and lack of adequate insurance coverage, adherence to the corporate  
6 fiction would permit R&O to reap the benefits of Orluff's ownership and management of Cowabunga  
7 Bay while avoiding any of the liability caused by the negligent conduct of HWP and the Individual  
8 Defendants, including the Opheikens Family. In point of fact, by virtue of Orluff serving as a straw  
9 man for R&O, the company recovered its unpaid costs from the construction of Cowabunga Bay,  
10 saved its reputation in the Las Vegas market by not defaulting its subcontractors, and attempted to  
11 shield itself from any liability related to the hazardous operations of the water park.  
12

13 80. Because Orluff is the alter ego of R&O and the protections of the corporate form have  
14 been abused in connection with the Cowabunga Bay project, Plaintiffs should be permitted to pierce  
15 the corporate veil in reverse and recover from R&O—the true beneficiary of Orluff's ownership and  
16 participation in the management of Cowabunga Bay.  
17

18 81. Reverse piercing of the veil will not harm the rights of innocent shareholders or  
19 creditors. While R&O has minority shareholders that own approximately fifteen percent (15%) of the  
20 corporation's outstanding stock, each minority shareholder is an executive with R&O and a member  
21 of the Board of Directors. As such, the minority shareholders voted for and benefitted from Orluff's  
22 decision to assume an ownership interest in the Cowabunga Bay project so R&O could recover its  
23 construction costs and pay its subcontractors. In that same vein, R&O's minority shareholders would  
24 have suffered if Orluff had not taken action to save the Cowabunga Bay project by serving as R&O's  
25 straw man. Reverse piercing is neither inequitable nor unjust under these circumstances.  
26  
27

28 **JURY DEMAND**

82. Plaintiffs hereby demand a trial by jury for all issues so triable.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

1. For compensatory damages in excess of \$15,000.00;
2. For punitive damages to be determined by the jury;
3. For attorney's fees and costs of suit incurred herein;
4. For pre-judgment and post-judgment interest, as allowed by law; and
5. For such other and further relief as is appropriate under the circumstances.

DATED this \_\_th day of June, 2018.

CAMPBELL & WILLIAMS

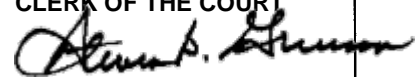
By \_\_\_\_\_  
DONALD J. CAMPBELL, ESQ. (1216)  
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700 South Seventh Street  
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*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this \_\_\_th day of June, 2018 I caused the foregoing document entitled **Third Amended Complaint** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

\_\_\_\_\_  
An Employee of Campbell & Williams



**OPPS**

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*TOM WELCH; ORLUFF OPHEIKENS;  
SLADE OPHEIKENS; and CHET OPHEIKENS*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

PETER GARDNER and CHRISTIAN  
GARDNER, individually, and on behalf of  
minor child LELAND GARDNER,

Plaintiffs,  
vs.

HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK, a  
Nevada limited liability company;  
ORLUFF OPHEIKENS, an individual;  
SLADE OPHEIKENS, an individual;  
CHET OPHEIKENS, an individual;  
SHANE HUIISH, an individual; SCOTT  
HUIISH, an individual; CRAIG HUIISH, an  
individual; TOM WELCH, an individual;  
and DOES I through X, inclusive; ROE  
CORPORATIONS I through X, inclusive,  
and ROE LIMITED LIABILITY  
COMPANY I through X, inclusive,

Defendants.

HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK, a  
Nevada limited liability company,

Third-Party Plaintiff,  
vs.

WILLIAM PATRICK RAY, JR.; and  
DOES 1 through X, inclusive,

Case No. A-15-722259-C  
Dept. No. XXX

**DEFENDANTS ORLUFF OPHEIKENS,  
SLADE OPHEIKENS, CHET OPHEIKENS,  
AND TOM WELCH'S OPPOSITION TO  
PLAINTIFFS' MOTION FOR LEAVE TO  
FILE THIRD AMENDED COMPLAINT**

Date of Hearing: July 25, 2018

Time of Hearing: 9:00 a.m

Third-Party Defendants.

**DEFENDANTS ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS,  
AND TOM WELCH'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO  
FILE THIRD AMENDED COMPLAINT**

COME NOW Defendants ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, and TOM WELCH ("the Opheikens Defendants"), by and through their attorney of record, JOHN E. GORMLEY, ESQ. of the law firm OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, and hereby file this Opposition to Plaintiffs' Motion For Leave To File Third Amended Complaint.

This Opposition is made and based upon all papers, pleadings, and records on file with the Court herein, the Points and Authorities and such oral argument, testimony, and evidence as the Court may require at the time this matter is considered.

Dated July 5, 2018

OLSON, CANNON, GORMLEY,  
ANGULO & STOBERSKI



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SLADE OPHEIKENS; and CHET  
OPHEIKENS*

1 **POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This Court is well aware of the facts of this case and the Opheikens Defendants will not  
5 recite them here. This specific matter concerns Plaintiffs' attempt to amend their Second  
6 Amended Complaint to add a futile, legally barred cause of action against a non-party, R&O  
7 Construction Company ("R&O"). The proposed cause of action, for "Reverse Veil Piercing  
8 Under The Alter Ego Doctrine," is not a recognized cause of action in Nevada. Moreover, the  
9 theory of recovery underpinning Plaintiffs' impermissible claim only arises in very limited  
10 circumstances not present here. Namely, reverse piercing is only permitted post judgment when a  
11 creditor is unable to collect against a judgment debtor; that creditor is then allowed to seek  
12 recovery from the assets of a corporation, on an alter ego theory, in which the debtor owns an  
13 interest.<sup>1</sup> In this instance, Plaintiffs simply are not capable of even alleging they are creditors.  
14 Therefore, Plaintiffs' proposed Third Cause of Action for reverse piercing is an impermissible  
15 and futile claim because Nevada law allowing reverse veil piercing requires that a plaintiff first be  
16 a judgment creditor before a reverse veil piercing theory of recovery can even be advanced in the  
17 appropriate form. *See LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000)  
18 (allowing for a judgment creditor to utilize a reverse veil piercing theory of recovery to enforce a  
19 post-judgment writ of attachment).

20 Not only have Plaintiffs' failed to allege that they have a judgment against a shareholder  
21 of R&O, Plaintiffs' Proposed Third Amended Complaint also contains allegations which are  
22 inconsistent and contradictory on their face. Accordingly, the Court should deny the Plaintiffs'  
23 Motion pursuant to NRCP 15(a) at this time.

24 ///

25  
26  
27 <sup>1</sup> "While the classic alter ego situation involves a creditor reaching the personal assets of a  
28 controlling individual to satisfy a corporation's debt, the "reverse" piercing situation involves a  
creditor reaching the assets of a corporation to satisfy the debt of a corporate insider based on a  
showing that the corporate entity is the alter ego of the individual." *LFC Marketing Group, Inc.*  
*v. Loomis*, 116 Nev. 896, 903, 8 P.3d 841, 846 (2000).

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## II.

### RELEVANT BACKGROUND

The lawsuit concerning Leland Gardner was filed on July 28, 2015. Since that time, Plaintiffs have engaged in a broad-ranging campaign of discovery and motion practice with an eye towards finding some basis of liability for Leland's near drowning against those with no actual responsibility.<sup>2</sup> To that end, after conducting nearly two years of discovery, which included subpoenaing records from R&O and taking numerous depositions, Plaintiffs were permitted to add, as defendants, the management committee of Henderson Water Park ("HWP"). This included Orluff Opheikens, Slade Opheikens, Chet Opheikens, and Tom Welch, now sued under a specious theory that they were individually negligent for the accident on May 27, 2015. In so allowing, the Nevada Supreme Court ruled in *Gardner v. Henderson Water Park, et al.*, 133 Nev. Adv. Op. 89, 405 P.3d 651 (2017), that managers of an LLC bear no personal liability by virtue of being a manager unless such managers committed acts of "individual negligence" or had "direct knowledge and actions that threatened physical injury to patrons" or "intentionally and willfully breached" a duty towards a plaintiff. *Id.* at \*7, 405 P.3d at 655. To date, despite turning over every stone, Plaintiffs have comprehensively failed in uncovering any evidence that any of these individuals had direct knowledge of actions which threatened Leland or intentionally and willfully breach a duty towards Plaintiffs.

Unable to find any evidence supporting their claims against the Opheikens Defendants, Plaintiffs are now seeking to name R&O as a defendant, but not on allegations that R&O committed any wrong doing. Instead, Plaintiffs seek to add R&O as a defendant now before they are awarded a judgment against Orluff Opheikens personally, and before they establish they are unable to collect on that speculative judgment. Plainly, Plaintiffs do not just seek to impair Orluff's interest in R&O, but they seek to impair all of R&O's assets. This misadventure has

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<sup>2</sup> The Court will note that Plaintiffs never attempted to sue the adult male who left the six-year old Leland alone, unattended and without a life jacket in a wave pool rather than make any effort to keep him safe. Without question, but for William Ray's egregious misconduct on May 27, 2015, this lawsuit would have never been filed.

1 somehow brought them to seek to add, prematurely, an innocent party into this case under a  
2 legally unrecognized cause of action.<sup>3</sup>

3       Indeed, Plaintiffs have not alleged that Orluff Opheikens owns a direct controlling interest  
4 in R&O. Rather, Plaintiffs allege a "family trust" owns 85% of the outstanding shares of R&O,  
5 and other individuals own the remaining 15%. Plaintiffs conveniently gloss over whether or not  
6 the "family trust" is irrevocable and whether the trustee is someone other than Orluff. *See*  
7 Proposed Third Amended Complaint, ¶14. Thus, according the Plaintiffs' Proposed Third  
8 Amended Complaint, the nexus between HWP and R&O is even more remote: HWP - Double Ott  
9 - Orluff – family trust - R&O.

10       Additionally, Plaintiffs draw conclusions which are not remotely supported by the  
11 underlying predicate factual allegations presented in their Proposed Third Amended Complaint.  
12 In fact, their predicate allegations contradict their conclusions and their complaint fails on this  
13 basis alone. For example, Plaintiffs' Proposed Third Amended Complaint alleges that Orluff,  
14 "treated corporate assets [presumably R&O's corporate assets] as his own and otherwise  
15 commingled funds for the purpose of ensuring R&O did not suffer severe monetary and  
16 reputational harm as a result of the Cowbunga Bay project." *See* Proposed Third Amended  
17 Complaint, ¶76. In making this misguided conclusion, Plaintiffs advance other allegations which  
18 completely contradict that any of the \$9M invested or \$12.2M loaned by Bank of Utah was  
19 subsequently "commingled" or mixed with R&O, the family trust, Double Ott, or Orluff's  
20 personal funds. For instance, at paragraphs 34 to 36 of the Proposed Third Amended Complaint,  
21 Plaintiffs allege the \$9M invested by R&O and \$12.2M loaned by Bank of Utah were all used to  
22 complete construction of the Cowabunga Bay, pay the subcontractors and the costs of  
23 construction and that "R&O did not make a profit from the construction of Cowabunga Bay and  
24 even waived its lucrative general contractor fee." By alleging that all of the \$9M and \$12.2M  
25 were used to pay for the costs of construction and nothing was left over, Plaintiffs have negated

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26 <sup>3</sup> In fact, if the Plaintiffs really thought R&O had any actual liability they would have named  
27 R&O as a direct party under a negligence theory. Plaintiffs know (and knew) R&O built the  
28 water park and their counsel is currently litigating against R&O in a different matter, alleging  
negligent construction of the very same water park. The reality of this all begs the question: if  
Plaintiffs really thought R&O has some responsibility, why try to create a new cause of action to  
bring them in?

1 and contradicted their bogus allegation that there has been any commingling. There can be no  
2 commingling of money entirely spent on construction costs.

3 To be absolutely clear, Plaintiffs' inconsistent, contradictory and conclusory accusations  
4 about the relationship between Orluff Opheikens, R&O, and any bank loans (whether in  
5 Paragraphs 47 or 76 of their Proposed Third Amended Complaint, whether concerning alleged  
6 commingling and use of corporate assets, or whether found elsewhere within the Plaintiffs'  
7 Motion) are utterly false. Plaintiffs took Orluff Opheikens deposition in May 2018 and there is  
8 absolutely no testimony therein which remotely supports Plaintiffs' reckless and regrettable  
9 accusations. A copy of that deposition, attached for the Court's benefit as **Exhibit A**, completely  
10 belies Plaintiffs' conclusory statements about the relationship between Orluff Opheikens and  
11 R&O.<sup>4</sup> By the same token, the deposition of Slade Opheikens was also taken in May 2018. Yet  
12 again, there is absolutely no testimony therein which supports Plaintiffs' misstatements of fact  
13 throughout their Motion and Opposition. A copy of Slade Opheikens' deposition is attached for  
14 the Court's benefit as **Exhibit B**, and once again it completely belies Plaintiffs' conclusory,  
15 illogical statements about R&O, Orluff Opheikens, the loans taken out to finish construction of  
16 the water park, and the factual underpinnings of Plaintiffs' legally unsustainable, futile attempt to  
17 reverse pierce the corporate veil against R&O.

18 Finally, if Plaintiffs are permitted to amend their complaint and name R&O as a defendant  
19 on their misguided reverse piercing theory, they would potentially cause irreparable and  
20 significant harm to R&O and its individual shareholders. Plaintiffs' Third Cause of Action for  
21 "Reverse Veil Piercing Under the Alter Ego Doctrine" would not be covered by R&O general  
22 liability insurance because the claim would not be one for damage or injury to person or property.

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23  
24 <sup>4</sup> For example, Orluff Opheikens does not own any shares in R&O. A separate family trust does.  
25 Plaintiffs completely ignore that reality in hopes of dragging R&O into this case. Yet another  
26 example: Plaintiffs know that neither R&O, Orluff Opheikens, Slade Opheikens, Chet Opheikens,  
27 nor Tom Welch, has ever taken a dime out of the water park. Not a single penny has gone to  
28 them; every cent has gone to the holder of the note: The Bank of Utah. And that loan wasn't even  
to Orluff Opheikens. Plaintiffs know this and strategically keep it hidden from this Court. When  
viewed objectively, Plaintiffs appear hopeful that if they spread enough mistruths around the  
Court might just let it slide at this stage because Leland Gardner almost drowned. When  
Plaintiffs talk about sanctioning a fraud, this Court should be very careful in choosing to dance to  
Plaintiffs' tune.

1 Consequently, on this uncovered claim, R&O's capacity to obtain bonding and new work based  
2 on its financial strength would potentially be diminished thereby preventing R&O from bidding  
3 on new jobs. Because R&O relies on bonding and its financial strength to obtain new  
4 construction projects, Plaintiffs' claim against R&O would irreparably impair R&O and its other  
5 shareholders who are innocent bystanders with no involvement or relationship to HWP.

6 With all of that said, even if the Court sets aside the negative impact to an innocent  
7 corporation and its shareholders for purposes of scrutinizing Plaintiffs' Motion for Leave and  
8 their Proposed Third Amended Complaint, the bottom line conclusion is that Plaintiffs still have  
9 no legal basis under Nevada law to seek to reverse pierce any corporate veil, as demonstrated  
10 below, and Plaintiffs' Motion should be denied.

### 11 III.

#### 12 STANDARD

13  
14 It is well-understood that NRCP 15(a) provides that leave to amend shall be freely given  
15 when justice so requires. *Stephens v. Southern Nevada Music Co.*, 89 Nev. 104, 507 P.2d 138  
16 (1973). It is equally well-understood, though, that this does not prevent a trial judge, in a proper  
17 case, from denying a motion to amend. *Id.* Indeed, the reasons sufficient to deny a motion to  
18 amend a pleading include: undue delay, bad faith or dilatory motive on the part of the movant.  
19 *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000). And, as the United States Supreme  
20 Court has noted, "[i]n the absence of any apparent or declared reason – such as undue delay, bad  
21 faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by  
22 amendments previously allowed, undue prejudice to the opposing party by virtue of the  
23 amendment, **futility of amendment**, etc. – the leave sought should, as the rules require, by  
24 "freely given." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d. 222 (1962)  
25 (interpreting FRCP 15(a)) (emphasis added).<sup>5</sup>

26  
27 <sup>5</sup> Where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure,  
28 rulings in federal courts interpreting and applying the federal rules are persuasive authority in  
applying the Nevada Rules. See *Exec. Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38  
P.3d 872, 876 (2002).

1 Indeed, under NRCPP 15(a), leave to amend, even if timely sought, need not be granted if  
2 the proposed amendment would be “futile.” *Allum v. Valley Bank of Nev.*, 109 Nev. 280, 287, 849  
3 P.2d 297, 302 (1993); *see also Halcrow Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 398,  
4 302 P.3d 1148, 1152 (2013). A proposed amendment may be deemed futile if the plaintiff seeks  
5 to amend the complaint in order to plead an impermissible claim, such as one which would not  
6 survive a motion to dismiss under NRCPP 12(b)(5) or a “last-second amendment[ ] alleging  
7 meritless claims in an attempt to save a case from summary judgment.” *See Nutton v. Sunset*  
8 *Stations, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966, 973 (Ct. App. 2015), *citing Soebbing v.*  
9 *Carpet Barn, Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993).

10 “[A]n amendment should not be allowed if it inevitably will be considered to be a waste  
11 of time and resources on which the movant has no realistic chance of prevailing at trial.” *Nutton*,  
12 357 P.3d at 973. In determining futility, a district court may not consider outside facts determined  
13 in discovery but must limit its inquiry to the proposed amendment to determine whether the  
14 movant may be able to state a claim. *Id.* at 976.

15 The question of whether alter ego exists is one of law in Nevada; it is not a question of  
16 fact. *See* NRS 78.747(3) (“The question of whether a stockholder, director, or officer acts as the  
17 alter ego of a corporation must be determined by the court as a matter of law.”); *Material Supply*  
18 *Int’l, Inc. v. Sunmatch Industrial Co., Ltd.*, 62 F.2d 13, 19-20 (D.D.C. 1999) (“Whether one  
19 corporation is the alter ego of another is a question of law.”); *FG Hemisphere Associates, LLC v.*  
20 *Unocal Corporation*, 560 Fed.Appx. 672 (9<sup>th</sup> Cir. 2014) (the availability of the alter ego doctrine  
21 to determine the location of intangible property under the Federal Sovereign Immunities Act is a  
22 question of law).<sup>6</sup>

23  
24 <sup>6</sup> Plaintiffs’ statement that “it is well settled that the determination of whether the alter ego  
25 doctrine applies is a question of fact reserved for the jury” is puzzling. In fact, the issue is far  
26 from “well-settled”. Here, the persuasive Nevada statute, NRS 78.747, makes clear that issues of  
27 alter ego are questions of law, not fact. It is worth noting that Plaintiffs relied heavily upon this  
28 specific statute in their efforts to seek individual liability against the members of the LLCs – the  
subject of *Gardner v. Eighth Judicial District Court*, 133 Nev. Adv. Op. 89, 405 P.3d 651 (2017).  
The *Gardner* Court cited NRS 78.747 with approval – at Plaintiffs’ behest -- multiple times in its  
decision. Moreover, all of the cases cited by Plaintiffs in their Motion regarding whether alter ego  
is a question of law are inapposite. *Runvee, Inc. v. United States*, 2013 WL 1249602 (D. Nev.  
Mar. 26, 2013), involved a tax liability issue. *Oost-Lievense v. N. Am. Consortium, P.C.*, 969

IV.

ARGUMENT

**A. The Nevada Supreme Court's *Gardner* Decision Did Not Create A New Cause Of Action And Does Not Support Plaintiffs' Attempts To Fabricate A Legally Unrecognized Claim Against A Non-Party**

As this Court is aware, Plaintiffs have made previous efforts to add various defendants – such as the Opheikens Defendants – under a factually unsupportable and baseless theory that these men were somehow individually negligent with regards to the running of the Cowabunga Bay water park. Plaintiffs' purpose, in this regard, is not to hold those who are responsible for Leland Gardner's near drowning accountable. Rather, the purpose is merely to find new (and hopefully deeper) pockets. To be clear, that is exactly what Plaintiffs are regrettably doing with this Motion: seeking to add a non-party, R&O, knowing that it has no ownership interest in the water park and absolutely no individual liability at all, only in hopes of shaking down more money.

Now, the relevant discovery has been done. Plaintiffs exhausted their full 7 hours in deposing Orluff Opheikens, a 70+ year old man with chronic fatigue syndrome, and they exhausted nearly that same time deposing his son, Slade Opheikens. They already know that R&O has absolutely no connections whatsoever upon which Plaintiffs could, in good faith, even suspect that R&O has any liability at all in this case. They already know, through their exhaustive questioning of Orluff Opheikens, that: (1) there is absolutely no evidence that the hallmarks for alter ego exist between him and R&O; (2) there was no commingling of funds; (3) no undercapitalization; (4) no unauthorized diversion of funds; (5) no treatment of corporate assets as his own; (6) and no failure to observe corporate formalities. *See LFC*, 116 Nev. at 904, 8 P.3d at 848 (2000) (*internal citations omitted*).<sup>7</sup>

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F.Supp. 874 (S.D.N.Y. 1997), relied upon Texas law. *Rd. Sprinkley Fitters Local Union No. 669, U.A., AFL-CIO v. Tristar Fire Protection, Inc.*, 2014 WL 707245 (E.D. Mich. Feb. 24, 2014), solely implicates the 6<sup>th</sup> Circuit. In short, Plaintiffs are simply wrong to rely upon any of these cases in the face of NRS 78.747 and *Gardner*.

<sup>7</sup> These are just some instances in which Plaintiffs have represented what they wish the actual facts of this case were rather than cite the true facts faithfully. Regardless, if the Plaintiffs really thought R&O had any actual liability they would have named R&O as a direct party under a negligence theory. Plaintiffs know R&O built the water park and their counsel is currently litigating against R&O in a different matter, alleging negligent construction of the very same water park.

1 Without question, Plaintiffs' Motion and Proposed Third Amended Complaint are not  
2 brought in good faith. Instead, Plaintiffs rely upon a factually discredited and legally unsupported  
3 theory of recovery which has never been permitted by the Nevada Supreme Court or any other  
4 court in this State. This Court should not condone the Plaintiffs' shotgun approach, and it should  
5 look very closely at what Nevada law actually allows *vis a vis* any alter ego theory of recovery --  
6 whether traditional or reverse -- and not read into *Gardner* what is not there.

7 In this regard, it appears that Plaintiffs believe that the *Gardner* decision gave them *carte*  
8 *blanche* to try to assert any fanciful theory they might throw against the wall in order to add R&O  
9 into the mix, irrespective of law or facts. *Gardner* allows no such thing. Rather, *Gardner* merely  
10 stands for the proposition that "the alter ego doctrine applies to LLCs" and that, at the initial  
11 pleading stage, the Plaintiffs should be permitted "to allege that the Managers [e.g. the Opheikens  
12 Defendants and others] were subject to liability through the alter ego doctrine." *Gardner*, 133  
13 Nev. Adv. Op. at \*11, 405 P.3d at 656. It adds nothing more to Nevada law regarding alter ego  
14 theory.

15 Notably, *Gardner* did not touch the mountain of precedent that clearly rejects alter ego as  
16 an independent cause of action. *Gardner* also did not rule that individual members of an LLC are  
17 automatically liable for the acts of the LLC. And *Gardner* certainly did not expand Nevada law to  
18 include a new basis for seeking to pierce the corporate veil, in reverse, to drag a non-party into this  
19 case (with absolutely no factual foundation). Again, this Court should reject Plaintiffs'  
20 understanding of what Nevada law allows concerning alter ego, and it should deny Plaintiffs'  
21 Motion.

22 **B. Plaintiffs' Proposed Amendment Is Futile Because It Would Be Subject To**  
23 **Immediate Dismissal Pursuant To NRCP 12(b)(5)**

24 An amendment is futile if it would not survive a motion to dismiss under NRCP 12(b)(5).  
25 *Id.* Taking the Plaintiffs' factual allegations in their Proposed Third Amended Complaint as true,  
26 this Court must still deny Plaintiffs leave to amend pursuant to NRCP 15(a) because their  
27 proposed third cause of action, "Reverse Veil Piercing Under The Alter Ego Doctrine", is not a  
28 legally recognized cause of action in Nevada. Specifically, Nevada law does not recognize "Alter  
Ego" (traditional or reverse) to be its own independent cause of action.

1 “‘Ordinarily, a corporation is regarded as a legal entity separate and distinct from its  
2 stockholders, officers and directors.’” *Gowen v. Tiltware LLC*, 2009 U.S. Dist. LEXIS 43970, 13  
3 (D. Nev. 2009), *affirmed*, *Gowen v. Tiltware LLC*, 437 Fed. Appx. 528, 2011 U.S. App. LEXIS  
4 11802 (9th Cir. Nev. 2011) (*quoting Robbins v. Blecher*, 52 Cal.App.4th 886, 892, 60 Cal.Rptr.2d  
5 815 (1997)); *see also Canarelli v. Eighth Judicial Dist. Court of Nev.*, 265 P.3d 673, 677 (Nev.  
6 2011) (“Under the common law, a corporation is a legal entity that exists separate and distinct  
7 from its shareholders, officers, and directors.”) (*citation omitted*). “Under the alter ego doctrine,  
8 however, where a corporation is used by an individual or individuals, or by another corporation,  
9 to perpetrate fraud, circumvent a statute, or accomplish some other wrongful or inequitable  
10 purpose, a court may disregard the corporate entity and treat the corporation's acts as if they were  
11 done by the persons actually controlling the corporation.” *Gowen at* \*13. But even then, “the  
12 corporate cloak will not be lightly cast aside.” *Wyatt v. Bowers*, 103 Nev. 593, 597 (1987) (*citing*  
13 *Baer v. Walker*, 85 Nev. 219 (1969)).

14 Of particular importance to the Plaintiffs’ Motion is that “[a] request to pierce the  
15 corporate veil is only a means of imposing liability for an underlying cause of action and is not a  
16 cause of action in and of itself.” *Local 159 v. Nor-Cal Plumbing, Inc.*, 185 F.3d 978, 985 (9th  
17 Cir.1999) (*citing Peacock v. Thomas*, 516 U.S. 349, 354, 116 S. Ct. 862 (1996)). This is  
18 independent of whether the alter ego claim is traditional or “reverse”.<sup>8</sup> As the United States  
19 District Court for the District of Nevada has repeatedly stated, ***“alter-ego is a theory of liability***  
20 ***aimed at penetrating a corporation's limited liability protection, it is not an independent cause***  
21 ***of action.”*** *Fernandez v. Penske Truck Leasing Co., L.P.*, 2012 U.S. Dist. LEXIS 69596, \*4, n. 2  
22 (D. Nev. 2012) (*emphasis added*) (*citing Taddeo v. Taddeo*, 2011 U.S. Dist. LEXIS 103649, \*28  
23 (D. Nev. 2011)); *see also Adams v. Silar Advisors, LP*, 2013 U.S. Dist. LEXIS 60118, \*21 (D.  
24 Nev. 2013) (alter ego is a legal theory and measure of relief not amounting to an independent  
25 cause of action); *Waterfall Homeowners Ass’n v. Viega, Inc.*, 283 F.R.D. 571, 579 (D. Nev.  
26 2012) (“claims for alter ego are not independent causes of action”); *Henderson v. Buchanan (In*  
27 *re Western World Funding, Inc.)*, 52 B.R. 743, 782 (Bankr. D. Nev. 1985). “Put another way, a

28 <sup>8</sup> “Thus, an attempt of a third party to pierce the corporate veil does not constitute a cause of  
action independent of that against the corporation; rather, it is an assertion of facts and  
circumstances that will persuade the court to impose the corporate obligation on its owners.” 18  
*Am Jur 2d Corporations* § 47.

1 claim against a defendant based on the alter ego theory is a derivative of the substantive cause of  
2 action against the corporate defendant.” *Smith v. Simmons*, 638 F. Supp.2d 1180, 1190, n. 14  
3 (E.D. Cal. 2009).

4 Because the alter ego doctrine – traditional or reverse -- is not an independent cause of  
5 action, there can be no alter ego relief without a substantive underlying cause of action. As the  
6 Ninth Circuit has stated in a case arising in Nevada:

7 A claim based on the alter ego theory is not in itself a claim for substantive relief, but  
8 rather is procedural. ***“A finding of fact of alter ego, standing alone, creates no cause of action.***  
9 It merely furnishes a means for complainant to reach a second corporation or individual upon a  
10 cause of action that otherwise would have existed only against the first corporation. An attempt to  
11 pierce the corporate veil is a means of imposing liability on an underlying cause of action, such as  
12 a tort or breach of contract.

13 *Grimmett v. McCloskey (In re Wardle)*, 2006 Bankr. LEXIS 4817, 20-22 (B.A.P. 9th Cir. Nev.  
14 2006) (*internal citations omitted*) (*emphasis added*); *see also Simmons*, 638 F. Supp. at 1190, n.  
15 14 (*citation omitted*) (alter ego “is ‘not itself a claim for substantive relief,’ but rather is a means  
16 to ‘disregard the corporate entity as a distinct defendant and to hold the alter ego individuals  
17 liable on the obligations of the corporation where the corporate form is being used by the  
18 individuals to escape personal liability, sanction a fraud, or promote injustice.’”). Alter ego,  
19 especially in reverse, only becomes an issue when liability is imposed, and the issue of  
20 determining alter ego is premature until “[w]hen and if any defendant is shown to be liable for the  
21 violations alleged in the complaint, and is unable to satisfy any judgment rendered, the court can,  
22 if necessary, reopen the issue of piercing the corporate veil for further discovery at that time.”  
23 *Higgins v. Journal Register Co.*, 2007 U.S. Dist. Lexis 78761 at \*4-5 (D. Conn. Oct. 23, 2007).<sup>9</sup>

24 <sup>9</sup> Of those that have considered the issue, the majority of state courts have found an alter ego  
25 claim does not constitute an independent action. Courts in Arkansas, California, Colorado,  
26 Florida, New York, Tennessee, Texas, and Utah have noted alter ego is not an independent claim,  
27 but rather a theory of liability, procedure, or equity to enforce another substantive claim. *See*  
28 *Forever Green Athletic Fields, Inc. v. Lasiter Constr., Inc.*, 384 S.W.3d 540, 553 (Ark. Ct. App.  
2011); *Leek v. Cooper*, 125 Cal. Rptr. 3d 56, 71 (Cal. Ct. App. 2011); *Swinerton Builders v.*  
*Nassi*, 272 P.3d 1174, 1177-78 (Colo. Ct. App. 2012); *Turner Murphy Co. v. Specialty*  
*Constructors, Inc.*, 659 So.2d 1242, 1245 (Fla. Dist. Ct. App. 1995); *Morris v. N.Y. State Dep't of*  
*Taxation & Fin.*, 623 N.E.2d 1157, 1160 (N.Y. 1993); *Boles v. Nat'l Dev. Co.*, 175 S.W.3d 226,  
251 (Tenn. Ct. App. 2005); *Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d 692, 693 n.1 (Tex.  
1990); *Jones & Trevor Mktg., Inc. v. Lowry*, 284 P.3d 630, 634 n.1 (Utah 2012). Similarly,

1 Therefore, in cases where summary judgment has dismissed claims of actionable wrong,  
2 “alter ego has no remaining application to the case.” *Towne v. Robbins*, 2005 U.S. Dist. LEXIS  
3 5206, \*13 (D. Or. 2005). For instance, “[i]f the underlying cause of action for breach of the  
4 agreement is dismissed... the claims of liability for the remaining Defendants under alter ego or  
5 veil-piercing theories would also be dismissed.” *TV Events & Mktg. v. AMCON Distrib. Co.*, 526  
6 F. Supp. 2d 1118, 1128 (D. Haw. 2007). *Thus, “the veil-piercing doctrine does not come into*  
7 *play...unless and until [the Plaintiff’s] establish their right to a money judgment against [the*  
8 *corporate defendants] under the alter ego doctrine....”* *Local 159 v. Nor-Cal Plumbing, Inc.*, 185  
9 F.3d 978, 985 (9th Cir. 1999) (*emphasis added*). Simply put, absent an underlying cognizable  
10 cause of action, coupled with a established right to a money judgment, the alter ego remedy is  
11 unavailable.

12 Such prohibited claim is exactly the scenario presented in Plaintiffs’ Proposed Third  
13 Amended Complaint. Specifically, Plaintiffs assert an independent cause of action for “Reverse  
14 Veil Piercing Under The Alter Ego Doctrine” which is not premised upon any tort or breach of  
15 contract. *See generally* Plaintiffs’ Proposed Third Amended Complaint, pp. 16-18. Frankly,  
16 Plaintiffs’ proposed third cause of action is no more actionable in Nevada than saying “Punitive  
17 Damages” or “Third-Party Insurance Bad Faith” is an independent cause of action. It simply  
18 cannot survive an NRCP 12(b)(5) motion to dismiss. Staying within the four corners of the  
19 Plaintiffs’ Proposed Third Amended Complaint, their proposed amendment is futile and the  
20 Plaintiffs’ Motion should be denied.

21 **C. Plaintiffs’ Proposed Third Amended Complaint Is Also Futile Because They**  
22 **Have Not Alleged, And Cannot Allege, The Necessary Elements To Allow Them**  
23 **To “Reverse Pierce” At This Stage**

24 Even if this Court were to create a heretofore unrecognized cause of action called  
25 “Reverse Veil Piercing Under The Alter Ego Doctrine” by obliterating the *LFC Marketing*

26 federal courts applying Illinois, Connecticut, Pennsylvania, and Virginia state law have noted that  
27 an alter ego claim is not an independent cause of action. *See Int’l Fin. Servs. Corp. v. Chromas*  
28 *Techs. Can., Inc.*, 356 F.3d 731, 735-36 (7th Cir. 2004); *Everspeed Enters. Ltd. v. Skaarup*  
*Shipping Int’l*, 754 F. Supp. 2d 395, 404 (D. Conn. 2010); *Siematic Mobelwerke GmbH & Co. KG*  
*v. Siematic Corp.*, 643 F. Supp. 2d 675, 694 (E.D. Pa. 2009); *C.F. Trust, Inc. v. First Flight Ltd.*  
*P’ship*, 111 F. Supp. 2d 734, 742 (E.D. Va. 2000). As noted above, federal courts in Nevada have  
reached the same conclusion.

1 *Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000) decision, under Nevada law the  
2 Plaintiffs' proposed amendment would still be futile. The reason being, Plaintiffs have failed to  
3 allege the necessary predicate for such a claim; namely, they have not alleged they are a judgment  
4 creditor.

5 A careful review of the *LFC* case reveals that an action for reverse piercing of the  
6 corporate veil in the present case is premature and not ripe for adjudication at this time. In the  
7 *LFC* case, Plaintiff Loomis was a judgment creditor of William Lange, who had held himself out  
8 as the President, CEO, and primary owner of the corporation. Plaintiff had obtained a judgment of  
9 \$25,000 against William Lang and for three years had been unsuccessful in its collection efforts  
10 against William Lang. Plaintiff Loomis then obtained a writ of attachment against monies owed  
11 to the corporation in a post judgment proceeding at which time the corporation appeared in the  
12 case to defend its interests. After a hearing under NRS 31.070(5), the District Court determined  
13 that LFC Marketing was the alter ego of William and thus granted the motion for writ of  
14 attachment in the post-judgment proceeding. The court stated, in granting the writ of attachment,  
15 that:

16 While the classic alter ego situation involves a **creditor** reaching the personal assets of a  
17 controlling individual to satisfy a corporation's debt, the "reverse" piercing situation involves a  
18 **creditor** reaching the assets of a corporation to satisfy **the debt** of a corporate insider based on a  
19 showing that the corporate entity is the alter ego of the individual.

20 *LFC*, 116 Nev. at 903, 8 P.3d at 846 (*emphasis added*).

21 The *LFC* Court cited several cases involving the principal of reverse piercing of the  
22 corporate veil, however those cases involve the collection of a pre-existing debt in a proceeding  
23 in which the complaining party is attempting to collect the pre-existing debt from the alter ego  
24 corporation. For instance, in *Cargale Inc. v. Hedge*, 375 N.W.2d 477 (Minn. 1985), the court held  
25 that the family farm corporation was the alter ego of its owner--occupants, and therefore, the  
26 owners were entitled to reverse pierce the corporate entity to assert homestead exemption against  
27 the judgment creditor of one owner. In *Taylor v. Newton*, 117 Cal.App.2d, 257 P.2d 68 (1953),  
28 the plaintiff was attempting to collect against a judgment debtor. The court declared that the  
corporation was the debtor's alter ego and therefore both of them were jointly and severally liable

1 for the judgment debt. Notably, a judgment was present before the attempt to show the alter ego  
2 status of the corporation was allowed.

3 The *LFC* Court also cited to *Towe Antique Ford Foundation v. I.R.S.*, 999 F.2d 1387 (9<sup>th</sup>  
4 Cir. 1993), for the proposition that most courts considering the reverse piercing issue allow such  
5 piercing. *LFC*, 116 Nev. at 903, 8 P.3d at 846. *Towe Antique*, however, involved an established  
6 tax liability, and the *Towe Antique* Court remarked that “[o]rdinarily, courts are called upon to  
7 apply the alter ego doctrine in cases where a party seeks to hold an individual liable for a business  
8 entity’s **debts**. *Towe Antique*, 999 F. 2d at 1390, citing *Drilcon, Inc. v. Roil Energy Corp., Inc.*,  
9 230 Mont. 166, 749 P.2d 1058 (1988) (*emphasis added*).

10 Here, Plaintiffs have not alleged or established that Orluff Opheikens owes any debt to the  
11 Plaintiffs. Bluntly, Plaintiffs have not alleged or established that they are judgment creditors in  
12 any respect. They simply have no legal or factual basis to reverse pierce to reach R&O at this  
13 time.

14 Plaintiffs also pay no heed to the equitable concerns involved with reverse pierce theory.  
15 However, the *LFC* decision signals that the equities do not only flow to a complaining party.  
16 Rather, they flow to those who may be harmed by an improper reverse pierce. Particularly, *LFC*  
17 cited with approval to a law review article which describes the different types of reverse piercing  
18 theories, insider and outsider, and which casts a bright light upon the dangers of the type of  
19 haphazard application of reverse pierce theory which Plaintiffs espouse. *LFC*, 116 Nev. at 903, 8  
20 P.3d at 846. The *LFC* Court therein cited to Gregory S. Crespi, *The Reverse Piercing Doctrine:*  
21 *Applying Appropriate Standards*, 16 J.Corp.L. 33, 55-69 (1990), which concludes that “only  
22 under highly unusual circumstances should a court uphold an outsider reverse piercing claim and  
23 allow a person with a claim against a corporate insider to attach corporate assets directly to satisfy  
24 a claim.” *Id.* at 69. Crespi further notes that “[a] key factor in any outsider reverse piercing  
25 controversy is the presence of corporate shareholders other than the insider against whom the  
26 outsider is asserting the primary claim. **If other shareholders do exist, allowance of a reverse**  
27 **pierce would prejudice those shareholders by allowing the outsider to attach assets in which**  
28 **they have an interest. This injustice visited upon non-culpable parties would militate**  
**strongly against granting the equitable remedy of corporate disregard.”** *Id.* at 66 (*emphasis*

1 added).<sup>10</sup> Stated another way, allowing Plaintiffs to assert a reverse piercing claim now would be  
2 doubly prejudicial in this case: first, it would act as an impermissible prejudgment writ of  
3 attachment against R&O; and second, it would absolutely harm purely innocent shareholders.

4 To reiterate, the one thing that all of the cases cited with approval by the *LFC* Court have  
5 in common is that there was a pre-existing debt evidenced either by a note, a tax lien, or a  
6 judgment. Such is not the case here. Orluff Opheikens owes the Plaintiffs nothing at the present  
7 time. He has denied all liability, and liability has not remotely been established.

8 Even further, if the Plaintiffs fail to prove that Orluff Opheikens is actually liable to them,  
9 then of course no debt will ever be owed by him or (by the hypothetical “reverse pierce” alter  
10 ego) R&O. This means that the issue of any alter ego is not ripe for adjudication at the present  
11 time. And, even if the Plaintiffs obtain a judgment against Orluff Opheikens, then and only then  
12 will it be the time for Plaintiffs to try to prove that R&O is his alter ego in a Chapter 31  
13 proceeding. Stated another way, the “reverse pierce” issue – without any judgment -- is totally  
14 premature, unripe for adjudication by this Court, and necessarily futile at this stage.

15 Clear language appearing in the *LFC* case shows that this is indeed the law. The Court  
16 there held that, “[c]onceptually, we conclude that reverse piercing is not inconsistent with  
17 traditional piercing in its goal of preventing abuse of the corporate form. Indeed “it is particularly  
18 appropriate to apply the alter ego doctrine in ‘reverse’ when the controlling party uses the  
19

---

20 <sup>10</sup> The “factual allegations” raised in Plaintiffs’ Proposed Third Amended Complaint, *e.g.*  
21 Paragraphs 73-81, are strongly disputed and not supported by the facts of this case. Nevertheless,  
22 this Court can set aside the question of whether those “facts” are disputed at this stage and focus  
23 squarely upon the Proposed Third Amended Complaint and determine whether the proposed  
24 amendment is “facially futile without having to look outside the four corners of the pleadings.”  
25 *See Nutton*, 131 Nev. Adv. Op. 34, 357 P.3d at 974. Even when afforded such liberality,  
26 Plaintiffs concede that there will be harm to non-culpable parties if a reverse pierce through  
27 Orluff Opheikens to R&O is permitted. *See e.g.*, Plaintiffs’ Proposed Third Amended Complaint,  
28 Paragraph 73. Although Plaintiffs implore this Court to ignore the harm to innocent shareholders  
by, in effect, slapping a prejudgment writ of attachment upon R&O, this harm strongly suggests  
that a reverse pierce would be impermissible as a matter of law. The Court should also consider  
whether other harms would be inflicted upon R&O and other innocent shareholders, such as the  
impact to R&O’s bonding ability and financial strength from being recklessly named in a lawsuit  
of this nature under a legally unrecognized cause of action which is not covered by insurance.  
One might wonder if the proposed amendment was actually being brought with a bad faith,  
ulterior motive to try to force a settlement. *See Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825,  
828 (2000).

1 controlled entity to hide assets or secretly to conduct business to avoid **the pre-existing liability**  
2 of the controlling party.” *Id.* at 903, 8 P.3d at 846, citing *Select Creations, Inc. v. Paliapito Am.,*  
3 *Inc.*, 852 F.Supp. 740, 774 (E.D.Wis. 1994) (*emphasis added*).

4 As noted above, there is not a single statement within the Proposed Third Amended  
5 Complaint confirming that the Plaintiffs have obtained a judgment against Orluff Opheikens, nor  
6 that Plaintiffs have an established debt owed by Orluff which Plaintiffs have not been able to  
7 collect. In order to even go forward with any reverse piercing theory, the Plaintiffs will have to  
8 obtain a judgment against Orluff Opheikens and then unsuccessfully attempt to collect on that  
9 judgment. Then, and only then, can they come to this Court and try to prove that R&O is Orluff  
10 Opheikens’ alter ego.

11 Finally, there simply is no showing at the present time that the alleged adherence to the  
12 fiction of a separate corporate entity would sanction any sort of fraud or promote injustice. If  
13 Plaintiffs never obtain judgment, certainly there will be no injustice or fraud involved. The  
14 conditions precedent to allow a reverse pierce theory are indisputably not present at this time.  
15 The issue is not ripe for adjudication and Plaintiffs’ proposed amendment is necessarily futile at  
16 this stage. This Court should deny Plaintiffs’ Motion.

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24 ///

25 ///

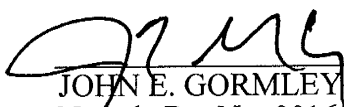
V.

CONCLUSION

Plaintiffs' Proposed Third Amended Complaint seeks to assert a legally impermissible claim in a manner unrecognized in Nevada. There is no basis under Nevada law to allow an independent cause of action for "Reverse Veil Piercing Under The Alter Ego Doctrine". Furthermore, Plaintiffs have failed to allege that they have established the predicate fact – in this case, an uncollectible judgment against Orluff Opheikens – which would even permit them to try to advance their "Reverse Veil Piercing" theory in any manner. Consequently, Plaintiffs' Proposed Third Amended Complaint is facially futile and would be subject to dismissal pursuant to NRCPP 12(b)(5). Therefore, Plaintiffs' Motion for Leave should be denied pursuant to NRCPP 15(a), *Halcrow Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 302 P.3d 1148 (2013), and *Nutton v. Sunset Stations, Inc.*, 131 Nev. Adv. Op. 34, 357 P.3d 966 (Ct. App. 2015).

Dated July, 7, 2018

OLSON, CANNON, GORMLEY,  
ANGULO & STOBERSKI

  
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SLADE OPHEIKENS; and CHET  
OPHEIKENS

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 5 day of July, 2018, I served a true and correct copy of the foregoing document (and any attachments) entitled: **DEFENDANTS ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, AND TOM WELCH'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof 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 when necessary: by placing a copy in a sealed envelope, first-class postage fully prepaid thereon, and by depositing the envelope in the U.S. mail at Las Vegas, Nevada, addressed as follows:

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An employee of OLSON, CANNON, GORMLEY,  
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# **EXHIBIT A**



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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN  
GARDNER, on behalf of minor  
child, LELAND GARDNER,

Plaintiffs,

vs.

CASE NO.  
A-15-722259-C  
VOLUME I

HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK, a  
Nevada limited liability company;  
WEST COAST WATER PARKS, LLC, a  
Nevada limited liability company;  
DOUBLE OTT WATER HOLDINGS, LLC,  
a Utah limited liability company;  
ORLUFF OPHEIKENS, an individual;  
SLADE OPHEIKENS, an individual;  
CHET OPHEIKENS, an individual;

///

VIDEOTAPED DEPOSITION OF ORLUFF OPHEIKENS

Taken at the offices of Campbell & Williams

on Friday, May 4, 2018

at 9:32 a.m.

at 700 South Seventh Street  
Las Vegas, Nevada

Reported by: Denise R. Kelly, CCR #252, RPR

<p>1 SHANE HUIISH, an individual; SCOTT HUIISH, an individual; CRAIG HUIISH, 2 an individual; TOM WELCH, an individual; DOES I through X, 3 inclusive; ROE Corporations I through X, inclusive; and ROE 4 Limited Liability Company I through X, inclusive, 5 6 Defendants. 7 AND ALL RELATED CLAIMS 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>page 2</p> <p>1 APPEARANCES (CONT'D): 2 For Defendants Scott Huish and Craig Huish: 3 KIMBERLY BEAL, ESQ. ROGERS, MASTRANGELO, CARVALHO &amp; MITCHELL 4 700 South Third Street Las Vegas, Nevada 89101 5 702.383.3400 kbeal@rmcmlaw.com 6 Also present: 7 JOSEPH CAMP, VIDEOGRAPHER 8 LAS VEGAS LEGAL VIDEO PETER GARDNER 9 SLADE OPHEIKENS SCOTT HUIISH TOM WELCH 10 11 12 * * * * * 13 14 INDEX 15 WITNESS ORLUFF OPHEIKENS PAGE 16 Examination by Mr. Campbell 7 Continued Examination by Mr. Campbell 211 17 18 19 20 INFORMATION TO BE SUPPLIED 21 None 22 23 NO ANSWER PROVIDED BY THE DEPONENT 24 Page 44 Page 83 Page 211 Page 322 25</p> <p>page 4</p>
<p>1 APPEARANCES: 2 For the Plaintiffs: 3 DONALD J. CAMPBELL, ESQ. SAMUEL R. MIRKOVICH, ESQ. 4 PHILIP R. ERWIN, ESQ. GARRETT LOGAN, LAW CLERK 5 CAMPBELL &amp; WILLIAMS 700 South Seventh Street 6 Las Vegas, Nevada 89101 702.382.5222 djc@cwlawlv.com srm@cwlawlv.com pre@cwlawlv.com 8 For Defendant Henderson Water Park: 9 DOUGLAS J. DUESMAN, ESQ. THORNDAL, ARMSTRONG, DELK, BALKENBUSH &amp; EISINGER 10 1100 East Bridger Avenue Las Vegas, Nevada 89101 11 702.366.0622 djd@thorndal.com 12 13 For Defendants Double Ott and the Opheikens 14 15 JOHN E. GORMLEY, ESQ. OLSON, CANNON, GORMLEY, ANGULO &amp; STOBERSKI 9950 West Cheyenne Avenue 16 Las Vegas, Nevada 89129 702.383 0701 jgormley@ocgas.com 17 For Defendant Shane Huish: 18 WALTER F. FICK, ESQ. HALL, JAFFE &amp; CLAYTON, LLP 7425 Peak Drive 19 Las Vegas, Nevada 89128 702.316.4111 wfick@lawhjc.com 20 21 22 23 /// 24 /// 25 ///</p> <p>page 3</p>	<p>1 EXHIBITS 2 (Exhibit Nos. 1 through 38 were marked 3 in prior depositions.) 4 DESCRIPTION PAGE 5 Exhibit 39 - Copies of Photographs of 6 Ribbon Cutting at Cowabunga 7 Bay with identifications 8 of people in the photos by 9 Orluff Opheikens 261 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>page 5</p>

page 6

1 LAS VEGAS, NEVADA, FRIDAY, MAY 4, 2018,  
 2 9:32 A.M.  
 3 \* \* \* \* \*  
 4 THE VIDEOGRAPHER: Good morning. Today is  
 5 May 4th, 2018. This begins the videotaped deposition  
 6 of Orluff Opheikens. The time is approximately  
 7 9:32 a.m.  
 8 My name is Joseph Camp, court videographer  
 9 of Las Vegas Legal Video. And your court reporter is  
 10 Denise Kelly of Rocket Reporters.  
 11 Were are located at Campbell & Williams,  
 12 700 South Seventh Street, Las Vegas, Nevada 89101.  
 13 This is District Court, Clark County,  
 14 Nevada, Case No. A-15-722259.  
 15 Will counsel present please identify  
 16 themselves for the record, and the court reporter will  
 17 administer the oath.  
 18 MR. CAMPBELL: Donald Jude Campbell,  
 19 Campbell & Williams, 700 South Seventh Street, with  
 20 the plaintiff.  
 21 MR. MIRKOVICH: Samuel Mirkovich,  
 22 Campbell & Williams, appearing on behalf of the  
 23 plaintiffs.  
 24 MR. ERWIN: Phil Erwin, Campbell &  
 25 Williams, appearing on behalf of the plaintiffs.

page 7

1 MR. LOGAN: Garrett Logan, Campbell &  
 2 Williams, on behalf of plaintiffs.  
 3 MR. DUESMAN: Douglas Duesman, Thorndahl  
 4 Armstrong, on behalf of Henderson Water Park.  
 5 MS. BEAL: Kimberly Beal from Rogers  
 6 Masterangelo, on behalf of Craig and Scott Huish.  
 7 MR. FICK: Walter Fick with Hall Jaffe &  
 8 Clayton also on behalf of Mr. Huish.  
 9 MR. HUISH: Scott Huish with Henderson  
 10 Water Park.  
 11 MR. WELCH: Tom Welch.  
 12 MR. OPHEIKENS: Slade Opheikens.  
 13 MR. GORMLEY: John Gormley, Olson  
 14 Cannon & Gormley, on behalf of Double Ott and the  
 15 Opheikens.  
 16  
 17 ORLUFF OPHEIKENS,  
 18 having been first duly sworn, was  
 19 examined and testified as follows:  
 20  
 21 EXAMINATION  
 22 BY MR. CAMPBELL:  
 23 Q. Good morning, Mr. Opheikens. How are you,  
 24 sir?  
 25 A. Fine, thank you.

page 8

1 Q. Mr. Opheikens, have you ever had your  
 2 deposition taken before?  
 3 A. Yeah.  
 4 Q. On how many occasions?  
 5 A. I have no idea. Two or three times maybe.  
 6 Q. Two or three times.  
 7 When was the last time you had your  
 8 deposition taken, sir?  
 9 A. I don't recall.  
 10 Q. Okay. Would it have been within the last  
 11 10 years?  
 12 A. Honestly, I can't remember.  
 13 Q. Okay. We are going to cover then some of  
 14 the procedures and protocols that are going to be  
 15 attendant to the taking of your deposition. So I  
 16 would ask that you pay attention to what I'm about to  
 17 share with you. If you have any questions or you want  
 18 me to elaborate, don't for a minute hesitate, I'm  
 19 happy to do so. Okay?  
 20 A. Okay.  
 21 Q. This deposition is being conducted  
 22 pursuant to the Nevada Rules of Civil Procedure. This  
 23 deposition is being taken of you as a party to this  
 24 litigation.  
 25 The most important feature of taking

page 9

1 deposition testimony is that the deponent, that's you,  
 2 gives his testimony, his answers to questions  
 3 propounded to him under oath.  
 4 That's the most important feature because  
 5 you can't in any material way prevaricate. And I'm  
 6 not suggesting that you would. But should you do so,  
 7 should you falsely answer a question or otherwise not  
 8 fully answer a question with respect to what is asked  
 9 of you in that regard and try to conceal facts, that  
 10 would be a felony under Nevada law. And, of course,  
 11 I'm not suggesting you would ever commit such a  
 12 serious offense such as perjury under Nevada law, but  
 13 simply to advise you and reinforce how important it is  
 14 that you respond to the questions truthfully in all  
 15 regards. Okay?  
 16 A. Okay.  
 17 Q. All right. Mr. Opheikens, it's also  
 18 important that you understand the question. If you at  
 19 any time don't understand the question, because I'm  
 20 from time to time given to asking maybe a convoluted  
 21 question or one that can't be understood by you,  
 22 please alert me to that fact. I'm happy to redraft it  
 23 for you. I'm happy to reframe it in such a manner  
 24 that we are both on the same page or understand one  
 25 another, what I'm asking and what you're answering.

page 10

1 Will you do that for me?

2 **A. Yes.**

3 Q. Okay. In that regard, I want you to take

4 all the time you feel is necessary to think about the

5 question that is being asked of you and answer it.

6 This is not going to be, you know, something like you

7 would see on a Perry Mason show where people are

8 required to give rapid-fired answers. Okay? You just

9 take your time, think about the question, and go ahead

10 and answer it. Will you do that for me?

11 **A. Yes.**

12 Q. All right. One of the things that we like

13 to do in these depositions is to get you to answer

14 audibly. While you're on videotape, and that's being

15 recorded digitally, it is somewhat difficult for the

16 court reporter to take down all of your testimony if

17 you're nodding your head or shaking your head to

18 indicate affirmative or negative responses. So we are

19 going to ask you to answer audibly in all regards.

20 Same way with respect to "uh-huhs" or

21 "huh-uhs" or things of that nature to indicate

22 negative or affirmative responses. We ask you to just

23 go ahead and say "yes" or "no." And I can tell you I

24 have been doing this 40 years, and I have never once

25 ever had a witness that I didn't have to say, "Does

page 11

1 that mean 'yes' or is that a 'yes' or a 'no?'" Okay.

2 If I say that to you, it's not meant to be

3 a criticism of any way of your testimony or your

4 appearance, demeanor, or the manner in which you're

5 testifying. It's simply to remind you. Because you

6 are not doing this on an everyday basis, so you're

7 probably going to forget that from time to time.

8 Okay?

9 **A. Okay.**

10 Q. All right. Similarly, it's important that

11 you let me get my full question out. In everyday

12 conversation you are going to anticipate exactly what

13 somebody is about to ask you about halfway through the

14 question. And in everyday conversation it's not a

15 bit, you know, unusual for you to go ahead and answer

16 the question having anticipated it and going ahead and

17 saving the person asking the question the time and

18 expense necessary to get it all out.

19 That's impossible for the court reporter

20 to handle during the course of a deposition, because

21 she has to have full question, then full answer, not

22 half a question, full answer, half a question. Okay?

23 **A. Okay.**

24 Q. All right. And I may remind you from time

25 to time on that as well. Okay?

page 12

1 **A. Okay.**

2 Q. All right. I'm not going to ask you to

3 engage in anything that we generally regard as rank

4 speculation. You know, wild guessing. I am entitled,

5 however, to your most -- to your best recollection of

6 events and your reasonable interpretation of the

7 events that you witnessed or otherwise participated in

8 or were told about. Okay?

9 You're going to understand certain things

10 by my -- by the mere fact that you have lived a

11 certain amount of time on God's green earth. You're a

12 man of great wisdom, I'm sure. So I'm going to advise

13 you that with respect to speculation, if I asked you,

14 for example, to speculate what the length of the

15 dining room table in my house was, you couldn't tell

16 me what that was. Right? Because you've never been

17 in my house. You don't know if there is a dining room

18 table here.

19 But if I asked you to say, okay, tell me

20 the general length of this board table you're sitting

21 at. You may say, "Okay, it looks to be about 20 feet

22 or so."

23 That's the difference between the two.

24 Okay?

25 **A. Okay.**

page 13

1 Q. All right. You're present here today with

2 multiple counsel that are going to be attending these

3 proceedings and some representing you individually in

4 this matter.

5 And that's your entitlement. It's your

6 right. And that's an important feature. But it's

7 your testimony that we are after. We're not after the

8 testimony of anybody that is representing you.

9 Accordingly, you can't look to your attorneys to give

10 you an answer to a pending question.

11 If, however, there is a question that

12 would in the opinion of your attorney invade the

13 attorney/client privilege; that is, that would call

14 for you to respond in such a manner that would reveal

15 protected or privileged conversations with an

16 attorney, you have an opportunity to talk to your

17 client about that. All right? But barring that,

18 there generally isn't any basis upon which you can

19 take a break during a pending question to talk your

20 attorney about certain things.

21 Now, if for any reason you have to take a

22 break in these proceedings to, for example, go to the

23 restroom, or something of that nature, please alert me

24 to that fact. We will try to finish up the question

25 or the particular area that we are delving into at

page 14

1 that time, and I'll be happy to take a break to permit  
 2 you to do so and accommodate you in that regard.  
 3 Your deposition is going to be lasting at  
 4 least seven hours by rule. Okay. We generally take a  
 5 15-minute break in the morning, a 15-minute break in  
 6 the afternoon, and approximately a half-an-hour break  
 7 or so for lunch.  
 8 If there is anything that comes up that's  
 9 important for you to attend to, however, I'll also  
 10 permit you to take a break there. For example, if you  
 11 get a phone call from a loved one who's ill or  
 12 something of that nature.  
 13 With respect to your deposition today, is  
 14 there any reason why your deposition cannot go  
 15 forward? For example, are you suffering from any  
 16 cognitive disability of any kind or type? Are you  
 17 under the care of a physician or taking medication of  
 18 any kind or type that doesn't permit you to give your  
 19 best testimony here today?  
 20 **A. I suffer from something called chronic**  
 21 **fatigue syndrome.**  
 22 Q. Okay.  
 23 **A. And I never know if it's going to hit.**  
 24 Q. Okay.  
 25 **A. I hope I'll be fine.**

page 15

1 Q. All right. All right. And do you take  
 2 medication for that?  
 3 **A. No.**  
 4 Q. All right. And when were you first  
 5 diagnosed with that malady?  
 6 **A. Time flies by so fast, as you know. Just**  
 7 **let me think for a second.**  
 8 Q. Sure.  
 9 **A. Probably about 2004.**  
 10 Q. Okay.  
 11 **A. Maybe '05.**  
 12 Q. Are you actively treated for that malady?  
 13 **A. There is not much treatment they can do,**  
 14 **other than you just have to get rest and do -- you**  
 15 **know, eat the right foods and all that kind of stuff.**  
 16 Q. Good.  
 17 **A. I'm really doing pretty good.**  
 18 Q. Good, I'm glad to hear it.  
 19 Okay. Anything other than that? You are  
 20 not on any medications --  
 21 **A. No.**  
 22 Q. -- or anything that --  
 23 **A. No.**  
 24 Q. Do you take any medications at all for any  
 25 malady?

page 16

1 **A. No.**  
 2 Q. Okay. Good for you. I wish I could say  
 3 the same.  
 4 Mr. Opheikens, this deposition, as I  
 5 mentioned, is being recorded digitally as well as by  
 6 stenographic means. But at the end of it, the  
 7 stenographic reporter, Miss Kelly in this particular  
 8 action, the young lady who swore you in, is going to  
 9 prepare a verbatim transcript of everything that is  
 10 said.  
 11 We provide that transcript for you to  
 12 review. If you make any changes in that transcript,  
 13 and sometimes people do, they change the spelling of a  
 14 name, a person's name, things of the nature, you're  
 15 entitled to do that.  
 16 However, with respect to substantive  
 17 changes in your testimony, for example, if this were  
 18 an automobile accident and you testified here today  
 19 that "the light was red," and then changed your  
 20 testimony to the effect that "it was green," that  
 21 could be used to impeach your testimony at the time of  
 22 trial.  
 23 That is to say, you answered one way under  
 24 oath and then after you reflected on how that answer  
 25 affected possibly your liability, you then changed

page 17

1 your answer. Impeachment means the suggestion would  
 2 be made that you prevaricated or lied. And obviously,  
 3 that's something that you want to try to avoid. Okay?  
 4 **A. Um-hum.**  
 5 Q. That's a "yes"?  
 6 **A. Yes.**  
 7 Q. See, I caught you already.  
 8 Okay. So I want your best testimony  
 9 today, and that's why I'm going to allot you all the  
 10 time necessary for you to go ahead and give me your,  
 11 your answers. Okay?  
 12 **A. Okay.**  
 13 Q. All right. Is there anything that I've  
 14 discussed with you so far, Mr. Opheikens, that is in  
 15 any way confusing to you or needs clarification?  
 16 **A. I don't think so.**  
 17 Q. Okay. Very good.  
 18 Mr. Opheikens, please tell me what your  
 19 understanding of this case is all about.  
 20 **A. Well, of course a child drowned and was**  
 21 **maimed, his -- with brain damage. It's our testimony**  
 22 **or my testimony that we subordinated or assigned that**  
 23 **responsibility to the operations people running the**  
 24 **park.**  
 25 **I'm an investor, I'm not -- I don't run --**

page 18

1 **I'm not a water park guy.**  
 2 **That's probably it in my, in my mind.**  
 3 Q. Okay. Tell me what the name of the little  
 4 boy is.  
 5 **A. Leland Gardner.**  
 6 Q. Okay. When did you first learn of Leland  
 7 Gardner's event at your water park?  
 8 **A. I don't, I don't recall a date. It was, I**  
 9 **believe it was the afternoon or late afternoon of the**  
 10 **day that it happened. Maybe evening, early evening.**  
 11 **I'm not positive. But I don't have a strong memory of**  
 12 **that moment. Yeah, that's all I remember.**  
 13 Q. Okay. And you don't know the date that  
 14 occurred?  
 15 **A. I believe it was May 27th.**  
 16 Q. And when was it that you were informed of  
 17 the event for the first time?  
 18 **A. Well, I believe May 27th in the evening.**  
 19 Q. And how were you informed?  
 20 **A. By phone.**  
 21 Q. And who was it that informed you of the  
 22 event?  
 23 **A. My son Slade.**  
 24 Q. Okay. And what was it that -- what did he  
 25 tell you? What did he say to you?

page 19

1 **A. Well, I'm guessing, because I don't have a**  
 2 **real vivid memory.**  
 3 Q. I want you to give your best recollection.  
 4 **A. Okay.**  
 5 Q. Okay.  
 6 **A. Basically that there had been an accident**  
 7 **and that there had been a drowning, and that they**  
 8 **thought the little boy was going to be okay. They had**  
 9 **got him out. And that's pretty much probably what I**  
 10 **remember.**  
 11 Q. All right. How long did this phone call  
 12 take place?  
 13 **A. I have no recollection of that.**  
 14 Q. Okay. Did he call you on your home phone  
 15 or your cellular phone?  
 16 **A. It would be my cellular phone.**  
 17 Q. And what's that number?  
 18 **A. (801)540-9357.**  
 19 Q. Okay. And what's his phone number?  
 20 **A. (801)540 -- no, 430-1303.**  
 21 Q. Approximately how long was it that this,  
 22 that was consumed during the course of this phone call  
 23 when you first learned of the event involving Leland?  
 24 **A. Okay, ask me that again.**  
 25 Q. I'm happy to do so. Thank you for

page 20

1 alerting me to the fact that I asked you a question  
 2 that you didn't understand.  
 3 How much time was consumed in this first  
 4 phone call that you had with your son concerning the  
 5 event?  
 6 **A. I, I really don't remember.**  
 7 Q. Okay. What was the next phone call? What  
 8 was the next communication that you had concerning the  
 9 event?  
 10 **A. I would be speculating, I just don't**  
 11 **remember.**  
 12 Q. I don't want you to speculate, just give  
 13 me your best reasoned estimate as to when it was.  
 14 MR. GORMLEY: If he has one, fair enough.  
 15 **THE WITNESS: I just don't remember.**  
 16 BY MR. CAMPBELL:  
 17 Q. Okay. Would it have been within days of  
 18 the event?  
 19 **A. Well, I believe so.**  
 20 Q. Okay. And why do you believe so?  
 21 **A. Well, I, I just think that my son would**  
 22 **have gotten with me.**  
 23 Q. All right. Well, irrespective of what  
 24 length of time passed since the first phone call with  
 25 your son, tell me what it was that your son -- and was

page 21

1 it the same son?  
 2 **A. Yes.**  
 3 Q. And his name again for the record?  
 4 **A. Slade Opheikens.**  
 5 Q. And tell me what it was when Slade called  
 6 you and shared information with you subsequently.  
 7 **A. Could you explain what "subsequently"**  
 8 **means.**  
 9 Q. Yes. After the first phone call.  
 10 **A. Yeah.**  
 11 Q. Okay. You think he had a second phone  
 12 call? I know you don't remember exactly when that  
 13 was, but tell me what that phone call was all about.  
 14 Tell me what he said and tell me what you said to the  
 15 best of your recollection.  
 16 **A. I just don't have any recollection at all.**  
 17 Q. None whatsoever?  
 18 **A. I don't. I'm sorry.**  
 19 Q. Okay. Tell me what the next communication  
 20 you had with anyone concerning the event.  
 21 **A. I don't know if I'm not understanding.**  
 22 **Are you asking me to remember day-by-day or**  
 23 **week-by-week or just kind of over a broad period of**  
 24 **time?**  
 25 Q. Well, if you can't answer me day-by-day,

page 22

1 just give me your best, best recollection of what you  
 2 do recall. For example, if you, if you talked to  
 3 Slade with respect to the event on what you believe to  
 4 be the evening of the 27th of May, the day the event  
 5 took place.  
 6 **A. Yes.**  
 7 Q. You talked to him some time later,  
 8 correct?  
 9 **A. Yes.**  
 10 Q. Okay. And when you talked to him some  
 11 time later, was that a matter of days, do you think,  
 12 your best recollection?  
 13 **A. I think it would have been sooner than**  
 14 **days.**  
 15 Q. Okay.  
 16 **A. And I, and I, I just don't recall.**  
 17 Q. Okay.  
 18 **A. I believe that, that I thought that the**  
 19 **young boy had been rescued and that he was going to be**  
 20 **okay.**  
 21 Q. Okay. Let's see if we can maybe assist  
 22 you.  
 23 Was there a point in time that you learned  
 24 that Leland was not going to be okay?  
 25 **A. I really didn't hear too much about it for**

page 23

**1 some period of time. I mean, I don't really think --**  
**2 oh, I remember making a call and asking I believe**  
**3 Shane.**  
 4 Q. And that's Shane?  
 5 **A. Huish.**  
 6 Q. Shane Huish.  
 7 **A. How the little boy was doing, whether they**  
**8 had any word. And I don't remember if that was one**  
**9 day or three days or -- I just don't remember.**  
 10 Q. Was it within a week?  
 11 **A. I believe so.**  
 12 Q. Okay.  
 13 **A. And, and I asked him if, you know, if**  
**14 they'd had word on the little boy. And what I recall**  
**15 is that he hadn't been able to talk to anybody, that**  
**16 something to do with medical laws. I don't know. I**  
**17 don't remember the exact conversation.**  
 18 Q. Um-hum.  
 19 **A. But they thought the little boy was going**  
 20 **to be okay.**  
 21 Q. Okay. All right. And what was the next  
 22 communication you had concerning Leland?  
 23 **A. Well, I don't think I remember very much**  
**24 of conversations or news or otherwise until something**  
**25 came out on television. And then I received a call**

page 24

**1 saying that, you know, that information, that they**  
**2 were saying things that just didn't make sense based**  
**3 on what we thought, what I thought.**  
 4 Q. Who was saying things? The news media?  
 5 **A. Yeah.**  
 6 Q. Okay. And do you recall what things the  
 7 news media was saying that differed from what you had  
 8 been informed?  
 9 **A. Well, I remember, again I believe it was**  
**10 Shane, or a conversation between my son Chet and**  
**11 Shane, where they felt like we needed to get a PR firm**  
**12 engaged because of the things that the, that were**  
**13 being said on television were so inaccurate. And it**  
**14 was, you know, potentially could do damage to the**  
**15 reputation of the park.**  
 16 Q. All right. And was this, was this a phone  
 17 call that you had with both of them? A conference  
 18 call with both of them, Chet and Shane?  
 19 **A. I don't think so.**  
 20 Q. Okay. Who do you think conveyed this  
 21 information to you?  
 22 **A. I think Chet.**  
 23 Q. Okay. Did you endorse the idea that you  
 24 should get a PR firm to assist?  
 25 **A. At that point, yes, I thought they should**

page 25

**1 look into it.**  
 2 Q. Okay. All right. And what did you tell  
 3 them in that regard?  
 4 **A. Oh, I don't know. They thought they ought**  
**5 to look into it.**  
 6 Q. But, nevertheless, you approved and  
 7 endorsed the idea that a PR firm should in fact be  
 8 hired?  
 9 **A. Well, at least they should talk to**  
**10 somebody.**  
 11 Q. Okay. And do you know who they talked to  
 12 about it?  
 13 **A. I don't remember the gentleman's name.**  
 14 Q. Okay. And did you ever talk to anyone  
 15 from a PR firm?  
 16 **A. No.**  
 17 Q. All right. Do you know if -- do you know  
 18 who it was that talked to, to the PR firm?  
 19 **A. I believe that, I believe there was a**  
**20 meeting set up and Chet and Shane were going to sit**  
**21 down with this gentleman.**  
 22 **And, and then -- okay, now my memory is**  
 23 **coming back. Okay, I'm sorry.**  
 24 **There, there had probably been something**  
 25 **in the television or TV news event about a shortage of**

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1 lifeguards. And, and I think that, that at that point  
 2 Shane pulled Slade aside, as they were going into this  
 3 meeting, to discuss this with this PR person.  
 4 Because we had been told that everything  
 5 was the way it was supposed to be and that he didn't  
 6 want us to think that something had been conveyed  
 7 wrongly and that maybe there was an issue with the  
 8 number of lifeguards.  
 9 Q. Okay. Now, do you recall when this was,  
 10 this conversation was? Withdraw the question.  
 11 Do you recall when the meeting was that  
 12 took place with the PR person?  
 13 A. I think it was like the end of July.  
 14 Q. End of July?  
 15 A. Quite a ways, quite a while.  
 16 Q. All right. Of 2015?  
 17 A. Yes.  
 18 Q. Okay. And how is it that you learned of  
 19 this meeting and the attendant facts?  
 20 A. Well, I think I heard it after the fact.  
 21 Q. From?  
 22 A. I don't recall. I could speculate, but...  
 23 Q. I don't want you to speculate. What is  
 24 your best reasoned recollection?  
 25 A. I don't know how to do a reasoned

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1 recollection without it being speculation, because I  
 2 don't remember.  
 3 Q. So you just have no idea whatsoever?  
 4 A. I don't have any clear memory.  
 5 Q. You can't give me any timeframe?  
 6 A. Okay. Timeframe for what, please?  
 7 Q. For when you were told about the meeting  
 8 with the PR person; that is, after it had been  
 9 accomplished?  
 10 A. Well, I think shortly after the meeting I  
 11 was told that, that Shane had decided possibly there  
 12 was a problem with the number of lifeguards.  
 13 Q. Okay. And do you know when you were told  
 14 that?  
 15 A. You mean like what time or do you mean  
 16 what day?  
 17 Q. Yes. In connection with when the meeting  
 18 took place?  
 19 A. After.  
 20 Q. And how long after, approximately?  
 21 A. I, I don't know. I have no recall. I  
 22 don't know. I didn't know when their meeting was.  
 23 Q. Would it have been at or near the time  
 24 that the meeting had taken place?  
 25 A. I would think so.

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1 Q. Very good. All right.  
 2 And who was it that shared this  
 3 information with you?  
 4 A. Well, it would have probably either been  
 5 Slade or Chet.  
 6 Q. Okay.  
 7 A. I don't know if Chet talked to Slade first  
 8 and then contacted me, or I just don't recall.  
 9 Q. Okay. Now, what was the next event or --  
 10 withdraw.  
 11 What was the next significant bit of  
 12 information that was shared with you concerning this  
 13 event?  
 14 A. I'm sorry. Nothing comes to my mind.  
 15 Q. Nothing comes to your mind, okay.  
 16 Following the time that this meeting with  
 17 the PR person was had, did the public relations firm  
 18 engage in an effort to put out a narrative that was  
 19 more consistent with one that was favorable to the  
 20 Cowabunga Bay as opposed to against it?  
 21 A. I, I don't think that the public relations  
 22 went forward.  
 23 Q. Okay. And why do you say that?  
 24 A. I, I just know that it didn't.  
 25 Q. How do you know that?

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1 A. I just know. I can't remember how I was  
 2 told or. But it didn't go forward.  
 3 Q. Okay. And, again, you don't know the name  
 4 of the man?  
 5 A. I don't.  
 6 Q. Okay. You don't know the name of the  
 7 firm?  
 8 A. I don't.  
 9 Q. Did you ever speak to anyone from the  
 10 public relations firm?  
 11 A. No.  
 12 Q. Was there ever a public relations firm  
 13 that was hired thereafter?  
 14 A. No.  
 15 Q. To your knowledge?  
 16 A. No.  
 17 Q. Okay. And how do you know that?  
 18 A. Okay. Not that I'm aware of.  
 19 Q. Okay. Very good.  
 20 Tell me a little bit about your  
 21 businesses. You are in the construction business as  
 22 your primary business?  
 23 A. Yes.  
 24 Q. And the name of it is?  
 25 A. R&O Construction Company.

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1 Q. All right. And what type of legal entity  
2 is R&O Construction Company?

3 **A. It's a corporation.**

4 Q. And when was it formed?

5 **A. Is approximate okay?**

6 Q. Yes, of course.

7 **A. I think about 1982.**

8 Q. Okay. And could you please tell me, as  
9 you sit here today, approximately how many legal  
10 entities you are associated with as an officer,  
11 director, or managing member?

12 **A. I don't know. Several.**

13 Q. Okay. And is several more or less than  
14 10?

15 **A. Probably less.**

16 Q. Okay. Could you tell me what Landmark,  
17 Inc. is?

18 **A. Well, it's actually my wife had a little  
19 cleaning business that she doesn't do much with  
20 anymore. It was just a little deal. And originally,  
21 I had an office building in Ogden, and I think that we  
22 thought that was probably put over in her name or  
23 something like that. So it's just something that  
24 hasn't been cleaned up.**

25 Q. Are you an officer or director of that

page 31

1 company?

2 **A. I honestly don't know. I would guess I'm  
3 an officer if it's still there.**

4 Q. Could you please tell me what Industrial  
5 Park Properties is?

6 **A. That's a little LLC that owns a piece of  
7 property.**

8 Q. All right. And what piece of property  
9 does that LLC own?

10 **A. Well, I can tell you it's in Farr West. I  
11 get them confused. There's two, there is two  
12 different entities out in Farr West. I think it's a  
13 lot just out in Farr West. We had a bigger piece of  
14 property and we sold a piece off, a couple pieces off,  
15 and it's kind of the remnant of that.**

16 **If when you name the other one, I decide  
17 that that's wrong, I'll correct it.**

18 Q. You're the managing member of Industrial  
19 Park Properties?

20 **A. I think so, yes.**

21 Q. What is Hamptons Development &  
22 Construction?

23 **A. That's a project that's pretty much  
24 completed. It's a -- I have a partner in it named  
25 Bob Anderson. It's a little residential subdivision**

page 32

1 **that we did pre '08 and we have been working since  
2 '08. We're pretty much -- it's pretty much gone now.**

3 Q. You were a managing member of that as  
4 well?

5 **A. I believe so.**

6 Q. What is a Wall Avenue Aircraft, LLC?

7 **A. It's kind of a -- we used to own an  
8 airplane years ago. I have no idea what's inside  
9 there now, if anything. Might be a car in there or  
10 something like that. I'm just not sure.**

11 Q. You're the manager of that as well?

12 **A. Well, do I have to tell you firmly that I  
13 am or I -- I'm guessing.**

14 Q. To the best of your recollection.

15 **A. I'm guessing that I am.**

16 Q. Okay. Your best reasoned recollection is  
17 what I'm after.

18 What is Wall Avenue Management?

19 **A. Well, I think, I think that's an entity --  
20 I don't know how to explain it. I years ago worked  
21 with a, an attorney and he set these LLCs up for real  
22 estate, these real estate entities. You probably  
23 understand them better than I do.**

24 Q. What is Opheikens & Company?

25 **A. That's an old residential corporation that**

page 33

1 **originally when I started was in residential  
2 construction, building homes.**

3 Q. You were the president of that company?

4 **A. Yes.**

5 Q. What is Opheikens & Sons Farms?

6 **A. That's a -- we own a farm up where I live,  
7 a little 20-acre piece of property.**

8 Q. And you're the manager of that LLC as  
9 well?

10 **A. Again, I think so.**

11 Q. Okay. What is Zeb's Again, LLC?

12 **A. That's gone. It was a little restaurant I  
13 helped a guy start at a little golf course place. And  
14 that's all gone.**

15 Q. What is Red Mountain?

16 **A. I have no idea. Red Mountain?**

17 Q. Red Mountain.

18 **A. I have, I have no idea.**

19 Q. Okay. What is Stencer Holdings, LLC?

20 **A. I believe that's our office here in  
21 Las Vegas, Nevada.**

22 Q. Okay. And where is it located?

23 **A. Just south of the airport on Spencer  
24 Street.**

25 Q. Do you know the address?

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1 **A. I, I don't offhand.**  
 2 Q. Okay. And you're the managing member of  
 3 that as well, correct?  
 4 **A. Probably.**  
 5 Q. Okay. R&O Construction Company is a  
 6 corporation?  
 7 **A. I think. Well, I think, yes. I think it**  
 8 **is.**  
 9 Q. Okay. And when it was formed in -- what  
 10 year did you say, I'm sorry?  
 11 **A. Well, I think approximately '82.**  
 12 Q. Okay. Were you the chief executive  
 13 officer?  
 14 **A. Yes.**  
 15 Q. Okay. And were you the chairman of the  
 16 board?  
 17 **A. No.**  
 18 Q. Who was chairman of the board?  
 19 **A. Well, that's a long time ago. It might**  
 20 **have been Les Randall.**  
 21 Q. Okay. Les Randall was the R in R&O?  
 22 **A. That's correct.**  
 23 Q. And you were the O in R&O?  
 24 **A. Correct. Fancy name, huh.**  
 25 Q. And did there come a time when you became

page 35

1 the chairman of the board?  
 2 **A. Yes.**  
 3 Q. And when was that?  
 4 **A. When I got sick.**  
 5 Q. And when was that?  
 6 **A. Roughly 15 years ago or so.**  
 7 Q. Okay. And who became chief executive  
 8 officer?  
 9 **A. At that time Del Campbell.**  
 10 Q. Okay. And who is Mr. Campbell?  
 11 **A. Well, he had been with us for a number of**  
 12 **years, Del passed away.**  
 13 Q. And what was his, what was his position?  
 14 **A. Well, he was the chief executive officer,**  
 15 **president of the company.**  
 16 Q. Okay. And before he became CEO, what was  
 17 his position?  
 18 **A. I think business development. I don't**  
 19 **know if he had a title, but that's what he did.**  
 20 Q. Are you chairman of the board of R&O  
 21 today?  
 22 **A. Yeah.**  
 23 Q. And who is the CEO?  
 24 **A. Slade Opheikens.**  
 25 Q. When did Slade Opheikens become the

page 36

1 chairman of the board -- excuse me, the chief  
 2 executive officer?  
 3 **A. When Del passed away.**  
 4 Q. And when was that?  
 5 **A. Let's say four to five years ago probably.**  
 6 Q. Tell me what R&O Investments is.  
 7 **A. I'm not sure. I'm actually not positive**  
 8 **if it -- I'm going to guess that it's a little thing**  
 9 **that we have some stocks and stuff in.**  
 10 **We actually had quite a few stocks before**  
 11 **this Cowabunga thing came along, and we had to sell**  
 12 **our stock in order to try and make this -- put this**  
 13 **park together.**  
 14 Q. All right. And were they publicly-traded  
 15 stocks?  
 16 **A. Yeah. Yeah.**  
 17 Q. Okay. And were you the manager of that  
 18 LLC as well, R&O Investments, LLC?  
 19 **A. Probably.**  
 20 Q. Okay. What is R&O Equipment, LLC?  
 21 **A. It's another LLC. I'm not sure what is**  
 22 **inside of it. It might be a car or a boat or**  
 23 **something. I'm just not positive what is in there.**  
 24 Q. And you're likewise the manager of that?  
 25 **A. I'm sure I am, yeah.**

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1 Q. What is R&O Properties?  
 2 **A. They are starting to sound similar. I**  
 3 **don't know. It might be a piece of property that we**  
 4 **purchased inside of R&O or something along that line.**  
 5 Q. All right. And you were the manager of  
 6 that?  
 7 **A. Well, if they're on there, I probably am.**  
 8 Q. Okay. R&O Management, Inc., what is that?  
 9 **A. Is that the green spot in the middle or**  
 10 **something?**  
 11 Q. No. The green spot in the middle is you.  
 12 **A. Oh. I don't know what R&O Management,**  
 13 **Inc. is.**  
 14 Q. Do you know if you, if you are a director  
 15 or officer of R&O Management, Inc.?  
 16 **A. Well, I would think I probably am, but you**  
 17 **know I, I don't know.**  
 18 Q. Okay. I would like to talk to you a  
 19 little bit about R&O, if I might. And as I understand  
 20 it, you were one of the founders of R&O Construction;  
 21 is that correct?  
 22 **A. That's correct.**  
 23 Q. All right. And who is Les Randall?  
 24 **A. Kind of like my dad.**  
 25 Q. Okay. And you, you participated in the

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1 development of this construction company with  
 2 Mr. Randall; is that correct?  
 3 **A. Yes.**  
 4 Q. All right. When you refer to him as your  
 5 dad, or sort of like your dad, this was a mentor of  
 6 yours of sorts?  
 7 **A. Yes, um-hum.**  
 8 Q. Okay. And were you ever involved in any  
 9 other business ventures with him?  
 10 **A. Well, we ran some horses at one point. I**  
 11 **don't know if you'd call it much of a business**  
 12 **adventure or venture, maybe business adventure. But**  
 13 **all we did probably was lose money.**  
 14 Q. At running horses?  
 15 **A. Quarter horses.**  
 16 Q. Okay. All right. Anything else?  
 17 **A. That was probably 20 years ago.**  
 18 Q. Okay. Anything else?  
 19 **A. That I did with Les?**  
 20 Q. Yes. That's correct.  
 21 **A. Not that I remember.**  
 22 Q. All right. Who is Tom Welch?  
 23 **A. Mr. Welch is right there.**  
 24 Q. Okay. And what is your relationship with  
 25 Mr. Welch?

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1 **A. Good friend.**  
 2 Q. All right. And when was it that you  
 3 developed a relationship with Mr. Welch?  
 4 **A. In college.**  
 5 Q. Okay. Did you ever develop a business  
 6 relationship with Mr. Welch?  
 7 **A. Well, okay. From the standpoint of**  
 8 **through R&O Construction Company, for instance?**  
 9 Q. That or anything else.  
 10 **A. Well, indirectly. I mean Tom worked for**  
 11 **Smith's Food King years ago and we built some Smith's**  
 12 **Food King stores.**  
 13 Q. All right. What was Mr. Welch's position  
 14 with Smith's Food King?  
 15 **A. I believe he was vice president.**  
 16 Q. Okay. And how many Smith's Food King  
 17 stores did you build?  
 18 **A. Well, over all these years, over all these**  
 19 **years quite a number. But Tom hadn't been with**  
 20 **Smith's Food King for a long time, a really long time.**  
 21 Q. Okay. So, perhaps I can back into this a  
 22 little bit. Was Mr. Welch instrumental in getting you  
 23 the first contract to build a Smith's Food King?  
 24 **A. Well, he introduced us, yes.**  
 25 Q. All right. And at the time that he

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1 introduced you, was Mr. Welch associated with Smith's  
 2 Food King, directly associated?  
 3 **A. Yes.**  
 4 Q. All right. And what was his position at  
 5 that time?  
 6 **A. I, I don't know what his title was. He**  
 7 **worked for Dee Smith.**  
 8 Q. Okay. Do you recall when it was that you  
 9 built the first Smith's Food King as a result of  
 10 Mr. Welch's introduction of you to Dee Smith?  
 11 **A. Probably in the neighborhood of '84 maybe.**  
 12 **1984.**  
 13 Q. Okay.  
 14 **A. We didn't build a first Smith's Food King,**  
 15 **we started out doing, hanging doors or something along**  
 16 **that line.**  
 17 Q. All right. When was it that -- did you  
 18 ever build a supermarket for the Smith family?  
 19 **A. Yes.**  
 20 Q. All right. When was the first one?  
 21 **A. Probably '85, somewhere in there.**  
 22 Q. All right. And how many did you build for  
 23 the Smith family?  
 24 **A. I, I have no idea.**  
 25 Q. Ballpark it.

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1 **A. A number. A number. Well, you can see**  
 2 **how accurate my ballparks are, though.**  
 3 Q. More or less than 10?  
 4 **A. More.**  
 5 Q. More or less than 20?  
 6 **A. You know, I'm guessing. That's a**  
 7 **speculation, isn't it?**  
 8 Q. Don't want you to speculate. I want your  
 9 best reasoned estimate.  
 10 **A. I, I just have no real idea.**  
 11 Q. So you can't give me any estimate as to  
 12 how many more than 10 you built for Smith?  
 13 **A. Not without guessing.**  
 14 Q. Okay. Did you -- and when you say not  
 15 without guessing, that's because you have no basis  
 16 upon which to reasonably estimate the amount of  
 17 Smith's Food Kings that you built, whether it was 15  
 18 or 20 or 25 or give me a range; is that correct?  
 19 **A. I don't understand what you're trying to**  
 20 **get at. Okay, let me say this. There is a lot of**  
 21 **different Smith's. Smith's have been purchased and**  
 22 **sold and purchased and sold. What Smith's are you**  
 23 **talking about?**  
 24 Q. Any Smith branded food store.  
 25 **A. I can pull a number out of the air, it**

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**1 will be way off. I have no way of knowing how many**  
**2 Smith's we've built.**  
 3 Q. Well, tell me this --  
 4 A. **Quite a few.**  
 5 Q. Have you built, have you built Smith's  
 6 food stores in markets other than Ogden or Salt Lake?  
 7 A. **Yes. Right here in Nevada.**  
 8 Q. Okay. Any, any other states?  
 9 A. **Yes.**  
 10 Q. Where?  
 11 A. **Probably New Mexico. Probably Colorado.**  
 12 **All over the place. I mean, I --**  
 13 Q. Okay. What other states?  
 14 A. **What other states?**  
 15 Q. That's the question.  
 16 A. **Well, I just don't know the answer to that**  
 17 **question.**  
 18 Q. Okay. We have got New Mexico. We've got  
 19 Colorado. We've got Nevada. We've got Utah. Any  
 20 others that you can think of?  
 21 A. **Are you talking possibilities or facts?**  
 22 **Do you want me to speculate or --**  
 23 Q. No, I don't want you to speculate. Again,  
 24 I told you at the beginning of the proceedings, I  
 25 never want you to speculate.

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**1 A. Okay.**  
 2 Q. I'll never ask --  
 3 A. **Then --**  
 4 Q. Excuse me.  
 5 A. **Okay.**  
 6 Q. I'll never ask you to speculate. But what  
 7 I am entitled to under the law is your best reasoned  
 8 estimate based upon your entire body of knowledge and  
 9 experience and devotion to these projects.  
 10 So here's the question. Can you tell me  
 11 how many food, Smith's Food Kings you built in Nevada?  
 12 A. **I can't.**  
 13 Q. Do you have a reasonable estimate?  
 14 A. **I don't.**  
 15 Q. Okay. So you can't tell me whether it's  
 16 one or 15?  
 17 A. **I, I can guess a number and I would be**  
 18 **lucky if I was on target.**  
 19 Q. I'm not asking you to guess.  
 20 A. **Okay, then --**  
 21 Q. I'm asking for a range or an estimate.  
 22 And you can't give me a range or estimate, correct?  
 23 A. **I just don't know.**  
 24 Q. Okay. And so if I asked you to give me a  
 25 range or estimate of the number of Smith's Food Kings

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1 that are built in New Mexico, you couldn't tell me  
 2 that either?  
 3 A. **No.**  
 4 Q. Okay.  
 5 A. **Okay.**  
 6 Q. And you couldn't tell me the amount of  
 7 Smith's Food Kings you built in Colorado or a range of  
 8 the number?  
 9 A. **You know, we are talking 40 years here.**  
 10 Q. What's the answer to the question, sir?  
 11 You can't tell me?  
 12 A. **I don't. I can't. I don't have any idea.**  
 13 Q. Okay. Do you know approximately how much  
 14 revenue was earned by R&O in 2015?  
 15 (No answer provided by deponent.)  
 16 MR. GORMLEY: I'm going to object and  
 17 instruct him not to answer. That goes to worth in  
 18 terms of punitive damages, which we haven't  
 19 established prima facie case in that yet.  
 20 MR. CAMPBELL: No, I'm not asking anything  
 21 about punitive damages.  
 22 MR. GORMLEY: I know, but you're asking  
 23 about net worth and value.  
 24 MR. CAMPBELL: Are you directing him not  
 25 to answer the --

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1 MR. GORMLEY: Yes.  
 2 MR. CAMPBELL: -- question?  
 3 MR. GORMLEY: Yes.  
 4 MR. CAMPBELL: Okay. And you are doing so  
 5 on the basis that it's not discoverable?  
 6 MR. GORMLEY: It's not discoverable at  
 7 this stage.  
 8 MR. CAMPBELL: Okay.  
 9 MR. GORMLEY: You can ask what projects  
 10 and other things, but...  
 11 MR. CAMPBELL: I disagree with you.  
 12 MR. GORMLEY: I understand.  
 13 MR. CAMPBELL: I'm not going to debate it  
 14 with you.  
 15 MR. GORMLEY: Appreciate it.  
 16 MR. CAMPBELL: We will deal with that down  
 17 the road.  
 18 MR. GORMLEY: Okay.  
 19 BY MR. CAMPBELL:  
 20 Q. I would like to talk to you about your  
 21 involvement with R&O. Do you attend board meetings of  
 22 R&O?  
 23 A. **I --**  
 24 MR. GORMLEY: At what stage? Object.  
 25 Vague and ambiguous.

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1 BY MR. CAMPBELL:  
2 Q. Anytime?  
3 A. Yes.  
4 Q. Okay. And how frequently today are board  
5 meetings of R&O conducted?  
6 A. Once a year.  
7 Q. Okay. Let me back up a little bit.  
8 When I'm talking about R&O, I'm talking  
9 about the construction company, not the satellite  
10 companies that may be associated with it, okay?  
11 A. Um-hum.  
12 Q. Okay. Are you with me?  
13 A. Um-hum.  
14 Q. Is that a "yes"?  
15 A. Yes.  
16 Q. Okay, that's two.  
17 MR. GORMLEY: We will keep track.  
18 BY MR. CAMPBELL:  
19 Q. All right. And does the -- does  
20 R&O Construction have committees?  
21 A. I don't think so.  
22 Q. Okay. So it doesn't have, for example, an  
23 audit committee?  
24 A. No.  
25 Q. Doesn't have, for example, a compliance

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1 committee?  
2 A. I don't think so.  
3 Q. Okay. Does R&O have meetings of its  
4 directors and/or officers on a regular basis?  
5 A. Okay. Directors and officers.  
6 Q. And/or officers?  
7 A. Alone, you mean or?  
8 Q. Scheduled meetings? Do you have quarterly  
9 meetings of any kind?  
10 A. I just don't know. I don't know that the  
11 titles that, you know, we have are the titles that  
12 you're using.  
13 Q. Okay. Go ahead and tell me what the  
14 titles that you have are.  
15 A. Well, we, we have a weekly project manager  
16 meeting. Some of those people sit on our -- come to  
17 our annual board meeting.  
18 Q. Okay.  
19 A. Are you looking for more?  
20 Q. Yes, I am.  
21 A. Okay, sorry.  
22 Q. That's okay.  
23 A. What are you looking for?  
24 Q. Other meetings such as those. Regularly  
25 scheduled meetings whether they are weekly or monthly

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1 or quarterly.  
2 A. Well, the project management meetings are  
3 basically designed around work, you know.  
4 Q. Right.  
5 A. Do we have a problem with the job or so on  
6 and so forth.  
7 Q. All right. What other type of meetings  
8 that you have?  
9 A. Me personally?  
10 Q. No, not necessarily you.  
11 A. Well, I suppose meetings with owners.  
12 Q. Okay.  
13 A. That were --  
14 Q. What are those called? You said you --  
15 you used the nomenclature that may not be the same  
16 that I'm using. So just tell me what they are called.  
17 A. Well, I -- you know, we're trying to get a  
18 job. Maybe you want to have an office building built,  
19 so we meet with you. The business development people  
20 meet with you and see if we can get the job.  
21 Q. Okay. What other sorts of committees or  
22 meetings that, that are conducted?  
23 MR. GORMLEY: Can I object just on the  
24 basis so it's clear that you're talking like scheduled  
25 meetings, not talking among each other.

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1 MR. CAMPBELL: I'm, I'm happy to lay more  
2 foundation.  
3 MR. GORMLEY: Okay.  
4 BY MR. CAMPBELL:  
5 Q. What I'm interested in is, for example,  
6 you told me you had a weekly meeting of your, your  
7 project manager meeting. Do you have other regularly  
8 scheduled meetings like that?  
9 A. I don't think so.  
10 Q. Okay.  
11 A. I don't.  
12 Q. All right. When I say you, I mean the  
13 collective you or the company.  
14 A. Yeah. Well, I don't --  
15 Q. Does the company?  
16 A. -- and I'm not aware of any regularly  
17 scheduled meetings.  
18 Q. Who would typically attend a project  
19 manager meeting?  
20 A. Slade would lead it.  
21 Q. He is the CEO, right?  
22 A. Yeah.  
23 Q. Who else?  
24 A. Rick Zampedri.  
25 Q. And who is he?

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1 **A. Project manager.**  
 2 Q. Could you spell that name for the court  
 3 reporter, please.  
 4 **A. R-i-c-k, Z-a-m-p-e-d-r-i.**  
 5 Q. Who else?  
 6 **A. Tim Gladwell.**  
 7 Q. Who is he?  
 8 **A. Project manager.**  
 9 **Mike Nichols.**  
 10 Q. And who is he?  
 11 **A. Project manager.**  
 12 **These are not meetings I attend, so I'm**  
 13 **trying to remember.**  
 14 **Frank McDonough, he is the chief**  
 15 **estimator. Charlie Auger.**  
 16 Q. Can you spell his last name.  
 17 **A. A-u-g-e-r. Chief financial officer.**  
 18 **That's probably it.**  
 19 Q. Okay. Does Charlie Auger, your CFO,  
 20 conduct regularly scheduled meetings? For example,  
 21 budget meetings, projection meetings, things of that  
 22 nature?  
 23 **A. Well, we have an annual meeting that he**  
 24 **takes a part of and would do those kind of things.**  
 25 Q. Okay. And would there be other regularly

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1 scheduled meetings that your CFO would participate in  
 2 with other individuals at R&O?  
 3 **A. I don't think so.**  
 4 Q. At the project managers meeting --  
 5 withdraw.  
 6 At the board of directors meetings, is  
 7 there an agenda that's usually prepared?  
 8 **A. Yes. Slade would prepare.**  
 9 Q. And would that be distributed to the other  
 10 members of the board before the meeting typically?  
 11 **A. Probably.**  
 12 Q. Okay. Who are the other members of the  
 13 board of directors?  
 14 **A. I think I just listed them for you.**  
 15 Q. Oh, I'm sorry.  
 16 **A. Rick and Tim.**  
 17 Q. Okay. Rick Zampedri?  
 18 **A. Yes.**  
 19 Q. He is a member of the board?  
 20 **A. Yes.**  
 21 Q. And then Tim Gladwell, he too is a member  
 22 of the board?  
 23 **A. Yeah. I believe.**  
 24 Q. And Mr. Nichols, is he a member of the  
 25 board?

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1 **A. I think so.**  
 2 Q. Mr. McDonough, is he a member of the  
 3 board?  
 4 **A. Yes.**  
 5 Q. Charlie Auger, is he a member of the  
 6 board?  
 7 **A. Yes.**  
 8 Q. Are there any other members of the board  
 9 that we haven't discussed?  
 10 **A. I don't think so.**  
 11 Q. Okay. Who is -- you are the chair, you're  
 12 the chairman of the board, correct?  
 13 **A. Yes.**  
 14 Q. Who is the vice chairman of the board, is  
 15 there one?  
 16 **A. No.**  
 17 Q. You're the big kahuna?  
 18 **A. Well, I never think of that way, but I'm**  
 19 **the old kahuna.**  
 20 Q. Okay. Who is the corporate secretary?  
 21 **A. I believe Charlie Auger.**  
 22 MR. GORMLEY: It's Auger?  
 23 **THE WITNESS: A-u-g-e-r.**  
 24 MR. GORMLEY: I'm sorry.  
 25 ///

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1 BY MR. CAMPBELL:  
 2 Q. Is he responsible for keeping the minutes  
 3 of the corporation in its meetings?  
 4 **A. I think we have a young gal come in who**  
 5 **takes the minutes.**  
 6 Q. Who assists him in that regard?  
 7 **A. Yes.**  
 8 Q. Okay. And what is her name?  
 9 **A. Lori. I can't think of her last name. I**  
 10 **can't think of her last name.**  
 11 Q. Okay.  
 12 **A. And it may come to me, because I sure**  
 13 **ought to be able to think of it.**  
 14 Q. How long has she been with you?  
 15 **A. A long time.**  
 16 Q. Okay. Is Lori the one that actually, that  
 17 actually takes down the minutes?  
 18 **A. Well, she sits there with a notebook and a**  
 19 **pen.**  
 20 Q. Right.  
 21 **A. Yeah, I think so.**  
 22 Q. And then, and then prepares them for this  
 23 secretary of the corporation?  
 24 **A. Yeah, wherever they go.**  
 25 Q. Okay. And thereafter, those minutes are

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1 distributed for approval by the board of directors at  
2 some point?

3 **A. I'm not sure.**

4 Q. Do you have a chief estimator?

5 **A. Yeah. Frank McDonough.**

6 Q. Mr. McDonough participates in the weekly  
7 project meetings?

8 **A. I believe so. You know, it's a fluid**  
9 **thing. I mean, every day. But if they call an**  
10 **organized meeting, Frank McDonough would be invited.**

11 Q. Okay. What is the job of an estimator?

12 **A. To try to put together the numbers to bid**  
13 **a project.**

14 Q. And when you say to put together the  
15 numbers to bid a project, what numbers does he put  
16 together?

17 **A. Well, you know, this building is built out**  
18 **of components. First you start with the footing or**  
19 **digging a hole.**

20 Q. Right.

21 **A. Pouring a foundation, et cetera,**  
22 **et cetera, et cetera.**

23 Q. Okay. I've represented a big construction  
24 company here in Las Vegas for a number of years, so I  
25 have an understanding, but I have to get this on the

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1 record. So I'm not trying to belabor anything, I just  
2 want to kind of take you through it.

3 **A. All right.**

4 Q. There are line items --

5 **A. Correct.**

6 Q. -- that goes into an estimator's  
7 configuration of whatever that bid is going to be,  
8 right?

9 **A. Yes.**

10 Q. Okay. Tell me all of the line items that  
11 go into configuration of a bid.

12 **A. Okay. So you want me to basically walk**  
13 **through this building?**

14 Q. No, just --

15 **A. Or something like it?**

16 Q. Something like it, exactly.

17 **A. All right. So you start with a survey**  
18 **and you dig a hole. And then you crawl down in the**  
19 **hole and pour footings. Then you pour a foundation on**  
20 **top of the footings. Then you backfill that hole.**  
21 **You may put footing drains or such if it's a basement.**

22 Q. Mr. Opheikens, I don't think we are on the  
23 same wavelength, and it's all attributable to me, I'm  
24 sure. So let me ask a more artfully drafted question.

25 **A. Okay.**

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1 Q. Okay. With respect to an estimator's  
2 function, he considers certain line items. And I'm  
3 not suggesting how to build a building or what every  
4 individual, every individual step would be taken in  
5 the building. But there would be, for example, there  
6 would be an estimate of labor involved in any  
7 particular excavation or construction of the building  
8 with respect to, as you say, the footings and things  
9 of that nature, right? There would be materials, do  
10 you agree?

11 **A. Yes.**

12 Q. Okay. So we have labor, and we have  
13 materials. What else is a line item in an estimator's  
14 configuration of a bid?

15 **A. Well, actually, you have labor and**  
16 **materials in each thing that I was telling you.**

17 Q. Right.

18 **A. Okay. So each line item, for instance,**  
19 **footings.**

20 Q. Right.

21 **A. Digging the hole.**

22 Q. Right.

23 **A. Backfilling the hole.**

24 Q. Right.

25 **A. Putting in the storm drain or the, you**

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1 **know, all those things are a line item. There can be**  
2 **50 or 100 line items.**

3 Q. Exactly. And that's what I'm trying to  
4 get to.

5 Typically, okay, there would also be a  
6 line item with respect to, for example, if you had to  
7 rent any specialized equipment, correct?

8 **A. Yeah.**

9 Q. Okay. What else would there be typically  
10 a line item for? What are the major ones?

11 **A. Okay. Earthwork, concrete, maybe it's a**  
12 **block job, so it's block. Typically we sub it all**  
13 **out. I mean, we don't have our own crews.**

14 Q. Right.

15 **A. So if we call you, the block mason, labor**  
16 **and insurances, and all those things are built into**  
17 **your block bid.**

18 Q. Right.

19 **A. So framing material would probably be**  
20 **under the framer's contract.**

21 Q. Okay.

22 **A. So then, of course, a roofer. And then**  
23 **depending on the outside materials, whether it be**  
24 **aluminum or wood or whatever the case may be.**

25 Q. Okay.

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1 **A. You think I should keep going? There is**  
2 **more.**  
3 Q. Is there typically more? You've talked  
4 about labor.  
5 **A. Well, I told you there might be 100 items**  
6 **and you wanted me to do 10.**  
7 Q. I didn't ask --  
8 **A. I don't know exactly how to -- I don't**  
9 **know what you're looking for.**  
10 Q. Okay. I'm just asking for the typical  
11 components in an estimator's project configuration to  
12 place a bid. And if you've told me all of them that  
13 you can think of at the time, that's fine.  
14 **A. Let's say that's it.**  
15 Q. Okay. R&O is a general contractor?  
16 **A. Correct.**  
17 Q. And it's licensed?  
18 **A. Yes.**  
19 Q. And what are its licensing limits?  
20 **A. I don't presently know.**  
21 Q. Okay. Ballpark it.  
22 **A. You mean what size project?**  
23 Q. Yes.  
24 **A. Licensing limits in Nevada or?**  
25 Q. Let's go Utah.

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1 **A. I, I don't know the answer to these, these**  
2 **are technical questions that, you know, 10 years ago I**  
3 **could have answered for you.**  
4 Q. Just give me --  
5 **A. I'm too far.**  
6 Q. -- a ballpark.  
7 **A. You mean per job?**  
8 Q. Yes.  
9 **A. 20 million.**  
10 Q. Okay. Did R&O build IKEA here?  
11 **A. Yes.**  
12 Q. What was that project, what was the number  
13 on that project?  
14 **A. I --**  
15 Q. Generally.  
16 **A. I have no idea.**  
17 Q. More or less than \$20 million?  
18 **A. I would think.**  
19 Q. You would think what?  
20 **A. It would be more or less.**  
21 Q. It would be more than \$20 million?  
22 **A. Well, I don't know. You know what? I'm**  
23 **not close enough to it, so I don't know the price of**  
24 **the IKEA.**  
25 Q. But you have a reasonable basis to believe

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1 it was probably in excess of \$20 million?  
2 **A. Well, just thinking of Nevada and the**  
3 **prices of things here. I wouldn't be surprised, let**  
4 **me put it that way.**  
5 Q. Okay. Who is responsible for budgeting  
6 and finance of R&O Construction Company?  
7 **A. Okay. Budgeting and finance. Financing**  
8 **what?**  
9 Q. Okay. Financing the business of the  
10 corporation?  
11 **A. Do you mean borrowing money or taking care**  
12 **of --**  
13 Q. That's one component.  
14 **A. I would say Charlie Auger.**  
15 Q. Who prepares operating budgets for the  
16 corporation?  
17 **A. Probably Slade. But I'm not sure what you**  
18 **mean by operating budget.**  
19 Q. Well, what do you mean when you use the  
20 term operating budget?  
21 **A. I don't use that term.**  
22 Q. What term do you use with respect --  
23 **A. Okay. You tell me what your term --**  
24 Q. Hold on. Hold on a second. You have to  
25 wait until I get out the question.

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1 **A. I'm sorry.**  
2 Q. All right. Makes her crazy and she starts  
3 throwing stuff at us.  
4 Who prepares the budget with respect to  
5 forecasting what the operations will, will entail  
6 insofar as capital expenditures?  
7 **A. Well, I'm going to give you two names,**  
8 **okay. I think part of what you're asking would be**  
9 **Slade, and part of what you're asking would be**  
10 **Charlie. But I don't know what where the line would**  
11 **be.**  
12 Q. So tell me what part you think -- what  
13 parts are we talking about?  
14 **A. I think Slade runs overall the company and**  
15 **he would budget income. Not income, but you know,**  
16 **next year's forecast.**  
17 Q. Okay. Projections?  
18 **A. Yeah.**  
19 Q. All right. And budgetary projections  
20 would be created by Slade and/or his department?  
21 **A. Well --**  
22 Q. Does he have people?  
23 **A. Yeah. Yeah.**  
24 Q. Okay. And so he has people underneath him  
25 that would assist him in that regard?

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1     **A. Yeah.**  
2     Q. And who would they be?  
3     **A. Well, I'm just saying yeah now because I**  
4     **don't know the answer.**  
5     Q. Presumably an estimator maybe?  
6     **A. Okay. Budgeting for the company I think**  
7     **would probably be Slade and --**  
8     Q. Your CFO?  
9     **A. And Charlie Auger, okay.**  
10    Q. Okay.  
11    **A. If they are sitting in a meeting talking**  
12    **about these things, then it would be members of the**  
13    **board.**  
14    Q. Right. Are budgetary projections --  
15    withdraw.  
16        Budgetary projections, as I understand,  
17    are presented to the board of directors at the annual  
18    meeting?  
19    **A. Maybe you think R&O is way more different**  
20    **than -- you know, we are a construction company. I**  
21    **don't know that we do all these -- I don't know that**  
22    **they don't. I'm not in all these meetings.**  
23    Q. Okay.  
24    **A. So I don't know the answers to a lot of**  
25    **the questions you're trying to ask.**

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1     Q. Well, have you ever seen budgetary  
2     projections for operations at any point in time for  
3     R&O?  
4     **A. So are you saying next year they might do**  
5     **a hundred million dollars worth and they would project**  
6     **that expenses total might equal 97 or 98 percent of**  
7     **that and then hopefully there is some profit? Is that**  
8     **what you're talking about?**  
9     Q. Correct.  
10    **A. Yes, we do that.**  
11    Q. Okay.  
12    **A. Once a year.**  
13    Q. And you do that at the board meetings?  
14    **A. At the annual board meeting or -- I'm not**  
15    **sure we call it board meeting, but...**  
16    Q. At the annual meeting?  
17    **A. Our annual meeting, yes.**  
18    Q. Has R&O Construction ever done any  
19    projects for any state government?  
20    **A. I'm sure we have for the State of Utah.**  
21    Q. Any other states?  
22    **A. I'm not aware of it.**  
23    Q. Okay. Has it ever, has R&O ever done  
24    projects for the federal government?  
25    **A. Gosh. Ever is such a long time. I think**

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1     **we were involved in one project.**  
2     Q. And what --  
3     **A. Maybe in a partnership with another**  
4     **construction company back East years ago.**  
5     Q. And what project was that, sir?  
6     **A. I believe it was a big base, like**  
7     **apartment project.**  
8     Q. Okay. And where was that project?  
9     **A. I believe in North Carolina.**  
10    Q. Where in North Carolina?  
11    **A. Oh, come on. I don't know. I don't have**  
12    **any idea. It's North Carolina.**  
13    Q. Did you ever go to North Carolina?  
14    **A. I never went -- I did one time, but I**  
15    **never went to the job.**  
16    Q. You didn't go to the job. What did you go  
17    there for?  
18    **A. Meet the people that we were trying to get**  
19    **the right to build the job.**  
20    Q. Okay. Got it.  
21        When you take on a project -- withdraw.  
22        I imagine when you built your first  
23    Smith's Food Store, you became acquainted with all  
24    that it was that was needed to be figured into the  
25    configuration of your bid; is that correct?

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1     **A. That's how you learn for sure.**  
2     Q. Okay. And, and with each successive food  
3     store, you learned more and more about what you were  
4     doing, correct?  
5     **A. Well, or what not to do.**  
6     Q. Or what not to do, which is sometimes just  
7     as important.  
8     **A. Yeah.**  
9     Q. Okay. And the same would be true with  
10    whatever other type of projects that you would engage  
11    in, presumably, correct?  
12    **A. Yeah.**  
13    Q. Okay. Would you say that -- withdraw.  
14        Did you ever build supermarkets, for  
15    example, or food stores for, that were ever branded as  
16    anything other than Smith's? For example, did you do  
17    it for, you know, Safeway?  
18    **A. Yes.**  
19    Q. Okay. And what other companies did you  
20    build stores for?  
21    **A. Well, actually, we did build some stores**  
22    **for Safeway.**  
23    Q. Um-hum.  
24    **A. We built some stores for Albertsons.**  
25    Q. Right.

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1     **A. Vons.**  
2     Q. Okay.  
3     **A. Associated Foods.**  
4     Q. Okay.  
5     **A. Just grocery stores, right?**  
6     Q. Just grocery stores, yes, sir.  
7     **A. I can't think of any others.**  
8     Q. All right. Please provide me with the  
9 best reasonable estimate you can give me as you sit  
10 here today of how many grocery stores R&O built over  
11 the years.  
12    **A. Well, it's 40 years, right? The first**  
13 **decade we probably didn't do more than one or two a**  
14 **year. I don't know. A hundred.**  
15    Q. Okay. That's a reasonable estimate in  
16 your mind as you sit here today, correct?  
17    **A. Well, the problem with it is, it's like**  
18 **sitting here throwing a dart at a wall, because I just**  
19 **really don't have any idea.**  
20    Q. And I understand it's a ballpark. Fair  
21 enough?  
22    **A. Fair enough.**  
23    Q. Okay. Is there any component of  
24 R&O Construction where its projects have exceeded the  
25 number of supermarkets that its built; for example,

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1 has R&O built a lot of schools?  
2    **A. No. I, I don't think so. I think**  
3 **supermarkets are, have been our specialty.**  
4    Q. All right. Has R&O built warehouses?  
5    **A. Not very many.**  
6    Q. Okay. But it has?  
7    **A. Yes.**  
8    Q. Has R&O built industrial complexes?  
9    **A. We have, but not very many.**  
10   Q. Okay. What other type of projects has R&O  
11 done?  
12   **A. We have done apartment house projects most**  
13 **recently.**  
14   Q. Okay.  
15   **A. Office buildings.**  
16   Q. All right.  
17   **A. We, we presently have done a few buildings**  
18 **on a school campus, but that's relatively new for R&O.**  
19   Q. Okay.  
20   **A. And we have done lots of small jobs. I**  
21 **mean --**  
22   Q. Sure, I understand.  
23   **A. Yeah.**  
24   Q. So we are on the same wavelength.  
25   **A. Yeah.**

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1     Q. I'm talking about, I'm talking about  
2 pretty sizable projects.  
3     **A. Yeah.**  
4     Q. Okay.  
5     **A. I think that's pretty good.**  
6     Q. All right. How many buildings have you  
7 done? Ballpark it.  
8     **A. Small jobs? Big jobs? Every job?**  
9     Q. Big jobs. Big jobs.  
10    **A. Well, I, I recall sitting in meetings**  
11 **several years ago when Dale was still here where we**  
12 **were looking at roughly a hundred jobs a year.**  
13    Q. Okay.  
14    **A. But that might be putting a door in or**  
15 **building a -- every job had a number. So we were a**  
16 **hundred plus in jobs, but that doesn't mean they were**  
17 **all great big jobs.**  
18    Q. What was the biggest job you ever did with  
19 respect to building a building? Would that be IKEA?  
20    **A. Pretty close, yeah. That was a very nice**  
21 **project for us.**  
22    Q. Any others of similar scale?  
23    **A. Well, I think that apartment project we**  
24 **did up on 215.**  
25    Q. What project was that?

page 69

1     **A. Well, it's up, it's up above The District,**  
2 **just east of The District.**  
3     Q. Right. Do you know the name of it?  
4     **A. I don't.**  
5     Q. Okay. Any others?  
6     **A. Not that really comes to mind. Not of**  
7 **that scope probably. That doesn't mean we haven't,**  
8 **it's just, just what I remember.**  
9     Q. Does R&O have projects underway in the  
10 State of Nevada right now?  
11    **A. Yes.**  
12    Q. How many?  
13    **A. I don't know. I'm just not close to it.**  
14    Q. Tell me the ones that you're aware of.  
15    **A. You know, you get a lot more information**  
16 **out of the people that know.**  
17    Q. Okay. But I'm asking you.  
18    **A. Yeah.**  
19    Q. You just tell me what you know. Can you  
20 give me a reasonable estimate of the number of  
21 projects that are underway here?  
22    **A. I, I really don't have any idea.**  
23    Q. Okay. Tell me, tell me those that you're  
24 aware of.  
25    **A. I really am not aware of what we are doing**

page 70

1 **down here.**

2 Q. So you don't have any idea if you're doing

3 a project at all right now?

4 **A. I know we are doing projects. I just**

5 **can't tell you where they are at or what they are.**

6 Q. So you don't know where they are at, what

7 they are, how big they are? There's nothing that you

8 can tell me about them?

9 **A. No.**

10 Q. Okay. Are there governmental requirements

11 that R&O as a construction company that does business

12 both intrastate and interstate that have to be

13 complied with?

14 **A. Yes.**

15 Q. What are they, generally speaking?

16 **A. Well, I, I don't know. I don't know what**

17 **you're asking for. I don't know the answer to that**

18 **question either.**

19 Q. When you said "yes" --

20 **A. Well, of course government, all**

21 **governments have rules and governments have laws.**

22 Q. Right.

23 **A. So any state you go into, you know you are**

24 **going to have to get a license.**

25 Q. Right.

page 71

1 **A. You know you are going to have to live by**

2 **the license.**

3 Q. Right.

4 **A. Or you're in trouble.**

5 Q. Okay.

6 **A. You could lose your license.**

7 Q. Okay. And in that regard, what type

8 typically for a construction company, governmental

9 regulations, do you have to comply with other than

10 licensing?

11 **A. Inspections.**

12 Q. Okay.

13 **A. That's probably the biggest thing you have**

14 **to. You know, you have to get permits, start the**

15 **project. Excuse me.**

16 **And you have to, you know, every so often,**

17 **depending on the project as it's progressing, you have**

18 **to call for an inspection. So they come out and you**

19 **can't move forward until you finish that inspection.**

20 Q. Um-hum. What else?

21 **A. You have to get a final inspection to give**

22 **occupancy to the owner.**

23 Q. Okay.

24 **A. Occupancy permit. That's all I could**

25 **think of.**

page 72

1 Q. Okay. What about governmental regulations

2 with respect to -- well, let's, for example, take

3 OSHA. What is OSHA?

4 **A. Well, OSHA is an inspector that comes out**

5 **on the projects unannounced and they inspect the**

6 **project. They can write you up with a ticket or**

7 **whatever if you're not doing something right.**

8 Q. And do you have, do you personally have

9 any experience in dealing with implementing or

10 otherwise being involved in the application of OSHA

11 regulations?

12 **A. Okay. Tell me that again.**

13 Q. Sure. It was a convoluted question. It's

14 my fault, not yours.

15 Do you know what OSHA certified means?

16 **A. Yeah, it means that you have gone through**

17 **their school, or, you know, been approved that you**

18 **know what you're doing, I suppose.**

19 Q. Okay. And are you OSHA certified?

20 **A. I don't know what R&O is presently. I**

21 **told you it's been a number of years since I really**

22 **have been that involved in the day-to-day.**

23 Q. When you were involved on a day-to-day

24 basis, was R&O OSHA certified?

25 **A. I'm sure we were. That's an operations**

page 73

1 **event. I mean, you know, our operations people would**

2 **take care of that. They could answer the question**

3 **probably better than me today.**

4 Q. I'm not asking today.

5 **A. Okay.**

6 Q. Okay.

7 **A. Back then?**

8 Q. Yes. The foundation for my --

9 **A. I'm sure we were. I just really don't**

10 **know the answer to that actual question, so I'm sure**

11 **we were.**

12 Q. And what is required to become OSHA

13 certified --

14 **A. I, I don't know.**

15 Q. -- as a contractor?

16 **A. I don't know. I don't remember.**

17 Q. Do you ever attend any OSHA seminars or

18 training or anything of that nature?

19 **A. I, I never.**

20 Q. Would you have individuals that were

21 responsible for that?

22 **A. Yes. We had an operations manager. He**

23 **took care of all those operational requirements.**

24 Q. And what was his name?

25 **A. Len Wright.**

page 74

1 Q. Is he still there?

2 A. No.

3 Q. Who does it today?

4 A. Well, I would be, I would be speculating.

5 I can tell you who I think does it. Probably Rick

6 Zampedri.

7 Q. And what is involved with respect to

8 becoming OSHA certified?

9 A. I don't know.

10 Q. You have no idea?

11 A. I have no idea.

12 Q. Do you know whether or not there's ever

13 been any -- during the period of time that you were

14 the chief executive officer, was there ever an

15 occasion in which OSHA cited the company for any

16 safety violation?

17 A. Well, I, I'm sure there was. And then we

18 would have, you know, met the requirements to fix

19 them. But I can't imagine on all those projects we

20 never had any kind of notice from OSHA.

21 Q. Can you recall the most serious OSHA

22 violation alleged?

23 A. No. We have had very little problem with

24 OSHA that I'm aware of.

25 Q. Have you ever hired an attorney or a law

page 75

1 firm to represent you with respect to compliance

2 issues regarding OSHA?

3 A. Not that I'm aware of. I know that our

4 people work very, have worked very closely with OSHA

5 because of safety, you know, trying to not have the

6 problem instead of waiting for the problem to happen

7 and then having to fix it.

8 Q. Okay. Fair to say that safety is the most

9 important consideration?

10 A. Absolutely.

11 Q. Undeniably, unquestionably, unequivocally,

12 correct?

13 A. It is under Slade and R&O for sure.

14 Q. Okay. And is that, is safety the

15 important consideration in all the businesses that you

16 operate?

17 A. I think safety is very important.

18 Q. Okay. Can you think of anything that is

19 more important than safety?

20 A. No. Not right out of the box.

21 Q. Okay. What does the position chairman

22 signify in your experience?

23 A. At R&O Construction Company?

24 Q. Yes, in your experience. Whether it was

25 at R&O or other corporations that you were associated

page 76

1 with.

2 A. Well, in my case, I -- basically, it's

3 really a title, maybe even really out of respect. I

4 really haven't been able to operate in the capacity

5 that I used to operate in for a number of years.

6 Q. All right. Most respectfully, I'm moving

7 to strike your answer because it was nonresponsive.

8 Don't take any offense to that, it's what lawyers do.

9 That's how we get paid. Okay? All right?

10 A. All right.

11 Q. Let me, let me ask a different question

12 perhaps.

13 In your mind, what is the chairman of a

14 company? What duties, responsibilities? What does

15 that, what does that entail?

16 A. Attend the annual board meeting.

17 Q. Okay. Anything else?

18 A. Attend any meetings that you're requested

19 to attend. Give your input. That's all I can really

20 think of.

21 Q. Have you ever sat on the board of

22 directors of any other companies other than those that

23 you have had an equity position in?

24 A. No.

25 Q. Okay. Have you ever owned -- have you

page 77

1 ever held a significant position in any publicly

2 traded corporation?

3 A. Significant, meaning?

4 Q. Million dollars or more?

5 A. I don't think so.

6 Q. Okay. Do you recall how many businesses

7 that you acted as chairman for over the years? Can

8 you give us a rough estimate? More or less than 10?

9 A. I think R&O.

10 Q. Any others?

11 A. Cowabunga, they had me listed as chairman.

12 Q. Any others?

13 A. I don't think so.

14 Q. Do you, do you hold the position as an

15 executive of any other businesses? This is slightly

16 different question than I've asked you. Do you occupy

17 a position as an executive or director of any other

18 businesses other than those that you have an actual

19 equity interest in?

20 A. No.

21 Q. Okay. Have you ever been involved in any

22 business that wasn't successful?

23 A. Of course.

24 Q. Okay. How many?

25 A. Not very many.

page 78

1 Q. Okay.

2 A. I can't even -- I mean, that little

3 restaurant I told you about, it didn't work out.

4 Q. Okay. A lot of restaurants don't.

5 A. I've, I've been involved in little

6 subdivisions from time to time, and they seem to work

7 really well until the downturns hit, like '08 and

8 whatever.

9 Q. Sure.

10 A. And then they -- what appears to be

11 successful goes unsuccessful all the sudden.

12 Q. Right. Any others that you can think of?

13 A. No.

14 MR. GORMLEY: I think it's time for a

15 break. We have been going for about an hour and a

16 half.

17 MR. CAMPBELL: Sure.

18 MR. GORMLEY: Is that okay?

19 MR. CAMPBELL: Absolutely. Let's take

20 15 minutes. Okay?

21 **THE WITNESS: Okay.**

22 **THE VIDEOGRAPHER:** The time is

23 approximately 11:00 a.m. We are going off the record.

24 (Recessed from 11:00 a.m. to 11:19 a.m.)

25 **THE VIDEOGRAPHER:** The time is

page 79

1 approximately 11:19 a.m. We are back on the record.

2 BY MR. CAMPBELL:

3 Q. How is it that you became involved with

4 Cowabunga Bay as a project?

5 A. It was a project that R&O was building

6 down here in Las Vegas.

7 Q. All right. What was the first involvement

8 of R&O with the Cowabunga Bay project?

9 A. I wasn't real familiar with. I didn't

10 even know we were building the water park when I first

11 became involved. I had heard we were building a water

12 park. But that's, that's all. And we were to start

13 with just doing the, I believe we were just doing the

14 first part of it, the ground, you know, the tubes

15 under the ground and pipes under the ground and the

16 earthwork and that kind of thing.

17 Q. Who did R&O contract with?

18 A. With the Huish family and Splash, another

19 group.

20 Q. Who is Splash?

21 A. Three guys. Two young guys and one of

22 them's older brother, I believe, from Provo, Provo

23 area in Utah.

24 Q. And at the time that R&O got involved in

25 the Cowabunga Bay project, did Splash and the Huishes

page 80

1 own the land?

2 A. I don't recall exactly how that -- I

3 wasn't in all that detail until later. But I don't

4 recall, remember. I think they had signed a contract.

5 I don't know if it was a partnership to purchase the

6 property. I believe they had purchased the property,

7 and then the owner of the property had subordinated

8 the property to them so they could get a loan or

9 something like that. I'm not clear memory-wise as to

10 how that actually worked.

11 Q. Okay. Well, tell me this. Are you aware

12 that there was litigation?

13 A. Yes.

14 Q. All right.

15 MR. GORMLEY: Let him finish the question.

16 MR. CAMPBELL: He did.

17 BY MR. CAMPBELL:

18 Q. And what is your familiarity with the

19 litigation that ensued?

20 A. Well, I was, I was involved in the

21 litigation is basically what it was.

22 Q. I'm aware of that. So just tell me what

23 you're aware of --

24 A. Basically --

25 Q. -- as a result of your involvement.

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1 A. Basically, from my perspective, it was

2 trying to get a negotiation so that a loan could be

3 put in place so that we could finish the project.

4 Because there was several million dollars worth of

5 bills that were due and that they didn't have the

6 funds to pay. So we were trying to put a contract

7 together so we could borrow the money and finish the

8 project and get these subcontractors paid off.

9 Q. Who sued who?

10 A. I don't remember.

11 Q. You don't, okay. Who were the parties to

12 the litigation?

13 A. Well, the Huishes, R&O, and Splash.

14 Q. Were you a party to the litigation?

15 A. Well, by party, are you being technical or

16 are you asking was I part of the group or a group? Is

17 that what you mean?

18 Q. I'm asking whether or not you were sued?

19 A. I don't recall.

20 Q. Did, did you hire a lawyer?

21 A. Yes.

22 Q. Who was your lawyer?

23 A. Aviva. I don't remember Aviva's last

24 name.

25 Q. And was R&O a party to the litigation?

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1     **A. I, I don't think so.**  
2     Q.    Okay. Were any of your relatives in any  
3 way a party to the litigation?  
4     **A. Are you, are you talking about my sons?**  
5     Q.    I am.  
6     **A. Yes. I mean, if I was, they were.**  
7     Q.    Okay.  
8     **A. What I don't remember is whether it was an**  
9 **entity or whether it was individuals. I think it was**  
10 **an entity kind of a thing.**  
11    Q.    What was the essential allegation that was  
12 being asserted against you or your company?  
13    **A. I, I just don't recall.**  
14    Q.    You don't recall, okay. Was it something  
15 to do with behavior that was commercially untoward;  
16 that is to say, that Splash was making allegations to  
17 the effect that you had done something underhanded,  
18 let's say?  
19    **A. I don't think so.**  
20    Q.    Okay. The matter was resolved, was it  
21 not?  
22    **A. Yes.**  
23    Q.    There was a, there was a resolution of the  
24 matter as a result of the involvement of Judge  
25 Elizabeth Gonzalez, correct?

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1     **A. Probably correct. I don't remember her**  
2 **name. Aviva knew her.**  
3     Q.    And what were the terms of the resolution  
4 of the matter?  
5     **A. Well, I think part of that was a**  
6 **nondisclosure agreement, and I'm not sure if we're**  
7 **okay to talk about that.**  
8     Q.    Okay. Well, I'm asking you what the terms  
9 were.  
10    **A. Well --**  
11        (No answer provided by deponent.)  
12        MR. GORMLEY: Let me object. Is there a  
13 nondisclosure agreement? Can we do that in some other  
14 form or fashion other than right now? Or I will have  
15 to instruct him not to answer.  
16        MR. CAMPBELL: Are you going to instruct  
17 him not to answer?  
18        MR. GORMLEY: Well, I'd rather -- I have  
19 no problem. But, I mean, if there is a nondisclosure,  
20 then we're going to have to do it. We can send you an  
21 answer in writing.  
22 BY MR. CAMPBELL:  
23    Q.    Did R&O pay anyone any money to resolve  
24 the matter?  
25    **A. I don't think so.**

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1     Q.    Okay. Did R&O Construction resolve the  
2 matter by, in any way, extending remuneration in any  
3 form or fashion to Splash?  
4     **A. I don't think so. I don't think R&O**  
5 **really had anything to do with it.**  
6     Q.    Had nothing to do with it?  
7     **A. I don't think R&O had anything to do with**  
8 **it.**  
9     Q.    Did you attend any proceedings before  
10 Judge Gonzalez?  
11    **A. Yeah. You mean like in a courtroom?**  
12    Q.    Yes.  
13    **A. Yes.**  
14    Q.    How many such proceedings did you attend?  
15    **A. Well, seems to me like we went to two.**  
16 **But it might have only been one.**  
17    Q.    "We" being who?  
18    **A. The parties. So the Huish, I believe Tom**  
19 **was there.**  
20    Q.    Mr. Welch?  
21    **A. Yes.**  
22    Q.    Was there a specific allegation that was  
23 made against Mr. Welch?  
24    **A. I, I don't recall.**  
25    Q.    Okay. Do you recall any general

page 85

1 allegation made against Mr. Welch to the effect that  
2 he had done something commercially untoward or  
3 underhanded in some fashion?  
4     **A. I don't remember anything like that.**  
5     Q.    Okay. You would remember something like  
6 that if that allegation had been made against  
7 Mr. Welch, would you not?  
8     **A. I don't know what I would remember**  
9 **anymore, but I don't remember it.**  
10    Q.    Does Mr. Welch have any equity position in  
11 the, in the operation generically known as  
12 Cowabunga Bay?  
13    **A. Yes.**  
14    Q.    How much?  
15    **A. You mean in percentage or?**  
16    Q.    That's the question.  
17    **A. Very small. Maybe 1 percent or something**  
18 **like that.**  
19    Q.    1 percent or something like that?  
20    **A. Yeah.**  
21    Q.    Okay. What was his capital contribution  
22 to acquire his equity position of 1 percent or so?  
23    **A. It was a couple hundred thousand dollars.**  
24 **We actually gifted that to Tom because he worked**  
25 **really hard to help us resolve this issue. And then**

page 86

1 **when it came time to pay him, he didn't want any pay.**  
 2 **So my son and I decided that we didn't feel good about**  
 3 **that, so we gifted him that interest in the park.**  
 4 Q. What was the, what was the value of the  
 5 interest that you gifted him?  
 6 **A. I have -- I don't have any -- I don't know**  
 7 **that we ever valued it. I just think we picked a**  
 8 **percentage and gifted it to him.**  
 9 Q. You would have had to have filed a federal  
 10 tax, gift tax return for a gift of that size, would  
 11 you not?  
 12 **A. I don't recall.**  
 13 Q. Are you suggesting that you did not file a  
 14 gift tax return as required by the Internal Revenue  
 15 Service of the United States Department of Treasury?  
 16 **A. I'm not suggesting anything. I don't know**  
 17 **what we did or didn't do.**  
 18 Q. Who signs the tax returns of  
 19 R&O Construction?  
 20 **A. Charlie Auger. Oh, no, probably me. I**  
 21 **probably sign them.**  
 22 Q. Do you recall whether or not any  
 23 disclosures were made to the Internal Revenue Service  
 24 Department of the Treasury with respect to the  
 25 acquisition of R&O's interest in Henderson Water Park?

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1 **A. I, I don't recall R&O being involved or**  
 2 **technically involved in Henderson Water Park.**  
 3 Q. Well, let's use the word technically,  
 4 because you're associated very closely with R&O,  
 5 correct? You are the chairman of the board?  
 6 **A. Yeah.**  
 7 Q. You formed a company called Double Ott,  
 8 did you not?  
 9 **A. Yes.**  
 10 Q. Okay. And that spinoff is in fact a  
 11 participant, an equity participant in Henderson Water  
 12 Park; is that correct?  
 13 **A. Yes.**  
 14 Q. And what's your position with Double Ott?  
 15 **A. I don't know if it's called managing**  
 16 **member or -- you know, they have, seem to have**  
 17 **different -- like in a corporation, this president and**  
 18 **something else is managing member or something like**  
 19 **that. But whatever that term is.**  
 20 Q. All right. Did you ever execute any  
 21 paperwork to that effect that you were the managing  
 22 member?  
 23 **A. Well, I'm guessing that it was executed.**  
 24 Q. Okay.  
 25 **A. That was put together by an attorney.**

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1 Q. Do you know who that attorney was?  
 2 **A. I'm just trying to remember. You know, I**  
 3 **don't. It might have been Tom, but I'm not positive.**  
 4 Q. Mr. Welch?  
 5 **A. Yeah.**  
 6 Q. He was the scrivener or he was the  
 7 transactional attorney? Is that what you're saying?  
 8 He put together all the paperwork?  
 9 **A. I don't know if it was Royce Richards or**  
 10 **if -- I don't, I just don't recall.**  
 11 Q. What was the equity interest that  
 12 Double Ott acquired?  
 13 **A. Well, that was kind of a moving target,**  
 14 **because originally when we were trying to resolve the**  
 15 **issue, the park, they thought the park was going to**  
 16 **cost somewhere in the neighborhood of 15 million. And**  
 17 **then it seemed that maybe it was going to be in the**  
 18 **neighborhood of 20 million. And then it ultimately**  
 19 **ended up being over 30 million.**  
 20 **And so by that, I mean there -- in the end**  
 21 **date I can tell you more or less how much money we put**  
 22 **in.**  
 23 Q. How much?  
 24 **A. Right around \$9 million or a little over**  
 25 **9 million, I believe.**

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1 Q. What was the first capital contribution  
 2 that was made to acquire the interest that Double Ott  
 3 acquired in Henderson Water Park?  
 4 **A. I, I don't recall.**  
 5 Q. Would it be fair to say that there were  
 6 essentially two families involved in Henderson Water  
 7 Park?  
 8 **A. I think so.**  
 9 Q. Okay. The Opheikens family?  
 10 **A. Yes, and the Huish.**  
 11 Q. And their long-time adviser and friend  
 12 Mr. Welch on the one side, correct?  
 13 **A. Yeah.**  
 14 Q. And the Huishes on the other side,  
 15 correct?  
 16 **A. Yeah.**  
 17 Q. What was the percentage of ownership of  
 18 each?  
 19 **A. Well, again, that was a moving target,**  
 20 **because as the park would require more funds to**  
 21 **operate, it wasn't always -- everybody wasn't always**  
 22 **capable to add money. And at some point it sort of**  
 23 **became, we were the last guy standing, and so we put**  
 24 **in more funds.**  
 25 **And so consequently, as you put more money**

page 90

1 **in, the interest would change.**  
 2 Q. The allocation, the capital accounts would  
 3 increase?  
 4 A. **Yes.**  
 5 Q. Okay.  
 6 A. **Yeah.**  
 7 Q. If you put money in. And correspondingly  
 8 it would decrease if you didn't?  
 9 A. **Yes. Yeah.**  
 10 Q. So what was the initial capital  
 11 contribution that Double Ott made?  
 12 A. **Well, I just simply don't recall that**  
 13 **number.**  
 14 Q. At the time the capital contribution was  
 15 made, was there any construction underway on the  
 16 property?  
 17 A. **Oh, yeah, the park was, I don't know,**  
 18 **maybe 30 percent complete or 40 percent, something**  
 19 **like that.**  
 20 Q. Okay. What percentage of the park had  
 21 been completed at the time the litigation ensued by  
 22 Splash?  
 23 A. **Probably about 30 percent. Because we**  
 24 **couldn't really go forward until that was resolved.**  
 25 Q. Okay. And R&O was the construction firm?

page 91

1 A. **Yes.**  
 2 Q. What year did -- withdraw.  
 3 Do you recall the first board meeting that  
 4 was held with respect to approving or otherwise  
 5 authorizing the approval of the project known as  
 6 Cowabunga Bay; that is to say, for R&O, when did they,  
 7 what board year did that take place?  
 8 A. **Okay, could you try it one more time.**  
 9 Q. Sure. I'm happy to do it. I'm happy to  
 10 do it.  
 11 A. **Thank you.**  
 12 Q. Okay. The board of directors would have  
 13 approved getting involved in the project at some  
 14 point?  
 15 A. **You mean when we initially --**  
 16 Q. Yeah.  
 17 A. **-- started the contract?**  
 18 Q. Contract, right.  
 19 A. **To build the park with the Huish and the**  
 20 **Splash boys.**  
 21 Q. Right.  
 22 A. **You're asking what calendar year?**  
 23 Q. Yeah.  
 24 A. **Well, it was either probably -- I think it**  
 25 **was 2012.**

page 92

1 Q. Okay. If, if we wanted to find out  
 2 exactly when, we'd just go back to the minutes,  
 3 correct?  
 4 A. **Sure.**  
 5 Q. Okay.  
 6 A. **Yeah.**  
 7 Q. The board minutes. Okay.  
 8 A. **Or even the permits.**  
 9 Q. Or even the permits, okay.  
 10 A. **Yeah.**  
 11 Q. Do you recall the first time the board  
 12 ever considered the project? I'm asking --  
 13 A. **No.**  
 14 Q. -- the question a slightly different way.  
 15 A. **I wasn't part of that.**  
 16 Q. Okay. When you say you weren't part of  
 17 that, you were on the board, right?  
 18 A. **The project is not necessarily approved**  
 19 **whether or not R&O is going to build it by a board.**  
 20 Q. Okay. But it would certainly be a matter  
 21 that would be discussed, a project of that size, at  
 22 the board of directors, annual board of directors  
 23 meetings, correct?  
 24 A. **I don't think so, not necessarily.**  
 25 Q. Okay. So if we get your minutes from

page 93

1 those years, it would, in your view, not display or in  
 2 any way mention Cowabunga Bay?  
 3 A. **Oh, I'm, I'm not implying that at all. I**  
 4 **don't know what it would say about Cowabunga Bay.**  
 5 Q. Or Henderson Water Park?  
 6 A. **Or Henderson Water Park, yes.**  
 7 **Well, and you're asking when the project**  
 8 **started. I don't believe there was a Henderson Water**  
 9 **Park.**  
 10 Q. Okay. I'm simply asking with respect to  
 11 the project that we generically refer to as  
 12 Cowabunga Bay. Okay?  
 13 A. **Okay.**  
 14 Q. All right. So with respect to the  
 15 decision that you were actual going to become involved  
 16 as an equity owner of the project, in which you had  
 17 previously been the contractor, do you recall when  
 18 that decision was made?  
 19 A. **Okay, let me think. Okay. I think, I**  
 20 **think the job was started in 2012 in like the fall and**  
 21 **then they were trying to open the park in April of**  
 22 **2013. I think that was the initial desires of the**  
 23 **Splash group.**  
 24 Q. Okay. When, okay, Double Ott actually  
 25 became an equity owner in the project --

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1     **A.    Okay.**  
2     Q.    That's the foundation in time.  
3     **A.    Okay.**  
4     Q.    -- the other participant, the Huish  
5 family --  
6     **A.    Yeah.**  
7     Q.    -- side of it, that was known as  
8 West Coast, correct?  
9     **A.    I believe that's right.**  
10    Q.    Okay. What was the initial contribution  
11 of West Coast?  
12    **A.    I think it was around four-and-a-half**  
13 **million dollars or something like that.**  
14    Q.    And what was the contribution, initial  
15 contribution of Double Ott?  
16    **A.    Well, okay. So there was a piece of**  
17 **property, the property that the water park sat on.**  
18    Q.    Um-hum.  
19    **A.    And the, the owner -- the seller of the**  
20 **property to Splash and to the Huish group originally.**  
21    Q.    Um-hum.  
22    **A.    So I believe that the Huish borrowed**  
23 **somewhere in the neighborhood of, I am going to say**  
24 **\$4 million, if you will just not -- I mean, if you**  
25 **just won't hold me to these numbers in general.**

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1     Q.    Ballpark, I get it.  
2     **A.    Okay. So I think it was like roughly they**  
3 **paid for half the property. So and I believe the**  
4 **sales price was in the neighborhood of \$8 million.**  
5 **And they had --**  
6     Q.    For the land?  
7     **A.    For the land.**  
8         **So they had an \$8 million line of credit.**  
9 **And \$4 million came out of that line of credit and**  
10 **went to pay for the half of the land that was**  
11 **initially paid for.**  
12    Q.    Okay.  
13    **A.    I think where they ran into a problem was**  
14 **that -- and the Splash boys were sort of really**  
15 **driving this at that point, okay -- and they thought**  
16 **they had financing all lined up. And so they thought**  
17 **this park would be up and operating, and the financing**  
18 **would be in place, and everything would be going full**  
19 **speed ahead like in April.**  
20         **I just got to collect my thoughts. When I**  
21 **try to talk and think, I get in trouble.**  
22    Q.    I can relate.  
23    **A.    Okay. So I'm just trying to re -- I'm**  
24 **trying to remember. Okay. So they had an \$8 million**  
25 **line of credit. And they, as I recall, paid**

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1    **\$4 million for half the land, and then the seller put**  
2 **a subordinated note or something along that line**  
3 **against the park. And I believe that that was due in**  
4 **a year, okay, plus or minus.**  
5    Q.    Okay.  
6    **A.    All right.**  
7    Q.    What was Double Ott's contribution,  
8 capital contribution?  
9    **A.    Well, Double Ott wasn't there then.**  
10   Q.    Okay. When it became involved, all right?  
11   **A.    You keep -- I'm here and then we're**  
12 **jumping up there.**  
13   Q.    I know.  
14   **A.    Okay. If you'll help me stay in the**  
15 **field.**  
16   Q.    I'm going to try to do that.  
17   **A.    Okay.**  
18   Q.    All right. Same ballpark.  
19   **A.    Okay.**  
20   Q.    So when Double Ott actually became  
21 involved, okay, with Henderson Water Park, you had the  
22 Huishes with West Coast and then you had Double Ott.  
23   **A.    Okay, but I think we are missing a part.**  
24   Q.    Okay, go ahead.  
25   **A.    Okay.**

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1     Q.    Correct me if you want to do that.  
2     **A.    Okay. So there is an \$8 million line of**  
3 **credit.**  
4     Q.    Right.  
5     **A.    And so 4 million goes out for the land.**  
6     Q.    Right.  
7     **A.    Now there's \$4 million left in the line of**  
8 **credit.**  
9     Q.    Okay.  
10    **A.    More or less.**  
11    Q.    Right.  
12    **A.    Okay. So R&O is building the project.**  
13    Q.    Right.  
14    **A.    And they are funding us out of that line**  
15 **of credit.**  
16    Q.    Right.  
17    **A.    Okay. The mess-up or the screw-up, or**  
18 **whatever you want to call it, was when we started this**  
19 **project the Splash boys told us that they had an**  
20 **\$8 million line of credit.**  
21    Q.    Um-hum.  
22    **A.    We called the accountant to make sure that**  
23 **there was \$8 million, there was an \$8 million line of**  
24 **credit, and he said yes. Where we went wrong is we**  
25 **didn't ask, yeah, but is there \$8 million in the**

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1 \$8 million line of credit, and there wasn't.  
 2 \$4 million of it had already been used to purchase the  
 3 property.  
 4 Q. Okay.  
 5 A. So we are going 100 miles an hour, so to  
 6 speak, building the project trying to get it ready by  
 7 April.  
 8 Q. Um-hum.  
 9 A. The first month's payment came out right  
 10 when it should. So it's really being fast-tracked.  
 11 And then the second month's payment got cut in half.  
 12 I mean, a couple of weeks or a month went by, and, you  
 13 know, there was reasons why. And then only half the  
 14 payment got made.  
 15 Well, meanwhile, we are going 100 miles an  
 16 hour.  
 17 To make a long story short. So at some  
 18 point, the 8 million has been used and we are roughly  
 19 4 million or so due and there is no loan.  
 20 One of the members of Splash's group had  
 21 worked for Goldman Sachs, and so he, you know, he kept  
 22 telling everybody, "No problem. The loan is coming."  
 23 And "The loan would be here tomorrow," or you know  
 24 what I mean.  
 25 This went on for quite a while. Two or

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1 three -- while these payments weren't being made.  
 2 That's about when I got the phone call. I  
 3 happened to be in Las Vegas. And that's when I got a  
 4 call and was asked if I would try to figure out what  
 5 the problem was, because nobody really knew. I mean,  
 6 something was wrong but we couldn't figure out what.  
 7 Q. Who called you?  
 8 A. My son Slade.  
 9 Q. Okay. Continue on.  
 10 A. Okay. So -- can I take a breath?  
 11 Q. Sure. Take a couple.  
 12 A. I'm running out of air.  
 13 MR. GORMLEY: Take a drink of water.  
 14 THE WITNESS: Okay. And I also got to  
 15 think.  
 16 All right. So now I get the phone call.  
 17 So I spend some time trying to figure out what is  
 18 going on. I mean, you know, what is the problem?  
 19 Which sounds easy, but... And I, as I recall, I met  
 20 with the Splash, and they were super nice guys, very  
 21 nice. They were, they were -- but here's the problem  
 22 in a nutshell.  
 23 So finally, look, we got to get these  
 24 subcontractors paid. How are we going to do this? It  
 25 was during this same period of time that I met the

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1 Huish family.  
 2 And when I met all these guys, you know,  
 3 they are just really super nice guys. And so I  
 4 started thinking, "Well, why can't -- how can we, how  
 5 can we fix this? How could we buy you guys some time  
 6 or something to help you get this park? Because if  
 7 you can get the park up and open, it should be  
 8 operational." And one of the Splash boys kept saying,  
 9 and he was not lying, he really thought he had a loan  
 10 set up.  
 11 So, but the loan never happened. And then  
 12 it turned out it was a hard money loan. Which, and  
 13 then of course, we start putting numbers together  
 14 going, "Guys, we are only doing, we were only doing  
 15 8 million or 9 million or something."  
 16 Q. Who was the lender?  
 17 A. Ultimately?  
 18 Q. No. No. On the hard money loan?  
 19 A. I'm not sure.  
 20 Q. Okay. Go ahead.  
 21 A. Okay. So when it -- so then we started  
 22 getting into these meetings, trying to figure out what  
 23 is really -- I mean, what can you really do. Because  
 24 guys -- and then -- well, we got to open in April  
 25 because we can't -- well, there is no way you are

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1 going to open in April. You haven't got a loan.  
 2 These subcontractors are not going to turn another  
 3 ounce of dirt until they get paid. We are now maybe  
 4 two or three months in arrears.  
 5 And so I said to them, "All right, listen,  
 6 guys. What if we put some money in? How much is this  
 7 park supposed to cost?" And it was \$12 million or  
 8 15 million, whatever. I don't really remember the  
 9 exact number. But it was down in that range.  
 10 I get talking and I forget to breathe.  
 11 Q. That's okay.  
 12 A. Okay. So, so we come, we come up with a  
 13 proposal, which went something like this. "Well,  
 14 look, the Huish have" -- and I'm making up these  
 15 numbers -- "but, look, if the Huish have \$4 million in  
 16 and there's 4 million coming out of this loan, which  
 17 is the line of credit, and so if we come up with \$4 or  
 18 \$5 million and get these subcontractors paid for and  
 19 then get a loan, we ought to be able to build this  
 20 park."  
 21 Q. All right.  
 22 A. So and here is where we ran into the  
 23 dispute with the Splash boys. You know, they said,  
 24 "well, we" -- they had, and I'm not -- don't hold me  
 25 to the number again, but it really wasn't very much,

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1 it was like \$300,000 of hard dollars. I mean of money  
 2 that they had put into the project. And Huish had  
 3 several million, whatever that number is. And then  
 4 the other money was money that was against the line of  
 5 credit. That's where the money had come from.  
 6 So we were saying to the Splash group,  
 7 "Listen, guys, we will put some money in dollar for  
 8 dollar. I mean, we don't -- we are not trying to get  
 9 an interest that's any more or any less fair than  
 10 yours. But if you're going to put in 300,000 and we  
 11 are going to put in 3 million, you don't get to have  
 12 40 percent of the park."  
 13 But they insisted that they were entitled  
 14 to 40 percent of the park, and that's really basically  
 15 what the dispute was. So it wasn't between R&O. It  
 16 had nothing to do with R&O.  
 17 Q. So the thrust of my question was what the  
 18 capital contribution --  
 19 A. I went through all that.  
 20 Q. That's okay. No. No. And I'm a pretty  
 21 patient guy so don't worry about it.  
 22 A. Okay.  
 23 Q. So whatever the capital contribution  
 24 was --  
 25 A. Well, I'm going to get --

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1 Q. Hold on. Hold on.  
 2 A. Okay.  
 3 Q. That was ultimately made by West Coast,  
 4 okay, West Coast, and then the capital contribution --  
 5 A. Now, do you mean the final?  
 6 Q. You have to wait until I get the question  
 7 out.  
 8 A. I'm sorry.  
 9 Q. I'm just giving you what is known as the  
 10 foundation here.  
 11 A. Okay.  
 12 Q. The point in time that I'm interested,  
 13 okay --  
 14 A. All right.  
 15 Q. -- is the Splash guys are out. Okay?  
 16 A. Oh, you are down the road.  
 17 Q. I'm down the road.  
 18 Splash guys are out. There is a capital  
 19 contribution, okay, that's been made in some form or  
 20 fashion by West Coast, correct?  
 21 A. Yeah.  
 22 Q. You basically covered that, you know, that  
 23 side of the equation for me, right?  
 24 A. I'm not sure.  
 25 Q. Pretty close.

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1 A. Okay.  
 2 Q. Double Ott made a capital contribution,  
 3 right?  
 4 A. Can I just ask you one question?  
 5 Q. Sure.  
 6 A. Okay. Is this at the point when we are  
 7 getting ready to start construction to finish the park  
 8 or is this ultimately at the end of building the park?  
 9 Q. No. This is, this is at the beginning of  
 10 Double Ott's involvement, okay.  
 11 A. Okay. I --  
 12 Q. There is something --  
 13 A. Okay.  
 14 Q. Hold on. Hold on.  
 15 MR. GORMLEY: Let him finish the question.  
 16 BY MR. CAMPBELL:  
 17 Q. Okay. So foundationally, the time I'm  
 18 interested in is Splash is out.  
 19 A. Okay.  
 20 Q. Okay. West Coast, the Huishes are in.  
 21 A. Okay.  
 22 Q. Double Ott, the Opheikens are in, right?  
 23 You with me?  
 24 A. Yeah. Yeah.  
 25 Q. Now, what was the capital contribution

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1 that was made by the Opheikens initially? Double Ott?  
 2 A. I think in the neighborhood --  
 3 Q. Double Ott, in other words?  
 4 A. I think in the neighborhood of 4 or  
 5 \$5 million.  
 6 Q. All right. Where did that money come  
 7 from?  
 8 A. Where did I get the money?  
 9 Q. Yes.  
 10 A. Okay. I borrowed the money.  
 11 Q. From?  
 12 A. R&O.  
 13 Q. Okay.  
 14 A. Put it in Double Ott.  
 15 Q. All right.  
 16 A. Invested the money there. And I  
 17 personally owe R&O, and then we took a loan out.  
 18 Q. All right. So initially, there was a loan  
 19 that was made by R&O Corporation?  
 20 A. Yeah.  
 21 Q. Correct?  
 22 A. Yeah.  
 23 Q. That loan was made to you personally?  
 24 A. Correct.  
 25 Q. Correct?

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1     **A.    Correct.**  
2     Q.    You signed personally for that loan?  
3     **A.    That's correct.**  
4     Q.    Okay. Who signed that loan agreement on  
5    behalf of R&O?  
6     **A.    I, I don't know without checking that out.**  
7     Q.    Did you sign as the -- you signed as the  
8    borrower, correct, personally?  
9     **A.    I'm sure I did.**  
10    Q.    All right. R&O was the lender, correct?  
11    **A.    Yes.**  
12    Q.    How much, how much was the loan, the  
13    initial loan?  
14    **A.    What I don't, what I don't recall is, I**  
15   **think the original loan was somewhere in the**  
16   **neighborhood of 4 million.**  
17    Q.    Okay.  
18    **A.    Okay. Cass probably, my personal**  
19   **attorney, R&O's attorney, probably handled that --**  
20    Q.    Okay.  
21    **A.    -- paperwork. I just don't remember.**  
22    Q.    So would the board of directors have  
23    approved that loan?  
24    **A.    Sure.**  
25    Q.    Okay. And you were on the -- you were the

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1    chairman of the board?  
2    **A.    Yeah.**  
3    Q.    Did you vote for the approval of the loan?  
4    **A.    Well, of course.**  
5    Q.    Okay. Was the vote unanimous for the  
6    approval of the loan from R&O to Double Ott? Or to  
7    you, excuse me, I'm sorry.  
8    **A.    I'm sure it was.**  
9    Q.    You thereafter contributed that \$4 million  
10   to Double Ott; is that correct?  
11   **A.    Yeah.**  
12   Q.    Okay. At the time that you contribute  
13   that money to Double Ott, you were the, you were the  
14   designated manager --  
15   **A.    Okay.**  
16   Q.    -- of Double Ott; is that correct?  
17   **A.    I think so.**  
18   Q.    Did you also bear a title of chairman at  
19   any time of Double Ott?  
20   **A.    I don't think so.**  
21   Q.    Okay. Now, you said that thereafter you  
22   got a loan from a bank?  
23   **A.    Correct.**  
24   Q.    Okay. And what bank was that?  
25   **A.    Bank of Utah.**

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1     Q.    And the Bank of Utah was a bank that you  
2    had done business with in the past?  
3     **A.    That's correct.**  
4     Q.    Okay. And when I say "you," I mean  
5    collectively you and R&O, correct?  
6     **A.    Really more me.**  
7     Q.    Okay. And you had had a number of, of  
8    loans or, or credit transactions with them over the  
9    years; is that correct?  
10    **A.    Not too many. But I, I know them.**  
11    Q.    You knew them, okay.  
12    **A.    Yeah.**  
13    Q.    Where were they located?  
14    **A.    In Ogden.**  
15    Q.    Ogden, right. Where you live?  
16    **A.    Yeah.**  
17    Q.    And R&O is located in Ogden?  
18    **A.    Right. Right.**  
19    Q.    And do you recall the general timeframe,  
20    the ballpark, okay --  
21    **A.    Okay.**  
22    Q.    -- of when your first loan agreement was  
23    with, with that bank on your own behalf or R&O's?  
24    **A.    Let me think.**  
25    Q.    Go ahead, yeah.

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1     **A.    Okay. And let me -- can I ask you a**  
2   **question?**  
3     Q.    Sure. Go ahead.  
4     **A.    Okay. So --**  
5     Q.    I'm looking historically here.  
6     **A.    Yeah, I understand.**  
7     Q.    Irrespective of what the project was or  
8    anything.  
9     **A.    Yeah.**  
10    Q.    And, again, I'm looking for a ballpark  
11    here, Mr. Opheikens.  
12    **A.    All right. So we, we probably resolved**  
13   **that issue because we were trying to get it ready for**  
14   **the next year. So now we are coming into fall.**  
15    Q.    Different question. Different question,  
16    okay.  
17    **A.    Well --**  
18    Q.    My question is, my question is, do you  
19    recall the very first commercial transaction you ever  
20    had with that bank?  
21    **A.    Oh. Oh, Bank of Utah. You mean like --**  
22    Q.    Yeah. Very first time you did business  
23    with those folks?  
24    **A.    Maybe in the '80s or '90s.**  
25    Q.    Okay. And before, before you went to them

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1 to get the loan for the water park for, or for  
 2 Double Ott to invest in the water park, how many, how  
 3 many loan transactions do you believe you may have  
 4 engaged in with that bank? And again ballpark.  
 5 **A. Here's what is difficult.**  
 6 Q. Sure. Go ahead and explain it to me.  
 7 **A. Okay. Back in the '70s or '80s --**  
 8 Q. Right.  
 9 **A. -- when we were building some homes --**  
 10 Q. Sure.  
 11 **A. -- I would have taken out construction**  
 12 **loans and done some of those kind of things with Bank**  
 13 **of Utah.**  
 14 Q. Um-hum.  
 15 **A. You know, the interest rates went crazy in**  
 16 **early '80s and all that kind of stuff. So I never**  
 17 **really borrowed a lot of money after that from Bank of**  
 18 **Utah. And so there may have been two or three or four**  
 19 **or five over those years. I, I don't recall even one**  
 20 **of them. But I can't imagine that from time to time**  
 21 **that I didn't do some kind of business with them. And**  
 22 **I knew them real well.**  
 23 Q. Okay. That's the point I'm getting. You  
 24 had a relationship with them?  
 25 **A. Yes.**

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1 Q. Okay. Who is it that you had the  
 2 relationship with at the bank?  
 3 **A. His name is -- well, Scott Parkinson.**  
 4 Q. Okay. And who is Scott Parkinson?  
 5 **A. Well, he was, you know, he was, I think,**  
 6 **probably their business development, but I'm not**  
 7 **positive about what his exact title was. He is**  
 8 **retired now.**  
 9 Q. And did you know, did you know him from a  
 10 previous life at Weber State, for example, or --  
 11 **A. Not, not that far back. But I had known**  
 12 **him with involvement in the Chamber of Commerce and**  
 13 **all those kind of things for probably 20 years or so.**  
 14 Q. Okay. All right. So whether it was  
 15 Chamber or Rotary or whatever. You had a business  
 16 relationship and he was an acquaintance?  
 17 **A. Yes.**  
 18 Q. You liked him?  
 19 **A. Oh, yeah.**  
 20 Q. And seemingly, he liked you?  
 21 **A. Yeah.**  
 22 Q. And thought you were good fella?  
 23 **A. I hope so.**  
 24 Q. Okay. And as a result of that, you got  
 25 loans from him over the years, right?

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1 **A. Yes.**  
 2 Q. Okay. So when you got involved in  
 3 Double Ott and you decided to go get a loan, you  
 4 decided you'd go see Scott, presumably?  
 5 **A. Probably.**  
 6 Q. Probably. Okay.  
 7 So did you actually meet with Scott?  
 8 **A. Yes.**  
 9 Q. Okay. Where did you meet with him?  
 10 **A. Well, probably at the bank.**  
 11 Q. Okay. Do you recall your first meeting  
 12 with him?  
 13 **A. No. But sort of.**  
 14 Q. Sort of.  
 15 **A. I mean, I --**  
 16 Q. That's fine.  
 17 **A. A gist, if you will.**  
 18 Q. Who was with you?  
 19 **A. Just me.**  
 20 Q. Okay. What did you tell him?  
 21 **A. I told him that we were in the middle of a**  
 22 **real nightmare down here on this project and I was**  
 23 **trying to figure out how to work it out.**  
 24 Q. Okay.  
 25 **A. I remember he -- of course his first**

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1 reaction is, you know, "Well, what do you know about a  
 2 water park? And why would we want to lend money --  
 3 Q. Right.  
 4 **A. -- on a water park?"**  
 5 Q. Right.  
 6 **A. And I said, "Well, look, why don't we, why**  
 7 **don't we go down to Salt Lake," because the Huish**  
 8 **family had a water park in Salt Lake City.**  
 9 Q. Okay.  
 10 **A. And so I took Scott, yeah, Scott. There**  
 11 **may have been another person with Scott. Seems like**  
 12 **there was, but I'm not 100 percent sure.**  
 13 Q. Um-hum.  
 14 **A. And we went, we drove down there one day**  
 15 **and met Shane, and I think --**  
 16 Q. Shane Huish?  
 17 **A. Yes. And I think his brother Dave.**  
 18 Q. Dave, okay.  
 19 **A. I think it was Dave. And, and we kind of**  
 20 **spent the morning, or, you know, mid-morning probably**  
 21 **and went to lunch and whatever. And so gave him kind**  
 22 **of a chance to, you know, to get to know the Huish.**  
 23 Q. Okay. And observe the operations and that  
 24 sort of thing?  
 25 **A. Yeah. Yeah.**

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1 Q. Okay. And so what happened next?

2 A. **Well, we went back and met with the bank**

3 **several times trying to figure out if we could or how**

4 **we could structure a loan. And ultimately we were**

5 **able to do that.**

6 Q. Who negotiated the loan, you?

7 A. **From their -- me.**

8 Q. From your side.

9 A. **Yeah.**

10 Q. Okay. And who negotiated the loan from

11 their side?

12 A. **Taft. Actually, a guy under Taft. I**

13 **can't think of Taft's last name.**

14 Q. Was, was he the loan officer?

15 A. **No, Taft is over the commercial loan**

16 **department, I believe.**

17 Q. Okay. He's, he's the vice president of

18 commercial loans, something of the nature?

19 A. **Yeah, probably something like that, yeah.**

20 **I can't believe I can't think of his name.**

21 Q. That's all right.

22 All right. Do you know who was on his

23 loan committee?

24 A. **Oh, I have no idea.**

25 Q. Did you ever meet with the loan committee?

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1 A. **No.**

2 Q. Okay. But ultimately, the bank's loan

3 committee approved this loan to you?

4 A. **Yes.**

5 Q. Of how much?

6 A. **I think it was 12.2 or 12.5 million.**

7 Q. And did you prepare a prospectus to

8 submit?

9 A. **I think, I think Scott gave them that.**

10 **But mainly the thing that got us a loan is everything**

11 **I owned is on the line.**

12 Q. Okay. You signed personally for the loan?

13 A. **Yes.**

14 Q. Okay. And, and to what purpose was the

15 loan of 2.2 to 2.5 to be put?

16 A. **12.2, you mean?**

17 Q. Excuse me, 12.2. I misspoke. Thank you

18 for correcting me.

19 A. **Okay. I'm sorry, now can you say it**

20 **again.**

21 Q. Sure. What were you going to do with the

22 dough?

23 A. **Well, we were thinking of a trip.**

24 Q. There you go.

25 A. **No. It, it was, it was to finish the**

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1 **park. I mean to, you know, actually get the park up**

2 **and get it complete.**

3 Q. All right.

4 A. **And open.**

5 Q. In other words, to get R&O paid back and

6 to get R&O paid for the construction --

7 A. **Get the --**

8 Q. -- services they rendered?

9 A. **Yeah, get all the bills paid.**

10 Q. And principal creditor was R&O?

11 A. **Well, okay.**

12 Q. Fair enough?

13 A. **We owed the subs.**

14 Q. Right.

15 A. **Yes, that's correct. Get everybody paid.**

16 Q. Right. Get everybody paid, okay.

17 So the, the first loan -- excuse me. The

18 first funding through the loan was extended to who?

19 Bad question.

20 On the funding of the loan --

21 A. **Who did we pay?**

22 Q. You got a certain amount to pay somebody

23 right away, correct?

24 A. **Yeah. I think the subcontractors, right.**

25 Q. Okay.

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1 A. **Because they were just really, some of**

2 **them were on the verge of filing for bankruptcy.**

3 Q. Bankruptcy which you don't want?

4 A. **No, of course not.**

5 Q. Okay. About how much was that, do you

6 recall?

7 A. **Well, again, plus or minus, I think it was**

8 **four, four and a half million is what sticks in my**

9 **head.**

10 Q. Okay. So that was the first funding that

11 was approved and applied?

12 A. **Well, I --**

13 Q. Or drawdown, however you want to --

14 A. **Well, it may have also been reimbursed.**

15 **You know, it's sort of like all these things need to**

16 **be paid.**

17 Q. Right.

18 A. **So I think it's that --**

19 Q. R&O?

20 A. **-- and I think it's the land, you know.**

21 Q. Okay.

22 A. **R&O never, we never received any fee for**

23 **our -- we made no profit on that project. We never**

24 **were reimbursed profit. But we did cover all of our**

25 **costs, which is our subcontractors, so on and so**

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1 **forth.**  
 2 Q. Got it. Okay.  
 3 So when you say that R&O never got any  
 4 profit, do you mean to say by that, that there was a  
 5 decision by the R&O board not to do the project for a  
 6 profit?  
 7 **A. No. I mean, Cowabunga Bay has not yet**  
 8 **been able to pay R&O, so it's an account receivable.**  
 9 Q. It's an account receivable?  
 10 **A. Yeah.**  
 11 Q. There hasn't been a forgiveness of debt?  
 12 **A. No.**  
 13 Q. Got it. Okay.  
 14 So when you got the loan, personally  
 15 signed for the loan and got the loan, did you then  
 16 have some sort of an agreement with Double Ott? Do  
 17 you understand the question?  
 18 **A. Are you assuming that --**  
 19 Q. Let me -- it was a poorly, it was a poorly  
 20 drafted question.  
 21 MR. GORMLEY: Let him rephrase it.  
 22 BY MR. CAMPBELL:  
 23 Q. Did Double Ott assume some responsibility  
 24 for the repayment of that loan that you personally  
 25 took out?

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1 **A. Well, I think Double Ott took out the**  
 2 **loan, but I had to sign personally.**  
 3 Q. Okay. All right. So they were the  
 4 actual, okay, entity?  
 5 **A. Or maybe it was Cowabunga Bay that took**  
 6 **out the loan. That seems like -- yeah, I think**  
 7 **Cowabunga Bay.**  
 8 Q. Cowabunga Bay is the dba for Henderson  
 9 Water Park, right?  
 10 **A. Oh, man, you know, you just keep helping**  
 11 **me be confused.**  
 12 Q. Well --  
 13 **A. No, I understand.**  
 14 Q. You understand what I'm saying?  
 15 **A. Yeah. I know it should be clear, but --**  
 16 Q. No, that's okay, that's okay. I think we  
 17 are on the same, same track.  
 18 **A. So it seems to me like I get a payment**  
 19 **coupon every month from Bank of Utah and it seems to**  
 20 **me like it says Cowabunga Bay on it.**  
 21 Q. Okay.  
 22 **A. So I think we have an entity, I'm sure we**  
 23 **do, called Cowabunga Bay Water Park.**  
 24 Q. Okay.  
 25 **A. And that entity signed for the loan.**

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1 Q. Okay.  
 2 **A. And I'm sure Double Ott and -- well, if it**  
 3 **had anything to do with me, it's put up as collateral.**  
 4 Q. Did the Huishes through any of their  
 5 entities sign for the loan or assume an obligation to  
 6 repay the loan?  
 7 **A. Yes.**  
 8 Q. Okay. When did that happen?  
 9 **A. It's all kind of at the same time.**  
 10 Q. About the same time?  
 11 **A. It's the same table.**  
 12 Q. Okay.  
 13 **A. You know what I mean.**  
 14 Q. All right.  
 15 **A. Just a big closing, a deep breath, and**  
 16 **then you go to work.**  
 17 Q. Okay. Where did the closing take place?  
 18 **A. You got to do that to me, don't you? It**  
 19 **must have been Ogden, I would think, at Bank of Utah.**  
 20 **So please forgive me if I'm wrong.**  
 21 Q. That's okay. Makes sense. Okay.  
 22 **A. Yeah.**  
 23 Q. At the closing, who was there from the  
 24 bank at the closing?  
 25 **A. Well, there was a loan officer assigned by**

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1 **Taft. I also I can't remember his name. But I only**  
 2 **worked with him on that loan. I didn't really know**  
 3 **him.**  
 4 Q. Okay. Did you know any of the members of  
 5 the loan committee?  
 6 **A. I'm not sure who's on the Bank of Utah**  
 7 **loan committee. I don't have that kind of --**  
 8 Q. Okay.  
 9 **A. -- pull, if you will.**  
 10 Q. All right. But you knew Mr. Taft as  
 11 the --  
 12 **A. I really got to know Taft.**  
 13 Q. -- VP of loans?  
 14 **A. I knew who Taft --**  
 15 MR. GORMLEY: Let him finish the question.  
 16 **THE WITNESS: I'm sorry.**  
 17 BY MR. CAMPBELL:  
 18 Q. No, that's all right.  
 19 You knew that Taft was the VP of loans.  
 20 He assigned a loan officer. The loan officer was who  
 21 did you say?  
 22 **A. I didn't. I can't remember.**  
 23 Q. Okay, can't remember. Okay, fair enough.  
 24 You think he was there. Who else was  
 25 there at the closing on behalf of the bank?

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1 A. **I, I think the loan officer pretty much.**  
2 **But all the papers were put together by an attorney --**  
3 Q. Sure.  
4 A. **-- here in Las Vegas, actually.**  
5 Q. Okay. And you were present?  
6 A. **At the closing?**  
7 Q. Yes, sir.  
8 A. **Of course.**  
9 Q. Who else from your side was present? Were  
10 any of your boys there?  
11 A. **I'm going to guess they were.**  
12 Q. Don't guess.  
13 A. **I don't know.**  
14 Q. Okay. You know for a fact you were there?  
15 A. **Well, I know I signed, so I know I was**  
16 **there.**  
17 Q. Okay. You were signing on the dotted line  
18 you were responsible?  
19 A. **Yes.**  
20 Q. Okay, very good.  
21 Did the -- withdraw.  
22 You've been involved in a number of  
23 commercial transactions with banks. The banks  
24 basically ask for a lot of documentation, correct?  
25 A. **Yes.**

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1 Q. The bank presumably asked for  
2 documentation that demonstrated that Cowabunga Bay or  
3 whatever entity it was that was also signing as being  
4 financially responsible for the loan being extended  
5 had the authority to in fact agree to their liability  
6 for the loan, right? It's called authorization  
7 approval, right?  
8 A. **You are in the legal jargon world now. I**  
9 **signed the papers that the bank required.**  
10 Q. Okay. When you signed -- you signed a  
11 paper as a guarantor of the loan?  
12 A. **Yes.**  
13 Q. Okay. And it was personally extended to  
14 you?  
15 A. **No. I personally --**  
16 Q. Double Ott?  
17 A. **Well, I think Double Ott.**  
18 Q. Right.  
19 A. **I think.**  
20 Q. And you signed for Double Ott?  
21 A. **I had to sign personally.**  
22 Q. Personally and as --  
23 A. **And Double Ott. I would have had to have**  
24 **signed for Double Ott.**  
25 Q. And you were authorized to sign for

page 124

1 Double Ott?  
2 A. **Yeah.**  
3 Q. All right. Were you the chief, you  
4 weren't the Indian?  
5 A. **I guess that's right.**  
6 Q. Okay. Thereafter, there was funding of  
7 the loan that took place on a, on a regular basis  
8 presumably, correct?  
9 A. **Yeah.**  
10 Q. Okay. The funding of this loan, however,  
11 was subject to certain contingencies or covenants,  
12 correct?  
13 A. **Yes.**  
14 Q. All right. What were the covenants that  
15 the loan was subject to?  
16 A. **Boy, you'd think I would remember that**  
17 **word. Because it was a big deal.**  
18 Q. There was a lot of negotiation over it?  
19 A. **Not so much negotiation as --**  
20 Q. As them telling you?  
21 A. **-- fear of --**  
22 Q. This is the way it's going to be?  
23 A. **This is the wrong thing to do or the right**  
24 **thing to do. Why am I doing this?**  
25 Q. Okay.

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1 A. **What I can't tell you right now, though,**  
2 **is what those covenants were.**  
3 Q. Okay. Can you tell me any of them?  
4 A. **Well, give me a hint. What would a**  
5 **covenant --**  
6 Q. Sure. Meeting certain projections.  
7 Being, being responsible for --  
8 A. **Yeah, okay. Thank you.**  
9 Q. -- adhering to the budget, for example,  
10 which is always the main one.  
11 A. **That helped me, because, yes, we had to**  
12 **meet certain criteria. I don't specifically remember**  
13 **it, but we had to make a certain amount of money,**  
14 **let's say.**  
15 Q. Right. Your cash flow had to be X?  
16 A. **Yeah. And you had to, of course, make the**  
17 **payments, that's just...**  
18 Q. Banks like that.  
19 A. **Yeah. So anyway, so there were covenants,**  
20 **and, and we've had to meet those regularly.**  
21 Q. All right. And in anticipation of  
22 complying with those covenants, you were also required  
23 to submit budgetary proposals and projections,  
24 correct?  
25 A. **Yes.**

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1 Q. All right. Who was it that submitted the  
2 budgetary proposals and projections?

3 **A. I believe Scott Huish prepared them,**  
4 **but -- or it might have been Craig Huish. Which is**  
5 **not -- doesn't have anything to do with the park, but**  
6 **he is an accountant that the Huish family have used, I**  
7 **believe, for a number of years.**

8 Q. All right. And why are the, why are  
9 budgetary projections required to be submitted to a  
10 bank for their approval?

11 **A. Well, I, I don't -- I think that when I**  
12 **say budgetary, I think they were asking to see**  
13 **something to help them be convinced that the park**  
14 **would work.**

15 Q. Right.

16 **A. Is that what you meant?**

17 Q. Right. And, in fact, there is a  
18 continuing and ongoing obligation to submit these  
19 projections to the loan committee or the bank, let's  
20 just say the bank, correct?

21 **A. I would take your word on that. I, I**  
22 **think you are correct, but I'm not really...**

23 Q. Now, were there any consequences that  
24 would flow from your failure to keep the budgetary  
25 limitations that had been submitted to the bank; that

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1 is to say, could the bank declare a violation of a  
2 covenant if you went over budget?

3 MR. GORMLEY: I object. Lack of  
4 foundation.

5 You can testify what you mean.

6 MR. CAMPBELL: Yeah.

7 **THE WITNESS: I don't, I don't understand**  
8 **that.**

9 BY MR. CAMPBELL:

10 Q. I'll -- then I'll just ask a different  
11 question --

12 **A. Okay.**

13 Q. -- to get to the same point.

14 The bank keeps a tab on how much you're  
15 spending, they are giving you money, you're --

16 **A. Now, are you talking --**

17 Q. Hold on. Wait until I get it out.

18 **A. Okay.**

19 Q. The bank is giving you money, right?

20 **A. Yeah. We make draws.**

21 Q. Right. One of the conditions of making  
22 the draws is that you have to show them what the draw  
23 was used for, correct?

24 **A. Okay. So you're talking about the loan --**  
25 Q. Is that --

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1 **A. -- the construction loan.**

2 Q. Is that correct?

3 **A. Okay, say it again.**

4 Q. One of the conditions of them giving you  
5 the loan and you complying with the covenants is when  
6 they give you money, you have to show them what you're  
7 doing with the money?

8 **A. Yes, what we would --**

9 Q. That's a "yes"?

10 **A. Well, I'm going to -- let me say this**  
11 **first.**

12 Q. Before you get there, and I'm going to let  
13 you say whatever you want. Okay?

14 And as a result of that, in advance of  
15 that, you submit projections to them, correct,  
16 budgetary projections or operational projections,  
17 correct?

18 **A. Okay. I'm confused. And let me tell you**  
19 **why.**

20 Q. Go ahead.

21 **A. Okay.**

22 Q. I'm not trying to confuse you.

23 **A. When you say operational to me, I think**  
24 **that's operating the park.**

25 Q. Okay.

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1 **A. Okay?**

2 Q. So let's withdraw -- let me rephrase the  
3 question.

4 **A. Well, let me go back.**

5 Q. All right, I'll let you.

6 **A. Because I want to, I want to be right.**

7 Q. You are beating me down here. You know,  
8 that's not your job, it's my job to beat you down.

9 Go ahead.

10 **A. Okay. So when we took out the loan, the**  
11 **\$12.2 million, it's to build the park.**

12 Q. I get it.

13 **A. Okay. So are you asking me about that?**

14 Q. That, yes.

15 **A. So we're -- and I'm going to call that a**  
16 **construction loan.**

17 Q. That's fine.

18 **A. Okay.**

19 Q. Okay.

20 **A. Okay. So that's what I'm talking about.**

21 Q. All right.

22 **A. So we would -- when we would pay somebody,**  
23 **we would have to show the invoices, et cetera, against**  
24 **a cost breakdown.**

25 Q. Right.

page 130

1 **A. Okay.**  
 2 Q. Now, let's go forward.  
 3 **A. Okay.**  
 4 Q. Now the park is up and running.  
 5 **A. Okay.**  
 6 Q. Okay. Now we are talking about  
 7 operations, correct?  
 8 **A. Right.**  
 9 Q. All right. And when you're talking about  
 10 operations, you submit budgets as well to the bank  
 11 showing them what your operations are, what's your  
 12 line items, what your projections are in the budget,  
 13 et cetera, correct?  
 14 MR. GORMLEY: If you know.  
 15 **THE WITNESS: Operations --**  
 16 MR. CAMPBELL: That's improper.  
 17 BY MR. CAMPBELL:  
 18 Q. Go ahead.  
 19 MR. GORMLEY: Well --  
 20 MR. CAMPBELL: You are not allowed to.  
 21 That's the classic, classic speaking objection.  
 22 Please don't explain it to me.  
 23 MR. GORMLEY: I'm not trying to explain.  
 24 MR. CAMPBELL: You made the objection.  
 25 ///

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1 BY MR. CAMPBELL:  
 2 Q. Go ahead.  
 3 MR. GORMLEY: Lack of foundation.  
 4 BY MR. CAMPBELL:  
 5 Q. Go ahead, sir.  
 6 MR. GORMLEY: Answer the question if you  
 7 know.  
 8 **THE WITNESS: Now I'm lost.**  
 9 BY MR. CAMPBELL:  
 10 Q. That's okay, I'll bring you back.  
 11 MR. GORMLEY: I'm sorry for losing you.  
 12 BY MR. CAMPBELL:  
 13 Q. No, I'll bring you back to it.  
 14 So we are in the operational phase. The  
 15 park is up and running. Okay? But you are still  
 16 drawing down on the loan.  
 17 **A. No, no. The -- that loan --**  
 18 Q. It's already --  
 19 **A. -- was invested into the park.**  
 20 Q. Okay. But you have to make payments,  
 21 correct?  
 22 **A. Yes.**  
 23 Q. Okay. And those payments are governed by,  
 24 you know, a payment schedule. They're actually called  
 25 something else in the terms of art. But a payment

page 132

1 schedule, right?  
 2 **A. Right.**  
 3 Q. All right. And there are covenants that  
 4 basically you agree I'm going to make these payments,  
 5 correct?  
 6 **A. Correct.**  
 7 Q. And one of the things you do in operations  
 8 is you want to make sure you can make those loan  
 9 payments, correct?  
 10 **A. And so that's the budget you're talking**  
 11 **about.**  
 12 Q. Is the answer to my question, yes, you  
 13 want to make sure you can make the payments?  
 14 **A. Okay. All of that was handled, I believe,**  
 15 **by Scott. So I don't -- I can't say yes, because I**  
 16 **didn't have anything to do with that part of the -- I**  
 17 **didn't operate it.**  
 18 Q. Let me, let me ask a different question.  
 19 **A. Okay.**  
 20 Q. You have an enormous amount of, of  
 21 experience and wisdom with respect to the operation of  
 22 big businesses. So I'm not necessarily committing you  
 23 to every single detail with respect to this particular  
 24 loan, but rather generally how these things work.  
 25 Okay?

page 133

1 **A. Okay.**  
 2 Q. All right. So they extend when you have  
 3 to pay the money back, right?  
 4 **A. Um-hum.**  
 5 Q. Okay. That's a "yes"?  
 6 **A. Yes.**  
 7 Q. That's three.  
 8 You got to pay the money back and you have  
 9 to do it on a certain schedule, correct?  
 10 **A. You mean like monthly?**  
 11 Q. Well, whatever it may be.  
 12 **A. Okay.**  
 13 Q. Sometimes it's quarterly, sometimes it's  
 14 monthly.  
 15 **A. Okay.**  
 16 Q. Right?  
 17 **A. Right.**  
 18 Q. Okay. And if you don't do that, they can  
 19 declare a default?  
 20 **A. Correct.**  
 21 Q. And in the event that they declare a  
 22 default, because there is a covenant that says they  
 23 can do that, they can -- basically, the bank can come  
 24 in and say, hey, all of it is due right now, pay up.  
 25 Correct?

<p>page 134</p> <p>1     <b>A. I believe so.</b> 2     Q. Now, one of the things that you're 3 concerned about is you never want to get into a 4 default situation, correct? 5     <b>A. Correct.</b> 6     Q. You don't want the bank coming in and 7 saying, "It's all due now, pay up," right? 8     <b>A. Right.</b> 9     Q. Okay. So what you want to do is you want 10 to watch your operations and observe, okay, what 11 you're budget is calling for and whether or not the 12 budget is going to be sufficient to fund your payment 13 obligations under the loan so there isn't a 14 declaration of default, right? 15    <b>A. Yes. Always.</b> 16    Q. Okay. Who was responsible for creating 17 the budget to fund the repayment of the loan? 18    <b>A. I, I believe Craig Huish.</b> 19    Q. Okay. And, and was there anyone from the 20 Opheikens side that was responsible for that or 21 otherwise responsible for reviewing it for Double Ott 22 or you or your family? 23    <b>A. Well, when you say "review," you mean like</b> 24 <b>in our annual meeting?</b> 25    Q. At any point in time.</p>	<p>page 136</p> <p>1 more frequently than an annual basis? 2    <b>A. I don't believe so.</b> 3    Q. Okay. They are shared, these projections, 4 budgetary projections are shared with the bank, 5 correct? 6    <b>A. I don't know.</b> 7    Q. All right. Have you ever seen loan 8 covenants that require budgetary projections to be 9 shared with the bank? 10   <b>A. I don't remember that I have.</b> 11    Q. Okay. Did the loan that you obtained and 12 signed for have any requirements for balloon payments? 13   <b>A. Yes, I think for the first three years or</b> 14 <b>something like that it required it.</b> 15    Q. Okay. What was, what was the balloon 16 payment in the first year? 17   <b>A. Oh, gosh. I, I don't remember the number.</b> 18    Q. Can you ballpark it? 19   <b>A. I think it was like 300 grand or something</b> 20 <b>like that.</b> 21    Q. Okay. What was it in the second year? 22   <b>A. I think it was consistent.</b> 23    Q. It was the same amount every year? 24   <b>A. I believe it was.</b> 25    Q. Okay. Of hundreds of thousands of</p>
<p>page 135</p> <p>1    <b>A. Wait --</b> 2    Q. Let me ask a different question. 3    <b>A. Okay.</b> 4    Q. When the Huish side, okay, was making 5 these budget proposals or submitting the budget, who 6 from the Opheikens side or the Double Ott side was 7 reviewing them? 8    <b>A. Probably, probably Slade.</b> 9    Q. Okay. And were there presentations or 10 were there budget projections that were made on a 11 regular basis -- 12   <b>A. Well, I think --</b> 13    Q. -- with respect to the operations? 14   <b>A. I think annual. But you have to remember</b> 15 <b>that annual in this water park is only about a</b> 16 <b>quarter. I mean, it's only open, you know, from April</b> 17 <b>to August, and then a few days, weekends only or</b> 18 <b>something like that.</b> 19    Q. So the answer is yes, correct? 20   <b>A. Okay, ask the question again.</b> 21    Q. Sure. These projections are made on, on 22 an ongoing basis in the operations of the park, 23 correct? 24   <b>A. Okay, on an annual basis.</b> 25    Q. All right. Are they made, are they made</p>	<p>page 137</p> <p>1 dollars? 2   <b>A. Well, I think it was around 300,000.</b> 3    Q. Okay. All right. Whatever it was, it was 4 in the hundreds of thousands of dollars is my point, 5 fair enough? 6   <b>A. I guess.</b> 7    Q. Okay. And those balloon payments were 8 covered by a covenant as well; but if you didn't make 9 the balloon payments, just like you didn't make your 10 ordinary loan payments, that that could be a basis for 11 the bank to declare a default, correct? 12   <b>A. Yes.</b> 13    Q. Okay. And so you wanted to make those 14 balloon payments as well, that's an important 15 component of your obligation under the contract, 16 correct? 17   <b>A. Yes.</b> 18    Q. Okay. Was the individual you were talking 19 about Bart, Bart Tucker? 20   <b>A. Yes.</b> 21    Q. Okay. 22   <b>A. How did you know?</b> 23    Q. Well, I do my best. I have done this for 24 40 years. I've learned something along the way -- 25   <b>A. Don't you think that --</b></p>

<p style="text-align: right;">page 138</p> <p>1 Q. -- no matter how dumb I am.</p> <p>2 A. <b>Don't you think that I ought to be able to</b></p> <p>3 <b>remember a guy named Bart Tucker, though?</b></p> <p>4 Q. Yeah, well. Okay.</p> <p>5 So did anyone from the bank ever come out</p> <p>6 to the park to observe its operations or conduct any</p> <p>7 meeting with any executive associated with Double Ott</p> <p>8 or West Coast or Henderson Water Park, LLC?</p> <p>9 A. <b>Okay. Ask me again.</b></p> <p>10 Q. Sure. I'm going to make it much simpler.</p> <p>11 A. <b>Okay.</b></p> <p>12 Q. Anybody from the bank ever come out to</p> <p>13 meet with anybody at Cowabunga Bay with respect to its</p> <p>14 obligations?</p> <p>15 A. <b>Yes.</b></p> <p>16 Q. Do you recall who that was?</p> <p>17 A. <b>Oh, I think Bart Tucker came out.</b></p> <p>18 Q. All right. Do you remember who else came</p> <p>19 out?</p> <p>20 A. <b>I think Richens.</b></p> <p>21 Q. Right.</p> <p>22 A. <b>Spencer Richens came out.</b></p> <p>23 Q. Right.</p> <p>24 A. <b>I believe -- well, I think some others</b></p> <p>25 <b>came out before the park opened.</b></p>	<p style="text-align: right;">page 140</p> <p>1 A. <b>-- they can come out and make sure the</b></p> <p>2 <b>house is half built if you're taking half the money.</b></p> <p>3 Q. Right. Exactly. They have a right to</p> <p>4 inspect and observe, right?</p> <p>5 A. <b>I, I suppose.</b></p> <p>6 Q. Okay. And, in fact, the Bank of Utah did</p> <p>7 that?</p> <p>8 A. <b>Well, I don't know that. I know they came</b></p> <p>9 <b>out. I don't know that they came out specifically to</b></p> <p>10 <b>do that.</b></p> <p>11 Q. Well, you know they weren't here to, to</p> <p>12 party, they were there for a commercial business,</p> <p>13 correct?</p> <p>14 A. <b>I don't know. They seemed to want to get</b></p> <p>15 <b>in the water.</b></p> <p>16 Q. Yeah. Did they?</p> <p>17 A. <b>I think they did, but I'm not positive.</b></p> <p>18 Q. But they were there for to serve the</p> <p>19 interests of their, of their bank?</p> <p>20 A. <b>Yeah, probably. Yes.</b></p> <p>21 Q. Do you recall signing a number of</p> <p>22 documents designating you as the authorized managing</p> <p>23 member on behalf of Henderson Water Park in connection</p> <p>24 with the extension of the loan?</p> <p>25 A. <b>No.</b></p>
<p style="text-align: right;">page 139</p> <p>1 Q. And after the park opened, correct?</p> <p>2 A. <b>Well, I don't remember.</b></p> <p>3 Q. Okay. And do you recall why these</p> <p>4 individuals from the bank came out to observe the</p> <p>5 operations?</p> <p>6 A. <b>Well, probably to make sure that we were</b></p> <p>7 <b>doing what we were supposed to be doing.</b></p> <p>8 Q. Right. And they had the right to do that,</p> <p>9 correct?</p> <p>10 A. <b>Well, I never thought of it that way. I</b></p> <p>11 <b>mean, they are certainly welcome.</b></p> <p>12 Q. Right. But irrespective of that, they</p> <p>13 had, they had a right and entitlement to inspect the</p> <p>14 project, correct?</p> <p>15 A. <b>I suppose so.</b></p> <p>16 Q. Okay. Have you ever heard of that as a</p> <p>17 component of a loan in any of the years that you were</p> <p>18 involved in the construction industry, for example?</p> <p>19 A. <b>Well, I, I think more in terms in my --</b></p> <p>20 <b>more normal than what I think you are describing is</b></p> <p>21 <b>that they have a right to send an inspector out --</b></p> <p>22 Q. Right.</p> <p>23 A. <b>-- to inspect. For instance, on a home if</b></p> <p>24 <b>we are building it --</b></p> <p>25 Q. Right.</p>	<p style="text-align: right;">page 141</p> <p>1 Q. You don't dispute that you were, you</p> <p>2 simply are saying you don't recall?</p> <p>3 A. <b>That's right.</b></p> <p>4 Q. Okay. The reason I'm asking, you are not</p> <p>5 denying that you were, you're just saying at the</p> <p>6 moment I'm asking you this question you don't recall</p> <p>7 if you were or not?</p> <p>8 A. <b>Yes.</b></p> <p>9 Q. Okay. Did Scott Huish sign personally on</p> <p>10 this loan?</p> <p>11 A. <b>I think so.</b></p> <p>12 Q. Did John Huish sign personally on the</p> <p>13 loan?</p> <p>14 A. <b>I think so.</b></p> <p>15 Q. Did he have any role in the development or</p> <p>16 operation of Cowabunga Bay, John Huish?</p> <p>17 A. <b>Well, he certainly, he certainly had a</b></p> <p>18 <b>role.</b></p> <p>19 Q. What was it?</p> <p>20 A. <b>John -- the Huish family, which is John</b></p> <p>21 <b>and Scott and Shane, were who we were impressed with.</b></p> <p>22 <b>I mean, you know, John is like, he was put in the</b></p> <p>23 <b>International Hall of Fame, for instance, when we were</b></p> <p>24 <b>trying to put all this financing together, for running</b></p> <p>25 <b>all the parks that he has run throughout his life.</b></p>

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1 **And --**  
2 Q. Was John an equity holder in West Coast?  
3 **A. I don't remember how West Coast is**  
4 **structured.**  
5 Q. Okay. Do you know who the members of  
6 West Coast are?  
7 **A. I don't recall.**  
8 Q. Okay. You are not suggesting that John is  
9 a member of West Coast, are you?  
10 **A. I'm not, I'm really not trying to suggest**  
11 **anything.**  
12 Q. Okay.  
13 **A. I just don't remember.**  
14 Q. All right. Who is Lisbeth Edmunds?  
15 **A. I think that's Scott and Shane's mom.**  
16 Q. Are you aware of the fact that she was a  
17 guarantor --  
18 **A. Yes.**  
19 Q. -- on the loan?  
20 **A. Yeah.**  
21 Q. How is it that you became aware of that  
22 fact?  
23 **A. She called me.**  
24 Q. And when did she call you?  
25 **A. At about the time when we were applying**

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1 **for the loan and Bank of Utah was basically saying we**  
2 **want all these personal guarantors.**  
3 Q. Okay. And she was one of the personal  
4 guarantors?  
5 **A. Yeah, she was willing to sign. She wanted**  
6 **to show her support for her boys.**  
7 Q. Why did she call you?  
8 **A. Because she was trying to encourage us to**  
9 **be willing to work with these guys.**  
10 Q. The Huishes?  
11 **A. Yeah. It's just another example of how**  
12 **honest the Huishes are.**  
13 Q. Um-hum.  
14 Where did the, where did the Huishes  
15 reside? Where is the Huish family from?  
16 **A. Well, she is in Salt -- Salt Lake area, I**  
17 **believe. I think the Huishes are from the Salt Lake**  
18 **area.**  
19 Q. Did you know the Huishes --  
20 **A. Prior?**  
21 Q. -- prior to any involvement in  
22 Cowabunga Bay?  
23 **A. No.**  
24 Q. You didn't?  
25 **A. No.**

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1 Q. Okay. It was only after your involvement  
2 in Cowabunga Bay that you came --  
3 **A. Right.**  
4 Q. -- to know them?  
5 **A. Right.**  
6 Q. Were you familiar with Lisbeth Edmunds  
7 before you were involved in Cowabunga Bay?  
8 **A. No.**  
9 Q. You'd never seen her on TV or anything of  
10 that nature?  
11 **A. No. Was she on TV?**  
12 Q. I'm just asking if you ever saw her on TV.  
13 **A. No. I didn't know of her or...**  
14 Q. I want to ask this question a different  
15 way, because I'm not trying to trick you, okay, but  
16 I'm just -- I'm giving you an opportunity to answer  
17 this question.  
18 **A. Okay.**  
19 Q. Did you ever meet with any representatives  
20 of the bank at Cowabunga Bay?  
21 **A. Well, it, it seems like I should have.**  
22 **But -- yes. Yeah. I think prior to the loan.**  
23 Q. Um-hum.  
24 **A. When we were talking to them to make the**  
25 **loan, I believe they came down. I'm not clear on**

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1 **exactly when. I don't know if it was when the park**  
2 **was pretty much done and --**  
3 Q. It's getting ready to open.  
4 **A. I think, I think it was then. I think**  
5 **when the park was starting to, you know, look like a**  
6 **park instead of a disaster area. But I also think**  
7 **that they may have come down even prior to that.**  
8 Q. I understand.  
9 **A. But I don't think I met them.**  
10 Q. But you do recall --  
11 **A. But I do think I met them the one time.**  
12 Q. Right. And who did you meet with?  
13 **A. Oh, you got to do that. Well, okay. I**  
14 **think Bart might have been one of them.**  
15 Q. Okay.  
16 **A. And I don't remember. I don't remember**  
17 **the name. Oh, okay, now look. Bank of Utah wasn't**  
18 **the only institution --**  
19 Q. I'm aware, I'll get there in a minute, but  
20 go ahead.  
21 **A. Okay. So I don't think it was Taft. I**  
22 **don't remember.**  
23 Q. Okay.  
24 **A. I remember the faces.**  
25 Q. All right.

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1 **A. But I can't --**  
2 Q. And you remember that they were from Bank  
3 of Utah. There were a couple of gentlemen that came  
4 down and you met with them? That's all --  
5 **A. But they also, they also may have been**  
6 **from the other institutions that were involved.**  
7 Q. All right. When you say institutions --  
8 **A. Well, I don't know what I'm talking about.**  
9 Q. -- do you mean other lenders?  
10 **A. Yeah.**  
11 Q. Okay. What other lenders were there?  
12 **A. Well, one of them is Lindquist has an**  
13 **insurance company. I don't know the name of the**  
14 **insurance company. Great something or --**  
15 Q. Who has the insurance company?  
16 **A. John Lindquist.**  
17 Q. Yes. Who is John Lindquist?  
18 **A. He's a -- he's from Ogden, and he owns a**  
19 **mortuary and cemetery. It's a long, long-time family**  
20 **from Ogden.**  
21 Q. Right.  
22 **A. And, and he has been very successful in**  
23 **insurance product, which I don't really understand.**  
24 **But, anyway, so he, he lends money through Bank of**  
25 **Utah is the way I would say it. I don't know if**

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1 **that's the proper way to think of it, but... So Bank**  
2 **of Utah somehow sort of represents him.**  
3 Q. Um-hum.  
4 **A. And then I think there was another small**  
5 **bank out of Casper, Wyoming. I don't remember the**  
6 **name of the bank, but... So I think there was a**  
7 **gentleman that came then. I think there was three**  
8 **people, but...**  
9 Q. How much would -- what was the lending  
10 amount of the Wyoming bank?  
11 **A. I -- gee, I don't remember.**  
12 Q. What was the purpose to which the funds  
13 were to be put?  
14 **A. Well, it's all part of that 12.2 million.**  
15 Q. Okay. And did you sign any guarantees on  
16 that loan?  
17 **A. Well, it's all the same loan.**  
18 Q. It's all the same loan, right?  
19 **A. Yeah. Yeah.**  
20 Q. They are, they are -- basically, this is a  
21 funding conglomeration, so to speak?  
22 **A. Yeah. Yeah, something like that.**  
23 Q. It's called a syndicated loan?  
24 **A. Well --**  
25 Q. Does that sound right?

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1 **A. I don't know what you call it.**  
2 Q. All right. So they, they had a piece of  
3 the action, and whatever interest that they had was  
4 covered pursuant to the transactional documents that  
5 you signed with the Bank of Utah?  
6 **A. I believe so.**  
7 Q. Okay. Did the -- withdraw.  
8 The Bank of Utah required certain  
9 information be given to them on at least an annual  
10 basis, correct?  
11 **A. Well, I'm going to guess so.**  
12 Q. Okay.  
13 **A. I think that information is furnished by**  
14 **Scott to Bank of Utah.**  
15 Q. Scott who?  
16 **A. Huish.**  
17 Q. Right.  
18 Where are -- where is the compendium of  
19 documents that have been forwarded to the Bank of Utah  
20 by Cowabunga Bay or Scott Huish or anyone on their  
21 behalf maintained and kept? That is to say --  
22 **A. Yeah, whose file cabinet are they in?**  
23 Q. Yeah. Yeah. Where are they?  
24 **A. I, I don't know.**  
25 MR. CAMPBELL: Okay. All right. We sort

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1 of exhausted that. So it's 12:30 or so. Do you want  
2 to take a break now for lunch? How much time do you  
3 want for lunch?  
4 MR. GORMLEY: Is there -- are we going  
5 out? Where is a place around here for lunch?  
6 MR. CAMPBELL: If you just go up to, to  
7 Las Vegas Boulevard here, you can hang a right and  
8 there's some sandwich shops there.  
9 MR. MIRKOVICH: Straight down Seventh.  
10 MR. ERWIN: Are we on the record or off  
11 the record?  
12 MR. CAMPBELL: Let's go off the record.  
13 THE VIDEOGRAPHER: The time is  
14 approximately 12:36 p.m. We are going off the record.  
15 (Recessed from 12:36 p.m. to 1:51 p.m.)  
16 THE VIDEOGRAPHER: The time is  
17 approximately 1:51 p.m. We are back on the record.  
18 MR. CAMPBELL: Would you kindly indicate  
19 the elapsed time of deposition testimony, please.  
20 THE VIDEOGRAPHER: It's been  
21 2 hours, 44 minutes, and 38 seconds.  
22 MR. CAMPBELL: Thank you.  
23 BY MR. CAMPBELL:  
24 Q. Could you tell me who Craig Nielsen is?  
25 **A. Well, he's a partner in the water park.**

<p style="text-align: right;">page 150</p> <p>1 He's from Salt Lake City. He is in the pool building 2 business. And as I recall, I believe he was already 3 involved in Cowabunga. I think he already had put 4 money in Cowabunga with the Splash group and the Huish 5 partnership. 6 Q. Do you know what his equity interest is? 7 A. I don't know percentagewise. I think he 8 has a little over \$2 million in the park. So I mean, 9 it's probably, you know, do the math of -- we did 10 dollar for dollar. So if it was 31 million, or 11 exactly whatever it was, divided by roughly 2 million. 12 Q. So his interest, his equity position would 13 be larger than Mr. Welch? 14 A. Oh, yes. 15 Q. What role does he have at Cowabunga Bay? 16 And, again, when I say Cowabunga Bay, I mean Henderson 17 Water Park, okay? 18 What role does Mr. Nielsen have at 19 Cowabunga Bay? 20 A. He is just, he's just got money in the 21 park. 22 Q. Okay. He's just a passive investor? 23 A. Yeah, pretty much. 24 Q. He has no position as in voting on -- 25 A. I don't believe so.</p>	<p style="text-align: right;">page 152</p> <p>1 want to. 2 A. Well, there is a management committee, but 3 the park is not managed by that committee. The park 4 was delegated to Shane Huish and Richard Woodhouse as 5 the general manager and/or the operational managers of 6 the park. 7 Q. Who is the chairman of the management 8 committee? 9 A. I am, I guess. 10 Q. And who are the members of the management 11 committee? 12 A. I believe it's Scott Huish, Shane Huish, 13 Slade, Chet, and Tom. Is that everybody? You 14 probably already know. Did I leave anybody out? 15 Q. How many, how many members associated with 16 Double Ott are there on the management committee for 17 Cowabunga Bay? 18 A. I think three. 19 Q. Including yourself? 20 A. Yes. 21 Q. How many from the Huish side? 22 A. I think three. 23 Q. So as far as you know, there are, there 24 are only six? There is not seven? 25 A. Well, I think Tom -- oh, now is Tom part</p>
<p style="text-align: right;">page 151</p> <p>1 Q. Okay. Just let me finish. 2 -- voting on the management committee? 3 A. I'm sorry. 4 Q. That's okay. That's all right. 5 A. We got to warm up after lunch. 6 Q. That's okay. 7 And your answer is you don't believe so; 8 is that correct? 9 A. Right. 10 Q. Okay. Cowabunga Bay is managed by a 11 management committee; is that correct? 12 A. Well, the -- 13 Q. That's a "yes" or a "no." 14 A. The park was delegated to Shane Huish to 15 manage. 16 Q. Strike as nonresponsive. 17 MR. CAMPBELL: Kindly read the gentleman 18 back the question. 19 (Record read as follows:) 20 "Q. Cowabunga Bay is managed by a 21 management committee; is that correct?" 22 MR. GORMLEY: He can explain his answer. 23 BY MR. CAMPBELL: 24 Q. And the answer is either "yes" or "no," 25 but you can go ahead and explain after that if you</p>	<p style="text-align: right;">page 153</p> <p>1 of -- 2 Q. I'm asking you. 3 A. That first, that first question, can you 4 ask that first part of that question back, please. 5 Q. Sure. How many members in total? Let's 6 ask it a different way. 7 A. Seven. 8 Q. Seven? 9 A. Seven. 10 Q. Okay. And how many of the seven members 11 are associated with the Opheikens side? 12 A. Well, I, I guess I would say four -- 13 Q. Okay. 14 A. -- counting Tom. 15 Q. Mr. Welch? 16 A. Mr. Welch. I didn't -- I don't know if he 17 is part of -- I don't remember which name you threw 18 out. 19 Q. And there are three -- 20 A. Double Ott. 21 Q. Yes. And there are three from, from the 22 Huish side, for a total of seven? 23 A. I believe that's correct. 24 Q. Okay. And you are the chairman; is that 25 correct?</p>

<p>page 154</p> <p>1 A. Yeah.</p> <p>2 Q. All right.</p> <p>3 A. Apparently.</p> <p>4 Q. And do you agree that the purpose of the</p> <p>5 management committee is to solely and exclusively be</p> <p>6 vested with all management's rights, power and</p> <p>7 authority over the business affairs and operation of</p> <p>8 the company?</p> <p>9 A. Okay. Can you, can you read it again.</p> <p>10 Q. Sure. Do you agree that the purpose of</p> <p>11 the management committee is to be solely and</p> <p>12 exclusively vested with all management rights, power,</p> <p>13 and authority over the business affairs and operation</p> <p>14 of the company?</p> <p>15 A. I think that's probably a yes.</p> <p>16 Q. And do you agree that the management</p> <p>17 committee has the full right, power, and authority to</p> <p>18 do all things necessary or desirable by it in its</p> <p>19 reasonable discretion to conduct the business affairs</p> <p>20 and operations of the company?</p> <p>21 A. Would you throw that one at me again.</p> <p>22 Q. Sure. And do you agree that the</p> <p>23 management committee has the full right, power, and</p> <p>24 authority to do all things necessary or desirable in</p> <p>25 its reasonable discretion to conduct the business</p>	<p>page 156</p> <p>1 Q. You're done?</p> <p>2 A. I think so.</p> <p>3 Q. Move to strike the answer as</p> <p>4 nonresponsive.</p> <p>5 Here is the question again. What are the</p> <p>6 duties and responsibilities of the management</p> <p>7 committee?</p> <p>8 A. Why don't you explain to me what</p> <p>9 nonresponsive means.</p> <p>10 Q. It means you didn't answer the question I</p> <p>11 asked.</p> <p>12 A. Oh.</p> <p>13 Q. Don't take that as an insult, it's an</p> <p>14 objection and it's preserving my record.</p> <p>15 A. Okay.</p> <p>16 Q. So what I'm saying is that that's not the</p> <p>17 question I asked of you.</p> <p>18 The question I asked of you is, again,</p> <p>19 what are the duties and responsibilities of the</p> <p>20 management committee?</p> <p>21 A. To put people in place to operate the</p> <p>22 water park and in a lawful way and in a safe manner.</p> <p>23 Q. Who was it that selected the members of</p> <p>24 the management committee?</p> <p>25 A. Well, I guess I would have to say from day</p>
<p>page 155</p> <p>1 affairs and operations of the company?</p> <p>2 A. Yeah, I think so.</p> <p>3 Q. That includes the use and assets of the</p> <p>4 company?</p> <p>5 A. Well, use and assets of the country --</p> <p>6 company? Are you saying sole?</p> <p>7 Q. The question stands as it is.</p> <p>8 A. I don't know.</p> <p>9 Q. Okay. Does it include the distribution of</p> <p>10 company cash?</p> <p>11 A. I think so.</p> <p>12 Q. Does it include the selection and</p> <p>13 dismissal of employees?</p> <p>14 A. No.</p> <p>15 Q. What are the duties and responsibilities</p> <p>16 of the management committee?</p> <p>17 A. Well, we -- we selected Shane and Richard</p> <p>18 Woodhouse to put them in the place of the operations</p> <p>19 management. We brought in -- they, they in turn hired</p> <p>20 NASCO to operate the lifeguards, to train them, to</p> <p>21 document the training and certify them. We, we</p> <p>22 brought in Haas &amp; Wilkinson (sic). We asked the</p> <p>23 insurance company to bring them in to audit the park</p> <p>24 to make sure that things were going to be reasonably</p> <p>25 done the way it needed to be done. Okay.</p>	<p>page 157</p> <p>1 one it was obvious the Huish group would be managing</p> <p>2 the water park. And I think John and Scott probably,</p> <p>3 you know, Shane was their pick. We all voted on it</p> <p>4 and agreed with it. John brought Richard Woodhouse</p> <p>5 from a previous park.</p> <p>6 Q. Let me reask the question a little bit</p> <p>7 differently.</p> <p>8 A. Okay.</p> <p>9 Q. How are the members of the management</p> <p>10 committee selected?</p> <p>11 A. The members of the management -- are you</p> <p>12 talking about the --</p> <p>13 Q. The seven members, how are they selected?</p> <p>14 A. The seven members?</p> <p>15 Q. Yes, sir.</p> <p>16 A. Well, I think, I think that was done,</p> <p>17 we -- they had three members from the Opheikens side</p> <p>18 and three members from the Huish side and then one to</p> <p>19 break a tie. It was mainly tied to making sure that</p> <p>20 the money wasn't disbursed out of the park, control</p> <p>21 the funds so that payments would get made to the bank.</p> <p>22 Q. Okay. Let me, let me ask an additional</p> <p>23 question. How did you select the members for your</p> <p>24 side of the management committee? How did you do</p> <p>25 that?</p>

<p style="text-align: right;">page 158</p> <p>1 A. Well, Slade is my son.</p> <p>2 Q. Right.</p> <p>3 A. Chet is my son.</p> <p>4 Q. Right.</p> <p>5 A. And Tom Welch is -- you know, had worked</p> <p>6 with us on the project.</p> <p>7 Q. Okay.</p> <p>8 Why did you pick Slade?</p> <p>9 A. Well, anybody who knows Slade will tell</p> <p>10 you that he is awesome.</p> <p>11 Q. Okay. And by awesome, you mean he is</p> <p>12 astute?</p> <p>13 A. He is conscious.</p> <p>14 Q. Okay.</p> <p>15 A. He cares.</p> <p>16 Q. Why did you pick Chet?</p> <p>17 A. No different. He is here and he is in --</p> <p>18 he's my son and he also does a good job.</p> <p>19 Q. Why did you pick Tom Welch?</p> <p>20 A. Same answer.</p> <p>21 Q. He is awesome?</p> <p>22 A. Yeah, he is.</p> <p>23 Q. Okay.</p> <p>24 When you were appointed as chairman of the</p> <p>25 management committee, was there a vote on that?</p>	<p style="text-align: right;">page 160</p> <p>1 A. Well, I don't know if that's really -- you</p> <p>2 know, I have a lot of years in business, but...</p> <p>3 Q. How old are you?</p> <p>4 A. I'm 73.</p> <p>5 Q. Okay. How many years have you been in</p> <p>6 business?</p> <p>7 A. Probably 45 years.</p> <p>8 Q. Okay.</p> <p>9 A. I think John Huish has had a lot of years</p> <p>10 in business, and particularly in this type of</p> <p>11 business.</p> <p>12 Q. What position does John Huish occupy with</p> <p>13 the company, with Cowabunga Bay?</p> <p>14 A. Well, he is, he's Scott and Shane's</p> <p>15 father. I don't know that he has a position; but he</p> <p>16 certainly is a mentor, somebody that we look to.</p> <p>17 Knows probably more than any of us about parks and</p> <p>18 stuff.</p> <p>19 Q. John Huish does not sit on the management</p> <p>20 committee, correct?</p> <p>21 A. That's correct.</p> <p>22 Q. He has no role in the operation of the</p> <p>23 park; is that correct?</p> <p>24 A. Yeah. That's fair.</p> <p>25 Q. Okay. He has no equity interest?</p>
<p style="text-align: right;">page 159</p> <p>1 A. I don't recall.</p> <p>2 Q. Okay. Was there, was there a</p> <p>3 memorialization of your selection as the chairman?</p> <p>4 A. I don't recall.</p> <p>5 Q. Was it your understanding that you were</p> <p>6 chairman because you had the greatest amount of risk</p> <p>7 at stake in the project as well as being the most</p> <p>8 experienced businessman?</p> <p>9 A. Well, I, I don't know that that discussion</p> <p>10 ever took place.</p> <p>11 Q. It was just assumed?</p> <p>12 A. Yeah, if anything.</p> <p>13 Q. Okay. You had the most skin in the game</p> <p>14 and you had the most experience, fair enough?</p> <p>15 A. Well, I certainly had the, the most money.</p> <p>16 But the Huish also had lots of money in the game.</p> <p>17 Q. But a lot -- but you had a lot more,</p> <p>18 right?</p> <p>19 A. I had more.</p> <p>20 Q. And you had the most experience in running</p> <p>21 this business?</p> <p>22 A. I have no experience in running a water</p> <p>23 park.</p> <p>24 Q. You had the most experience, business</p> <p>25 experience, fair to say?</p>	<p style="text-align: right;">page 161</p> <p>1 A. Not that I'm aware of.</p> <p>2 Q. So he is not even a passive investor, is</p> <p>3 he?</p> <p>4 A. That's probably true.</p> <p>5 Q. Okay. As chairman of the management</p> <p>6 committee, were other members of the management</p> <p>7 committee able to reach you by phone if they wanted to</p> <p>8 speak to you?</p> <p>9 A. Sure.</p> <p>10 Q. Were they able to reach you by an email</p> <p>11 address?</p> <p>12 A. Sure.</p> <p>13 Q. Do you have more than one email address?</p> <p>14 A. No.</p> <p>15 Q. Do you have more than one cell phone</p> <p>16 number?</p> <p>17 A. No.</p> <p>18 Q. Okay. As chairman of the management</p> <p>19 committee, were the other members entitled to rely on</p> <p>20 your business judgment and experience as a resource?</p> <p>21 A. Yes.</p> <p>22 Q. The management committee met on more than</p> <p>23 one occasion during the course of a particular year,</p> <p>24 did they not?</p> <p>25 A. Well, it probably depends on the year.</p>

<p style="text-align: right;">page 162</p> <p>1 Q. Is the answer yes to the question?</p> <p>2 A. Well --</p> <p>3 Q. Then we can boil it down from there.</p> <p>4 A. <b>You said on -- okay, repeat the question,</b></p> <p>5 <b>please.</b></p> <p>6 Q. Sure. Did the management committee ever</p> <p>7 meet on more than one occasion during the course of</p> <p>8 any one year?</p> <p>9 A. <b>Probably.</b></p> <p>10 Q. As I understand your earlier testimony,</p> <p>11 there was a decision made at some point to have one of</p> <p>12 the members of the management committee to conduct the</p> <p>13 day-to-day operations of the Cowabunga Bay park,</p> <p>14 correct?</p> <p>15 A. <b>Yes.</b></p> <p>16 Q. And who was that?</p> <p>17 A. <b>Shane Huish.</b></p> <p>18 Q. Okay. And when was, when was Shane Huish</p> <p>19 appointed to manage the park on a day-to-day basis as</p> <p>20 its general manager?</p> <p>21 A. <b>Pretty much from the time that the park</b></p> <p>22 <b>was -- that we were all going forward. Shane Huish</b></p> <p>23 <b>was the person that had been selected to be in that</b></p> <p>24 <b>position.</b></p> <p>25 Q. Who voted in favor of that decision?</p>	<p style="text-align: right;">page 164</p> <p>1 <b>experience.</b></p> <p>2 Q. Is the answer "yes"?</p> <p>3 A. <b>I believe that Shane had that experience.</b></p> <p>4 Q. Did you believe that that was important?</p> <p>5 A. <b>Yes.</b></p> <p>6 Q. Okay.</p> <p>7 A. <b>And I believe that he had that experience.</b></p> <p>8 Q. All right. Was there any sort of itemized</p> <p>9 listing or compilation of the skill set that you would</p> <p>10 want in a general manager that was ever compiled by</p> <p>11 the management committee before Shane Huish was</p> <p>12 appointed as general manager?</p> <p>13 A. <b>Not that I'm aware of.</b></p> <p>14 Q. What documentary evidence are you aware of</p> <p>15 that exists anywhere that details and memorializes the</p> <p>16 affirmative vote of all seven members of the</p> <p>17 management committee to make Shane Huish the GM?</p> <p>18 A. <b>I doubt if there is any.</b></p> <p>19 Q. And why is that?</p> <p>20 A. <b>We didn't conduct our meetings like that.</b></p> <p>21 Q. What do you mean when you say, "We didn't</p> <p>22 conduct our meetings like that"?</p> <p>23 A. <b>We, we had a meeting. We discussed. We</b></p> <p>24 <b>didn't really do these official votes. We weren't</b></p> <p>25 <b>running a corporation type minutes.</b></p>
<p style="text-align: right;">page 163</p> <p>1 A. <b>Everybody.</b></p> <p>2 Q. Okay. So there were dissents on that?</p> <p>3 A. <b>No.</b></p> <p>4 Q. All right. Did you vote in favor of it?</p> <p>5 A. <b>Yes.</b></p> <p>6 Q. Okay. Did all of your sons vote in favor</p> <p>7 of it?</p> <p>8 A. <b>Yes.</b></p> <p>9 Q. Did Mr. Welch vote in favor of it?</p> <p>10 A. <b>I think so.</b></p> <p>11 Q. Okay. Did you view that as to be an</p> <p>12 important position, that is, the position of general</p> <p>13 manager of the park?</p> <p>14 A. <b>Sure.</b></p> <p>15 Q. Did you believe it was important for that</p> <p>16 person to be an honest person?</p> <p>17 A. <b>Yes.</b></p> <p>18 Q. Did you believe that that person should</p> <p>19 have experience in aquatics management?</p> <p>20 A. <b>Well, Shane has been involved in that for</b></p> <p>21 <b>years.</b></p> <p>22 Q. The question is, did you believe that the</p> <p>23 person who occupied the person of general manager</p> <p>24 should have experience in aquatics management?</p> <p>25 A. <b>I believe that Shane did have that</b></p>	<p style="text-align: right;">page 165</p> <p>1 Q. Well, what minutes were kept?</p> <p>2 A. <b>I, I don't know. I'm not sure.</b></p> <p>3 Q. Who kept the minutes?</p> <p>4 A. <b>If there were any minutes, I would be</b></p> <p>5 <b>guessing as to who kept them, so I'm not sure.</b></p> <p>6 Q. Well, are you suggesting in any way that</p> <p>7 there were never any minutes kept of the management</p> <p>8 committee's actions?</p> <p>9 A. <b>I'm saying that I'm not sure.</b></p> <p>10 Q. Okay.</p> <p>11 Does R&amp;O regularly maintain minutes of its</p> <p>12 board of directors?</p> <p>13 A. <b>Yes. I believe we do.</b></p> <p>14 Q. You spoke earlier of the fact that the</p> <p>15 secretary was responsible for that, but the actual</p> <p>16 scrivener duties were assigned to a young lady who</p> <p>17 worked for you for a great number of years, correct?</p> <p>18 A. <b>Yes. Lori sits in on our meeting and</b></p> <p>19 <b>keeps notes.</b></p> <p>20 Q. Who is the scrivener, who keeps notes on</p> <p>21 the management committee meetings?</p> <p>22 A. <b>On R&amp;O?</b></p> <p>23 Q. No, sir. On Cowabunga Bay.</p> <p>24 A. <b>Who's the scrivener?</b></p> <p>25 Q. Yeah. Who keeps, who keeps the</p>

<p style="text-align: right;">page 166</p> <p>1 notation --</p> <p>2 <b>A. I've -- I don't --</b></p> <p>3 Q. Let me finish. You have to let me finish.</p> <p>4 <b>A. I'm sorry.</b></p> <p>5 Q. Not at all. It happens all the time.</p> <p>6 Who is it that is assigned the</p> <p>7 responsibility of keeping notes of actions taken,</p> <p>8 matters discussed, decisions made of the management</p> <p>9 committee during the course of its meetings?</p> <p>10 <b>A. I don't, I don't know that anybody has</b></p> <p>11 <b>been assigned to do that.</b></p> <p>12 Q. Okay. Do you know why?</p> <p>13 <b>A. Typically, we only have one meeting a year</b></p> <p>14 <b>and we go over everything and we make our decisions,</b></p> <p>15 <b>and...</b></p> <p>16 Q. Have you ever participated in any meetings</p> <p>17 of the management committee by telephone?</p> <p>18 <b>A. No.</b></p> <p>19 Q. Have you ever participated in any meetings</p> <p>20 by telephone of other members of the management</p> <p>21 committee with respect to operations?</p> <p>22 <b>A. I don't think so.</b></p> <p>23 Q. Would that be true for each year you have</p> <p>24 ever been involved as the, as the chairman of the</p> <p>25 management committee?</p>	<p style="text-align: right;">page 168</p> <p>1 <b>would say that the Huishes -- I mean, it was always</b></p> <p>2 <b>kind of understood amongst all of us that Shane Huish</b></p> <p>3 <b>would be in that position.</b></p> <p>4 Q. Okay. Did you or any of your side of the</p> <p>5 equation, any of the four, did you or any of the three</p> <p>6 people you appointed ever conduct a background</p> <p>7 investigation on Shane Huish?</p> <p>8 <b>A. I don't know. I didn't.</b></p> <p>9 Q. All right. Taking all the time you feel</p> <p>10 is necessary, please detail for me all of the</p> <p>11 information that was in your possession at the time</p> <p>12 that you voted affirmatively to have Shane Huish</p> <p>13 appointed as general manager.</p> <p>14 <b>A. You mean, for instance, his, what we --</b></p> <p>15 <b>his experience?</b></p> <p>16 Q. Yes.</p> <p>17 <b>A. Is that what you're talking about?</b></p> <p>18 Q. Yes.</p> <p>19 <b>A. Well --</b></p> <p>20 Q. Tell me all of the information that you</p> <p>21 had in your possession at the time that you voted</p> <p>22 affirmatively for his appointment as general manager</p> <p>23 as to what his qualifications and experience was.</p> <p>24 <b>A. Information in my possession.</b></p> <p>25 Q. Up here or on paper? You know, you told</p>
<p style="text-align: right;">page 167</p> <p>1 <b>A. Yes.</b></p> <p>2 Q. Okay. With respect to the management</p> <p>3 committee's appointment of Shane Huish as the general</p> <p>4 manager, the management committee not only has, as I</p> <p>5 think we've agreed earlier, the ability to, to hire</p> <p>6 employees or appoint employees to certain positions,</p> <p>7 but also has the right to terminate employees or</p> <p>8 terminate the position of an employee; is that</p> <p>9 correct?</p> <p>10 <b>A. No. We delegated that to the general</b></p> <p>11 <b>manager and they did all the hiring. We didn't do any</b></p> <p>12 <b>hiring other than those two gentlemen.</b></p> <p>13 Q. I don't think you understood the question.</p> <p>14 <b>A. Okay.</b></p> <p>15 Q. Mr. Huish was designated by the management</p> <p>16 committee to be a general manager, correct?</p> <p>17 <b>A. Well, okay, yeah.</b></p> <p>18 Q. All right. And the management committee</p> <p>19 retains the right to terminate him if it so desires,</p> <p>20 correct?</p> <p>21 <b>A. Yeah.</b></p> <p>22 Q. Okay. Who was it that nominated Shane</p> <p>23 Huish for the position of general manager of the park?</p> <p>24 <b>A. Well, I don't know that it really happened</b></p> <p>25 <b>in that form. I, I don't think that it did. But I</b></p>	<p style="text-align: right;">page 169</p> <p>1 me that there was no itemization or compilation of</p> <p>2 data points with respect to --</p> <p>3 <b>A. What did I know about it.</b></p> <p>4 Q. -- what the skill set was supposed to be.</p> <p>5 Do you remember that?</p> <p>6 <b>A. Yeah.</b></p> <p>7 Q. Okay. But, nevertheless, you had in mind</p> <p>8 he had a skill set that warranted him being appointed</p> <p>9 as general manager, correct?</p> <p>10 <b>A. Correct.</b></p> <p>11 Q. Okay. And my question is, what was that</p> <p>12 skill set that warranted your confidence in voting for</p> <p>13 him as general manager?</p> <p>14 <b>A. Well, Shane, Shane had a lot of experience</b></p> <p>15 <b>with water parks. He had --</b></p> <p>16 Q. Okay. Can I stop you right there.</p> <p>17 Tell me all of his experience that you</p> <p>18 were personally familiar with or otherwise made known</p> <p>19 to you of his experience at water parks.</p> <p>20 <b>A. He worked at in North Carolina. Well, he</b></p> <p>21 <b>worked for his dad for several years coming out of</b></p> <p>22 <b>school. He graduated from BYU --</b></p> <p>23 Q. Okay.</p> <p>24 <b>A. -- in these, this amusement park, what do</b></p> <p>25 <b>you call it, coming from a college degree, that kind</b></p>

<p style="text-align: right;">page 170</p> <p>1 of a degree. He worked for his dad for several years. 2 Then he went back to, I believe it was 3 North Carolina and worked with companies back there 4 with water parks. He was there for several years. 5 Let me think. 6 Then he went to -- gosh, I can't think of 7 their name, Six Flags. He was at Six Flags for I 8 think about three years. Then he came back and worked 9 in his family again for, I don't know, 10 or 12 years 10 it seems like, if my memory serves me right. They 11 developed the water park in Salt Lake City. And so he 12 was helping with that, that park. 13 They of course were in the midst of 14 operate or developing this park right here when, when 15 we became engaged with them. 16 Q. Have you now informed me as to all the 17 information that you had in your possession with 18 respect to Shane Huish's qualifications that compelled 19 you to vote for him as general manager of 20 Cowabunga Bay? 21 A. I believe so. 22 Q. Okay. So let's take them one by one. 23 Okay? 24 You said that he had worked for his dad. 25 Setting aside that for a second, because I think we</p>	<p style="text-align: right;">page 172</p> <p>1 were to put his resume, I'm sure you have it, in front 2 of me, it would tell you. 3 Q. Did you have a resume in front of you? 4 A. Yeah, I knew -- I had a resume or a copy 5 of one a long time ago about this big, I mean just 6 saying who he was. 7 But what we were really relying on was the 8 Huish family, they felt Shane was the right guy, and 9 we had no reason not to go along based on the 10 information that we had. 11 Q. Did your review of his resume support your 12 decision in that regard? 13 A. I think so. 14 Q. Okay. How many pages was his resume? 15 A. Oh, I don't, I don't remember. 16 Q. Okay. Where is your copy of his resume? 17 A. I, I have no idea. 18 Q. All right. Who is it that distributed his 19 resume to the members of the management committee? 20 A. I, I don't recall any of that. 21 Q. All right. Irrespective of that fact, you 22 relied on that resume; is that correct? 23 A. Well, that and word of mouth, I mean... 24 Q. But that resume was an important component 25 in making the decision to allow him to --</p>
<p style="text-align: right;">page 171</p> <p>1 will follow up on that, you said he worked in 2 North Carolina? 3 A. Yeah, that's my understanding. 4 Q. And for whom did he work for in 5 North Carolina? 6 A. Well, I, I don't remember the name of that 7 company. 8 Q. Okay. Detail for me all that he did for 9 that company. 10 A. Well, if I recall, I mean, we're talking 11 about a memory here that's probably five years old. 12 Q. Okay, tell me what you remember. 13 A. It seems to me like he was involved with 14 helping them with water, their water in their water 15 parks. At one point, I believe he was in charge of 16 two, two of the water parks that they were developing 17 back there. I may have confused that with Six Flags 18 to be honest with you. Anyway, that's what I 19 remember. 20 Q. Okay. You say you may have confused that 21 with Six Flags. In what fashion do you think you may 22 have confused that with Six Flags? 23 A. Well, he was doing similar things at 24 Six Flags, you know, working in one water park. That 25 might be where there was two. I don't recall. If you</p>	<p style="text-align: right;">page 173</p> <p>1 A. We, we made the decision collectively and 2 I felt good about it. 3 Q. And that, and his resume was an important 4 component in that regard, correct? 5 A. I suppose, yeah. 6 Q. Okay. Have you now told me all of the 7 information that was in your possession that supported 8 your position for Shane Huish to become the general 9 manager in the operation of the Cowabunga Bay park? 10 A. I believe so. 11 Q. Was anyone else considered to serve 12 besides Shane in that capacity? 13 A. I don't, I don't remember. 14 Q. Can you think of any? 15 A. No. 16 Q. Okay. Who conducts the performance review 17 of Mr. Shane Huish on an annual basis? 18 A. Well, I, I don't know if we do. 19 Q. Okay. As far as you know, you don't 20 conduct -- 21 A. Well, I think -- 22 Q. -- an annual review? 23 A. -- Slade and Scott would probably handle 24 that. 25 Q. My question is a little bit different. So</p>

<p style="text-align: right;">page 174</p> <p>1 let me ask it with a little bit more precision.  2 Could you please tell me whether or not  3 the management committee conducts an annual  4 performance review of Shane Huish's performance as  5 general manager of Cowabunga Bay park?  6 <b>A. As a committee?</b>  7 Q. That's the question.  8 <b>A. I don't think so.</b>  9 Q. Okay. And why not?  10 <b>A. I don't, I don't know. Never even thought</b>  11 <b>of it.</b>  12 Q. Okay.  13 Prior to the opening of the park, did the  14 management committee have to accomplish certain tasks  15 to facilitate the opening of the park?  16 MR. GORMLEY: Objection. Vague and  17 ambiguous.  18 Go ahead. You can answer.  19 <b>THE WITNESS: Well, as a construction</b>  20 <b>company, we had to get the occupancy permit and</b>  21 <b>then --</b>  22 BY MR. CAMPBELL:  23 Q. Okay. So the answer is "yes"?  24 <b>A. -- Shane and his group --</b>  25 Q. Let me rephrase the question.</p>	<p style="text-align: right;">page 176</p> <p>1 <b>A. The park, the park had to get those things</b>  2 <b>done.</b>  3 Q. Including licensing was one of the things  4 that the management committee --  5 <b>A. Yes.</b>  6 Q. -- had to do?  7 <b>A. Well, it's --</b>  8 Q. Including --  9 <b>A. It's not the management committee, it's</b>  10 <b>the part, it's the operations group --</b>  11 Q. Right. And --  12 <b>A. -- had to get those things done.</b>  13 Q. Right. And that's the management  14 committee, correct?  15 <b>A. No. That's Shane Huish and that group.</b>  16 <b>That's what they worked on while we were building the</b>  17 <b>park. You're saying like I was involved in that. I</b>  18 <b>was not involved in that. We were -- R&amp;O was over</b>  19 <b>building the building and we were doing those things</b>  20 <b>while they were getting ready to open the park.</b>  21 Q. You were on the management committee at  22 that time?  23 <b>A. I don't even know that.</b>  24 Q. Okay. So if you were on the management  25 committee pre-opening, okay, you were its chairman,</p>
<p style="text-align: right;">page 175</p> <p>1 MR. GORMLEY: He will rephrase it.  2 BY MR. CAMPBELL:  3 Q. Did the management committee have to  4 accomplish certain tasks before opening the park? The  5 answer to that question is either "yes" or "no."  6 <b>A. Well, I'm going to say no because I don't</b>  7 <b>know what they are.</b>  8 Q. Well, you just told me one, didn't you?  9 <b>A. Did I?</b>  10 Q. I think so.  11 <b>A. No, that was a construction company.</b>  12 Q. You had to get -- okay, let me rephrase  13 the question.  14 <b>A. Okay.</b>  15 Q. And, and allow me to suggest some topics  16 that they have to get you through this a little bit  17 quicker, because I'm not here --  18 <b>A. Okay.</b>  19 Q. -- to make your life difficult.  20 <b>A. Yeah.</b>  21 Q. Okay. You would agree with me that the  22 management committee had to accomplish certain tasks  23 to get the park open including licensing?  24 <b>A. Okay. Well, yes.</b>  25 Q. Staffing?</p>	<p style="text-align: right;">page 177</p> <p>1 correct?  2 <b>A. Yes.</b>  3 Q. And pre-opening, it was required that  4 licensing be obtained; is that correct?  5 <b>A. Yes, but I think that, again, that's</b>  6 <b>the -- I think it's the park -- and that's what I'm</b>  7 <b>going to call it, okay, because I don't know which</b>  8 <b>name is the right name -- has to get those things</b>  9 <b>done. I don't think the management committee is in</b>  10 <b>charge of that. We are in charge of hiring the people</b>  11 <b>to operate the park and that's part of their scope of</b>  12 <b>work.</b>  13 Q. Staffing had to be accomplished; is that  14 correct?  15 <b>A. Yes. And they did that also.</b>  16 Q. Budgeting had to be accomplished; is that  17 correct?  18 <b>A. Yes.</b>  19 Q. Okay. Was opening the park on a  20 particular date a matter of importance to the  21 management committee?  22 <b>A. Well, it was -- there was a lot of effort</b>  23 <b>put on by everybody to open the park on a certain day,</b>  24 <b>but it was never able to happen because of the slides.</b>  25 Q. Was the opening of the park on a</p>

<p style="text-align: right;">page 178</p> <p>1 particular assigned day important to the management 2 committee? 3 <b>A. Of course.</b> 4 Q. Okay. Were there a number of meetings 5 that were conducted by the management committee to 6 discuss concerns regarding opening the park on time? 7 <b>A. No. I think the meetings were the people 8 at the park that were doing the work trying to make it 9 happen.</b> 10 Q. You would agree with me that it was 11 incumbent upon Cowabunga Bay to abide by all 12 applicable safety codes, statutes, and ordinances; is 13 that correct? 14 <b>A. Yes.</b> 15 Q. Please detail for me all that you did to 16 ensure compliance with all statutory safety codes, 17 ordinances, rules, and regulations. 18 <b>A. That I did personally?</b> 19 Q. In your position as chairman of the 20 management committee. 21 <b>A. Well, again, the operations people at the 22 park were working with the health department, working 23 with the state. They were, you know, they were -- 24 whatever list they had, the things they needed to do 25 in order to open the park, they were working hard on</b></p>	<p style="text-align: right;">page 180</p> <p>1 Q. Thank you. 2 <b>A. -- have anything to do with that.</b> 3 Q. Do you recall participating in a 4 management meeting of January the 15th, 2014? 5 <b>A. Yeah, I think so.</b> 6 Q. And what was the purpose of that 7 management meeting that took place on January 15th, 8 2014? 9 <b>A. Well, I, I don't remember.</b> 10 Q. Okay. Was there an agenda prepared? 11 <b>A. Yes.</b> 12 Q. And where are the agendas of the meetings? 13 <b>A. Where are they?</b> 14 Q. Yeah. 15 <b>A. In our hand.</b> 16 Q. Where are they kept and maintained as 17 business records? 18 <b>A. I, I'm not sure.</b> 19 Q. Okay. But it's standard operating 20 procedure to have agendas, correct? 21 <b>A. Yes. They were generally -- one is 22 prepared for the meeting.</b> 23 Q. As far as you know, no notes or minutes or 24 the creation of any similar document or compilation of 25 events that took place at these management committee</p>
<p style="text-align: right;">page 179</p> <p>1 <b>to get them completed so they could open up.</b> 2 Q. Are you finished? 3 <b>A. Yeah.</b> 4 Q. Okay. Move to strike as nonresponsive. 5 MR. CAMPBELL: Would you kindly ask the 6 gentleman the question I asked. 7 MR. GORMLEY: I think it was responsive so 8 I'm objecting, but go ahead. 9 MR. CAMPBELL: Go ahead. 10 (Record read as follows:) 11 "Q. Please detail for me all that you 12 did to ensure compliance with all statutory 13 safety codes, ordinances, rules, and 14 regulations in your position as chairman of 15 the management committee." 16 <b>THE WITNESS: Stand on my answer.</b> 17 BY MR. CAMPBELL: 18 Q. Tell me all that you did personally as the 19 chairman. What did you do personally, sir? 20 <b>A. I, I didn't. I didn't have anything to do 21 with that on a day-by-day basis. That was handled by 22 the operations people at the park.</b> 23 Q. Tell me anything you did as chairman of 24 the management committee in that regard. 25 <b>A. I, I didn't do anything --</b></p>	<p style="text-align: right;">page 181</p> <p>1 meetings was ever created or maintained, is that -- 2 <b>A. I, I don't know. I'm not saying they were 3 and I'm not saying they weren't.</b> 4 Q. But as far as you know and sit here today, 5 you know of none? 6 <b>A. I don't know.</b> 7 Q. Okay. What was discussed at the 8 management meeting of January 15th, 2014? 9 MR. GORMLEY: Asked and answered. I 10 thought he just said he doesn't remember. 11 <b>THE WITNESS: I don't have any idea. I 12 don't, I don't recall.</b> 13 BY MR. CAMPBELL: 14 Q. Well, did it generally involve that you 15 were trying to ensure that your expectations were 16 being met in some regard with respect to what was to 17 occur at the water park including its opening? 18 <b>A. So 2014 would have been just before the 19 park would have opened. So, yeah -- right? So that's 20 safe to bet that we were talking about those things.</b> 21 Q. Okay. With respect to the creation of a 22 budget, in the operational aspect of Cowabunga Bay, 23 there are a number of different line items and sub 24 line items; is that correct? 25 <b>A. I suppose.</b></p>

<p style="text-align: right;">page 182</p> <p>1 Q. Okay. There is a labor line item, 2 correct? 3 <b>A. I don't know. I never looked at those</b> 4 <b>kind of details in a budget. The budget would have</b> 5 <b>been prepared by Scott or Scott's accountant, and they</b> 6 <b>would bring them in and we would go through them. But</b> 7 <b>I don't remember ever going down line item by line</b> 8 <b>item.</b> 9 <b>The meetings were more along the line of,</b> 10 <b>okay, here's, here's where we think we are at the end</b> 11 <b>of the year. We are okay. Hopefully there is enough</b> 12 <b>money left over, for instance, to add a canopy over</b> 13 <b>the top of the slide to get the lifeguards out of the</b> 14 <b>sun or some such thing.</b> 15 Q. Why was it? Why was it important to get 16 the lifeguards out of the sun? 17 <b>A. Well, because the sun is so hot.</b> 18 Q. Was it creating a, an operational problem 19 that the lifeguards didn't have adequate protection 20 from the sun? 21 <b>A. Well, if it's, if it's too hot, the sun,</b> 22 <b>yeah, of course.</b> 23 Q. And that in fact became a problem that was 24 chronic, was it not? 25 <b>A. You mean hot?</b></p>	<p style="text-align: right;">page 184</p> <p>1 correct? 2 <b>A. I don't know.</b> 3 Q. Okay. What would be the largest 4 operational component of labor? 5 <b>A. I don't know.</b> 6 Q. Under labor you would have maintenance, 7 correct? 8 <b>A. Yeah, probably.</b> 9 Q. You would have, you would have food and 10 beverage workers including, but not limited to, 11 bussers, servers, cooks, correct? 12 <b>A. A lot of people, yeah.</b> 13 Q. Yes, okay. 14 In addition, you would have clerical 15 personnel with respect to ticket sales and that sort 16 of thing, taking money from people at the park for 17 entrance? 18 <b>A. Yeah.</b> 19 Q. Correct? 20 <b>A. Uh-huh.</b> 21 Q. You would also have cabana-related 22 services and employees who handed out towels or helped 23 with the lockers, correct? 24 <b>A. Yeah, probably.</b> 25 Q. And the largest line item for labor among</p>
<p style="text-align: right;">page 183</p> <p>1 Q. No. Lifeguard, lifeguards complaining to 2 the point or otherwise simply deciding that they 3 weren't going to work any longer or not show up for 4 work, correct? 5 <b>A. I never ever heard anything like that.</b> 6 Q. You didn't? 7 <b>A. I didn't.</b> 8 Q. Okay. With respect to operational 9 expenses, you know what operational expenses are? 10 <b>A. Sure.</b> 11 Q. All right. What was the biggest component 12 of operational expenses in the budget? 13 <b>A. I honestly don't know. I didn't pay</b> 14 <b>that -- you know, I wasn't -- if the park was doing</b> 15 <b>well, and, and whatever they needed, it was fine with</b> 16 <b>me for them to -- for safety, anything they wanted to</b> 17 <b>get, it was fine with me.</b> 18 Q. Could you detail for me in your experience 19 what you would opine as what was likely to be the 20 largest operational expense of Cowabunga Bay. 21 <b>A. Well, I suppose labor --</b> 22 Q. Okay. 23 <b>A. -- is the one you're looking for, I think.</b> 24 Q. I'm not -- I'm just looking for what 25 you're telling me. So labor. It would be labor,</p>	<p style="text-align: right;">page 185</p> <p>1 those categories was lifeguards, correct? 2 <b>A. I don't know that.</b> 3 Q. Is there a reason why you don't know that? 4 <b>A. I've already told you, I didn't really --</b> 5 <b>I didn't pay a lot of attention to the detail. We are</b> 6 <b>talking one meeting. We are trying to get a park</b> 7 <b>open.</b> 8 Q. I'm not talking about just one meeting, 9 sir, I'm talking about multiple meetings that I'll 10 take you through here in a minute. 11 <b>A. Okay. I, I didn't go through all that</b> 12 <b>detail or I don't remember what the detail was.</b> 13 Q. You were aware, were you not, during the 14 course of a meeting that took place on March 5th, 2014 15 that a lifeguard plan had to be submitted to the 16 health department before the park could open, correct? 17 <b>A. Okay. Could you repeat that, please.</b> 18 Q. Sure. You were aware, at least as of a 19 management committee meeting that took place on 20 March 15th (sic), 2014, that a lifeguard plan had to 21 be created and submitted at least two weeks before 22 opening? 23 <b>A. I was, I was not aware of that at that</b> 24 <b>time. That would have been an operational thing</b> 25 <b>again. What I --</b></p>

<p style="text-align: right;">page 186</p> <p>1 Q. You were --</p> <p>2 A. What I probably was aware of, our people</p> <p>3 at R&amp;O were working with the health department to do</p> <p>4 whatever we needed to do so that they could move</p> <p>5 forward and get the permits that they needed at the</p> <p>6 water park.</p> <p>7 Q. You were aware that one of those permits</p> <p>8 was a permit that was granted by the health district</p> <p>9 approving a lifeguard plan, correct?</p> <p>10 A. No, I was not aware of that.</p> <p>11 Now, you're talking before opening,</p> <p>12 correct?</p> <p>13 Q. That's the question.</p> <p>14 A. Okay.</p> <p>15 Q. Would you agree that lifeguards are the</p> <p>16 single-most important aspect of providing safety for</p> <p>17 the customers, patrons of Cowabunga Bay?</p> <p>18 A. Yeah, I agree, they are very important.</p> <p>19 Q. Do you agree that they are the most single</p> <p>20 important component of safety?</p> <p>21 A. I, I don't know where to go with that.</p> <p>22 They are very important.</p> <p>23 Q. Do you know of any component of safety</p> <p>24 that is more important than that?</p> <p>25 A. I don't know that one piece of safety is</p>	<p style="text-align: right;">page 188</p> <p>1 A. For the people working for me?</p> <p>2 Q. Yes.</p> <p>3 MR. GORMLEY: I think the question is</p> <p>4 vague and ambiguous.</p> <p>5 BY MR. CAMPBELL:</p> <p>6 Q. Go ahead, please, sir.</p> <p>7 A. I just don't know how to answer that.</p> <p>8 Q. You can't answer that question "yes" or</p> <p>9 "no"?</p> <p>10 A. No.</p> <p>11 Q. Is there a reason why you can't?</p> <p>12 A. I, I just don't know the answer, honestly.</p> <p>13 Q. Is there a reason you don't know the</p> <p>14 answer to that?</p> <p>15 A. No, it's not -- I don't have a convenient.</p> <p>16 Q. You don't have a convenient what?</p> <p>17 A. I don't have a convenient memory. And</p> <p>18 I'm, I'm running out of juice, I guess.</p> <p>19 Q. When did you first become aware that the</p> <p>20 lifeguard plan that had been submitted to the, to the</p> <p>21 health district had, had been rejected?</p> <p>22 A. I don't think I ever knew that the</p> <p>23 lifeguard plan had been rejected.</p> <p>24 Q. Mr. Opheikens, isn't it true that you</p> <p>25 attended a meeting on or about April the 10th, 2014</p>
<p style="text-align: right;">page 187</p> <p>1 more important than another. Safety is safety.</p> <p>2 Q. Okay. Tell me what the other components</p> <p>3 of safety are.</p> <p>4 A. Whatever, whatever they are. I mean,</p> <p>5 walking through the parking lot and get run over by a</p> <p>6 car, stepping on glass, running across the concrete.</p> <p>7 Of course the safeguards -- I mean the, the lifeguards</p> <p>8 are important.</p> <p>9 Q. Do you agree with me that their most --</p> <p>10 that they are first line of defense in providing</p> <p>11 safety to patrons of the park operations?</p> <p>12 MR. GORMLEY: I'm going to object. Asked</p> <p>13 and answered three times.</p> <p>14 BY MR. CAMPBELL:</p> <p>15 Q. Go ahead, sir.</p> <p>16 A. Well, I really think the first line of</p> <p>17 defense are the folks that, you know, the guardians.</p> <p>18 Q. I'm not asking about anyone at all --</p> <p>19 A. Yeah.</p> <p>20 Q. -- except, okay, the folks that work for</p> <p>21 you. Okay?</p> <p>22 MR. GORMLEY: That wasn't the question.</p> <p>23 BY MR. CAMPBELL:</p> <p>24 Q. Do you agree that they are the first line</p> <p>25 of defense, the lifeguards?</p>	<p style="text-align: right;">page 189</p> <p>1 where that was disclosed to you?</p> <p>2 A. I, I don't recall. Why would that...</p> <p>3 MR. GORMLEY: Did you finish your answer?</p> <p>4 THE WITNESS: Yeah.</p> <p>5 BY MR. CAMPBELL:</p> <p>6 Q. Did you?</p> <p>7 A. Yes.</p> <p>8 Q. Was there something you wanted to add?</p> <p>9 A. No.</p> <p>10 Q. Let's talk about another meeting then,</p> <p>11 okay. How about the meeting of, the management</p> <p>12 committee meeting on May 1st and 2nd. Do you recall</p> <p>13 what was discussed at that --</p> <p>14 MR. GORMLEY: What year?</p> <p>15 MR. CAMPBELL: Again, we're still in the</p> <p>16 same year, 2014.</p> <p>17 MR. GORMLEY: Thank you.</p> <p>18 THE WITNESS: So you're saying we had a</p> <p>19 management meeting in April and we had another</p> <p>20 management meeting in --</p> <p>21 (Cell phone interruption.)</p> <p>22 MR. WELCH: Sorry.</p> <p>23 THE WITNESS: Okay. So you're saying we</p> <p>24 had a management meeting in April and we had a</p> <p>25 management meeting in May? A management meeting?</p>

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1 BY MR. CAMPBELL:  
2 Q. Yes.  
3 A. **Well, I don't recall.**  
4 Q. Okay. Do you recall learning at or about  
5 the management meeting of May 1st or 2nd that Shane's  
6 liquor application had been denied?  
7 A. **No, I don't recall.**  
8 Q. All right. When was it that you first  
9 became aware of the fact that Shane's liquor  
10 application had been denied?  
11 A. **I, I don't think, I don't think that was**  
12 **ever a subject that I was involved in. Again, Shane**  
13 **was operating the park and trying to get the things**  
14 **done that he was trying to accomplish.**  
15 Q. Okay. I want to be absolutely fair to  
16 you. Okay, Mr. Opheikens?  
17 A. **All right.**  
18 Q. When was the -- is it your testimony that  
19 at any time before the park was open you were not  
20 aware of the fact that Shane was not able to be  
21 licensed for the sale of liquor at the park?  
22 A. **I, I just don't recall.**  
23 Q. Were you aware that Shane had a criminal  
24 background?  
25 A. **No.**

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1 Q. When was the first time you ever learned  
2 that he had a criminal background?  
3 A. **I, I've never heard he had a criminal**  
4 **background.**  
5 Q. When you say you never heard, you mean  
6 that you never learned by any source that he had a  
7 criminal background?  
8 A. **I, I have no knowledge that Shane has a**  
9 **criminal background.**  
10 Q. And more specifically, you never learned  
11 from any source prior to the opening of the park that  
12 his license had been denied because he lied about not  
13 having an arrest record when in truth and in fact he  
14 did have an arrest record?  
15 A. **Oh, I think I did hear something about**  
16 **that when he was a kid or something like that. Is**  
17 **that what you're talking about?**  
18 Q. I'm asking very straightforward direct  
19 questions.  
20 A. **And I'm trying, and I'm trying to answer**  
21 **your questions.**  
22 Q. Were you aware that he had been arrested  
23 on three separate occasions?  
24 A. **No, I don't recall. I don't remember**  
25 **hearing that.**

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1 Q. Are you, are you now telling me that you  
2 were in fact informed that he had an arrest record at  
3 some point?  
4 A. **Well, I just don't, I just don't recall**  
5 **what it is that I knew. I don't think I ever really**  
6 **knew that Shane had an arrest record at all.**  
7 **Honestly, I still question that he does. So you're**  
8 **saying when he was a kid?**  
9 Q. I think you've answered the question. I'm  
10 going to move on.  
11 Were you aware that a revised lifeguard  
12 plan could not be completed without the management  
13 committee's approval because of the impact it had on  
14 the budget?  
15 A. **You're saying that we turned down a**  
16 **revised lifeguard plan over money?**  
17 MR. CAMPBELL: Could you repeat the  
18 question for the gentleman.  
19 (Record read as follows:)  
20 "Q. Were you aware that a revised  
21 lifeguard plan could not be completed without  
22 the management committee's approval because  
23 of the impact it had on the budget?"  
24 MR. GORMLEY: Objection. Assumes facts  
25 not in evidence.

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1 **THE WITNESS: I have no knowledge of that.**  
2 BY MR. CAMPBELL:  
3 Q. I believe you earlier told me that the  
4 purpose of the management committee generally was to  
5 exercise oversight over operations, but that  
6 day-to-day supervision in that regard was the  
7 responsibility of Mr. Huish, correct?  
8 A. **No, I -- I'm sorry. Try that again.**  
9 Q. Sure. As I understand your earlier  
10 testimony, you said that the management committee had,  
11 had the ability to exercise oversight as to the  
12 operations, but it was Mr. Shane Huish who had the  
13 day-to-day responsibilities --  
14 A. **Yes.**  
15 Q. -- to do that?  
16 A. **We delegated that to him as, as the**  
17 **manager of the park and the people that worked under**  
18 **him. It's not a lot different than a stockholder in**  
19 **any other corporation. Somebody has to do the work.**  
20 THE VIDEOGRAPHER: Pardon the  
21 interruption.  
22 Mr. Opheikens, when you play with the  
23 cord, it's really loud. I can hear it.  
24 **THE WITNESS: I'm sorry?**  
25 THE VIDEOGRAPHER: Playing with the cord,

<p style="text-align: right;">page 194</p> <p>1 it's really loud.</p> <p>2 <b>THE WITNESS: I'm sorry.</b></p> <p>3 <b>THE VIDEOGRAPHER: Thank you, sir.</b></p> <p>4 <b>BY MR. CAMPBELL:</b></p> <p>5 Q. You were not a stockholder, were you?</p> <p>6 <b>A. In Cowabunga Bay?</b></p> <p>7 Q. Correct.</p> <p>8 <b>A. Well, I'm an -- I have an interest in the</b></p> <p>9 <b>LLC.</b></p> <p>10 Q. You are a member of the LLC?</p> <p>11 <b>A. Okay, yes.</b></p> <p>12 Q. And not only are you a member of the LLC,</p> <p>13 you were a managing member of Cowabunga Bay, correct?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. You were the chairman of its management</p> <p>16 committee, correct?</p> <p>17 <b>A. Yes.</b></p> <p>18 Q. So you were not a mere shareholder, were</p> <p>19 you?</p> <p>20 <b>A. Oh, I see what you're saying.</b></p> <p>21 Q. Right?</p> <p>22 <b>A. Right.</b></p> <p>23 Q. You were not a passive investor, correct?</p> <p>24 <b>A. Well, I think you know what I'm trying to</b></p> <p>25 <b>say, that we delegated -- the responsibility of</b></p>	<p style="text-align: right;">page 196</p> <p>1 <b>A. Okay. I understand where you're trying to</b></p> <p>2 <b>go.</b></p> <p>3 Q. You previously even agreed with me on</p> <p>4 that, correct?</p> <p>5 <b>A. I don't know.</b></p> <p>6 Q. You would agree with me now, you are not a</p> <p>7 passive investor, correct?</p> <p>8 <b>A. Okay.</b></p> <p>9 Q. Okay.</p> <p>10 <b>MR. GORMLEY: Do you want to take a break?</b></p> <p>11 <b>How you doing?</b></p> <p>12 <b>THE WITNESS: I need to -- I need a break.</b></p> <p>13 <b>MR. CAMPBELL: Sure. How long would you</b></p> <p>14 <b>like to take?</b></p> <p>15 <b>THE WITNESS: Well, whatever.</b></p> <p>16 <b>THE VIDEOGRAPHER: The time is</b></p> <p>17 <b>approximately 2:52 p.m. We are going off the record.</b></p> <p>18 <b>(Recessed from 2:52 p.m. to 3:06 p.m.)</b></p> <p>19 <b>THE VIDEOGRAPHER: The time is</b></p> <p>20 <b>approximately 3:06 p.m. We are back on the record.</b></p> <p>21 <b>MR. CAMPBELL: And how much testimony time</b></p> <p>22 <b>have we consumed thus far?</b></p> <p>23 <b>THE VIDEOGRAPHER:</b></p> <p>24 <b>THE WITNESS: 3 hours, 45 minutes, and</b></p> <p>25 <b>34 seconds.</b></p>
<p style="text-align: right;">page 195</p> <p>1 <b>operating that park was delegated to Shane and Richard</b></p> <p>2 <b>Woodhouse. And they brought in these other people</b></p> <p>3 <b>to -- we had to -- NASCO to keep track of all these</b></p> <p>4 <b>lifeguards and train them and certify them and so</b></p> <p>5 <b>forth and so on. We brought in audits.</b></p> <p>6 <b>I mean, we did, I think, everything</b></p> <p>7 <b>reasonably possible to run a proper park or have a</b></p> <p>8 <b>proper park run. What I'm saying to you is I wasn't</b></p> <p>9 <b>there on a day-to-day basis operating the park.</b></p> <p>10 Q. What's the answer to my question?</p> <p>11 <b>MR. GORMLEY: Objection. I think he</b></p> <p>12 <b>answered it.</b></p> <p>13 <b>BY MR. CAMPBELL:</b></p> <p>14 Q. What was the question I asked of you?</p> <p>15 <b>A. I don't -- I guess I don't know.</b></p> <p>16 Q. You were not a passive investor, correct?</p> <p>17 <b>A. Well, I don't even know how to answer that</b></p> <p>18 <b>question.</b></p> <p>19 Q. You knew how to answer it with respect to</p> <p>20 other individuals who invested, did you not?</p> <p>21 <b>A. Well, I'm, I'm an investor.</b></p> <p>22 Q. But you're not a passive investor, that's</p> <p>23 the point. You compared yourself to a stockholder.</p> <p>24 <b>A. Okay.</b></p> <p>25 Q. You are not a passive investor.</p>	<p style="text-align: right;">page 197</p> <p>1 <b>BY MR. CAMPBELL:</b></p> <p>2 Q. During the break you had opportunity to</p> <p>3 speak to your counsel; is that correct?</p> <p>4 <b>A. Yeah.</b></p> <p>5 Q. Okay. Detail for me all that you said to</p> <p>6 him and all that he said to you during those</p> <p>7 conversations.</p> <p>8 <b>MR. GORMLEY: I'm going to object. There</b></p> <p>9 <b>was no question pending. And, and so I'm objecting to</b></p> <p>10 <b>anything that was said.</b></p> <p>11 <b>MR. CAMPBELL: Your objection is noted.</b></p> <p>12 <b>MR. GORMLEY: You can go ahead and answer.</b></p> <p>13 <b>BY MR. CAMPBELL:</b></p> <p>14 Q. Detail for me all that he said to you and</p> <p>15 all you said to him outside those doors.</p> <p>16 <b>A. Well, I told him that I was really running</b></p> <p>17 <b>out of energy fast, and I'm not sure I can make it</b></p> <p>18 <b>through the rest of the day.</b></p> <p>19 <b>I was surprised I didn't know of these</b></p> <p>20 <b>meetings that you talked about. I just don't recall</b></p> <p>21 <b>them at all.</b></p> <p>22 <b>And I was surprised when you talked about</b></p> <p>23 <b>the, this records of Shane Huish. I wasn't aware of</b></p> <p>24 <b>any of that.</b></p> <p>25 <b>I think mostly what we talked about is I'm</b></p>

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1 MR. CAMPBELL: Well, can you have someone  
2 in your stead? I mean, our -- it's day to day until  
3 completed. I'm accommodating the witness.  
4 MR. GORMLEY: I appreciate that.  
5 MR. CAMPBELL: So if you could get someone  
6 from your firm.  
7 MR. GORMLEY: All I'm saying is I have a  
8 mediation on Monday.  
9 MR. CAMPBELL: That's okay. If you can  
10 get somebody from your firm to --  
11 MR. GORMLEY: I have to check to see if  
12 Max or somebody else can sit in.  
13 MR. CAMPBELL: Yeah. I mean, you got  
14 smart guys over there. Get Cannon's butt over here.  
15 **THE WITNESS: Thank you.**  
16 MR. CAMPBELL: Absolutely.  
17 MR. GORMLEY: Are we off the record?  
18 THE VIDEOGRAPHER: This concludes Volume 1  
19 of the videotaped deposition of Orluff Opheikens on  
20 May 4th, 2018.  
21 The original the media from today's  
22 testimony will remain in the custody of Las Vegas  
23 Legal Video. The time is approximately 3:10 p.m. We  
24 are going off the record.  
25 (Whereupon, the deposition adjourned at 3:11 p.m.)

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[illegible]

<div>1 CERTIFICATE OF REPORTER</div> <div>2</div> <div>3 STATE OF NEVADA )</div> <div>4 ) ss</div> <div>5 COUNTY OF CLARK )</div> <div>6 I Denise R. Kelly, a Certified court</div> <div>7 Reporter, duly licensed by the State of Nevada do</div> <div>8 hereby certify:</div> <div>9 That I reported the deposition of</div> <div>10 ORLUFF OPHEIKENS, commencing on Friday, May 4, 2018,</div> <div>11 at the hour of 9:32 a.m.</div> <div>12 That prior to being deposed, the deponent</div> <div>13 was duly sworn by me to testify to the truth;</div> <div>14 That I thereafter transcribed my said</div> <div>15 stenographic notes into written form;</div> <div>16 That the typewritten transcript is a</div> <div>17 complete, true, and accurate transcription of my said</div> <div>18 stenographic notes;</div> <div>19 I further certify that pursuant to NRCP</div> <div>20 Rule 30(e)(1) that the signature of the deponent:</div> <div>21 _X_ was requested by the deponent or a</div> <div>22 party before the completion of the deposition;</div> <div>23 __ was not requested by the deponent or a</div> <div>24 party before the completion of the deposition;</div> <div>25 I further certify that I am not a relative</div>	<div>page 202</div>
<div>1 or employee of counsel or of any of the parties</div> <div>2 involved in the proceeding, nor a person financially</div> <div>3 interested in the proceeding.</div> <div>4 IN WITNESS WHEREOF, I have set my hand in my</div> <div>5 office in the County of Clark, State of Nevada, this</div> <div>6 12th day of May, 2018.</div> <div>7</div> <div>8</div> <div>9</div> <div>10</div> <div>11</div> <div>12</div> <div>13 _____</div> <div>14 Denise R. Kelly</div> <div>15 CCR #252, RPR</div> <div>16</div> <div>17</div> <div>18</div> <div>19</div> <div>20</div> <div>21</div> <div>22</div> <div>23</div> <div>24</div> <div>25</div>	<div>page 203</div>

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Gardner vs Henderson Water Park, LLC, et al.

Videotaped Deposition of  
**ORLUFF OPHEIKENS, VOL. 2**

*May 08, 2018*



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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN  
GARDNER, on behalf of minor  
child, LELAND GARDNER,

Plaintiffs,

vs.

CASE NO.  
A-15-722259-C  
VOLUME 2

HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK, a  
Nevada limited liability company;  
WEST COAST WATER PARKS, LLC, a  
Nevada limited liability company;  
DOUBLE OTT WATER HOLDINGS, LLC,  
a Utah limited liability company;  
ORLUFF OPHEIKENS, an individual;  
SLADE OPHEIKENS, an individual;  
CHET OPHEIKENS, an individual;

///

VIDEOTAPED DEPOSITION OF ORLUFF OPHEIKENS

Taken at the offices of Campbell & Williams

on Tuesday, May 8, 2018

at 9:29 a.m.

at 700 South Seventh Street  
Las Vegas, Nevada

Reported by: Denise R. Kelly, CCR #252, RPR

<p>1 SHANE HUIISH, an individual; SCOTT 2 HUIISH, an individual; CRAIG HUIISH, 3 an individual; TOM WELCH, an 4 individual; DOES I through X, 5 inclusive; ROE Corporations I 6 through X, inclusive; and ROE 7 Limited Liability Company I 8 through X, inclusive, 9 10 Defendants. 11 _____/ 12 AND ALL RELATED CLAIMS 13 _____/ 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>page 205</p> <p>1 APPEARANCES (CONT'D): 2 For Defendants Scott Huish and Craig Huish: 3 KIMBERLY BEAL, ESQ. 4 ROGERS, MASTRANGELO, CARVALHO &amp; MITCHELL 5 700 South Third Street 6 Las Vegas, Nevada 89101 7 702.383.3400 8 kbeal@rmcmlaw.com 9 10 Also present: 11 12 JOSEPH CAMP, VIDEOGRAPHER 13 LAS VEGAS LEGAL VIDEO 14 SLADE OPHEIKENS 15 SCOTT HUIISH 16 17 * * * * * 18 19 INDEX 20 21 WITNESS PAGE 22 ORLUFF OPHEIKENS 23 Examination by Mr. Campbell 7 24 Continued Examination by Mr. Campbell 211 25 26 INFORMATION TO BE SUPPLIED 27 None 28 29 NO ANSWER PROVIDED BY THE DEPONENT 30 Page 44 31 Page 83 32 Page 211 33 Page 322 34 35</p> <p>page 207</p>
<p>1 APPEARANCES: 2 For the Plaintiffs: 3 DONALD J. CAMPBELL, ESQ. 4 SAMUEL R. MIRKOVICH, ESQ. 5 PHILIP R. ERWIN, ESQ. 6 GARRETT LOGAN, LAW CLERK 7 CAMPBELL &amp; WILLIAMS 8 700 South Seventh Street 9 Las Vegas, Nevada 89101 10 702.382.5222 11 djc@cwlawlv.com 12 srm@cwlawlv.com 13 pre@cwlawlv.com 14 For Defendant Henderson Water Park: 15 VINCENT M. GODINHO, ESQ. 16 THORNDAL, ARMSTRONG, DELK, BALKENBUSH &amp; EISINGER 17 1100 East Bridger Avenue 18 Las Vegas, Nevada 89101 19 702.366.0622 20 vmg@thorndal.com 21 22 For Defendants Double Ott and the Opheikens 23 24 JOHN E. GORMLEY, ESQ. 25 OLSON, CANNON, GORMLEY, ANGULO &amp; STOBERSKI 9950 West Cheyenne Avenue Las Vegas, Nevada 89129 702.383 0701 jgormley@ocgas.com For Defendant Shane Huish: WALTER F. FICK, ESQ. HALL, JAFFE &amp; CLAYTON, LLP 7425 Peak Drive Las Vegas, Nevada 89128 702.316.4111 wfick@lawhjc.com /// /// ///</p>	<p>page 206</p> <p>1 EXHIBITS 2 (Exhibit Nos. 1 through 38 were marked 3 in prior depositions.) 4 5 DESCRIPTION PAGE 6 Exhibit 39 - Copies of Photographs of 7 Ribbon Cutting at Cowabunga 8 Bay with identifications 9 of people in the photos by 10 Orluff Opheikens 261 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p> <p>page 208</p>

<p style="text-align: right;">page 209</p> <p>1 LAS VEGAS, NEVADA, TUESDAY, MAY 8, 2018, 2 9:29 A.M. 3 * * * * * 4 THE VIDEOGRAPHER: Good morning. Today is 5 May 8th, 2018. This begins Volume 2 of the videotaped 6 deposition of Orluff Opheikens. The time is 7 approximately 9:29 a.m. 8 My name is Joseph Camp, court videographer 9 of Las Vegas Legal Video. And your court reporter is 10 Denise Kelly of Rocket Reporters. 11 We are located at Campbell &amp; Williams, 12 700 South Seventh Street, Las Vegas, Nevada 89101. 13 This is District Court, Clark County, 14 Nevada, Case No. A-15-722259, entitled Peter Gardner 15 and Christian Gardner, individually and on behalf of a 16 minor child, Leland Gardner, plaintiffs, versus 17 Henderson Water Park, LLC, doing business as 18 Cowabunga Bay Water Park, a Nevada limited liability 19 company, et al., defendants, and all related matters. 20 Will counsel please state your appearances 21 for the record and the court reporter will administer 22 the oath. 23 MR. CAMPBELL: Donald Jude Campbell, 24 Campbell &amp; Williams, appearing on behalf of 25 plaintiffs.</p>	<p style="text-align: right;">page 211</p> <p>1 ORLUFF OPHEIKENS, 2 having been first duly sworn, was 3 examined and testified as follows: 4 5 CONTINUED EXAMINATION 6 BY MR. CAMPBELL: 7 Q. Good morning, Mr. Opheikens. 8 A. <b>Good morning.</b> 9 Q. How are you, sir? 10 Please tell me all that you did between 11 Friday and today to prepare for this deposition. 12 A. <b>A lot of sleeping. I did have a meeting</b> 13 <b>with John Sunday for about an hour and a half or so.</b> 14 <b>That was pretty much it.</b> 15 Q. Okay. Tell me all that was discussed in 16 that meeting with Mr. Gormley in that hour and a half. 17 (No answer provided by deponent.) 18 MR. GORMLEY: I would object and instruct 19 you not to answer that question. 20 MR. CAMPBELL: All right. Under Coyote 21 Springs, I'm entitled to that information. You asked 22 for a recess. The recess was granted to you. And 23 accordingly, anything that occurs during that, that 24 recess is subject to being discovered by us in these 25 proceedings.</p>
<p style="text-align: right;">page 210</p> <p>1 MR. MIRKOVICH: Samuel Mirkovich, 2 Campbell &amp; Williams, appearing on behalf of the 3 plaintiffs. 4 MR. ERWIN: Phil Erwin, Campbell &amp; 5 Williams, appearing on behalf of the plaintiffs. 6 MR. LOGAN: Garrett Logan, Campbell &amp; 7 Williams, on behalf of the plaintiffs. 8 MR. FICK: Walter Fick, Hall Jaffe &amp; 9 Clayton, on behalf of Shane Huish. 10 MS. BEAL: Kimberly Beal, Rogers 11 Masterangelo, on behalf of defendant Scott Huish. 12 MR. OPHEINKENS: Slade Opheikens. 13 MR. GORMLEY: John Gormley, Olson Cannon &amp; 14 Gormley, on behalf of Double Ott and the Opheikens. 15 MR. CAMPBELL: There is no appearance by 16 the Thorndahl firm. We have waited now 30 minutes. 17 We called them, talked to them, they said that they 18 did not have this on calendar or it was otherwise 19 inappropriately removed. We told them that we are 20 proceeding, but we would wait until 9:30. 21 That time has expired, and accordingly we 22 are going to proceed. 23 Could you swear in the witness once again, 24 please, Ms. Kelly. 25 ///</p>	<p style="text-align: right;">page 212</p> <p>1 MR. GORMLEY: No case law says that in 2 Nevada. I instruct him not to answer. 3 MR. CAMPBELL: Okay. Well, the case law 4 is pretty clear on it, it's Coyote Springs, and -- 5 MR. GORMLEY: I know the case. 6 MR. CAMPBELL: You can direct him not to 7 and we will file our motion to compel. 8 MR. GORMLEY: Okay. 9 BY MR. CAMPBELL: 10 Q. Did you review any documents? 11 A. <b>No. Not, not that I can think of.</b> 12 Q. Were any documents read to you? 13 A. <b>No. We just discussed. I mean, as much</b> 14 <b>as anything, they thought I did an okay, you know, I</b> 15 <b>was doing okay. I'm sorry I was crashed and burned.</b> 16 <b>I was so tired I could hardly function. I appreciate</b> 17 <b>that you let me have some time off.</b> 18 Q. My pleasure. My question, though, is 19 whether or not any documents were read to you or 20 portions of documents read to you. 21 A. <b>I don't think so.</b> 22 Q. Is your testimony that you did not review 23 any documents during the period of time that you were 24 preparing once again for your deposition in this 25 matter during the course of the recess that was</p>

<p style="text-align: right;">page 213</p> <p>1 granted at your request?</p> <p>2 <b>A. Yeah, the only thing I did was sit and</b></p> <p>3 <b>talk.</b></p> <p>4 MR. GORMLEY: Let me just check the</p> <p>5 record. I advised Mr. Campbell that the client was</p> <p>6 very tired and could have difficulty going on.</p> <p>7 Mr. Campbell asked the client whether,</p> <p>8 Mr. Opheikens, whether or not he could continue a</p> <p>9 little further. He said he could. And Mr. Campbell</p> <p>10 graciously, because of the circumstances, said we will</p> <p>11 adjourn the deposition.</p> <p>12 So, as opposed to me adjourning a</p> <p>13 deposition or walking out. I think it seemed to be</p> <p>14 mutually agreed upon between the parties, I think</p> <p>15 generally is a fair statement of what took place.</p> <p>16 MR. CAMPBELL: I recognize that everything</p> <p>17 is on the record, and I'm not going to engage in a</p> <p>18 debate that is clearly reflected in the record.</p> <p>19 (Mr. Scott Huish enters the proceedings.)</p> <p>20 BY MR. CAMPBELL:</p> <p>21 Q. So, what was it that you viewed before you</p> <p>22 came to your deposition for the first time on Friday?</p> <p>23 <b>A. Well, okay, there was some documents to do</b></p> <p>24 <b>with Haas &amp; Wilkerson. There was a letter from Morton</b></p> <p>25 <b>Insurance.</b></p>	<p style="text-align: right;">page 215</p> <p>1 different, Mr. Opheikens. Who was this document by</p> <p>2 Haas &amp; Wilkerson prepared for? It was prepared for</p> <p>3 Cowabunga Bay?</p> <p>4 <b>A. I believe so.</b></p> <p>5 Q. Okay. And do you know who the principals</p> <p>6 were that prepared this document?</p> <p>7 <b>A. Okay. The principals of Cowabunga Bay,</b></p> <p>8 <b>you mean?</b></p> <p>9 Q. No, sir. No. The people that prepared</p> <p>10 this from Haas &amp; Wilkerson.</p> <p>11 <b>A. No, but if you -- I'm sure you have a copy</b></p> <p>12 <b>of it. If you were to give me a copy of it, I'm sure</b></p> <p>13 <b>we could find their, their names are on the documents.</b></p> <p>14 Q. Did you ever meet with any of those</p> <p>15 individuals?</p> <p>16 <b>A. No.</b></p> <p>17 Q. Okay. And what was the letter from the</p> <p>18 insurance company that you reviewed in preparation for</p> <p>19 your deposition?</p> <p>20 <b>A. Morton Insurance had a safety officer that</b></p> <p>21 <b>they send out. They go out sometimes and check our</b></p> <p>22 <b>jobs. And we asked them to come down and just again</b></p> <p>23 <b>walk through the park, and, you know, help us to make</b></p> <p>24 <b>sure everything was safe.</b></p> <p>25 Q. Okay. When you say, "They help us check</p>
<p style="text-align: right;">page 214</p> <p>1 MR. GORMLEY: Should we add that Mr. Huish</p> <p>2 just arrived?</p> <p>3 <b>THE WITNESS: We went over -- I had some,</b></p> <p>4 <b>I'm going to call it documentation, which was the</b></p> <p>5 <b>lawsuit that you filed, I believe, at -- where you</b></p> <p>6 <b>guys were at last. What is that called?</b></p> <p>7 MR. GORMLEY: Supreme Court?</p> <p>8 <b>THE WITNESS: Supreme Court, yeah.</b></p> <p>9 BY MR. CAMPBELL:</p> <p>10 Q. Anything else?</p> <p>11 <b>A. Not that I can think of.</b></p> <p>12 Q. What was the Haas &amp; Wilkerson documents?</p> <p>13 <b>A. That was an audit that was prepared by</b></p> <p>14 <b>Haas &amp; Wilkerson when they came to the park right just</b></p> <p>15 <b>shortly after the park opened. I think it was like</b></p> <p>16 <b>about a 150-page document. And they went through and</b></p> <p>17 <b>made a list of all the things they found that needed</b></p> <p>18 <b>to be taken care of. I think of it as kind of a</b></p> <p>19 <b>punchlist for the contractors. And then a list of</b></p> <p>20 <b>safety issues to do with the water park itself.</b></p> <p>21 Q. And who is this prepared for?</p> <p>22 <b>A. Well, we -- I believe, Slade requested</b></p> <p>23 <b>that the insurance company send somebody out just sort</b></p> <p>24 <b>of a double check to make sure that the park was safe.</b></p> <p>25 Q. Okay. But my question is a little bit</p>	<p style="text-align: right;">page 216</p> <p>1 our jobs," who are you referring to when you use the</p> <p>2 word "our"? R&amp;O?</p> <p>3 <b>A. Yes. R&amp;O's insurance company.</b></p> <p>4 Q. And are they Cowabunga Bay's insurance</p> <p>5 company?</p> <p>6 <b>A. No.</b></p> <p>7 Q. Okay. Who is Cowabunga Bay's insurance</p> <p>8 company?</p> <p>9 <b>A. Lance. I can't think of his last name.</b></p> <p>10 <b>And I also can't remember the name of the insurance</b></p> <p>11 <b>company. It's an, it was an insurance company that</b></p> <p>12 <b>the Huishes had worked with for years. He was their</b></p> <p>13 <b>agent. I think the request might have been made by</b></p> <p>14 <b>the Huish. I'm not, I'm not positive.</b></p> <p>15 Q. And where are they based?</p> <p>16 <b>A. The Huish?</b></p> <p>17 Q. No, sir. The insurance company, Lance's</p> <p>18 insurance company?</p> <p>19 <b>A. I think they are -- you know, I don't</b></p> <p>20 <b>know. I would be guessing.</b></p> <p>21 Q. Well, is there some reasonable basis upon</p> <p>22 which you believe that they may be located in one</p> <p>23 particular state as opposed to another?</p> <p>24 <b>A. Well, what run through my mind is that</b></p> <p>25 <b>Scott Huish is from up in the northeast. So I thought</b></p>

<p style="text-align: right;">page 217</p> <p>1 well, maybe that's where the insurance is -- or 2 northwest, I'm sorry. So I just assumed, but I 3 actually don't know. 4 Q. Okay. You said that you also reviewed 5 documentation as to when the lawsuit was filed. Do 6 you mean to say that you reviewed the Complaint, the 7 actual lawsuit that was filed and the allegations that 8 were stated therein? 9 A. Yes. Yes. 10 Q. Okay. And then you also reviewed certain 11 briefs that went to the Supreme Court, is that 12 correct, in support of our claims that were being 13 advanced? 14 A. I'm not familiar with the term briefs. 15 And I, I'm not clear what they were, but -- 16 Q. And I'm glad that you -- 17 A. But it was a number of pages, okay. 18 Q. Okay. All right. And were these written 19 materials that were advancing a particular position of 20 either -- 21 A. Yes, sir. 22 Q. -- of either the plaintiffs or the 23 defendants? 24 A. Yes, sir. 25 Q. All right. Did you review both the</p>	<p style="text-align: right;">page 219</p> <p>1 no recollection. 2 March did you say 14th? 3 MR. GORMLEY: 5th. 4 BY MR. CAMPBELL: 5 Q. No. I said March the 5th of 2014. 6 A. Okay. So that would have been just before 7 the park opened the first year, correct? 8 Q. That is correct. 9 A. I'm wondering -- I'm not saying there 10 wasn't a meeting, I have no recollection of a meeting. 11 Q. All right. And, again, you're not aware 12 of any minutes having been created that memorialize 13 what occurred at that meeting, are you? 14 MR. GORMLEY: Object. Lack of foundation. 15 He doesn't remember -- 16 THE WITNESS: I -- no. 17 MR. GORMLEY: -- the meeting. 18 Go ahead, you can answer the question. 19 MR. CAMPBELL: I'm going to object to 20 speaking objections once again. 21 MR. GORMLEY: Sounds like -- 22 MR. CAMPBELL: I'd like to, I'd like to 23 keep track of speaking objections, please, on a 24 separate disk. Thank you. 25 ///</p>
<p style="text-align: right;">page 218</p> <p>1 plaintiffs' materials and the defendants' materials as 2 to what they were arguing in the Supreme Court? 3 A. No. I don't believe so. I think it was 4 basically here's what -- the way I would say is here 5 is what they are thinking you guys did or didn't do or 6 accusing you of, I suppose. 7 Q. Okay. Did you also review the Supreme 8 Court's orders that were issued in this case? 9 A. No. I don't think so. 10 Q. Mr. Opheikens, on March the 5th, 2014, 11 there was a meeting of the management committee. Do 12 you recall that meeting? 13 A. No, sir. 14 MR. GORMLEY: Do you have a copy of the 15 meeting notes to refresh his recollection? 16 BY MR. CAMPBELL: 17 Q. With respect to -- 18 MR. GORMLEY: I guess not. 19 BY MR. CAMPBELL: 20 Q. With respect to that meeting, was there 21 any agenda that had been prepared? 22 A. I, I'm not aware. I have no recollection 23 of the meeting. I'm not saying there wasn't one. But 24 if you did have some, an agenda, then I would have a 25 better idea what we are talking about. But I, I have</p>	<p style="text-align: right;">page 220</p> <p>1 BY MR. CAMPBELL: 2 Q. Go ahead. 3 A. I don't, I don't know of any minutes. 4 Q. Okay. Do you know of anyone that kept any 5 minutes of that meeting? 6 A. No. 7 Q. All right. Do you recall that that 8 particular meeting involved the necessity of obtaining 9 the approval of the health department with respect to 10 a lifeguard plan? 11 MR. GORMLEY: Same objection. Asked and 12 answered. 13 THE WITNESS: I don't, I don't remember 14 sitting in a meeting like that. 15 BY MR. CAMPBELL: 16 Q. When you say "sitting in a meeting like 17 that," what does that mean? 18 A. Well, you asked me if I was in a meeting 19 that had something to do with a lifeguard plan. I 20 have -- I don't remember anything like that. 21 Q. Did you ever sit in on any meeting where a 22 lifeguard plan was discussed in any matter generally 23 or specifically? 24 A. No. 25 Q. You seem very confident in that regard.</p>

<p style="text-align: right;">page 221</p> <p>1     <b>A. I, I just have no recollection about a</b> 2 <b>lifeguard plan.</b> 3     Q. Okay. Do you recall being present at a 4 meeting the following month, specifically on 5 April 10th, 2014, again before the park opened, where 6 that lifeguard plan was again discussed? 7     MR. GORMLEY: Same objection. 8     <b>THE WITNESS: No, I don't. But I wonder</b> 9 <b>if you're confusing construction meetings with</b> 10 <b>Cowabunga meetings.</b> 11 BY MR. CAMPBELL: 12     Q. No, sir. I'm not. 13     <b>A. Okay. I, I don't recall.</b> 14     Q. Okay. Moving on to yet another meeting 15 that took place on May 1st and May 2nd. Again, 16 this -- 17     MR. GORMLEY: 2014? 18     MR. CAMPBELL: Excuse me. Allow me to 19 make my record. 20 BY MR. CAMPBELL: 21     Q. Again, this is in 2014. 22     MR. GORMLEY: Thank you. 23     <b>THE WITNESS: Okay.</b> 24 BY MR. CAMPBELL: 25     Q. Okay?</p>	<p style="text-align: right;">page 223</p> <p>1     Q. Do you ever recall ever attending any 2 meeting at which the issue of liquor being served and 3 the impact that that might have on lifeguards? 4     <b>A. I, I remember that subject coming up. I</b> 5 <b>don't remember where, I don't remember when. I don't</b> 6 <b>know if it might have been just a conversation at the</b> 7 <b>park, but I do remember the subject.</b> 8     Q. Taking all the time you feel is necessary 9 to do so, please detail for me all that you can recall 10 regarding your communications received and considered 11 by you, or otherwise commented on, regarding that 12 subject matter, specifically the service of liquor at 13 the park and the possible impact upon lifeguards. 14     <b>A. Okay. In English you want me to tell you</b> 15 <b>everything I remember; is that correct?</b> 16     Q. On that subject matter, that is correct. 17     <b>A. Well, I vaguely remember that we had</b> 18 <b>concerns about liquor by the drink, but then we are</b> 19 <b>from Utah so I guess that's kind of natural.</b> 20     <b>We didn't -- I had nothing to do with</b> 21 <b>that. I recall making an application or being</b> 22 <b>involved with, you know, with that subject. I know</b> 23 <b>that the operations management were wanting to obtain</b> 24 <b>a license and serve I thought it was beer. But does</b> 25 <b>liquor mean beer? Anyway, that's pretty much all I</b></p>
<p style="text-align: right;">page 222</p> <p>1     <b>A. All right.</b> 2     Q. Do you recall being present at that 3 meeting? 4     <b>A. No, I don't.</b> 5     Q. Do you recall any discussion with respect 6 to lifeguards? 7     <b>A. No.</b> 8     (Mr. Godinho enters the proceedings.) 9 BY MR. CAMPBELL: 10     Q. Do you recall seeing any communications in 11 any written form whether in text or an email with 12 respect to lifeguards? 13     <b>A. No.</b> 14     Q. Do you recall with respect to -- 15     MR. CAMPBELL: Let's go ahead and make a 16 record who has now appeared. 17     MR. GODINHO: Vincent Godinho on behalf of 18 Henderson Water Park, LLC. 19     MR. HUIH: Scott Huish. 20 BY MR. CAMPBELL: 21     Q. Do you ever recall any issue with respect 22 to the, the issue of liquor being served and any 23 impact that that might have with respect to 24 lifeguards? 25     <b>A. Okay. Could you ask that again, please.</b></p>	<p style="text-align: right;">page 224</p> <p>1 <b>can recall.</b> 2     Q. Okay. My question wasn't directed with 3 respect to what your particular involvement was from 4 the standpoint of obtaining a liquor license or what 5 actions you took in that regard. Rather, a specific 6 conversation that you told me that you had with 7 respect to the issue. So that's what I'm asking you 8 about. 9     Who did you have the conversation with? 10     <b>A. I, I don't know that I had a conversation.</b> 11 <b>But I think I was more overheard a conversation with</b> 12 <b>Shane, and I'm going to call it on the tarmac or</b> 13 <b>whatever out there where they serve the food court, as</b> 14 <b>I recall. That they were wanting to apply for it. I</b> 15 <b>don't remember exactly when that took place. I don't</b> 16 <b>even remember what year it took place. But I, I just</b> 17 <b>remember that bit of information.</b> 18     Q. And what was the, what was the component 19 of the discussion with respect to impact on 20 lifeguards? 21     <b>A. I, I don't remember any conversation like</b> 22 <b>that.</b> 23     Q. Have you had a sufficient amount of time 24 upon which to reflect upon the question and to answer 25 it?</p>

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1     **A. I believe so.**  
2     **Q.** As a general matter, did you face any  
3 particular challenges in getting Cowabunga Bay open  
4 and running in the spring of 2014?  
5     **MR. GORMLEY:** Objection. Vague and  
6 ambiguous. Overbroad.  
7     **THE WITNESS:** Does that mean answer?  
8     **MR. GORMLEY:** You can answer.  
9     **THE WITNESS:** Okay.  
10    **Okay.** There was a, there were a lot of  
11 **hurdles to jump to get the park opened. We had a lot**  
12 **of problems getting the slides and the, and the towers**  
13 **in place. Just in general just getting the park built**  
14 **was very difficult.**  
15 **BY MR. CAMPBELL:**  
16    **Q.** And that's what I'm asking you about. I'm  
17 asking specifically what those challenges or what  
18 those difficulties were. Share with me all that you  
19 can recall of what those difficulties or challenges  
20 were in the spring of 2014 in getting the park open.  
21    **A. Okay. I'm trying to isolate in my mind**  
22 **now '14 from '15. Because it just seems like it went**  
23 **on forever.**  
24    **But '14, when we were originally trying to**  
25 **get the park open, the slides, as I recall, the slides**

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1 were -- okay, when I say slides, I mean the Fiberglas  
2 slides were laying out in the parking lot. So the  
3 whole parking lot was asphalted and the slides had  
4 been sitting there for six months or more.  
5    **When it came time to erect them, it became**  
6 **a problem of their steel wasn't there. And by steel,**  
7 **I mean the towers that hold the slides up. I mean,**  
8 **you can't have a slide if you don't have a column or a**  
9 **steel tower to hold it up there.**  
10   **When that, so when it became clear, it --**  
11 **the people from Turkey, I think Pauline furnished all**  
12 **that stuff, and so we had to get the columns here.**  
13 **They sent them across the sea on barges or whatever**  
14 **you call them and they would get stuck in port down in**  
15 **Los Angeles. So there was just a lot of frustration**  
16 **and effort getting that stuff here.**  
17    **Then when it got here, the steel columns**  
18 **were not properly welded. So basically, they were --**  
19 **we had to bring the inspectors in from the inspection**  
20 **department and go over them and then get some local**  
21 **welders to restructure them and redo them. And it's**  
22 **just never ending time, these time issues.**  
23    **And so in the end we got -- when we did**  
24 **get the park opened, the big blue slide out there on**  
25 **the main road -- do you know what I'm referring to?**

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1    **Q.** Go ahead and answer my question.  
2    **A. As I recall, we -- in fact, I know we**  
3 **didn't get that slide open. We couldn't get it built.**  
4 **So we opened the park with that one ride not**  
5 **available.**  
6    **Q.** Were there any other challenges in getting  
7 the park opened for the 2014 season?  
8    **A. I'm sure there was a lot. I mean,**  
9 **everything is a challenge when you're trying to build**  
10 **a park. But I don't specifically know what you're**  
11 **wanting me to talk about.**  
12    **Q.** Any challenges that you encountered in the  
13 opening of the park in the 2014 season, whatever they  
14 were.  
15    **MR. GORMLEY:** Overbroad.  
16    But you can answer the question to the  
17 best of your ability.  
18    **THE WITNESS:** I think I just did. I think  
19 **that was our biggest issue.**  
20 **BY MR. CAMPBELL:**  
21    **Q.** You can't recall any others?  
22    **A. Not off, not off the top of my head.**  
23    **MR. GORMLEY:** He didn't ask the biggest  
24 issue, he said any issue with anybody, I think.  
25    **THE WITNESS:** Are you trying to ask me

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1 **something in particular?**  
2 **BY MR. CAMPBELL:**  
3    **Q.** Sir, I think my questions are very  
4 straightforward, direct, intelligible.  
5    **A. Yes, sir.**  
6    **Q.** And I, and I think you've answered it. If  
7 you're telling me that the only challenges that you  
8 can recall in getting the park open were those  
9 regarding the erection of a slide, then that's what it  
10 is. If you're telling me that you believe there are  
11 others, I would ask you to articulate what those  
12 challenges were in 2014, in the spring of 2014 in  
13 getting the park open.  
14    **A. Okay. So in addition to that, I suppose**  
15 **then it's the construction of the, of the project. I**  
16 **mean, there is cement --**  
17    **Q.** Right.  
18    **A. -- being poured. There is the piping.**  
19 **But I think by then we pretty much had most of the**  
20 **piping underground.**  
21    **Q.** Okay.  
22    **A. So there is the compaction of that, and**  
23 **then, you know, the concrete is being poured. And all**  
24 **of this was back on fast track after having been shut**  
25 **down for some time.**

<p style="text-align: right;">page 229</p> <p>1 Q. Okay.</p> <p>2 A. So I would say in general it's all that</p> <p>3 construction progress.</p> <p>4 Q. Were there any other issues that were</p> <p>5 nonconstruction related that presented challenges in</p> <p>6 opening the park in 2014?</p> <p>7 A. Okay. So I'm thinking in terms of</p> <p>8 construction Cowabunga Bay, okay. They were, they</p> <p>9 were over in their trailer, so to speak, trying to get</p> <p>10 permits and approvals, whatever that means. I mean, I</p> <p>11 know they were working hard on I think advertising. I</p> <p>12 don't think those things, though, were holding up</p> <p>13 opening. I think holding up opening was probably us</p> <p>14 getting the project completed so it could open.</p> <p>15 Q. All right. So as you sit here today, the</p> <p>16 only challenges that you can personally recall in the</p> <p>17 spring of 2014 that were impactful in some fashion on</p> <p>18 the opening of the park were those related to the</p> <p>19 actual construction?</p> <p>20 A. I believe so.</p> <p>21 Q. Okay. Have you had a sufficient amount of</p> <p>22 time upon which to reflect on that question and answer</p> <p>23 it?</p> <p>24 A. I think so.</p> <p>25 Q. I would like to move now to the 2015</p>	<p style="text-align: right;">page 231</p> <p>1 like February or something like that. But anyway, and</p> <p>2 at that -- the one thing I do remember -- I get the</p> <p>3 years so mixed up.</p> <p>4 It's like my brain is stuck. '15? Let me</p> <p>5 think of it in terms of months.</p> <p>6 So --</p> <p>7 MR. GORMLEY: Can you restate the</p> <p>8 question, maybe that will trigger something, if you</p> <p>9 would, please.</p> <p>10 BY MR. CAMPBELL:</p> <p>11 Q. Do you have the question in mind?</p> <p>12 A. Okay, we would have opened in -- they</p> <p>13 would have opened in about April on weekends.</p> <p>14 You know, somewhere in there, one thing I</p> <p>15 remember is Shane mentioned to me that he was, he was</p> <p>16 on a committee with the -- had been on a committee</p> <p>17 through the winter months working on the lifeguard,</p> <p>18 the number of lifeguards and they had a committee. I</p> <p>19 think it was the state health department.</p> <p>20 And he -- he was concerned that, that the</p> <p>21 number of lifeguards they had -- he had been from the</p> <p>22 start, he was concerned about safety and that the</p> <p>23 number of lifeguards typically around the nation was</p> <p>24 in the neighborhood of seven or eight.</p> <p>25 And, and he had met with -- had been</p>
<p style="text-align: right;">page 230</p> <p>1 preseason. That would have been the 2015 -- the year</p> <p>2 of 2015 would have been the first full season for</p> <p>3 Cowabunga Bay, correct?</p> <p>4 A. Yes. I think that's correct. The</p> <p>5 previous year we opened without the blue slide. I'm</p> <p>6 trying to remember if we opened up on time with the</p> <p>7 blue slide. But I think in general the answer to your</p> <p>8 question is correct.</p> <p>9 Q. Okay. What did the, what did the</p> <p>10 management committee do to prepare for the 2015</p> <p>11 season?</p> <p>12 A. Well --</p> <p>13 MR. GORMLEY: Object. Vague and</p> <p>14 ambiguous. Overbroad.</p> <p>15 Go ahead, you can answer.</p> <p>16 THE WITNESS: Okay. The operations group</p> <p>17 is doing, is doing most of the work at that point.</p> <p>18 Shane and those guys are just busy as can be cleaning</p> <p>19 the park and getting everything ready for their grand</p> <p>20 opening. You wanted to know about the other.</p> <p>21 You know, at some point, and I don't, I</p> <p>22 can't put a date on it by memory, but I'm guessing</p> <p>23 or -- you know, I think we, I think we had a meeting</p> <p>24 and that there would have been a budget. What I don't</p> <p>25 remember is whether that was spring. Might have been</p>	<p style="text-align: right;">page 232</p> <p>1 meeting with this committee. And that they had, I</p> <p>2 don't know, they had agreed to give him a variance or</p> <p>3 a pass, something. And I remember saying to Shane,</p> <p>4 "Well, Shane, whatever you do, don't jump the gun.</p> <p>5 Make sure everything is proper before you, you know,</p> <p>6 start changing your numbers."</p> <p>7 And that was discussed in a meeting I</p> <p>8 believe in maybe February or March, that might --</p> <p>9 maybe that's the meeting you were asking me about.</p> <p>10 The other things that maybe would have</p> <p>11 been discussed is generally, you know, a budget would</p> <p>12 come in which is basically -- what would you call it?</p> <p>13 A speculation of what costs were going to be.</p> <p>14 We really hadn't had a full year yet, so</p> <p>15 it's hard to compare, you know, this year's cost with</p> <p>16 last year's costs, because we really haven't had a</p> <p>17 year. We had about four months of, four-and-a-half</p> <p>18 months or something like that of actual park</p> <p>19 operation.</p> <p>20 I don't recall what else would have been</p> <p>21 discussed. I mean, generally there is several items</p> <p>22 on the agenda. But I just don't remember what they</p> <p>23 were.</p> <p>24 Q. Now, when you say that Shane had been</p> <p>25 concerned over the number of lifeguards that were</p>

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1 being required, for what period of time had Shane been  
2 concerned --  
3 **A. That --**  
4 Q. You have to wait until I finish my  
5 question.  
6 **A. Okay.**  
7 Q. For what period of time had Shane been  
8 concerned with respect to that issue?  
9 **A. That's, that's when I heard about it that**  
10 **he was working with the health department.**  
11 Q. But my question is, for what period of  
12 time had he been concerned prior to him beginning to  
13 work on it with the health department?  
14 **A. I, I don't have any idea.**  
15 Q. Would it, would it have been a matter of  
16 weeks or months or more than that?  
17 **A. Do you mean since he had been meeting with**  
18 **the health department?**  
19 Q. No. That it had been a concern to him?  
20 **A. Well, that's when I -- that was, that was**  
21 **the one -- that's when I heard about it or that's when**  
22 **he told me about it. He -- I don't know if the word**  
23 **excited is the right word; but, you know, he felt**  
24 **like, you know, he was making headway and he was, you**  
25 **know, happy about it.**

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1 Q. Now, insofar as him being concerned, share  
2 with me what his concerns were.  
3 **A. Well, the only thing I, I recall him**  
4 **saying was that he was worried that if you had too**  
5 **many lifeguards standing around the wave pool that the**  
6 **lifeguards would be, you know, talking about last**  
7 **night's hot date or something like that. That's**  
8 **really, really all I recall. That they are not paying**  
9 **attention to what they should be paying attention to.**  
10 Q. Anything else?  
11 **A. Not that I can think of.**  
12 Q. You further stated that there was a  
13 speculation with respect to the budget and costs  
14 associated with the lifeguards. Share with me what  
15 that was. By that do you mean what the projections  
16 were in the budget for the lifeguards --  
17 **A. No.**  
18 Q. -- when you say speculation?  
19 **A. Nothing to do with the lifeguards. To do**  
20 **with the park. Just the, just to budget. Profit and**  
21 **loss, you know. I mean, like every other business is**  
22 **run, they have a budget.**  
23 **You know what, I don't have any**  
24 **recollection. I just know that if we had a meeting,**  
25 **we would have had something along that line.**

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1 Q. Well, do you recall what specific meeting  
2 of the management committee this was discussed, this  
3 subject matter of the lifeguards and then later at  
4 some point the budget?  
5 **A. I, I can't pin that down. I don't**  
6 **remember rather what month it is. Seemed to me like**  
7 **it was a meeting in Salt Lake. But, but I -- I just**  
8 **don't really recall a date.**  
9 Q. Okay. But you know it occurred to the  
10 best of your recollection sometime in February or  
11 March of 2015?  
12 **A. Well, I, I believe so.**  
13 Q. Let me go back before the meeting that you  
14 believe that you attended at which the subject matters  
15 were discussed in February or March of 2015 and ask  
16 you about the year-end meeting in 2014. Okay?  
17 **A. Okay. Now, I think the year-end meeting**  
18 **would be the same as --**  
19 Q. That would be the October meeting that  
20 takes place at the year end after the closure of the  
21 park in the previous year. You have one every year,  
22 correct?  
23 **A. Well, what's hard, Mr. Campbell, is to say**  
24 **that we did everything every year. We'd been --**  
25 **basically we opened and we haven't had years to say we**

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1 **do everything. You know what I'm saying?**  
2 Q. Okay. Then let me ask you a different  
3 question.  
4 **A. Okay.**  
5 Q. Tell me all that occurred at the meeting  
6 that you held at the closure of the season in 2014  
7 which took place on the days October 30th and 31st of  
8 2014.  
9 **A. Well, can you tell me where --**  
10 MR. GORMLEY: Object. Assumes facts not  
11 in evidence.  
12 **THE WITNESS: Can you tell me where that**  
13 **meeting occurred?**  
14 MR. CAMPBELL: Objection. Speaking  
15 objection. Would you please take it down.  
16 MR. GORMLEY: Take it down as an improper  
17 question. Assumes facts not in evidence.  
18 **THE WITNESS: Do you know where that**  
19 **meeting was at? Was that a Las Vegas meeting or a**  
20 **Salt Lake meeting? Do you have any idea?**  
21 BY MR. CAMPBELL:  
22 Q. I didn't attend it. Perhaps you can tell  
23 me where it occurred.  
24 **A. Well, I can't remember.**  
25 Q. Okay. Well, irrespective of the venue,

<p style="text-align: right;">page 237</p> <p>1 please tell me all that you can recall that took place 2 at that meeting that took place over a two-day period, 3 sir. 4 <b>A. Okay. You're saying at the end of the</b> 5 <b>season in '14, so that would have been after the park</b> 6 <b>closed in 2014.</b> 7 Q. I'm telling you the exact dates. 8 <b>A. Okay. Well --</b> 9 Q. The exact dates are October 30 and 31 of 10 2014. 11 MR. GORMLEY: Still object. We haven't 12 seen any evidence that there was a meeting on those 13 dates. 14 <b>THE WITNESS: I haven't -- I don't.</b> 15 <b>You're telling me dates. I don't remember the dates.</b> 16 <b>I remember we had meetings. I don't remember --</b> 17 BY MR. CAMPBELL: 18 Q. Then tell me about that meeting 19 irrespective of what peculiar or specific dates it was 20 on. Tell me about the two-day meeting that you had in 21 October. 22 <b>A. I don't remember a two-day meeting.</b> 23 Q. Do you remember a meeting taking place in 24 the month of October after the park was closed in 25 2014?</p>	<p style="text-align: right;">page 239</p> <p>1 Q. Okay. Did you ever inspect the park in 2 2015? 3 MR. GORMLEY: Objection. Vague by 4 inspection. 5 <b>THE WITNESS: Okay. I don't know what you</b> 6 <b>mean. Are you asking me if I was ever at the park in</b> 7 <b>2015?</b> 8 BY MR. CAMPBELL: 9 Q. I'm asking if you were ever at the park in 10 2015 and whether or not you inspected the park while 11 you were at it? 12 <b>A. I was at the park a number of times in the</b> 13 <b>winter months of 2015 because we were putting that</b> 14 <b>blue slide together, so...</b> 15 Q. That would have been what? February? 16 <b>A. Yeah, February. Some January, some</b> 17 <b>February, maybe some March. I wasn't at the park</b> 18 <b>after it opened.</b> 19 Q. So you were never at the park while it was 20 operating in 2015? 21 <b>A. That's correct.</b> 22 Q. Okay. 23 <b>A. That I remember.</b> 24 Q. All right. 25 Was there ever any conflict between the</p>
<p style="text-align: right;">page 238</p> <p>1 <b>A. Well, I think we had a meeting. But I</b> 2 <b>don't remember the details of the meeting. I'm just</b> 3 <b>blank.</b> 4 Q. You're just blank, okay. So you can't 5 tell me a single thing that occurred at that meeting 6 as you sit here today? 7 <b>A. Well, I'm -- as it comes to me, I'll tell</b> 8 <b>you. If it -- you know what I mean? I mean, sitting</b> 9 <b>right here at this moment, I can't think.</b> 10 Q. Okay. 11 Let's go to yet another meeting that took 12 place, one specifically on March 9th and possibly the 13 10th of 2015. Do you recall that management committee 14 meeting? 15 MR. GORMLEY: Same objection. Assumes 16 facts not in evidence. Make sure that's on the 17 record. 18 <b>THE WITNESS: Of '15?</b> 19 BY MR. CAMPBELL: 20 Q. Yes, sir. 21 <b>A. Well, that might be the meeting I told you</b> 22 <b>about.</b> 23 Q. Okay. Is there anything else that you 24 recall from that meeting other than what you told me? 25 <b>A. No.</b></p>	<p style="text-align: right;">page 240</p> <p>1 Huishes and the Opheikens group with respect to 2 ownership and responsibilities of the park? 3 <b>A. I, I don't, I don't think so. My, my</b> 4 <b>recollection with the Huishes, we've had a very close</b> 5 <b>relationship. You know, we were the contractor side</b> 6 <b>of the venture. And you know, they had the</b> 7 <b>experience. John and Scott felt like Shane was, you</b> 8 <b>know, the right guy for the job. He was -- it was, it</b> 9 <b>was their park. We were coming in trying to help.</b> 10 <b>Shane was put in the position as general</b> 11 <b>manager. Richard Woodhouse was brought in by John</b> 12 <b>Huish because he had worked for the Huish family for</b> 13 <b>John and those guys for like years and years. He had</b> 14 <b>operated his own park. So I really don't know.</b> 15 <b>Now, there may, there may have been, as</b> 16 <b>the park required more funds and we were putting, you</b> 17 <b>know, we were putting more money in, I think the</b> 18 <b>accountants were going back and forth adjusting</b> 19 <b>percentages of ownership or whatever. There might</b> 20 <b>have been some --</b> 21 Q. Adjusting the capital accounts, you mean? 22 <b>A. Yeah, yeah.</b> 23 Q. There might have been some what? 24 <b>A. Yeah.</b> 25 Q. Conflict?</p>

<p style="text-align: right;">page 241</p> <p>1 A. Well, I don't know of any conflict. I 2 don't know if anybody had any hurt feelings or 3 something like that. But I was just trying to think 4 what might stand out or something like that. But none 5 that I'm aware. I've never had any real conflict with 6 the Huish.</p> <p>7 Q. Well, when you say that there may have 8 been some developments with respect to the need for 9 the investment of more capital and the adjusting of 10 the capital accounts, meaning that your capital 11 account was increased because the Opheikens were 12 putting more money in and had more responsibility, 13 correct?</p> <p>14 A. Yes, that's correct.</p> <p>15 Q. And as a corollary to that, there was a 16 commensurate decrease in the capital account of the 17 Huishes, correct?</p> <p>18 A. Well, the accounting people were --</p> <p>19 Q. Right.</p> <p>20 A. -- doing that, yeah.</p> <p>21 Q. Right. And so in layman's terms, okay, 22 the more you put in, the more you own; the less you 23 put in, the less you own, correct?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. Was -- and what was the discussion</p>	<p style="text-align: right;">page 243</p> <p>1 that they would like to buy the park.</p> <p>2 Q. I again ask you, was there any tension 3 between the two groups; that is, the Huishes --</p> <p>4 A. Not that --</p> <p>5 Q. You have to wait until I get the question 6 out on the record.</p> <p>7 A. Okay.</p> <p>8 Q. Was there any tension between the two 9 groups, meaning the Huishes and the Opheikens --</p> <p>10 A. Not that --</p> <p>11 Q. -- with respect, with respect to financial 12 issues?</p> <p>13 A. Not that I'm aware of.</p> <p>14 Q. Okay. Did you ever refer to yourself as a 15 caged tiger?</p> <p>16 A. Caged tiger?</p> <p>17 Q. Yes.</p> <p>18 A. I don't know. That doesn't seem like 19 something. (Cell phone interruption.)</p> <p>20 BY MR. CAMPBELL:</p> <p>21 Q. It doesn't sound like a term that you 22 would use?</p> <p>23 A. It's not -- doesn't seem like part of 24 my --</p>
<p style="text-align: right;">page 242</p> <p>1 with the Huishes regarding that? Was there any 2 tension at all regarding that?</p> <p>3 A. None that I'm aware of. I never was in a 4 conversation where there was any tension.</p> <p>5 Q. Did you ever hear of any tension 6 concerning that?</p> <p>7 A. I never did.</p> <p>8 Q. Were you aware of the fact that the 9 Huishes were looking for a buyer to, to take over your 10 interest?</p> <p>11 A. Yes. We would have, we would have 12 supported that.</p> <p>13 Q. Okay. And how is it that that particular 14 subject matter first arose?</p> <p>15 A. I think from day one when we all 16 recognized there was a problem, we -- you know, we are 17 not water park operators. We are in the construction 18 business. That's where we should be. That's where we 19 want to be. And so we never were looking to be in the 20 water park long term. We would have been happy to 21 have sold or have Huish take over the park.</p> <p>22 I thought their long-term goal was to own 23 the park, but they were always very happy and willing 24 to discuss options that would come up. They would get 25 phone calls from time to time from people suggesting</p>	<p style="text-align: right;">page 244</p> <p>1 Q. Personality?</p> <p>2 A. Yeah.</p> <p>3 Q. Okay. Going back to an answer that you 4 gave a narrative form, you refer to Shane Huish as 5 being part of the operations group, quote, operations 6 group. Do you recall using that term?</p> <p>7 A. I'm not surprised if I did. I don't 8 recall exactly, but, yeah.</p> <p>9 Q. Okay. What is the operations group?</p> <p>10 A. Well, by that I mean Shane Huish is, is 11 the general manager over operations of the park. His 12 assistant was Richard Woodhouse. And, you know, they 13 run the park. They hired, fired, and did whatever 14 operations would do.</p> <p>15 Q. Was there any designation of particular 16 individuals to something that was known as, quote, the 17 operations group, end quote?</p> <p>18 A. Well, that's more just my terminology.</p> <p>19 Q. Is the answer no?</p> <p>20 A. The answer is no.</p> <p>21 Q. Okay.</p> <p>22 Okay. You also said that in the, in the 23 particular conversation where you discussed the fact 24 that Shane had been concerned over the number of 25 lifeguards he was required to have that you told him,</p>

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1 "Don't get ahead of yourself in that regard, let's  
2 wait until you have more information," or words to  
3 that effect. Do you recall that?  
4 **A. Well --**  
5 Q. Do you recall, do you recall that  
6 testimony?  
7 **A. Yes, yes. Yes.**  
8 Q. I would like to go back to that subject  
9 matter of that testimony.  
10 **A. Okay.**  
11 Q. And I would like to now have you tell me  
12 all that you can recall with respect to that  
13 communication, what he said to you and what you said  
14 to him. And in that regard can you tell me  
15 foundationally where it took place physically? Were  
16 you at the park? Were you at a business office?  
17 Where were you?  
18 **A. It, it took place near the -- between his**  
19 **office and there is another office where the**  
20 **lifeguards, you know, hung out or whatever you want to**  
21 **call it.**  
22 Q. Okay.  
23 **A. Had lunch or took a break.**  
24 Q. Okay. And --  
25 **A. So we were just passing right there.**

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1 Q. Okay.  
2 **A. And he had come back, I believe, from a**  
3 **meeting, and, and just mentioned that.**  
4 Q. He had come back from a meeting with whom?  
5 **A. With I believe the health department.**  
6 Q. Okay. And, again, this would be sometime  
7 in the spring of 2015?  
8 **A. Correct.**  
9 Q. Okay. And so he stopped you, apparently,  
10 or you stopped him?  
11 **A. Well, I, I honestly don't recall. We, we**  
12 **talked.**  
13 Q. You bumped into one another --  
14 **A. Yes.**  
15 Q. Okay. And was anyone else present for  
16 this conversation?  
17 **A. There could have been. I, I don't recall**  
18 **if there was who else was there.**  
19 Q. Okay.  
20 **A. Because it's kind of an area where it's a**  
21 **traffic, traffic area.**  
22 Q. And when you say it's in an area that's a  
23 traffic area, designate for me specifically where it  
24 was.  
25 **A. Okay, well, if his office is on the other**

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1 **side of that wall right there, and the lifeguards room**  
2 **is right there, it was kind of in the middle.**  
3 Q. Okay. And tell me now all that was said  
4 by Shane Huish and all that you said in response  
5 during the course of the communication.  
6 **A. Well, therein is always a problem for me**  
7 **is to remember what was said. I can tell you that,**  
8 **kind of the gist of the conversation as I remember it.**  
9 **But I don't, I don't have recall for words and**  
10 **sentences he said, I said, he said, I said.**  
11 Q. Okay. The law doesn't require that.  
12 **A. Okay.**  
13 Q. The only thing that is required in the  
14 giving of deposition testimony is your best  
15 recollection with respect to the actual words that  
16 were used or words to the effect. Not everyone can  
17 recall precise words in every single conversation.  
18 The law doesn't demand that of any witness.  
19 **A. Okay.**  
20 Q. I'm asking you what was said if you can  
21 recall what was said or what words were used or what  
22 words to the effect were used.  
23 **A. Well, I, I remember Shane was pleased that**  
24 **he had just come back from a meeting with the health**  
25 **department. Rather he had just come back or this had**

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1 **taken place in the last few days, I don't know. But**  
2 **in my mind, he had had a meeting recently with the**  
3 **health department and that they had -- they had voted**  
4 **or committed that they were going to change something**  
5 **to do with the number of lifeguards that were**  
6 **required.**  
7 Q. I think you said at one point seven or  
8 eight?  
9 **A. Yeah, I believe that's correct.**  
10 Q. That they were going to, that they were  
11 going to permit seven or eight lifeguards as opposed  
12 to --  
13 **A. Yeah, something of an industry standard, I**  
14 **remember, and more of an industry standard.**  
15 Q. And how many lifeguards were being  
16 required by the health department at the time that  
17 they were reflecting upon the issue, and, and the  
18 suggestion that they go to seven or eight?  
19 **A. I, I didn't know. I had no idea. I never**  
20 **even thought about it.**  
21 Q. But you understood that it was certainly  
22 more than --  
23 **A. It was more, yes.**  
24 Q. -- than eight?  
25 **A. Yes.**

<p style="text-align: right;">page 249</p> <p>1 Q. Okay. How many more than eight?</p> <p>2 <b>A. I don't have -- I don't know.</b></p> <p>3 Q. All right. What else was said during the</p> <p>4 course of this communication?</p> <p>5 <b>A. Well, I just remember -- you know, I'd had</b></p> <p>6 <b>issues with the Contractors Board. In particular, one</b></p> <p>7 <b>issue where we had a subcontractor working on a job</b></p> <p>8 <b>and, and he didn't have a license. I mean, I just</b></p> <p>9 <b>said, "Shane, just don't jump the gun. Because if you</b></p> <p>10 <b>do, it -- just don't, don't do that." And --</b></p> <p>11 Q. What do you mean by that, "Shane, don't</p> <p>12 jump the gun"?</p> <p>13 <b>A. I mean, make sure that the Is are crossed</b></p> <p>14 <b>and the Ts are -- I mean, the Ts are crossed and the</b></p> <p>15 <b>Is are dotted before you make any change, make sure</b></p> <p>16 <b>that it's finished by them.</b></p> <p>17 Q. And what did you mean by that?</p> <p>18 <b>A. I meant don't do it until it's legal.</b></p> <p>19 Q. And what did he say in response?</p> <p>20 <b>A. I, I think he indicated agreement. I</b></p> <p>21 <b>don't -- I mean, there wasn't any debate.</b></p> <p>22 <b>He also in a meeting --</b></p> <p>23 Q. Okay. Are you done with your answer with</p> <p>24 respect to what took place in that communication?</p> <p>25 <b>A. Yes.</b></p>	<p style="text-align: right;">page 251</p> <p>1 me what it was that anyone else said at the meeting</p> <p>2 with respect to the lifeguard issue?</p> <p>3 <b>A. I don't think it was a big discussion. It</b></p> <p>4 <b>was, you know -- I don't remember what anybody else</b></p> <p>5 <b>said.</b></p> <p>6 Q. Who was in attendance at the meeting that</p> <p>7 you can recall?</p> <p>8 <b>A. Well, I think -- obviously I think Shane</b></p> <p>9 <b>was there. I think Scott was there. I think Slade</b></p> <p>10 <b>was there. I think Tom was there. I think Craig was</b></p> <p>11 <b>there. Any one of them could have --</b></p> <p>12 Q. Were you there?</p> <p>13 <b>A. Yeah, I was there.</b></p> <p>14 Q. Anyone else?</p> <p>15 <b>A. Well, what I'm trying to say is any one of</b></p> <p>16 <b>them could have maybe not been there. Or I might be</b></p> <p>17 <b>forgetting somebody, but...</b></p> <p>18 Q. To the best of your recollection, were all</p> <p>19 the members of the management committee present for</p> <p>20 that particular discussion?</p> <p>21 <b>A. I, I don't think Chet was there, but just</b></p> <p>22 <b>because I said that he is probably there. I mean, you</b></p> <p>23 <b>know. I think that meeting took place in Salt Lake.</b></p> <p>24 <b>It could have been Vegas.</b></p> <p>25 Q. Now, please tell me all that you or any</p>
<p style="text-align: right;">page 250</p> <p>1 Q. All right. Now, did you want to volunteer</p> <p>2 something that you believe that would impact that</p> <p>3 answer?</p> <p>4 <b>A. No. Impact it?</b></p> <p>5 Q. You were going to say something.</p> <p>6 <b>A. Yeah.</b></p> <p>7 Q. All right.</p> <p>8 <b>A. Okay. There was a meeting in -- a later</b></p> <p>9 <b>meeting maybe a few days later that we had where there</b></p> <p>10 <b>was a meeting, one of our meetings, maybe the March</b></p> <p>11 <b>meeting or something like that. Where Shane brought</b></p> <p>12 <b>that information to the board that, you know, the good</b></p> <p>13 <b>news, whatever it was, as I recall.</b></p> <p>14 <b>And again, I brought up, "Listen, just</b></p> <p>15 <b>make sure that, that it's voted on and correct before</b></p> <p>16 <b>you go forward with that."</b></p> <p>17 Q. Okay. And were there any minutes</p> <p>18 maintained at that meeting?</p> <p>19 <b>A. I don't, I don't know that. I don't, I</b></p> <p>20 <b>don't think -- we weren't so structured that we were</b></p> <p>21 <b>having minutes. We were just a group of guys trying</b></p> <p>22 <b>to get the park opened and we were having -- but it</b></p> <p>23 <b>was a regular, one of our regular meetings. It was a</b></p> <p>24 <b>called meeting, let me say it that way.</b></p> <p>25 Q. And in that regard, could you please tell</p>	<p style="text-align: right;">page 252</p> <p>1 other member of the management committee did to ensure</p> <p>2 that your concerns that Shane not jump the gun were in</p> <p>3 fact ensured against. That is to say, tell me all of</p> <p>4 the steps, procedures, or any other actions that were</p> <p>5 taken by you or any other member of the management</p> <p>6 committee to ensure that Shane did not do what you</p> <p>7 feared he might do.</p> <p>8 <b>A. Well, I, I don't think I ever feared or</b></p> <p>9 <b>even thought that, that Shane would do anything. It</b></p> <p>10 <b>wasn't -- this was just me saying, "Hey, guy, whatever</b></p> <p>11 <b>you do, don't do that. Because we did it with a</b></p> <p>12 <b>subcontractor and just don't do that." And that was</b></p> <p>13 <b>it. It was just, it was relatively casual.</b></p> <p>14 <b>It wasn't driven by fear. I never thought</b></p> <p>15 <b>Shane would, would ever reduce the number of</b></p> <p>16 <b>lifeguards. That never even crossed my mind. I never</b></p> <p>17 <b>knew --</b></p> <p>18 Q. Well, it must have crossed your mind</p> <p>19 because you didn't mention it just once but you</p> <p>20 mentioned it twice. You mentioned it to him in the</p> <p>21 hall when you first heard about it, and then you</p> <p>22 mentioned it to him at a formal collection of the</p> <p>23 management committee members and you again mentioned</p> <p>24 it to him. So it must have been some concern to you</p> <p>25 at that point, correct?</p>

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1     **A. If you had been through what I had been**  
2 **through with my contractor's license, you would know**  
3 **exactly what -- just don't do anything like that,**  
4 **period.**  
5     Q. But my point is, is this was not a casual  
6 concern of yours, this was in fact an important  
7 concern of yours. So important that you mentioned it  
8 to him on two separate occasions and admonished him  
9 that he shouldn't jump the gun and make sure his Ts  
10 were crossed and Is were dotted, correct?  
11    **A. Yes.**  
12    Q. Okay. Now, here's the question. What  
13 steps did you take or put in place to ensure that he  
14 didn't jump the gun and that the Ts were crossed and  
15 the Is were dotted on this very important issue?  
16    **A. It never crossed my mind that Shane Huish**  
17 **would do anything other than what he is required to do**  
18 **by the position that he was in.**  
19    Q. Well, he was required to tell the truth  
20 with respect to his arrest record and he didn't do  
21 that which cost him the opportunity to get a liquor  
22 license, correct?  
23       MR. GORMLEY: Let me object.  
24 Argumentative.  
25 ///

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1 BY MR. CAMPBELL:  
2    Q. Isn't that true?  
3    **A. Well, I don't know about the liquor**  
4 **license. And I really, since you said that, found out**  
5 **that his arrest record is relatively minor. What**  
6 **he -- my understanding was that he, he didn't tell**  
7 **them that he had gotten a ticket or something along**  
8 **that line.**  
9    Q. You don't know what he said or what he  
10 didn't say?  
11    **A. Oh, you're right.**  
12    Q. Is that right? So your just speculating  
13 now, right?  
14    **A. Yes.**  
15    Q. But you do know this much, that the  
16 Henderson Police Department found out that he was  
17 arrested on three occasions, advanced that fact to the  
18 licensing board, and recommended that he not be  
19 approved for a liquor license, correct?  
20    **A. I know that because you've been sitting**  
21 **here for two days telling me that.**  
22    Q. But you knew it back then when it  
23 occurred, did you not?  
24    **A. I didn't know.**  
25    Q. You didn't know?

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1     **A. No.**  
2     Q. You had no idea that that had occurred?  
3     **A. If I knew, I certainly have spaced it, it**  
4 **never registered to me as a problem.**  
5     Q. And you didn't know that it was, that  
6 because of that, the park didn't have a liquor  
7 license, and therefore had to nominate yet another  
8 employee to get a liquor license?  
9     **A. I had no involvement with that.**  
10    Q. You didn't know that either?  
11    **A. Well, if -- I don't remember anything**  
12 **about it, sir.**  
13    Q. Are you telling me that you don't recall  
14 anything now or that you knew it at one time but  
15 simply have no information you can share with me of a  
16 particularized nature regarding it?  
17       MR. GORMLEY: Let me object. He's asked  
18 and answered the question five times. Last time he  
19 said he had no idea. You are badgering the witness.  
20 BY MR. CAMPBELL:  
21    Q. Go ahead, sir.  
22    **A. I was not involved in a liquor license.**  
23 **It didn't matter to me if the park had a liquor**  
24 **license. I wasn't managing the park.**  
25    Q. But you did know that he was turned down

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1 for a liquor license, didn't you?  
2       MR. GORMLEY: Objection. Misstates  
3 testimony.  
4 BY MR. CAMPBELL:  
5    Q. In fact, that was your testimony on  
6 Friday, correct?  
7       MR. GORMLEY: No. Misstates testimony.  
8 It was not.  
9       MR. CAMPBELL: Again, speaking objection.  
10 Put that on a separate disk.  
11       MR. GORMLEY: Make a third disk too.  
12 BY MR. CAMPBELL:  
13    Q. Go ahead.  
14    **A. I don't think I did know, sir. You're the**  
15 **one that's been pounding this about Shane. I, I**  
16 **thought Shane did an excellent job.**  
17    Q. You did?  
18    **A. Yes.**  
19    Q. Okay. And so you had no confrontations  
20 with Shane?  
21    **A. I don't remember --**  
22       MR. GORMLEY: At what point in time?  
23 Vague and ambiguous.  
24 BY MR. CAMPBELL:  
25    Q. At any time point in time.

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1     **A. I don't ever remember a confrontation with**  
2 **Shane.**  
3     Q. Isn't it a fact that you had not one, but  
4 more than one confrontation with Shane, and told him  
5 that he didn't want to let the caged tiger out after  
6 him, referring to yourself as a caged tiger that might  
7 do him some sort of harm in some respect if he didn't  
8 follow your instructions?  
9     **A. I have absolutely no recollection of any**  
10 **such thing.**  
11     Q. Okay. Shane wasn't particularly enamored  
12 with the fact that you were giving him directions, was  
13 he?  
14     MR. GORMLEY: Calls for speculation.  
15     **THE WITNESS: I never saw Shane -- I would**  
16 **say he is more expressionless than enamored. I never**  
17 **sensed any pushback from Shane.**  
18 BY MR. CAMPBELL:  
19     Q. Did you ever feel that Shane was concerned  
20 with respect to your moods and whether you were happy  
21 or otherwise not happy for whatever reason with  
22 respect to the park?  
23     MR. GORMLEY: Objection. Calls for  
24 speculation as to his state of mind, Shane's state of  
25 mind.

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1 BY MR. CAMPBELL:  
2     Q. Go ahead, sir.  
3     **A. I have no, I have no idea what you're**  
4 **talking about.**  
5     Q. So there were no occasions in which you  
6 had ever experienced that Shane was concerned with  
7 respect to how you would react to a particular bit of  
8 news?  
9     MR. GORMLEY: Same objection.  
10 BY MR. CAMPBELL:  
11     Q. Concerning the park, that is?  
12     MR. GORMLEY: Vague and ambiguous.  
13     **THE WITNESS: I, I would be surprised if**  
14 **that were true.**  
15 BY MR. CAMPBELL:  
16     Q. Okay.  
17     Did you utilize the services of an  
18 attorney here in Las Vegas, Nevada with respect to the  
19 operation of the park?  
20     MR. GORMLEY: Let me object. Vague and  
21 ambiguous. His operation --  
22     MR. CAMPBELL: Again, speaking objection.  
23     Please be --  
24     MR. GORMLEY: I didn't say anything.  
25     MR. CAMPBELL: -- be so kind as to put

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1 that on as well.  
2     MR. GORMLEY: Yeah, sure. But I didn't  
3 say anything, so...  
4 BY MR. CAMPBELL:  
5     Q. Go ahead, sir.  
6     MR. GORMLEY: Enjoy that.  
7     **THE WITNESS: I, I guess I don't know.**  
8 **Okay. We, we used the services of Aviva Gordon.**  
9 BY MR. CAMPBELL:  
10     Q. Okay.  
11     **A. What I'm not sure of what you're asking is**  
12 **whether that was we or if that was Cowabunga or, or**  
13 **both. And I think the answer is that we used Aviva**  
14 **Gordon as our -- as a personal attorney down here.**  
15     Q. You mean the Opheikens?  
16     **A. Yeah.**  
17     Q. Okay.  
18     **A. That's that I think.**  
19     Q. So Cowabunga Bay might have likewise used  
20 her?  
21     **A. They could have.**  
22     Q. Okay. Who was paying her? Was it the  
23 Opheikens family? Was it R&O Construction? Was it  
24 Cowabunga Bay, Henderson Water Park?  
25     **A. I don't recall.**

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1     Q. Okay. What type of work did she perform  
2 on behalf of Cowabunga Bay or the Opheikens?  
3     **A. Well, she, she was involved with the**  
4 **Splash group --**  
5     Q. All right.  
6     **A. -- as our attorney.**  
7     Q. In that litigation?  
8     **A. Yes.**  
9     Q. That was, that was part of the settlement  
10 conference with the Honorable Elizabeth Gonzalez?  
11     **A. Yes, I believe so.**  
12     Q. All right. Did the Huishes have their  
13 separate counsel in that?  
14     **A. I don't think so. But I could be wrong.**  
15     Q. Okay. Did you use her services thereafter  
16 on behalf of Cowabunga Bay?  
17     **A. I, I don't recall.**  
18     Q. Did you use the services of any other  
19 attorney?  
20     **A. I, I don't remember using any other**  
21 **attorney. Unless it was Cass Butler, our personal**  
22 **attorney in Ogden. But I --**  
23     Q. Was there any other attorney you ever used  
24 that you can recall?  
25     **A. Now, would you be referring to the**

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1 attorney that I think represented Bank of Utah on the  
2 loan documents? Would you be thinking that?  
3 Q. Okay. Did you use an attorney for that?  
4 A. Well, I don't know if I did or Bank of  
5 Utah did. There was certainly an attorney that was  
6 involved.  
7 Q. Okay. Any other attorney that performed  
8 legal work on behalf of Cowabunga Bay?  
9 A. Not that I recall.  
10 MR. CAMPBELL: Okay. All right. Do you  
11 want to take a quick break now?  
12 MR. GORMLEY: Sure.  
13 THE WITNESS: That would be great.  
14 THE VIDEOGRAPHER: The time is  
15 approximately 10:42 a.m. We are going off the record.  
16 (Recessed from 10:42 a.m. to 10:58 a.m.)  
17 (Deposition Exhibit 39 marked.)  
18 THE VIDEOGRAPHER: The time is  
19 approximately 10:58 a.m. We are back on the record.  
20 BY MR. CAMPBELL:  
21 Q. You have placed before you Exhibit No. 39.  
22 Exhibit No. 39 is what we refer to as an aggregate  
23 exhibit, it consists of more than one page. But you  
24 will see that this exhibit is essentially a depiction  
25 of an event that took place in which you are present.

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1 A. Um-hum.  
2 Q. With respect to Exhibit No. 39, could you  
3 please tell me what that event was?  
4 A. It was ribbon cutting that must have taken  
5 place in probably sometime in July of 2014, I would  
6 guess.  
7 Q. Okay. Going from right -- excuse me, from  
8 left to right, okay, please place on that exhibit the  
9 names of those individuals that are there with the pen  
10 I've provided you.  
11 A. Okay. So --  
12 Q. So write, okay, that's who?  
13 A. I don't know.  
14 Q. Okay. Just put "UNK" for unknown.  
15 A. Write it?  
16 Q. Yes, sir, above him.  
17 A. (Deponent complies.)  
18 Q. The next individual, do you know that next  
19 individual?  
20 A. No, I don't recognize him. I guess  
21 somebody with the chamber.  
22 Q. Do you know the young lady standing next  
23 to him?  
24 A. No, I don't think so.  
25 Q. Okay. So those are both unknown as well?

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1 A. Um-hum.  
2 MR. GORMLEY: "Yes"?  
3 BY MR. CAMPBELL:  
4 Q. Is that a "yes"?  
5 A. Yes.  
6 Q. Next individual in the brown coat, do you  
7 know that individual?  
8 A. I don't believe so.  
9 Q. Okay. Put "UNK."  
10 A. (Deponent complies.) Okay.  
11 Q. The lady next to the him, do you know who  
12 that is?  
13 A. No.  
14 Q. So that's another unknown?  
15 A. Yeah.  
16 And then Shane.  
17 Q. Put "Shane" above his head.  
18 A. (Deponent complies.)  
19 And then me, of course.  
20 Q. All right. So put "Orluff" there.  
21 A. (Deponent complies.) Okay.  
22 Q. Do you know the individual next to you?  
23 A. I don't think so.  
24 Q. Put "unknown."  
25 A. (Deponent complies.)

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1 Q. There is a child next to that gentleman in  
2 the blue shirt.  
3 A. I don't think I know.  
4 Q. Okay, put an arrow, "unknown."  
5 A. To the child in the blue?  
6 Q. Yes.  
7 A. (Deponent complies.)  
8 Q. Do you know the child next in order?  
9 A. No.  
10 Q. Do you know the child next in order from  
11 there?  
12 A. I don't believe so.  
13 Q. So those three children standing there,  
14 you don't know who they are?  
15 A. No. Can I draw an arrow? There is four,  
16 aren't there?  
17 Q. Right. In fact, it likes like there is  
18 actually four.  
19 A. Should I put an arrow to all four of them?  
20 Q. All four, "unknown."  
21 A. Can I do one unknown and four arrows?  
22 Q. Sure. Yes.  
23 A. (Deponent complies.) Okay.  
24 Q. Who is the gentleman standing behind those  
25 four children in the white shirt?

<p style="text-align: right;">page 265</p> <p>1 A. I don't know.</p> <p>2 Q. But an "unknown" there, if you would,</p> <p>3 please.</p> <p>4 A. (Deponent complies.)</p> <p>5 Q. There appears to be someone with a bell</p> <p>6 hat on with sunglasses, do you know who that is?</p> <p>7 A. No idea.</p> <p>8 Q. But "unknown."</p> <p>9 A. (Deponent complies.) Okay.</p> <p>10 Q. There appears to be a young lady in a</p> <p>11 sundress wearing, a blue sundress, wearing sunglasses.</p> <p>12 Do you know who that is?</p> <p>13 A. I don't think I know any of them.</p> <p>14 Q. Okay.</p> <p>15 What about the lady in red next to her, do</p> <p>16 you know her?</p> <p>17 A. No.</p> <p>18 Q. What about the child standing in front of</p> <p>19 her?</p> <p>20 A. No.</p> <p>21 Q. The child next to the small child, do you</p> <p>22 know that?</p> <p>23 A. No.</p> <p>24 Q. The blonde in the black tank top and</p> <p>25 striped skirt?</p>	<p style="text-align: right;">page 267</p> <p>1 Q. Okay. Calling your attention to the first</p> <p>2 page of Exhibit 39, do you remember what day this was?</p> <p>3 A. I think it would have been early in July</p> <p>4 or in July, but I don't remember the day.</p> <p>5 Q. Okay. And it appears that, that this is</p> <p>6 the ribbon-cutting ceremony opening the park?</p> <p>7 A. I think so.</p> <p>8 Q. It appears that there is a large scissors</p> <p>9 in which you have grasped the lower part of the</p> <p>10 handle?</p> <p>11 A. Right.</p> <p>12 Q. And Shane Huish has grasped the upper part</p> <p>13 of the handle; is that correct?</p> <p>14 A. That's right.</p> <p>15 Q. The second page of Exhibit No. 39 depicts</p> <p>16 the ribbon having been cut and you are gesturing</p> <p>17 with --</p> <p>18 A. Hoorah.</p> <p>19 Q. I'm sorry?</p> <p>20 A. Hoorah.</p> <p>21 Q. With a Tiger Woods like hoorah, correct?</p> <p>22 A. I hadn't thought of it quite like that.</p> <p>23 That's probably how it felt.</p> <p>24 Q. Okay. Now, I would like to go back to the</p> <p>25 next meeting in order that would have taken place</p>
<p style="text-align: right;">page 266</p> <p>1 A. I don't know.</p> <p>2 Q. Or the lady behind her? You don't know</p> <p>3 any of those?</p> <p>4 A. No. I can't see the lady behind her.</p> <p>5 Q. All right. Let's go to the second page of</p> <p>6 aggregate Exhibit No. 39.</p> <p>7 A. Okay.</p> <p>8 Q. Is there anyone else on aggregate</p> <p>9 Exhibit 39 that you can recognize?</p> <p>10 A. Oh, I see Slade.</p> <p>11 Q. And he is standing directly behind Shane?</p> <p>12 A. Behind Shane.</p> <p>13 Q. Okay. Would you identify him?</p> <p>14 A. (Deponent complies.)</p> <p>15 And that might be Chet behind --</p> <p>16 Q. In the blue shirt?</p> <p>17 A. But I'm not positive.</p> <p>18 Q. In the blue shirt standing behind the</p> <p>19 woman who appears to be clapping wearing a flower</p> <p>20 black-and-white top; is that correct? That's Chet?</p> <p>21 A. I'm saying it might be. I can't see</p> <p>22 enough, I mean, to tell.</p> <p>23 Q. Okay. So go ahead, how about putting</p> <p>24 "Chet" with a question mark.</p> <p>25 A. Okay. (Deponent complies.)</p>	<p style="text-align: right;">page 268</p> <p>1 after the last one we discussed, the last one having</p> <p>2 been March 31st, 2015.</p> <p>3 The next management committee meeting</p> <p>4 would have taken place on April the 16th, 2015.</p> <p>5 MR. GORMLEY: Object. Lack of foundation.</p> <p>6 BY MR. CAMPBELL:</p> <p>7 Q. Do you recall that?</p> <p>8 A. No.</p> <p>9 Q. Okay.</p> <p>10 MR. GORMLEY: You said 2015 or '16, I'm</p> <p>11 just writing it down.</p> <p>12 MR. CAMPBELL: 2015.</p> <p>13 MR. GORMLEY: Thank you.</p> <p>14 BY MR. CAMPBELL:</p> <p>15 Q. Were you there for it?</p> <p>16 A. I, I don't recall.</p> <p>17 Q. Okay. All right. Going back to the</p> <p>18 earlier March 31st, 2015 meeting, with respect to the</p> <p>19 subject matter of you once again cautioning Mr. Shane</p> <p>20 Huish to cross his Ts and dot his Is, you previously</p> <p>21 testified that you cannot recall doing anything</p> <p>22 thereafter to ensure he crossed his Ts and dotted his</p> <p>23 Is, correct?</p> <p>24 A. I never thought it was necessary.</p> <p>25 Q. Do you recall whether or not any other</p>

<p style="text-align: right;">page 269</p> <p>1 member of the management committee ensured that he 2 crossed his Ts and dotted his Is and didn't jump the 3 gun? 4 <b>A. I don't think anybody thought any</b> 5 <b>different than I did, that Shane wasn't going to do</b> 6 <b>what Shane should do. It just wasn't in our minds</b> 7 <b>that there was a problem.</b> 8 Q. So the answer is no, you're not aware of 9 anyone doing anything else? 10 <b>A. No.</b> 11 MR. GORMLEY: Same objection. Calls for 12 speculation. It's speculative. 13 BY MR. CAMPBELL: 14 Q. You are not, you are not aware of anyone 15 else doing anything else, correct? 16 <b>A. Well, I, I don't know what anybody else</b> 17 <b>did.</b> 18 Q. Thank you. 19 And you can't tell me anything that anyone 20 else on the management committee did, correct? 21 Correct? 22 MR. GORMLEY: Incomplete hypothetical. 23 <b>THE WITNESS: You know, I'm just confused</b> 24 <b>now. I don't, I don't know what somebody else did.</b> 25 <b>///</b></p>	<p style="text-align: right;">page 271</p> <p>1 meeting took place in June. I'm taking your word for 2 it, but we haven't seen anything. 3 BY MR. CAMPBELL: 4 Q. Were you present for a meeting shortly 5 after the drowning of Leland Gardner? 6 <b>A. I don't believe so. I don't recall.</b> 7 Q. Do you know where the meeting took place? 8 <b>A. I don't know that there was a meeting.</b> 9 Q. Well, do you remember the first meeting of 10 the management committee that took place after this 11 little boy suffered his brain damage in your pool? 12 <b>A. I don't recall.</b> 13 Q. Okay. Was it within a matter of days? 14 <b>A. I don't recall.</b> 15 Q. Weeks? 16 <b>A. I don't recall.</b> 17 Q. Months? 18 <b>A. I, I just don't recall.</b> 19 Q. Well, there had to be one meeting that 20 took place sometime thereafter that, correct? 21 <b>A. Well, I don't recall.</b> 22 Q. So, Mr. Opheikens, a child drowned in your 23 pool and suffered irreversible brain damage leaving 24 him a quadriplegic. 25 MR. GORMLEY: I'm going to object. It's</p>
<p style="text-align: right;">page 270</p> <p>1 BY MR. CAMPBELL: 2 Q. And you can't tell me that anybody did a 3 single thing to ensure -- 4 <b>A. Well, I can't tell you that somebody</b> 5 <b>didn't do a lot. I, I don't know.</b> 6 Q. You have nothing that you can offer in 7 that regard here today, correct? 8 <b>A. That's correct.</b> 9 Q. Thank you. 10 Now, let's talk about the first post 11 incident meeting of the management committee, that 12 your counsel has supplied us information on, to the 13 effect that it occurred on June 2015 after Leland 14 Gardner suffered brain damage as a result of his 15 drowning. Are you with me? 16 <b>A. June?</b> 17 Q. Correct. 18 <b>A. Okay.</b> 19 Q. Okay. 20 MR. GORMLEY: Let me object. Nothing in 21 the record established that. Go ahead. 22 MR. CAMPBELL: Sorry, what was your 23 objection? 24 MR. GORMLEY: My objection is you haven't 25 established through any documents or papers that a</p>	<p style="text-align: right;">page 272</p> <p>1 not his pool. 2 BY MR. CAMPBELL: 3 Q. At that time, sir, okay, did it occur to 4 you that you should have a meeting right away of the 5 management committee? 6 <b>A. I don't recall.</b> 7 Q. Do you recall any meeting of the 8 management committee where my client, Leland Gardner, 9 who drowned in that wave pool and suffered 10 irreversible brain damage and quadriplegia, was 11 discussed? 12 <b>A. I, I don't recall a meeting about that</b> 13 <b>topic. Umm, I don't think we -- as I recall, we had</b> 14 <b>no idea about the scope of this issue until you filed</b> 15 <b>a lawsuit. And then, even then, we thought that --</b> 16 <b>I'm trying to remember.</b> 17 Q. You thought he was going to be okay once 18 we filed the lawsuit? 19 <b>A. Well, we thought he was going to be okay</b> 20 <b>up to that point. We hadn't -- as I recall, Shane had</b> 21 <b>tried contacting the hospital or something along that</b> 22 <b>line, and had talked to somebody, and they thought</b> 23 <b>that Leland was going to be okay.</b> 24 <b>And, and so I never really heard any</b> 25 <b>negative story or awful, that awful information until,</b></p>

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1 **until a lawsuit was filed.**  
2 Q. Tell me what Shane was told.  
3 **A. You would have to ask Shane, I --**  
4 Q. Well, what did he tell you?  
5 **A. Well, I think my information came through**  
6 **Slade.**  
7 Q. Okay. What did Slade tell you?  
8 **A. Well, I think Slade told me more or less**  
9 **what I just told you.**  
10 MR. GORMLEY: Say it again.  
11 **THE WITNESS: He talked to Shane.**  
12 MR. CAMPBELL: Okay. I'm going to ask you  
13 to stop.  
14 MR. GORMLEY: I'm just trying --  
15 MR. CAMPBELL: Don't help me. I know what  
16 I'm doing.  
17 MR. GORMLEY: I know you do.  
18 MR. CAMPBELL: I'm going to ask you to  
19 stop interrupting. I know this may be difficult for  
20 you for whatever reason, but I'm going to ask you to  
21 stop.  
22 BY MR. CAMPBELL:  
23 Q. So tell me --  
24 MR. GORMLEY: I interrupted once.  
25 ///

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1 BY MR. CAMPBELL:  
2 Q. Tell me what it is that you were told.  
3 **A. Well, my impression of what I was told was**  
4 **that they thought the little boy was going to be okay.**  
5 Q. All right. And what led you to that  
6 impression? What were you told?  
7 **A. I don't recall that.**  
8 Q. Okay. Just that they had spoken to  
9 someone at the hospital and they said that the little  
10 boy was going to be okay?  
11 **A. Yes.**  
12 Q. All right. And when did that -- when was  
13 that communicated to you?  
14 **A. Shortly after the accident.**  
15 Q. By shortly, do you mean within a month?  
16 **A. Within a day --**  
17 Q. Within a day.  
18 **A. -- or two.**  
19 Q. Or two.  
20 **A. And I think that it was sort of in three**  
21 **or four days or whatever, still the same impression.**  
22 Q. That the little boy was going to be okay?  
23 **A. Yes.**  
24 Q. Because someone at the hospital had  
25 likewise reaffirmed that in some fashion --

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1 **A. That's --**  
2 Q. -- to Shane or --  
3 **A. To Shane, I believe.**  
4 Q. Okay. All right. Because that's what you  
5 were told?  
6 **A. That's my impression.**  
7 Q. Okay. Tell me what you did.  
8 **A. Well, I, of course, was interested. I**  
9 **didn't really --**  
10 Q. How did that interest manifest itself?  
11 **A. I really didn't know what to do. I, I**  
12 **thought the little boy was going to be okay. So I, I**  
13 **didn't do anything. We, we were checking to find out**  
14 **is he okay. And the word that came back to us was**  
15 **that he was going to be okay. So I didn't do**  
16 **anything.**  
17 Q. All right. Can you tell me how soon after  
18 the drowning of Leland that you can recall a meeting  
19 that took place of the management committee at which  
20 that event was discussed?  
21 **A. I don't, I don't recall.**  
22 Q. Can you give me a reasonable approximation  
23 of when it would have taken place? Would it have  
24 taken place within days, weeks, or months?  
25 **A. Well, I, I think probably, what I can**

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1 **remember is that when you filed the lawsuit, of**  
2 **course, the first impression was, and I'm trying to**  
3 **think of the right way to say it, was that -- maybe it**  
4 **was because it was on, came out on television, came**  
5 **out on the news, that the information you had was**  
6 **wrong. Because we were -- we thought that it was bad**  
7 **information. The information that we had been given**  
8 **and the information that is now being talked about on**  
9 **television was wrong.**  
10 Q. Okay. What was wrong?  
11 **A. Well --**  
12 Q. When you say, "The information on the  
13 television we thought was wrong," do you mean to say  
14 that the information that you had was right?  
15 **A. No, no, no. I don't know what is right**  
16 **and what is wrong. But we were under the impression**  
17 **that the news coverage was wrong.**  
18 Q. Okay. What news coverage did you observe?  
19 **A. I believe it's Channel 8 on the news.**  
20 Q. Okay.  
21 **A. I didn't observe it.**  
22 Q. All right.  
23 **A. I mean, I, I think my son called and --**  
24 **Chet who lives in Vegas --**  
25 Q. Okay.

<p style="text-align: right;">page 277</p> <p>1 A. -- and said, "Guess what is on the news, I 2 mean, they are saying this." And our impression was 3 that it was misinformation. 4 Q. But you later found out that the 5 information was correct; is that correct? 6 A. Well, I think -- so I think our next 7 meeting was with an attorney. 8 Q. There was a pending question. So, sir, so 9 the pending question related to the observation by 10 Chet of a news story on Channel 8, okay? 11 A. All right. 12 Q. All right. And you said that the 13 information conveyed in that Channel 8 news story was 14 information that was in your view incorrect or 15 otherwise at odds with what you believed to have 16 occurred; is that correct? 17 A. That's correct. 18 Q. Was this a news story that was narrated by 19 an investigative reporter by the name of George Knapp? 20 A. I don't, I don't know that. 21 But, sir, I would like to tell you -- 22 Q. Is the answer that you don't know? 23 A. I don't know. 24 Q. Did you see more than -- did you ever see 25 this particular news story --</p>	<p style="text-align: right;">page 279</p> <p>1 thinking of another attorney, okay. 2 Q. That would handle this matter? 3 A. Yes, that we met with. And -- 4 Q. I'm going to get to it. I'm going to get 5 to that. 6 A. Okay. 7 Q. Okay. So when you discovered as a result 8 of the Channel 8 news story that the facts that were 9 being presented were much different from what you 10 thought had occurred, okay -- 11 A. Um-hum. 12 Q. -- how were they different? 13 A. Well, Leland. 14 Q. Do you mean to say that the condition of 15 my client Leland Gardner was far graver and serious 16 than what Shane's information had led you to believe? 17 A. That's correct. 18 Q. Okay. 19 And when that information was learned by 20 you, specifically what was the information that you 21 gleaned or learned of that suggested Leland Gardner's 22 physical condition was far graver than what you had 23 been led to believe? 24 A. Could you repeat. 25 Q. What was the information that was shared</p>
<p style="text-align: right;">page 278</p> <p>1 A. I never -- 2 Q. -- at any time? 3 A. I never saw it. 4 Q. At any time? 5 A. Not that I recall. 6 Q. Did you ever see any news story at any 7 time regarding Cowabunga Bay? 8 A. Okay, I saw something in the newspaper. I 9 saw a newspaper article. 10 Q. Okay. And what newspaper was that in? 11 A. Oh, man. I can see it. It's a local 12 paper. You know the paper, it's -- 13 Q. The Review-Journal? 14 A. Yeah, I think so. 15 Q. How was that brought to your attention? 16 A. I, I, I honestly don't know. Somebody 17 told me that, you know, and I think I pulled it up 18 on -- 19 Q. On the Internet? 20 A. On the Internet. 21 Q. Okay. 22 A. And as time went on, which I don't 23 remember the timeframe, but I do want to -- you know, 24 you asked me if we had another attorney. And I told 25 you, I thought I had told everybody, but right now I'm</p>	<p style="text-align: right;">page 280</p> <p>1 with you following the Channel 8 news investigative 2 report that indicated to you that the actual condition 3 of Leland Gardner was far graver than what had been 4 conveyed to you by Shane? 5 A. I believe that we then had a meeting with 6 the other attorney that I was going to tell you about, 7 Lou Brandon, and I think that's where our next meeting 8 took place was in his conference room. 9 Q. And his name is Lou? 10 A. Brandon, I believe. 11 Q. Was that here in Las Vegas? 12 A. Yes. 13 Q. And is he associated with a particular 14 firm? 15 A. Yes. 16 MR. GORMLEY: Objection. 17 THE WITNESS: I, I don't know the name of 18 the firm. 19 BY MR. CAMPBELL: 20 Q. You don't know -- do you know how to spell 21 his name? 22 A. Well, I think it's L-o-u, and I believe 23 it's B-r-a-n-d-o-n. 24 Q. And when did this meeting take place? 25 A. Well, I think shortly after this</p>

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1 information was -- when the lawsuit was filed, of  
2 course, we are all going, "What? And what is this?"  
3 And, and at some point we end up in a  
4 meeting with Lou Brandon. I don't know. I think our  
5 attorney Cass Butler probably put that meeting  
6 together, our personal attorney.  
7 MR. GORMLEY: I object regarding any  
8 communications with --  
9 MR. CAMPBELL: No. Well, he can tell me  
10 if somebody arranged a meeting. That's not  
11 attorney-client.  
12 MR. GORMLEY: As long as you agree that we  
13 are not piercing the attorney/client privilege.  
14 MR. CAMPBELL: Of course not. No.  
15 BY MR. CAMPBELL:  
16 Q. Go ahead.  
17 A. I, I think that's my, end of my sentence.  
18 Q. So it wasn't until a lawsuit was filed  
19 that there was the first meeting of the management  
20 committee members that --  
21 A. That I --  
22 Q. Wait a second, let me get it out.  
23 -- that this issue was discussed being the  
24 drowning of Leland Gardner?  
25 A. That I attended.

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1 Q. Okay.  
2 A. That I recall.  
3 Q. Why did you not attend any meeting of  
4 management committee members regarding this drowning  
5 until you were -- until a lawsuit was initially filed  
6 in this matter?  
7 A. I've told you before. I'm not a water  
8 park operator. I know you don't want to hear it. We  
9 put Shane and that group of people in there to operate  
10 that water park.  
11 We -- I, I certainly thought that they  
12 were abiding by the law. Nobody, Shane Huish  
13 included, nobody ever told me they weren't using the  
14 required number of lifeguards. Our attorney at home  
15 was working with whoever he was working with.  
16 So it's not that we were -- had no  
17 concern. We thought we were doing what we should be  
18 doing.  
19 Q. Are you done?  
20 A. I am.  
21 MR. CAMPBELL: Move to strike as  
22 nonresponsive.  
23 Would you kindly, Ms. Kelly, ask again the  
24 question I propounded.  
25 ///

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1 (Record read as follows:)  
2 "Q. Why did you not attend any  
3 meeting of management committee members  
4 regarding this drowning until a lawsuit was  
5 initially filed in this matter?"  
6 THE WITNESS: I don't, I don't know if  
7 there was a meeting for me to attend. I, I may have  
8 been out of town. I'm not positive about that.  
9 I was in touch with -- you know, people  
10 were contacting me and telling me whatever they were  
11 telling me. So it's not like nobody was paying any  
12 attention to this thing. You know, it's a serious  
13 matter.  
14 BY MR. CAMPBELL:  
15 Q. Are you done?  
16 A. Are you going to say I'm nonresponsive  
17 again?  
18 Q. No. No. I'm just -- I just don't want to  
19 interrupt your answer if you were going to take a  
20 breath and say more. I'm trying to be polite.  
21 A. You have been, sir.  
22 Q. Okay. So when was it that you found out  
23 for the first time that there was in fact a failure to  
24 provide the full contingent of lifeguards as was  
25 mandated by the, by the Southern Nevada Health

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1 District requirement at the time that Leland drowned  
2 suffering brain injury and quadriplegia?  
3 MR. GORMLEY: Object. Argumentative.  
4 Go ahead.  
5 THE WITNESS: Would you repeat that.  
6 MR. CAMPBELL: Sure. Would you kindly  
7 repeat my question, Ms. Kelly.  
8 (Record read as follows:)  
9 "Q. So when was it that you found out  
10 for the first time that there was in fact a  
11 failure to provide the full contingent of  
12 lifeguards as was mandated by the Southern  
13 Nevada Health District requirement at the  
14 time that Leland drowned suffering brain  
15 injury and quadriplegia?"  
16 BY MR. CAMPBELL:  
17 Q. Do you understand the question?  
18 A. No, I don't.  
19 Q. Okay. I'm happy to rephrase it.  
20 A. Okay.  
21 Q. Okay? And I appreciate you informing me  
22 that you didn't understand.  
23 When was the first time after Leland  
24 drowned, okay --  
25 A. Got it.

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1 Q. -- and after you found out, all right,  
2 that he suffered these horrific injuries, that you  
3 also found out that the correct number or contingent  
4 of lifeguards that was required by the health district  
5 was not in fact honored at Cowabunga Bay --  
6 **A. Okay.**  
7 Q. -- that they have far less? Do you  
8 understand the question?  
9 **A. I do.**  
10 Q. When did you first learn of that fact?  
11 **A. That also was after the lawsuit was filed.**  
12 Q. Okay. Did you find out that fact by  
13 reading the lawsuit itself?  
14 **A. No.**  
15 Q. How did you find out that there were far,  
16 far fewer lifeguards present on the day Leland drowned  
17 than were required by the health district?  
18 **A. I, I believe I got a phone call from my**  
19 **son Slade, and, and he and Chet -- I mean, he and**  
20 **Scott Huish had set up a meeting, and they were headed**  
21 **down to try and get to the bottom of all this and**  
22 **figure out what to do. Excuse me, sir.**  
23 Q. Okay. And so they told you that the  
24 lawsuit had been filed, correct?  
25 **A. Correct.**

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1 Q. That not only had a lawsuit been filed but  
2 that Leland's injuries were far graver than you  
3 thought, correct?  
4 **A. I believe that's correct.**  
5 Q. And they also told you that there was far,  
6 far fewer lifeguards than were mandated under the  
7 health district's requirements, correct?  
8 **A. Well, I don't think they said to me that**  
9 **there were far, far fewer.**  
10 Q. Okay. What did they say in that regard?  
11 **A. But I think they said that, that -- let me**  
12 **think. Okay.**  
13 MR. GORMLEY: Did --  
14 **THE WITNESS: They --**  
15 MR. CAMPBELL: Please.  
16 MR. GORMLEY: I know, I know.  
17 MR. CAMPBELL: You are interrupting again.  
18 MR. GORMLEY: I think --  
19 MR. CAMPBELL: Please don't interrupt his  
20 answers.  
21 MR. GORMLEY: Seriously.  
22 BY MR. CAMPBELL:  
23 Q. Go ahead, sir.  
24 **A. Can you repeat the question.**  
25 Q. Sure.

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1 **A. Sorry.**  
2 Q. We've already, we've already established  
3 that they called you and they told you there has been  
4 a lawsuit that's now been filed, correct?  
5 **A. Correct.**  
6 Q. They said, and by the way, this child's  
7 injuries are far graver, or words to the effect --  
8 **A. Yes.**  
9 Q. -- than you believed, correct?  
10 **A. Well, yeah.**  
11 Q. Right?  
12 **A. Yeah.**  
13 Q. Because they had the lawsuit which spelled  
14 it out, right?  
15 **A. Well, yeah.**  
16 Q. Okay. And they also told you that there  
17 were far fewer lifeguards present when Leland drowned  
18 than were required under the health district's plan,  
19 correct?  
20 **A. Okay. Where I think you're putting words**  
21 **in my mind or mouth, okay --**  
22 Q. Okay.  
23 **A. -- I don't mean that as an insult.**  
24 Q. No, I don't take it as such.  
25 **A. Okay.**

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1 Q. I'm not trying to do that.  
2 **A. Okay.**  
3 Q. I'm asking questions.  
4 **A. Is that Shane had -- they were going into**  
5 **a meeting. And I think the meeting was with -- what**  
6 **do you call these people? I'm sorry. What do you**  
7 **call the people that when you think everything -- that**  
8 **you're being unfairly lambasted, let's say, in the**  
9 **press? And you hire a specialist to come in and try**  
10 **to deal with the press. Do you know what I'm trying**  
11 **to say?**  
12 Q. Yes. A public relations strategy --  
13 **A. Correct.**  
14 Q. -- session?  
15 **A. Okay.**  
16 Q. Okay.  
17 **A. So, again, I want to back up because I**  
18 **don't know exact dates. But so they were, they were**  
19 **under the impression that what was being said wasn't**  
20 **correct, and so they were headed into a meeting with**  
21 **this public relations person to say, hey, what do we**  
22 **do here?**  
23 **And at that, and at that meeting Shane**  
24 **Huish said something to one of my kids, I don't**  
25 **remember which one, but along the line that, "You know**

<p style="text-align: right;">page 289</p> <p>1 what, I didn't mean to misled you, but I may have 2 misled you; because I thought I was okay with seven or 3 eight lifeguards, whatever the number may be, but I 4 didn't have the required number." Okay. 5 Q. Now, this is, this meeting with the P-, 6 with the press relations people, the PR people -- 7 A. Yeah. 8 Q. -- was one that was attended by the 9 Huishes and the Opheikens? 10 A. Well, I think Shane and my son in 11 Las Vegas were just going to meet with this gentleman 12 kind of as a what should we do. And I think the 13 meeting ended up not taking place, is my impression. 14 Q. And was that a meeting that was to take 15 place with Tom Letizia? 16 A. Well, gosh, I don't know. Maybe. 17 Q. Okay. So at the time they were going to 18 have the meeting after the lawsuit was filed, the 19 meeting that they wanted to have was with a PR person, 20 correct? 21 A. Correct. 22 Q. And this -- and the purpose of having the 23 PR person was to address what, what bad publicity was 24 going to flow from this in some fashion that you were 25 sued, correct?</p>	<p style="text-align: right;">page 291</p> <p>1 At the same time or the same period of 2 time, probably Cass Butler, our personal attorney, 3 contacted Lou Bryan (sic), I'm guessing, but I think 4 I'm in the ballpark. 5 Q. The Las Vegas lawyer? 6 A. Yeah. And I think, because I think by 7 now word has come back that, that maybe we really do 8 have a problem here. And, and so -- so I think the 9 meeting that you asked me about took place in Lou 10 Bryan's (sic) conference room. And I think there was 11 a couple, three meetings in Lou Brandon's conference 12 room. 13 Q. Okay. And did you attend any of them? 14 A. I believe I attended all three. 15 Q. Okay. When was the first one? 16 A. You keep doing that to me. I know you 17 don't mean to, but... 18 Q. Let me try to, let me try to reframe it 19 for you. 20 A. All right. 21 Q. How soon after the filing of the initial 22 Complaint, the filing of the initial lawsuit where you 23 learned for the first time of this grave and serious 24 condition of my client Leland Gardner, did you then 25 have the meeting with the attorney in Las Vegas?</p>
<p style="text-align: right;">page 290</p> <p>1 A. Yeah. I think so, yeah. 2 Q. Okay. And so there was, as I understand 3 it, there was an assumption on the part of your son 4 and, and the Huishes, that what was in the filed 5 lawsuit, the lawsuit that was filed with the court, 6 were allegations that were untrue in some fashion? 7 A. That's correct. 8 Q. Okay. Now, that meeting didn't take place 9 with the PR person, correct? 10 A. I'm not sure. My impression is it didn't. 11 Q. All right. But you informed me that there 12 was thereafter, as I understand it, and you correct me 13 if I'm wrong, a meeting that was held with an attorney 14 at or about that same time, correct, named Brandon? 15 A. Okay. Let me get -- let me try and think. 16 Q. Go ahead. 17 A. Okay. 18 Okay. So I'm think -- I think that there 19 were several things happening now, as you would 20 expect. 21 I believe during this same timeframe Slade 22 got on a plane and flew here to Vegas. And Scott 23 Huish got on a plane and flew here to Vegas. And they 24 were having a meeting trying to check out "What?" One 25 of those kind of things.</p>	<p style="text-align: right;">page 292</p> <p>1 A. I think relatively soon. 2 Q. Within days? 3 A. I think so. 4 Q. Fair enough. 5 You have told me that you do not believe 6 that there was a meeting at which this tragic event 7 was discussed among the management committee members 8 until such time as it was actually discussed with the 9 attorney Lou Brandon, correct? 10 A. To the best of my recollection. 11 Q. Okay. Now, different question. 12 Following the time of the initial lawsuit, 13 was there a subsequent meeting, okay? 14 A. Say again. 15 Q. Sure. Following the time of the lawsuit, 16 was there a subsequent meeting of the management 17 committee members regarding the park, the operation of 18 the park in any way? 19 A. Okay. Could you tell me what you mean by 20 "subsequent." Does that mean at the same time sort 21 of? 22 Q. Well, I'm going to -- I will tell you 23 this, okay. Let's see if I can put this in frame. 24 I'll represent to you, all right, that the lawsuit of 25 which we speak, the initial lawsuit was in fact filed</p>

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1 with the Eighth Judicial District Court on July 28th,  
2 2015.  
3 **A. Okay.**  
4 Q. All right. I'm not trying to trick you in  
5 any way here.  
6 **A. No, no, I get it.**  
7 Q. Okay?  
8 I will also tell you that we know of a  
9 meeting that took place of the management committee  
10 members on or about August 4th of 2015. Are you with  
11 me?  
12 **A. Um-hum.**  
13 Q. All right. Is that a "yes"?  
14 **A. July 28th. August 4th.**  
15 Q. Correct.  
16 **A. Okay.**  
17 Q. All right. Within days of the lawsuit  
18 being filed, there was a meeting of the management  
19 committee meeting on August the 4th, 2015. Are you  
20 with me?  
21 **A. I am.**  
22 Q. So it seems logical based upon your  
23 testimony to me that you would have had the lawsuit  
24 come to your attention, there would have been a  
25 meeting with Mr. Brandon in Las Vegas about it, and

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1 then a subsequent meeting of all of the members of the  
2 management committee meeting at or about August 4th of  
3 2015.  
4 **A. You, you may be correct. I don't**  
5 **recollect. But what I think is more likely.**  
6 Q. And just -- and I'll tell you because I'm  
7 not trying to hide the ball here.  
8 **A. Yeah.**  
9 Q. I believe that meeting took place at  
10 R&O Construction. Okay?  
11 **A. Oh, in Las Vegas R&O or do you mean**  
12 **Salt Lake?**  
13 Q. I believe, I believe in Salt Lake, but I'm  
14 not sure.  
15 MR. MIRKOVICH: Here.  
16 MR. CAMPBELL: Oh, was it here? Oh, it  
17 was here.  
18 BY MR. CAMPBELL:  
19 Q. We believe it was here, I'm sorry. Okay.  
20 Are you with me?  
21 **A. On August 4th?**  
22 Q. Yes, sir.  
23 **A. Okay. I just wanted to tell you what I**  
24 **think.**  
25 Q. Okay.

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1 **A. Okay. I think that was maybe the meeting**  
2 **that Slade and Scott came down and met. I don't know**  
3 **who else might have been involved in that meeting.**  
4 **But that's my best guess. I don't recollect the**  
5 **meeting.**  
6 Q. At all?  
7 **A. At all.**  
8 Q. You don't remember anything being  
9 discussed if you don't remember the meeting then,  
10 correct?  
11 **A. That's correct. But I'll tell you this.**  
12 **If I think of something, as I've done, I will bring it**  
13 **to your attention.**  
14 Q. Well, let me ask you this.  
15 **A. Okay.**  
16 Q. When was it that you first discovered the  
17 actual number of lifeguards that were on duty, present  
18 and on duty at the time that Leland was drowning?  
19 **A. There has been a lot of frustration on my**  
20 **part, because I've heard so many different numbers.**  
21 **Everybody seems to have a different number.**  
22 **The, the first time that I heard a number,**  
23 **that just shocked me, was from the insurance attorney,**  
24 **I believe, and -- Paul Eisinger. And I, and I don't**  
25 **recall exactly.**

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1 MR. GORMLEY: I have to object in terms of  
2 attorney/client privilege if he's discussing something  
3 with you. If you learned it some other way, that's  
4 fine.  
5 **THE WITNESS: All right. Anyway, I don't**  
6 **recall.**  
7 BY MR. CAMPBELL:  
8 Q. The transmission of facts in a case are  
9 not privileged.  
10 MR. GORMLEY: I never heard that argument  
11 before.  
12 MR. CAMPBELL: Yes. They are not. But,  
13 are you telling him not to answer?  
14 MR. GORMLEY: I'm telling him not to  
15 answer because I think it's a discussion with Paul  
16 Eisinger.  
17 BY MR. CAMPBELL:  
18 Q. Well, irrespective. Did you learn from  
19 some source what the actual number was?  
20 **A. I, I'm still not clear what the number**  
21 **was.**  
22 Q. All right. And when you say you're not  
23 clear, do you have a range?  
24 **A. Well, I -- I, I believe that Shane thought**  
25 **that it was okay to have seven. I believe that Shane**

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1 **thought he had seven. But I believe there was a**  
2 **breakdown there in the operations of some type and**  
3 **what happened shouldn't have happened.**  
4 Q. So how many were there?  
5 A. **Well, I think there was three, and two**  
6 **rovers. Whether that's three or five, but I know that**  
7 **it's not seven.**  
8 Q. At the time that Leland was drowning in  
9 the wave pool, how many lifeguards were present at the  
10 wave pool?  
11 A. **I don't know. I wasn't there.**  
12 Q. How many do you believe were there?  
13 A. **Five. That's not seven.**  
14 Q. Okay. And that's based upon what?  
15 A. **What I have been told by Shane and Richard**  
16 **Woodhouse and that's it.**  
17 Q. And you have confidence that there were  
18 five there because they told you that? That at the  
19 time --  
20 A. **I, I have. I have.**  
21 Q. Here's the question. Here's the question.  
22 Okay?  
23 A. **Okay.**  
24 Q. And it's a yes or no. Do you have  
25 confidence in the accuracy of Shane and

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1 Mr. Woodhouse's representation to you that there were  
2 five lifeguards present and on duty at the time Leland  
3 Gardner was drowning in the wave pool?  
4 A. **I just don't know. I wasn't there.**  
5 Q. And what did you do to determine whether  
6 the information you were receiving in that regard was  
7 accurate or was it false? What did you do?  
8 A. **We sent Slade down. He met with Scott**  
9 **Huish. They had a meeting. They made some changes.**  
10 **I relied on them.**  
11 Q. On, on who?  
12 A. **On Slade and Scott.**  
13 Q. Slade who?  
14 A. **Slade Opheikens.**  
15 Q. Your son?  
16 A. **Yes.**  
17 Q. Okay.  
18 There is an insurance policy that was  
19 acquired on behalf of the operation of Cowabunga Bay,  
20 correct, liability insurance policy?  
21 A. **Yeah.**  
22 Q. Okay. Do you know what the limits of  
23 liability of that policy are?  
24 A. **I believe it's 5 million.**  
25 Q. And when was it that you learned for the

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1 first time that the limits of liability were  
2 5 million?  
3 A. **Well, I remember a discussion when we were**  
4 **getting ready to open the park, more or less, over how**  
5 **much insurance to have.**  
6 **Because as I recall, the insurance -- I**  
7 **don't know if his name is Lance or -- anyway, they**  
8 **were thinking maybe two, two-and-a-half million was**  
9 **enough.**  
10 **We were concerned just because it**  
11 **doesn't -- we just weren't sure how much was enough.**  
12 **And so we asked that agent to do some, some checking,**  
13 **and get back with us to what he thought we should**  
14 **really carry. Because we didn't know. We are not in**  
15 **the water park business.**  
16 **And then we also asked Morton Insurance,**  
17 **our agent, as I recall, for some information. I**  
18 **believe they --**  
19 Q. Who does the R&O stuff?  
20 A. **Morton?**  
21 Q. Yes.  
22 A. **Yes.**  
23 Q. They provide insurance --  
24 A. **Right.**  
25 Q. -- coverage for R&O Construction?

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1 A. **Right.**  
2 Q. I'm just getting in the record who Morton  
3 is.  
4 A. **I'm sorry. Okay.**  
5 Q. Go ahead.  
6 A. **So we just kind of, so we relied on their**  
7 **input as to how much is enough. And we thought we**  
8 **were, if anything, overinsured. We were trying to be**  
9 **overinsured, not underinsured.**  
10 Q. Has R&O Construction Company ever suffered  
11 a catastrophic loss?  
12 A. **Yes.**  
13 Q. How many of them?  
14 A. **I don't know. Too many.**  
15 Q. Okay. Tell me what catastrophic losses  
16 that you can recall.  
17 A. **I, I --**  
18 Q. Well, tell me any of them. You say there  
19 is too many of them. You have --  
20 A. **Okay. Well, one is too many.**  
21 Q. I understand. So tell me what  
22 catastrophic losses.  
23 A. **40 years ago we had a young father that**  
24 **was a subcontractor down in a trench, as I recall,**  
25 **putting a line in and the dirt collapsed on him.**

<p style="text-align: right;">page 301</p> <p>1 Q. Buried alive?</p> <p>2 A. <b>Yeah.</b></p> <p>3 Q. Died?</p> <p>4 A. <b>Correct.</b></p> <p>5 Q. Um-hum. And there was a claim that was</p> <p>6 advanced, correct?</p> <p>7 A. <b>I, I -- I don't have recall with that.</b></p> <p>8 Q. Okay. But money was paid out by some</p> <p>9 agency?</p> <p>10 A. <b>I would guess.</b></p> <p>11 Q. Do you know how much was paid out?</p> <p>12 A. <b>I have no, I have no idea.</b></p> <p>13 Q. Do you understand it was in the millions?</p> <p>14 A. <b>No.</b></p> <p>15 Q. Okay. How much was it?</p> <p>16 A. <b>I have no idea.</b></p> <p>17 Q. Okay. What other catastrophic injuries?</p> <p>18 A. <b>We had a superintendent was driving back</b></p> <p>19 <b>and forth to, somewhere between Salt Lake and I can't</b></p> <p>20 <b>remember where, but out there on that alone and he ran</b></p> <p>21 <b>off the road and the car rolled over and he was</b></p> <p>22 <b>killed.</b></p> <p>23 Q. All right. When was that?</p> <p>24 A. <b>30 years ago.</b></p> <p>25 Q. Okay.</p>	<p style="text-align: right;">page 303</p> <p>1 acquired for Cowabunga Bay in this case?</p> <p>2 A. <b>No.</b></p> <p>3 Q. Are you aware that there is a provision</p> <p>4 with respect to funds that could be achieved in the</p> <p>5 event of a catastrophic event?</p> <p>6 A. <b>No.</b></p> <p>7 Q. Has there been any claim or designation of</p> <p>8 this event as catastrophic by you to the insurance</p> <p>9 company?</p> <p>10 A. <b>I, I don't know.</b></p> <p>11 Q. Has there been any claim that this event</p> <p>12 constituted a catastrophic injury which has been</p> <p>13 advanced by any member of the management committee for</p> <p>14 Cowabunga Bay to the insurance carrier in this case?</p> <p>15 A. <b>I don't know.</b></p> <p>16 BY MR. CAMPBELL:</p> <p>17 Q. Has Cowabunga Bay or Henderson Water Park,</p> <p>18 we have been using that --</p> <p>19 A. <b>Yeah, you've kept me mixed up.</b></p> <p>20 Q. Oh, I haven't kept you mixed up. We</p> <p>21 agreed that they are both the same, right? Okay?</p> <p>22 A. <b>But I forget.</b></p> <p>23 Q. All right. So when I'm talking about</p> <p>24 Cowabunga Bay, I am also talking about the legal</p> <p>25 entity.</p>
<p style="text-align: right;">page 302</p> <p>1 A. <b>We had a project downtown Ogden where they</b></p> <p>2 <b>just finished a safety meeting and a subcontractor</b></p> <p>3 <b>went out on a beam and didn't tie off, and it's</b></p> <p>4 <b>winter, you know, slippery and fell off the beam and</b></p> <p>5 <b>it killed him.</b></p> <p>6 Q. When was that?</p> <p>7 A. <b>Maybe 20, 20 years ago, maybe.</b></p> <p>8 Q. What is the most recent one that you had?</p> <p>9 A. <b>I, I'm not aware of any recent.</b></p> <p>10 Q. Okay. And by recent, within the past 10</p> <p>11 years have you had one?</p> <p>12 A. <b>I'm not aware of any.</b></p> <p>13 Q. Past 15 years?</p> <p>14 A. <b>I'm not aware of any since the one that I,</b></p> <p>15 <b>the last one I told you about.</b></p> <p>16 Q. Okay. How much liability insurance do you</p> <p>17 carry at R&amp;O?</p> <p>18 A. <b>I couldn't answer that question now.</b></p> <p>19 Q. Is it more or less than \$5 million?</p> <p>20 A. <b>I honestly couldn't carry that question.</b></p> <p>21 Q. Do you understand that catastrophic means</p> <p>22 death or severe injury of a permanent ongoing nature,</p> <p>23 you know, like paralysis, things of that nature?</p> <p>24 A. <b>Yeah. Yeah.</b></p> <p>25 Q. Have you ever read the policy that was</p>	<p style="text-align: right;">page 304</p> <p>1 A. <b>Okay.</b></p> <p>2 Q. Okay. Just to remind you of that,</p> <p>3 Henderson Water Park.</p> <p>4 A. <b>Okay.</b></p> <p>5 Q. It's just easier, I think, for you to just</p> <p>6 recall Cowabunga Bay. That's why I've used it, okay?</p> <p>7 A. <b>Yeah.</b></p> <p>8 Q. Because I don't want to mix you up.</p> <p>9 Has, has Cowabunga Bay, all right,</p> <p>10 received any letter from the insurance company</p> <p>11 declaring that there is a reservation of rights of any</p> <p>12 kind or type?</p> <p>13 A. <b>I'm not -- I don't know.</b></p> <p>14 Q. Okay. Who would know the answer to that</p> <p>15 question?</p> <p>16 A. <b>I would, I would guess Scott Huish. But</b></p> <p>17 <b>that is just a guess on my part.</b></p> <p>18 Q. Besides the initial news account from the</p> <p>19 CBS affiliate KLAS TV Channel 8 news here in</p> <p>20 Las Vegas, have you seen or been advised of subsequent</p> <p>21 news coverage regarding this tragedy?</p> <p>22 A. <b>The newspaper, I think I told you.</b></p> <p>23 Q. Um-hum.</p> <p>24 A. <b>And the TV is all I'm aware of.</b></p> <p>25 Q. Okay. You haven't, you haven't seen</p>

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1 anything else?

2 **A. No, I haven't.**

3 Q. Okay. Now, on December 22nd of 2017, you

4 were personally served with an amended lawsuit in

5 which you were personally named as a party, correct?

6 **A. Correct.**

7 Q. I believe it was served that morning at

8 1025 East 2100 North Street in Ogden, Utah.

9 **A. I believe it was actually served on the**

10 **24th.**

11 Q. We have it was the 22nd, but you think it

12 was the 24th?

13 **A. Well, I remember get -- my doorbell**

14 **ringing at 6:00 in the morning on Christmas Eve and I**

15 **thought it was unprofessional.**

16 Q. It's been filed with the Court, I believe,

17 the 22nd.

18 **A. Okay. I'm just telling you when it was**

19 **served.**

20 Q. What did you do after receipt of that

21 lawsuit?

22 **A. I'm sure I took it to Cass at our office.**

23 Q. Cass who?

24 **A. Cass Butler.**

25 Q. Has Cass Butler attended any meetings here

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1 in Las Vegas, Nevada in reference to this case?

2 **A. For example, like with Lou Brandon?**

3 Q. Yes.

4 **A. You know what, I don't, I don't remember.**

5 **I want to remember. But I, I'm not sure.**

6 Q. Does Cass Butler represent Cowabunga Bay

7 in any way, shape, or form?

8 **A. He represents me.**

9 Q. Okay.

10 **A. So I think he has been. In fact, I**

11 **believe he is who lined up Lou Brandon.**

12 Q. Okay. All right. And he has in the past

13 represented Cowabunga Bay, as I understand; is that

14 correct?

15 **A. It may be correct. Yeah, probably, I'm**

16 **sure he has.**

17 Q. All right. Any other attorneys that have

18 represented Cowabunga Bay?

19 **A. Well, I keep thinking of more.**

20 Q. Okay.

21 **A. The last one I thought of was Paul Price.**

22 Q. Is who?

23 **A. Isn't that his name, Paul Price? The**

24 **insurance attorney? No, Eisinger, Paul Eisinger.**

25 Q. Paul Eisinger.

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1 **A. And then Lou Brandon.**

2 Q. Okay.

3 **A. And we have met with an assistant of**

4 **Lou Brandon's. I don't recall his name, but...**

5 Q. Okay. Do you recall a meeting of the

6 management committee that took place on November of

7 2015? That would have been approximately a month or

8 so before you were --

9 **A. Well, let me say this. I, I don't recall**

10 **a meeting on a certain day.**

11 Q. Um-hum.

12 **A. But I feel like we had a meeting about**

13 **that time. It just seems to me like we did. But I**

14 **don't, I don't remember the meeting, if that makes**

15 **sense to you.**

16 Q. Well, do you recall at any meeting of the

17 management committee, after Leland was

18 catastrophically injured and after the initial lawsuit

19 was filed, that you met with the other management

20 committee meetings (sic) to discuss operations of the

21 park going forward?

22 **A. Well, I think that's the meeting that I am**

23 **remembering.**

24 Q. All right. And would -- and that would

25 have taken place at or about, at or about --

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1 **A. November.**

2 Q. -- November of 2015? Fair enough?

3 **A. Yeah. That's what I think, yeah.**

4 Q. Okay. Now, at that meeting was there an

5 examination of the failure to comply with the

6 lifeguard requirements as set forth by the Southern

7 Nevada Health District? Was there a discussion of

8 that issue?

9 **A. I, I don't recall that. I don't recall**

10 **even thinking about --**

11 Q. That issue?

12 **A. I just have no recall of that at all.**

13 Q. Okay.

14 Is there any -- withdraw.

15 Was there any change in your participation

16 or the manner in which you participated in the

17 management of Cowabunga Bay after Leland suffered his

18 catastrophic injuries?

19 **A. No, I don't think so.**

20 Q. Okay. At the 20 -- November 2015 meeting,

21 were there any directives or personnel changes made

22 with respect to operations of the park?

23 **A. Okay, please say ask that question again.**

24 (Record read as follows:)

25 "Q. At the November 2015 meeting,

<p style="text-align: right;">page 309</p> <p>1 were there any directives or personnel 2 changes made with respect to operations of 3 the park?"</p> <p>4 <b>THE WITNESS: I don't, I don't recall.</b></p> <p>5 BY MR. CAMPBELL:</p> <p>6 Q. Had they been discussed, do you think you 7 would have remembered them?</p> <p>8 A. <b>Okay. So the -- I, I think that Scott and</b> 9 <b>Slade had been working on something, but I just don't</b> 10 <b>recall exactly what it was or how it came down. It</b> 11 <b>led to IAM, I know.</b></p> <p>12 Q. Led to what?</p> <p>13 A. <b>A group named IAM, I-A-M.</b></p> <p>14 Q. Okay. Anything else?</p> <p>15 A. <b>No.</b></p> <p>16 Q. Okay. So let's see if I can encapsulate. 17 So there was no personnel change or change in the 18 duties of any member of the operations that you can 19 recall at that 2015 meeting in November, correct?</p> <p>20 A. <b>Well, I think there was changes, but I</b> 21 <b>just don't remember exactly when they took place.</b></p> <p>22 Q. Was, was Shane Huish fired?</p> <p>23 A. <b>The, the lifeguard responsibility -- or</b> 24 <b>he, he no longer ran the lifeguards, so to speak.</b> 25 <b>That was taken away from him, I believe. That's when</b></p>	<p style="text-align: right;">page 311</p> <p>1 Q. What makes you believe that that's the 2 case?</p> <p>3 A. <b>Because, because they called me, and at</b> 4 <b>the time what they were talking about sounded</b> 5 <b>reasonable. And I think they were asking me if I was</b> 6 <b>okay with it.</b></p> <p>7 Q. Well, that's what I'm asking you, what was 8 it?</p> <p>9 A. <b>I just, I've told you everything that I</b> 10 <b>remember.</b></p> <p>11 Q. And as you sit here today, can you tell me 12 whether or not there was some sort of discipline 13 imposed upon Shane Huish directly attributable to the 14 catastrophic injuries that were suffered by Leland 15 Gardner?</p> <p>16 A. <b>I believe there was. But you're going to</b> 17 <b>have to ask those guys what they were.</b></p> <p>18 Q. And was that, when you were told, did you 19 upon reflection believe that the discipline imposed 20 upon him was commensurate with the harm that was 21 suffered by Leland Gardner?</p> <p>22 A. <b>I don't know.</b></p> <p>23 Q. Wasn't that important to you?</p> <p>24 A. <b>Of course.</b></p> <p>25 Q. All right.</p>
<p style="text-align: right;">page 310</p> <p>1 <b>they brought IAM in, that's their specialty.</b></p> <p>2 Q. Was Shane Huish fired?</p> <p>3 A. <b>No.</b></p> <p>4 Q. Was he disciplined in any way?</p> <p>5 A. <b>You would have to ask Slade and Scott.</b> 6 <b>They met with -- they made the decision and they</b> 7 <b>called me to go over with me what they were thinking.</b> 8 <b>That's back around I believe in August.</b></p> <p>9 Q. No, we are talking about in the meeting --</p> <p>10 A. <b>It didn't happen --</b></p> <p>11 Q. -- of November 2015.</p> <p>12 A. <b>Well, it didn't happen in November of</b> 13 <b>2015.</b></p> <p>14 Q. So here's the question, okay.</p> <p>15 A. <b>Okay.</b></p> <p>16 Q. Was he disciplined?</p> <p>17 A. <b>I believe he was.</b></p> <p>18 Q. How?</p> <p>19 A. <b>I, I think he had rights that were</b> 20 <b>removed.</b></p> <p>21 Q. What rights were removed in the, as a 22 disciplinary measure that was imposed by the 23 management committee on Shane Huish?</p> <p>24 A. <b>I'm going to defer to them. I wasn't</b> 25 <b>there. I don't know.</b></p>	<p style="text-align: right;">page 312</p> <p>1 A. <b>I, I don't know how to answer that</b> 2 <b>question. I just don't know.</b></p> <p>3 Q. Truthfully, did you believe that the 4 discipline that had been imposed upon him was 5 commensurate with the injuries that were suffered by 6 Leland Gardner?</p> <p>7 A. <b>I don't, I don't think anything is</b> 8 <b>commensurate with what poor Leland Gardner is going</b> 9 <b>through.</b></p> <p>10 Q. And, but in fact, as you sit here today, 11 you can't even tell me what the discipline, if any, 12 there was at that time, correct?</p> <p>13 A. <b>I just don't know.</b></p> <p>14 MR. CAMPBELL: I think we have, what, 15 about an hour left?</p> <p>16 THE VIDEOGRAPHER: 55 minutes.</p> <p>17 MR. CAMPBELL: Okay. Let's take a 18 10-minute break for you, okay, and we will finish up.</p> <p>19 <b>THE WITNESS: Yeah.</b></p> <p>20 THE VIDEOGRAPHER: The time is 21 approximately 12:06 p.m. We are going off the record. 22 (Recessed from 12:06 p.m. to 12:24 p.m.)</p> <p>23 THE VIDEOGRAPHER: The time is 24 approximately 12:24 p.m. We are back on the record. 25 ///</p>

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1 BY MR. CAMPBELL:  
2 Q. Whose decision was it to hire IAM?  
3 A. **I, I believe Scott Huish and Slade worked**  
4 **on that. But I'm not sure exactly who.**  
5 Q. Slade who? Slade Opheikens?  
6 A. **Well, let me think.**  
7 Q. Well, I'm just asking. We have to have an  
8 identification of the last name, okay. You said Scott  
9 Huish and then you said Slade, and Slade is Opheikens,  
10 correct?  
11 A. **Yeah. But I'm trying --**  
12 Q. Okay.  
13 A. **I'm trying to remember when IAM came into**  
14 **the, the picture and how --**  
15 Q. Okay. When did you first, when did you  
16 first learn that IAM was hired?  
17 A. **I guess I really didn't know when IAM**  
18 **actually went to work. I met them down at the park.**  
19 Q. When?  
20 A. **I think in the spring of or maybe the --**  
21 **either the fall or the winter of '16 or fall of '15,**  
22 **but I don't remember for sure. I met --**  
23 Q. When you met them --  
24 A. **-- the guy that's working for IAM.**  
25 Q. I'm sorry?

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1 A. **I met the guy that was working for IAM.**  
2 Q. And when you met him, was the park open  
3 for business?  
4 A. **I can't remember.**  
5 Q. And when you met him, it was at the park?  
6 A. **Yes.**  
7 Q. And when you met him, who was it that  
8 introduced you?  
9 A. **Shane.**  
10 Q. And who else was present?  
11 A. **I, I don't know if Richard Woodhouse was**  
12 **present or not.**  
13 Q. And was -- what the gentleman's name from  
14 IAM?  
15 A. **I think Chris. I don't remember his last**  
16 **name.**  
17 Q. All right. And at the time you met him,  
18 was IAM already retained to perform services?  
19 A. **I'm not positive exactly when that**  
20 **started, or, you know, how it really happened. I**  
21 **just, I just was really impressed with him. I just**  
22 **thought, I just remember being really impressed with**  
23 **the person.**  
24 Q. Was, was anyone else from IAM present  
25 besides the gentleman that you talked to?

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1 A. **I don't, I don't remember. I don't**  
2 **believe so.**  
3 Q. All right. What was it that was so  
4 impressive about the gentleman from IAM?  
5 A. **I don't know. You know when you meet,**  
6 **sometimes you meet people and they just -- you are**  
7 **impressed with the person. I don't, I don't**  
8 **specifically remember a reason to be impressed.**  
9 Q. Well, apparently you were, so I'm asking  
10 if you can articulate the reasons why. Did he appear  
11 to be very knowledgeable about the industry?  
12 A. **Yes, and just --**  
13 Q. And did he appear to have a great deal of  
14 experience?  
15 A. **Yes.**  
16 Q. All right. Did he tell you about his  
17 company and the experience of his company?  
18 A. **I'm sure he did.**  
19 Q. All right. And you tell -- did he tell  
20 you that they had a body of clients that they  
21 performed services for and that this was their bread  
22 and butter, so to speak?  
23 A. **I believe so.**  
24 Q. Okay. So he presented to you a resume, so  
25 to speak, that was impressive, correct?

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1 A. **Well, I don't know if I thought of it in**  
2 **those terms. But I was impressed, I just remember**  
3 **that.**  
4 Q. All right. Did you talk to Shane or Slade  
5 or anyone else about what their view of IAM was and  
6 whether or not they shared how impressed you were?  
7 A. **I believe I did talk to, to Slade and**  
8 **Scott.**  
9 Q. Okay.  
10 A. **And I think they were equally impressed.**  
11 Q. Opheikens?  
12 A. **Yes.**  
13 Q. Okay. And they were equally impressed?  
14 A. **Well, my impression is they thought he**  
15 **was, would do a really good job.**  
16 Q. Were they there for this meeting --  
17 A. **What meeting?**  
18 Q. -- with you?  
19 A. **I --**  
20 Q. Where you came away with the impression  
21 that this gentleman and his firm was a solid, IAM.  
22 A. **I don't, I don't think it was a meeting.**  
23 **I think I was just over at the park having lunch.**  
24 Q. Were they with you?  
25 A. **No.**

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1 Q. Okay. They met him at, at an earlier  
2 point in time?  
3 **A. They must have. Because I'm pretty sure**  
4 **he was working at the park.**  
5 Q. All right. And, and they recommended that  
6 he be hired or the firm be hired, I should say?  
7 **A. I don't recall how that came about.**  
8 Q. Well, did they object to him being hired?  
9 **A. Did they object?**  
10 Q. Yes.  
11 **A. I don't know how it came about. I don't**  
12 **know why anybody would object.**  
13 Q. Okay. All right. So as far you knew,  
14 they were in favor of hiring this firm that was  
15 eventually hired, correct?  
16 **A. Probably.**  
17 Q. Okay. Makes sense to me too.  
18 So do you know of anyone that objected to  
19 hiring this firm, IAM?  
20 **A. No.**  
21 Q. Do you know of anyone who was in any way  
22 critical of IAM or their principles?  
23 **A. No.**  
24 Q. Okay. Everything you knew about them told  
25 you that they were a stable, solid firm; is that

page 318

1 correct?  
2 **A. I felt good about them, that's all I could**  
3 **say.**  
4 Q. You were satisfied?  
5 **A. Yes.**  
6 Q. Okay. And as far as you know, all the  
7 other members of the management committee were equally  
8 satisfied, to your knowledge?  
9 **A. I have no idea how the others felt about**  
10 **it.**  
11 Q. Well, no one expressed to you anything  
12 different than how you felt, right?  
13 **A. Nobody that I recall was negative.**  
14 Q. Okay. When they were first hired, they  
15 were -- the first time they performed services was in,  
16 was for the 2016 season?  
17 **A. That's what I was trying to remember.**  
18 Q. Okay.  
19 **A. And I don't remember.**  
20 Q. All right. Is that your best  
21 recollection?  
22 **A. Well, it could have been late in 2015.**  
23 Q. Were they brought in, do you believe that  
24 they were brought in immediately after the drowning of  
25 Leland?

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1 **A. I don't, I don't think, no. I don't think**  
2 **immediately.**  
3 Q. Well, were they brought in within weeks?  
4 **A. Well, weeks puts us in August.**  
5 Q. Okay.  
6 **A. And --**  
7 Q. That would have been months, actually, but  
8 go ahead.  
9 **A. That's correct. But, okay. But I think**  
10 **that it was towards the end even further, maybe**  
11 **September.**  
12 Q. September?  
13 **A. The first of September possibly.**  
14 Q. Okay. Would it have been at or about the  
15 time that the Gardner family filed their first  
16 lawsuit?  
17 **A. Yeah, I think it was after that.**  
18 Q. Okay. It was after the lawsuit was filed  
19 that IAM was hired, correct?  
20 **A. Yeah.**  
21 Q. And it was then that IAM performed certain  
22 duties; is that correct?  
23 **A. Correct.**  
24 Q. And that was -- and that was with the  
25 approval of the management committee that they did

page 320

1 that?  
2 **A. I actually think all this was happening**  
3 **with the -- I don't think there was a management**  
4 **committee meeting that made this big decision to hire**  
5 **IAM. I don't know exactly how that came down.**  
6 Q. Well, no one from the management committee  
7 you've told us ever objected to their hiring, correct?  
8 **A. Not that I'm aware.**  
9 Q. And no one in the management committee  
10 that you know of had anything negative to say about  
11 them, correct?  
12 **A. Not that I'm aware.**  
13 Q. And you further told us that no member of  
14 the management committee had anything but good things  
15 to say about them as far as you knew, correct?  
16 **A. As far as I knew.**  
17 Q. Okay. So when they took over after you  
18 were sued, excuse me, after Cowabunga Bay was sued by  
19 Leland Gardner's family, for the first time, what were  
20 their duties and responsibilities?  
21 **A. That all falls under the operations.**  
22 Q. Okay. So they were to perform what  
23 particular operational function?  
24 **A. I think mainly they were to control all**  
25 **the lifeguards, teach them, certify them, audit them,**

<p style="text-align: right;">page 321</p> <p>1 <b>whatever was required to do the proper lifeguard job</b> 2 <b>according to the way it should be done and according</b> 3 <b>to the law.</b> 4 Q. Okay. Now, did there come a time when 5 IAM's function, duties, and responsibility were 6 expanded to include other functions, duties, and 7 responsibilities? 8 <b>A. I'm, I'm not aware, I don't know.</b> 9 Q. Well, there was another drowning at 10 Cowabunga Bay, correct? 11 <b>A. Yes.</b> 12 Q. All right. Who drowned? 13 <b>A. I don't, I don't remember the kid's name.</b> 14 Q. You don't remember the kid's name? 15 <b>A. I don't.</b> 16 Q. Okay. Do you remember how old the kid 17 was, the child? 18 <b>A. I believe he was a teenager. I just can't</b> 19 <b>remember. I think he was 12 or 13.</b> 20 Q. Okay. And you don't know his name? 21 <b>A. I can't remember his name.</b> 22 Q. Okay. And when was it that you first 23 learned that there had been another drowning? 24 <b>A. I, I don't recall.</b> 25 Q. All right. Was Shane Huish still employed</p>	<p style="text-align: right;">page 323</p> <p>1 MR. GORMLEY: Well, yes. So? I don't 2 care. 3 MR. CAMPBELL: And you're telling him not 4 to answer that question? 5 MR. GORMLEY: Because you have another 6 lawsuit. You want -- 7 MR. CAMPBELL: I'm not asking him anything 8 about the other lawsuit. I'm not asking him about 9 liability or anything of the nature. I'm asking about 10 if he knows the date. 11 MR. GORMLEY: I don't know where this line 12 of questioning is going. 13 MR. CAMPBELL: Well, stay tuned and object 14 then rather than in advance of the questions that are 15 objectionable, because I'm not going to ask him 16 anything that's objectionable. 17 BY MR. CAMPBELL: 18 Q. Okay. Do you know the date? 19 MR. GORMLEY: I'll let him answer that. 20 <b>THE WITNESS: I don't remember.</b> 21 BY MR. CAMPBELL: 22 Q. Okay. Do you believe it's in the summer 23 of 2016? 24 <b>A. I believe so.</b> 25 Q. Okay. After that date, was there an</p>
<p style="text-align: right;">page 322</p> <p>1 at the time of the second drowning? 2 <b>A. Yes. But he didn't have anything to do</b> 3 <b>with the lifeguards.</b> 4 Q. So the answer to my question that I asked; 5 to-wit, was Shane Huish still employed at the time of 6 the second drowning, the answer is "yes"? 7 <b>A. Yes.</b> 8 Q. Okay. When did the second drowning take 9 place? 10 (No answer provided by deponent.) 11 MR. GORMLEY: Let me object. I'm on the 12 verge of instructing him not to answer. This is 13 another lawsuit that's been filed. We are not 14 prepared to go into these issues at this time. 15 Don't answer the questions. 16 MR. CAMPBELL: You're telling him not to 17 answer the question as to when the second drowning 18 took place? 19 MR. GORMLEY: Yes. 20 MR. CAMPBELL: That's a matter of public 21 record, and you're telling him -- 22 MR. GORMLEY: I don't care what you think 23 it is. 24 MR. CAMPBELL: It is a matter of public 25 record.</p>	<p style="text-align: right;">page 324</p> <p>1 expansion of the duties of IAM? 2 <b>A. I don't know.</b> 3 Q. Was there any demotion of Wayne (sic) 4 Huish's responsibilities in any way, shape, or form? 5 <b>A. I don't know.</b> 6 Q. Has Wayne -- or Shane Huish, excuse me, I 7 meant to say Shane. Was Shane Huish demoted in any 8 way, shape, or form following the second drowning? 9 This one resulting in death to the little boy whose 10 name you can't recall. 11 <b>A. I believe so.</b> 12 Q. Okay. How so? 13 <b>A. I wasn't part of that, figuring that out.</b> 14 <b>So I'm not going to try to answer the question because</b> 15 <b>I just don't know it well enough to sit here and tell</b> 16 <b>you.</b> 17 Q. Well, how do you know that his 18 responsibilities were diminished in some fashion? 19 <b>A. Because I was told.</b> 20 Q. Who told you? 21 <b>A. I think, I think -- I don't remember.</b> 22 Q. Okay. It was, it was someone on the 23 management committee? 24 <b>A. I just don't remember. You asked me who</b> 25 <b>and I was trying to think and I don't know.</b></p>

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1 Q. All right. How did you learn? Did you  
2 learn from a conversation or did you read it or a  
3 telephone call or?  
4 **A. I, I just can't remember.**  
5 Q. Was it such an unimportant event that you  
6 just put it out of your mind?  
7 MR. GORMLEY: Let me object.  
8 Argumentative.  
9 **THE WITNESS: I just don't know.**  
10 BY MR. CAMPBELL:  
11 Q. Were the duties that were the subject of  
12 diminishment in this responsibility sphere of Shane  
13 Huish, assumed by IAM; that's to say, were duties  
14 taken away from Shane and then directed to be the  
15 responsibility of IAM?  
16 **A. I believe so.**  
17 Q. Okay. Do you know what those duties are?  
18 **A. I'm not knowledgeable enough to try and**  
19 **explain them.**  
20 Q. Can you tell me who runs the park now, is  
21 it Shane Huish or, or is it IAM?  
22 MR. GORMLEY: How is this relevant to the  
23 drowning?  
24 BY MR. CAMPBELL:  
25 Q. Go ahead.

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1 **A. I don't know the exact structure right now**  
2 **of, of the operations.**  
3 Q. Why not?  
4 **A. Well, I'm actually not on the management**  
5 **committee anymore.**  
6 Q. When did you leave the management  
7 committee? Was it before or after you were sued?  
8 **A. After.**  
9 Q. How long after?  
10 **A. Probably a year.**  
11 Q. Why are you no longer on the management  
12 committee?  
13 **A. Obviously I'm old.**  
14 Q. Any other reason?  
15 **A. I don't think there needs to be any other**  
16 **reason. I hate to admit it, but it's where I am at.**  
17 Q. Have you engaged in any efforts to sell  
18 the interest, your interest, to any third party in the  
19 Cowabunga Bay park?  
20 **A. I, I don't think we could say that we have**  
21 **engaged. I, I think there has been conversations**  
22 **with, probably with Scott Huish. I don't know. You**  
23 **know, I don't know what they are. But if, certainly**  
24 **if somebody wanted to buy the water park, you know, we**  
25 **would --**

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1 Q. Consider it?  
2 **A. We would consider it, yeah.**  
3 **Do you want to buy it?**  
4 Q. And there have been no such discussions of  
5 any sort of negotiations to sell it as of yet?  
6 **A. I don't, I don't think anything is serious**  
7 **or promising. I think there has been interest, a**  
8 **phone call, you know.**  
9 Q. By who?  
10 **A. I'm not sure. Those, those conversations**  
11 **have taken place through Scott. They haven't been**  
12 **serious enough for us to even hardly have a**  
13 **conversation about them.**  
14 Q. You mean the conversations with Scott  
15 concerning possible -- your divestiture from the  
16 business, have not been serious enough to consider at  
17 this point?  
18 **A. Well, I think if the Huish -- I think they**  
19 **might be interested to do something. But, you know**  
20 **what, I don't know how under this investigation or**  
21 **lawsuit. I don't know how you would even sell a park,**  
22 **if you could even sell a park.**  
23 Q. Different question. And it's more  
24 directed towards third parties. Has there been any  
25 attempt to sell your interest or that of your family

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1 in Cowabunga Bay to any third parties?  
2 **A. No.**  
3 Q. Okay. Have you ever acquired or sold any  
4 business of any kind through a broker?  
5 **A. Well, ever is a long time. I don't think**  
6 **so. I, I definitely cannot think of a business. I**  
7 **mean, I think an emphatic no.**  
8 Q. Have you ever acquired a warehouse through  
9 a broker?  
10 **A. Well, define a warehouse. Do you mean**  
11 **like our office?**  
12 Q. An office or an office complex?  
13 **A. Yes.**  
14 Q. Okay.  
15 **A. A small, not very big, but...**  
16 Q. Have you sought out a broker to --  
17 **A. Market.**  
18 Q. -- to seek, to sell, market, or otherwise  
19 locate a third party to purchase your interest and  
20 that of the Opheikens family?  
21 **A. No.**  
22 Q. Okay. At the time that you resigned your  
23 position as chairman of the management committee, did  
24 you remain on the committee as a member?  
25 **A. No.**

<p style="text-align: right;">page 329</p> <p>1 Q. So when you resigned as chairman, you went 2 off the committee completely? 3 A. Yes. 4 Q. Was an individual appointed in your place 5 as chairman? 6 A. I'm not sure. 7 Q. Was another individual appointed to the 8 management committee? 9 A. I'm, I'm not sure. 10 Q. Do you believe that there has been a newly 11 appointed member to the management committee? 12 A. I, I don't know. 13 Q. Did you ever ask anyone? 14 A. No. 15 Q. And no one ever discussed that subject 16 matter with you? 17 A. No. 18 Q. And no one discussed the subject matter of 19 who would become chairman upon your relinquishing that 20 position? 21 A. No. I, I don't know. 22 Q. Was the answer no or you don't know? 23 A. Can you ask me the question again, please. 24 MR. CAMPBELL: Please do so. 25 ///</p>	<p style="text-align: right;">page 331</p> <p>1 A. I just don't remember when we had a 2 meeting, the last meeting. I would guess last fall, 3 but, but I don't specifically remember the meeting. 4 Q. Were you at a management committee meeting 5 at which the designation of IAM to operate the entire 6 park was made? 7 A. I don't, I don't recall. 8 Q. Why is Shane Huish still employed by 9 Cowabunga Bay? 10 A. I, I think that Shane really, really 11 cares. Shane is so good with the customers. As far 12 as safety is concerned, I always thought Shane really 13 was very safety conscious. And I don't know what 14 happened on this lifeguard issue. I had no idea it 15 was happening. I had no idea how it happened. I just 16 wasn't there. 17 Q. That's right, you weren't, were you? 18 A. That's right, I wasn't. 19 Q. So it is fair to say then that Shane 20 Huish's responsibility for operations ended at 21 Cowabunga Bay after the second drowning? 22 A. I don't know when. I think that happened 23 prior to that, but I'm not positive. 24 Q. Yes, the second drowning occurred prior to 25 the time that Shane's operational responsibilities</p>
<p style="text-align: right;">page 330</p> <p>1 (Record read as follows:) 2 "Q. And no one discussed the subject 3 matter of who would become chairman upon your 4 relinquishing that position?" 5 THE WITNESS: I don't, I don't remember 6 specifically talking about it. Cass handled it, and I 7 was just happy get off and be gone. 8 BY MR. CAMPBELL: 9 Q. Okay. As you sit here today, you can't, 10 you can't recollect anything with respect to what 11 events transpired after you said "I'm resigning," 12 correct? 13 A. Yeah. Pretty much. 14 Q. When was the last meeting of the 15 management committee of Cowabunga Bay that you 16 presided over? 17 A. Well, I, I've never thought of me ever 18 presiding over a meeting, but we had meetings. 19 Q. Do you want me to ask -- let me ask the 20 question this way since you quibble with the word 21 "presiding." 22 When was the last meeting at which you 23 were in attendance of the management committee before 24 you resigned your position as chairman of that 25 committee?</p>	<p style="text-align: right;">page 332</p> <p>1 ended. 2 A. I don't believe that's correct. 3 Q. Oh, you don't? 4 A. No. 5 Q. And why don't you believe that that's 6 correct? 7 A. I just don't think that's correct. 8 Q. Well, what is your body of knowledge that 9 leads you to believe that that's not correct? 10 A. I, I just think that Shane Huish, things 11 were changed prior to the end of 2015. I just don't 12 remember exactly what the changes were. I'm not sure 13 I even ever really knew what the changes were. 14 Q. Are you aware of any amended operating 15 agreement that exists for the Henderson Water Park? 16 A. There could be some, but I, I'm not aware 17 of them. Does that mean, for instance, if I am 18 relieved of being on the board? Or is that an 19 amended -- is that amended? 20 Q. Well, do you know what an operating 21 agreement is for an LLC? 22 A. Yes. 23 Q. Okay. An operating agreement is, is far 24 more inclusive than just who happens to be a chairman 25 of the management committee. Okay? So do you</p>

<p style="text-align: right;">page 333</p> <p>1 understand what I'm saying to you?</p> <p>2 <b>A. I think I do.</b></p> <p>3 Q. Okay. So I am asking, has there been a</p> <p>4 new operating agreement or amended operating agreement</p> <p>5 for the Cowabunga Bay Henderson Water Park that you</p> <p>6 know of?</p> <p>7 <b>A. That would remove me from --</b></p> <p>8 Q. No.</p> <p>9 <b>A. -- is that what you're talking about?</b></p> <p>10 Q. That does anything. That does anything</p> <p>11 with respect to the operations.</p> <p>12 <b>A. There may have been. I'm not sure if</b></p> <p>13 <b>that's -- I don't, you know.</b></p> <p>14 Q. Why do you believe there may have been?</p> <p>15 <b>A. Well, I signed, I signed a document taking</b></p> <p>16 <b>me off of the board.</b></p> <p>17 Q. And who prepared that document?</p> <p>18 <b>A. I, I believe Cass may have had it prepared</b></p> <p>19 <b>by somebody. I'm not sure who prepared it, but, but I</b></p> <p>20 <b>signed it with Cass.</b></p> <p>21 Q. Where did you execute that document with</p> <p>22 Cass?</p> <p>23 <b>A. I don't -- I think in my office.</b></p> <p>24 Q. In Utah?</p> <p>25 <b>A. Yeah.</b></p>	<p style="text-align: right;">page 335</p> <p>1 worth statement was provided to?</p> <p>2 <b>A. I would guess Zions Bank.</b></p> <p>3 Q. In Ogden?</p> <p>4 <b>A. Or Salt Lake Bank. I mean, they have a</b></p> <p>5 <b>branch.</b></p> <p>6 Q. SLC. Okay.</p> <p>7 Is there a investment advisory firm you</p> <p>8 use for your investments?</p> <p>9 <b>A. I don't think so. You're talking about</b></p> <p>10 <b>like stocks or things like that?</b></p> <p>11 Q. Yes.</p> <p>12 <b>A. No. No.</b></p> <p>13 Q. You don't use Morgan Stanley or</p> <p>14 Wells Fargo advisers or?</p> <p>15 <b>A. No.</b></p> <p>16 Q. You know, Goldman Sachs, nothing like</p> <p>17 that?</p> <p>18 <b>A. No.</b></p> <p>19 Q. Well, who manages your investments?</p> <p>20 <b>A. Well, I don't have a lot of those kind of</b></p> <p>21 <b>investments.</b></p> <p>22 Q. Okay. You are basically a real estate</p> <p>23 guy?</p> <p>24 <b>A. Yeah.</b></p> <p>25 Q. Okay. Who's your certified public</p>
<p style="text-align: right;">page 334</p> <p>1 Q. Okay. Have you disposed of any asset more</p> <p>2 than \$25,000 in value since the time that the first</p> <p>3 lawsuit was filed in this matter in July of 2015?</p> <p>4 <b>A. Are you talking about a personal asset?</b></p> <p>5 <b>You know, we build, we build homes, we sell a home,</b></p> <p>6 <b>pay off the bank loans, I mean, that's kind of the</b></p> <p>7 <b>business we are in.</b></p> <p>8 Q. Personal asset is what I'm talking about.</p> <p>9 Something that you would list, okay, on a personal net</p> <p>10 worth sheet.</p> <p>11 <b>A. I sold one lot. I think it was for</b></p> <p>12 <b>200,000, and paid a commission, and I paid off a bank</b></p> <p>13 <b>loan.</b></p> <p>14 Q. When was that?</p> <p>15 <b>A. Probably a month ago.</b></p> <p>16 Q. Okay. Anything else?</p> <p>17 <b>A. No, I think that's it.</b></p> <p>18 Q. When is the last time you created a net</p> <p>19 worth statement for a bank?</p> <p>20 <b>A. I honestly don't know. Charlie Auger</b></p> <p>21 <b>takes care of that if the bank requests it.</b></p> <p>22 Q. Charlie Auger is your CFO?</p> <p>23 <b>A. CFO, yeah. I would, I would guess that he</b></p> <p>24 <b>would have done that in the last one or two years.</b></p> <p>25 Q. Okay. And do you know what bank that net</p>	<p style="text-align: right;">page 336</p> <p>1 accountant? Your personal certified public</p> <p>2 accountant?</p> <p>3 <b>A. Royce Richards.</b></p> <p>4 Q. How long has he been your CPA?</p> <p>5 <b>A. A number of years.</b></p> <p>6 Q. What is the name of the firm?</p> <p>7 <b>A. I think it's Woods Richards or Richards</b></p> <p>8 <b>Woods.</b></p> <p>9 Q. When the second drowning occurred -- and I</p> <p>10 will tell you the little boy's name is Daquan</p> <p>11 Bankston. Okay?</p> <p>12 <b>A. Okay.</b></p> <p>13 Q. After Daquan Bankston died by drowning at</p> <p>14 the wave pool at Cowabunga Bay, did you make any</p> <p>15 inquiry of anyone as to the facts and circumstances of</p> <p>16 the little boy's death?</p> <p>17 MR. GORMLEY: Let me object to relevancy</p> <p>18 concerning the lawsuit of Leland Gardner and this</p> <p>19 second drowning.</p> <p>20 You can answer the question.</p> <p>21 MR. CAMPBELL: Thank you.</p> <p>22 <b>THE WITNESS: I, I talked to Scott Huish</b></p> <p>23 <b>and I think Slade also, you know, that they told me</b></p> <p>24 <b>what was going on.</b></p> <p>25 <b>///</b></p>

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1 MR. CAMPBELL: Okay. How much time do I  
2 have left?  
3 THE VIDEOGRAPHER: 26 minutes.  
4 MR. CAMPBELL: Okay. Let's take a break.  
5 THE VIDEOGRAPHER: The time is  
6 approximately 12:59 p.m. We're going off the record.  
7 (Recessed from 12:59 p.m. to 1:06 p.m.)  
8 THE VIDEOGRAPHER: The time is  
9 approximately 1:06 p.m. We are back on the record.  
10 BY MR. CAMPBELL:  
11 Q. Have you assigned any interest that you  
12 possess in Henderson Water Park, Cowabunga Bay, or any  
13 of the entities that are associated with to any other  
14 party?  
15 **A. No.**  
16 Q. Has any entity, to your knowledge,  
17 associated with Cowabunga Bay, changed its status in  
18 any way such as going from a corporation to a limited  
19 liability company to a partnership, anything of that  
20 nature?  
21 **A. I don't believe so. Not that I'm aware**  
22 **of.**  
23 Q. I asked this question, but bear with me  
24 because I'm asking it again for a reason, for  
25 foundation.

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1 To the best of your recollection, when did  
2 you resign your position as presiding chairman of the  
3 management committee of Cowabunga Bay?  
4 **A. I would say in the last two or three**  
5 **months.**  
6 Q. Okay. What other documents were created  
7 in conjunction with your resignation of that position  
8 besides your, whatever document your lawyer in Ogden  
9 prepared for you?  
10 **A. I -- I'm not, I'm not aware. I just**  
11 **signed the documents as he --**  
12 Q. Was --  
13 **A. -- prepared them.**  
14 Q. Sorry.  
15 **A. I don't think.**  
16 Q. That's the question, was there more than  
17 one document?  
18 **A. I don't think so.**  
19 Q. Okay.  
20 **A. But, you know.**  
21 Q. Did you -- have you ever participated in  
22 any sort of restructuring of any entity that's been in  
23 any way involved with Cowabunga Bay?  
24 **A. No.**  
25 Q. Has there been any meeting that you have

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1 attended or otherwise are aware of with respect to the  
2 lending institution that you have outstanding loans  
3 with for Cowabunga Bay?  
4 **A. No. I don't believe so.**  
5 Q. Okay.  
6 **A. None that I've attended.**  
7 Q. Is Lou Brandon still your attorney?  
8 **A. I don't think so. But we still -- I know**  
9 **that Cass was still working with something with**  
10 **Lou Brandon --**  
11 Q. Okay.  
12 **A. -- the other day. So I'm not sure how to**  
13 **answer that question.**  
14 Q. All right. Don't tell me what they were  
15 doing.  
16 **A. I don't know.**  
17 Q. Okay. But you believe that Lou,  
18 Mr. Brandon is still an attorney who is in some  
19 fashion associated with this litigation; is that fair  
20 enough?  
21 **A. Yes, I believe so.**  
22 Q. Okay. Now, since the time -- withdraw.  
23 Have you at any time seen any recordings,  
24 visual recordings, that depict the physical condition  
25 of little Leland?

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1 **A. No, I haven't.**  
2 Q. Do you know that they exist?  
3 **A. I've heard. I think Lou Brandon told us**  
4 **that, that he watched them, and they were so -- they**  
5 **were really hard to watch.**  
6 Q. All right. Why did you choose not to  
7 watch them?  
8 **A. Mr. Campbell, I had a son that was killed**  
9 **in our backyard with a brain injury on a four-wheeler.**  
10 **I just didn't know how -- I just couldn't deal with**  
11 **it.**  
12 Q. How long ago was that?  
13 **A. It's been probably 20, 25 years ago.**  
14 Q. Who was the manufacturer?  
15 **A. I, I don't remember. I didn't sue**  
16 **anybody. It was me that bought it.**  
17 Q. Well, I've handled a number of those cases  
18 and successfully so, and established liability on  
19 four-wheelers. Particularly ones that were developed,  
20 configured, and tested about the same time as your boy  
21 died from.  
22 And you have my greatest and most sincere  
23 condolences. It is something that you never get over.  
24 No matter how many children you have, no matter how  
25 long you live. Until the day you die, you will never

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1 MS. BEAL: Yes, please.  
2 COURT REPORTER: Mr. Godinho, did you want  
3 a copy of the transcript?  
4 MR. GODINHO: Yes.  
5 (Whereupon, the deposition adjourned at 1:16 p.m.)  
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CERTIFICATE OF DEPONENT		page 344
PAGE	LINE	CHANGE
		REASON
1		
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12		
13	I, ORLUFF OPHEIKENS, deponent herein, do	
14	hereby certify and declare under penalty of perjury	
15	that the within and foregoing transcription, including	
16	my corrections reflected above, is a true and correct	
17	transcription of my testimony contained therein; that	
18	I have read, corrected, and hereby affix my signature	
19	to said deposition.	
20	Executed this ____ day of _____,	
21	2018, at _____.	
22	(City/State)	
23		
24		
25	_____ ORLUFF OPHEIKENS, Deponent	

<p>1 CERTIFICATE OF REPORTER</p> <p>2</p> <p>3 STATE OF NEVADA )</p> <p>4 ) ss</p> <p>5 COUNTY OF CLARK )</p> <p>6 I Denise R. Kelly, a Certified court</p> <p>7 Reporter, duly licensed by the State of Nevada do</p> <p>8 hereby certify:</p> <p>9 That I reported the deposition of</p> <p>10 ORLUFF OPHEIKENS, commencing on Tuesday, May 8, 2018,</p> <p>11 at the hour of 9:29 a.m.</p> <p>12 That prior to being deposed, the deponent</p> <p>13 was duly sworn by me to testify to the truth;</p> <p>14 That I thereafter transcribed my said</p> <p>15 stenographic notes into written form;</p> <p>16 That the typewritten transcript is a</p> <p>17 complete, true, and accurate transcription of my said</p> <p>18 stenographic notes;</p> <p>19 I further certify that pursuant to NRCP</p> <p>20 Rule 30(e)(1) that the signature of the deponent:</p> <p>21 _X_ was requested by the deponent or a</p> <p>22 party before the completion of the deposition;</p> <p>23 __ was not requested by the deponent or a</p> <p>24 party before the completion of the deposition;</p> <p>25 I further certify that I am not a relative</p>	<p>page 345</p>
<p>1 or employee of counsel or of any of the parties</p> <p>2 involved in the proceeding, nor a person financially</p> <p>3 interested in the proceeding.</p> <p>4 IN WITNESS WHEREOF, I have set my hand in my</p> <p>5 office in the County of Clark, State of Nevada, this</p> <p>6 13th day of May, 2018.</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13 _____</p> <p>Denise R. Kelly</p> <p>CCR #252, RPR</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>page 346</p>

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