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

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

Appellants,

v.

R & O CONSTRUCTION, INC.

Respondent.

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

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

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# **EXHIBIT B**

Gardner vs Henderson Water Park, LLC, et al.

Videotaped Deposition of  
**JEFFREY SLADE OPHEIKENS**

*May 24, 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

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 JEFFREY SLADE OPHEIKENS

Taken at the offices of Campbell & Williams

on Thursday, May 24, 2018

at 9:33 a.m.

at 700 South Seventh Street  
Las Vegas, Nevada

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

<p>1 SHANE HUISH, an individual; SCOTT 2 HUISH, an individual; CRAIG HUISH, 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 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, Craig Huish and West Coast 3 Water Parks: 4 5 REBECCA MASTRANGELO, ESQ. 6 ROGERS, MASTRANGELO, CARVALHO &amp; MITCHELL 7 700 South Third Street 8 Las Vegas, Nevada 89101 9 702.383.3400 10 rmastrangelo@rmcmlaw.com 11 Also present: 12 SHANE GODFREY, VIDEOGRAPHER 13 LAS VEGAS LEGAL VIDEO 14 PETER GARDNER 15 SCOTT HUISH 16 TOM WELCH 17 18 19 20 21 22 23 24 25</p> <p>page 4</p> <p>INDEX</p> <table><tr><td>WITNESS</td><td>PAGE</td></tr><tr><td>JEFFREY SLADE OPHEIKENS</td><td></td></tr><tr><td>Examination by Mr. Campbell</td><td>10</td></tr></table> <p>INFORMATION TO BE SUPPLIED</p> <p>None</p>	WITNESS	PAGE	JEFFREY SLADE OPHEIKENS		Examination by Mr. Campbell	10																		
WITNESS	PAGE																								
JEFFREY SLADE OPHEIKENS																									
Examination by Mr. Campbell	10																								
<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 DOUGLAS J. DUESMAN, ESQ. 16 THORNDAL, ARMSTRONG, DELK, BALKENBUSH &amp; EISINGER 17 1100 East Bridger Avenue 18 Las Vegas, Nevada 89101 19 702.366.0622 20 djd@thorndal.com 21 22 For Defendants Double Ott, the Opheikens and Tom 23 Welch: 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: KEVIN S. SMITH, ESQ. HALL, JAFFE &amp; CLAYTON, LLP 7425 Peak Drive Las Vegas, Nevada 89128 702.316.4111 ksmith@lawhjc.com /// /// ///</p> <p>page 3</p>	<p>1 EXHIBITS 2 (Deposition Exhibit Nos. 1 through 39 3 marked in prior depositions.) 4 DEPOSITION 5 Exhibit 40 - Operating Agreement for 6 Henderson Water Park, LLC 7 CB002475-2509 8 Exhibit 41 - Fourth Addendum to the 9 Operating Agreement 10 CB02439-24141 11 Exhibit 42 - 7/5/14 Email with 12 Attachments 13 CB004954-4958 14 Exhibit 43 - 7/6/14 Email 15 TOSC00044 16 Exhibit 44 - 7/9/14 and 7/14/14 17 Email 18 TOSC00097-98 19 Exhibit 45 - 7/11/14, 3/26/16 and 20 3/27/16 Text Messages 21 CB012595-12596 22 Exhibit 46 - 7/10/14 and 7/11/14 23 Email with Attachments 24 TOSC00057-75 25 Exhibit 47 - 7/9/14, 7/14/14 and 7/15/14 Email TOSC00105-106 Exhibit 48 - 8/15/14 Email with Attachments TOSC00290-292 Exhibit 49 - 9/17/14 Email TOSC00300 Exhibit 50 - 10/20/14 Email with Attachments TOSC00632-633 SHUIH0000332 ///</p> <p>page 5</p> <table><tr><td></td><td>PAGE</td></tr><tr><td>94</td><td></td></tr><tr><td>132</td><td></td></tr><tr><td>185</td><td></td></tr><tr><td>191</td><td></td></tr><tr><td>194</td><td></td></tr><tr><td>197</td><td></td></tr><tr><td>203</td><td></td></tr><tr><td>208</td><td></td></tr><tr><td>213</td><td></td></tr><tr><td>214</td><td></td></tr><tr><td>215</td><td></td></tr></table>		PAGE	94		132		185		191		194		197		203		208		213		214		215	
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1	EXHIBITS (CONT'D)			1	LAS VEGAS, NEVADA, THURSDAY, MAY 24, 2018,		
2	DEPOSITION	PAGE		2	9:33 A.M.		
3	Exhibit 51 - 3/9/15 and 3/10/15			3	* * * * *		
4	Email			4	THE VIDEOGRAPHER: Good morning. Today is		
5	Exhibit 52 - 3/31/15 and 4/1/15	225		5	Thursday, May 24th, 2018. The time is approximately		
6	Email			6	9:33 a.m. This begins the video deposition of Slade		
7	Exhibit 53 - 4/16/15, 4/17/15	227		7	Opheikens.		
8	TOSC01566			8	We are located at Campbell & Williams,		
9	Exhibit 54 - 5/27/15 Email	234		9	700 South Seventh Street, Las Vegas, Nevada 89101.		
10	with Attachments			10	My name is Shane Godfrey, court		
11	TOSC00997-1000	245		11	videographer with Las Vegas Legal Video, located at		
12	Exhibit 55 - 5/28/15 Email	251		12	729 South Seventh Street, Las Vegas, Nevada 89101.		
13	with Attachments			13	This is District Court, Clark County,		
14	TOSC01043-1047	254		14	Nevada, Case No. A-15-722259, in the matter of Peter		
15	Exhibit 56 - 7/29/15 and 7/30/15	256		15	Gardner and Christian Gardner, individually and on		
16	Email			16	behalf of minor child Leland Gardner, plaintiffs,		
17	Exhibit 57 - 7/16/15, 7/21/15 and	264		17	versus Henderson Water Park, LLC dba Cowabunga Bay		
18	7/22/15 Email			18	Water Park, et al., defendants.		
19	TOSC01059-1061	266		19	This video deposition is requested by the		
20	Exhibit 58 - 9/16/15 and 9/17/15	275		20	attorneys for the plaintiffs.		
21	Email			21	Will counsel and all present please state		
22	Exhibit 59 - 9/26/15 and 9/27/15	278		22	your appearances for the record.		
23	Email			23	MR. CAMPBELL: Donald Jude Campbell,		
24	Exhibit 60 - 5/13/16 Email			24	Campbell & Williams, appearing on behalf of plaintiff.		
25	CB012401			25	MR. MIRKOVICH: Samuel Mirkovich,		
1	EXHIBITS (CONT'D)		page 7	1	Campbell & Williams, appearing on behalf of		page 9
2	DEPOSITION	PAGE		2	plaintiffs.		
3	Exhibit 62 - 6/26/17, 6/27/17			3	MR. LOGAN: Garrett Logan, Campbell &		
4	and 6/30/17			4	Williams, appearing on behalf of the plaintiffs.		
5	with Attachments			5	MR. DUESMAN: Douglas Duesman, Thorndahl		
6	TOSC01539-1547	281		6	Armstrong, appearing on behalf of Henderson Water		
7	Exhibit 63 - 12/1/15 Email			7	Park.		
8	CB024138	283		8	MR. SMITH: Kevin Smith, Hall Jaffe &		
9				9	Clayton, appearing for Shane Huish.		
10				10	MS. MASTRANGELO: Rebecca Mastrangelo for		
11				11	Scott Huish, Craig Huish, and West Coast Water Parks.		
12				12	MR. GORMLEY: John Gormley on behalf of		
13				13	the Opheikens, Double Ott, and Tom Welch.		
14				14	THE VIDEOGRAPHER: Thank you.		
15				15	The witness may now be sworn in by Denise		
16				16	Kelly with Rocket Reporters.		
17				17	MR. CAMPBELL: Let's recognize our client.		
18				18	MR. MIRKOVICH: Peter Gardner is here, as		
19				19	well as defendants Scott Huish and Tom Welch.		
20				20			
21				21	JEFFREY SLADE OPHEIKENS,		
22				22	having been first duly sworn, was		
23				23	examined and testified as follows:		
24				24	///		
25				25	///		



<p>1 EXAMINATION</p> <p>2 BY MR. CAMPBELL:</p> <p>3 Q. Would you please state your name for the</p> <p>4 record, spelling your full name.</p> <p>5 A. <b>Jeffrey Slade Opheikens. First name</b></p> <p>6 <b>Jeffrey, J-e-f-f-r-e-y. Slade, S-l-a-d-e. Opheikens,</b></p> <p>7 <b>O-p-h-e-i-k-e-n-s.</b></p> <p>8 Q. What is your date of birth?</p> <p>9 A. <b>10/9/69.</b></p> <p>10 Q. Have you given deposition testimony</p> <p>11 before?</p> <p>12 A. <b>Yes, I have.</b></p> <p>13 Q. On how many occasions?</p> <p>14 A. <b>One time.</b></p> <p>15 Q. And when was that, sir?</p> <p>16 A. <b>Probably 10, 12 years ago.</b></p> <p>17 Q. And what did it relate to?</p> <p>18 A. <b>Project we did in California.</b></p> <p>19 Q. And was it a commercial dispute or a</p> <p>20 personal injury matter?</p> <p>21 A. <b>A commercial dispute regarding schedule on</b></p> <p>22 <b>a project and payment.</b></p> <p>23 Q. All right. You were in attendance at your</p> <p>24 father's deposition in this matter?</p> <p>25 A. <b>Correct.</b></p>	<p>page 10</p>	<p>1 officer. And you, of course, understand that?</p> <p>2 A. <b>Yes, I do.</b></p> <p>3 Q. Okay. The second thing that is very</p> <p>4 important is that we are on the same wavelength. If</p> <p>5 you don't understand a question that I ask of you,</p> <p>6 don't hesitate to tell me that. I'm more than happy</p> <p>7 to redraft or reframe the question in such a manner</p> <p>8 that you do understand it, because I want to make sure</p> <p>9 that we are both on the same wavelength; that, in</p> <p>10 fact, you're answering the question that I am asking</p> <p>11 of you. And I don't take it as any criticism of me by</p> <p>12 you asking me to phrase it in a manner that you can</p> <p>13 better understand it.</p> <p>14 The importance of that is not only that</p> <p>15 you understand that we are on the same timeframe; but</p> <p>16 that if you change your testimony at a later point in</p> <p>17 time, saying, well, you really didn't understand the</p> <p>18 question, that's probably going to fall on deaf ears</p> <p>19 with the jury and the judge because you had an</p> <p>20 opportunity to correct your misunderstanding here. So</p> <p>21 we invite you to do that and no one is going to take</p> <p>22 any offense to that.</p> <p>23 Similarly, this is not an opportunity</p> <p>24 where you are going to be abused in any fashion. We</p> <p>25 consider ourselves professionals in this regard and we</p>	<p>page 12</p>
<p>1 Q. And you will recall that I gave him</p> <p>2 basically a rundown of the protocols that are</p> <p>3 applicable to deposition testimony that is being given</p> <p>4 in this action. Do you recall that?</p> <p>5 A. <b>Yes.</b></p> <p>6 Q. I'm going to basically give you the same</p> <p>7 rundown. You may remember some of it from having</p> <p>8 attended a deposition in the past, in which you were</p> <p>9 the deponent, but I want to make sure there is a</p> <p>10 refreshing of your recollection in that regard as to</p> <p>11 what the protocols and requirements are with respect</p> <p>12 to giving testimony in a deposition.</p> <p>13 The most important feature, of course, is</p> <p>14 that your deposition is being taken under oath. That</p> <p>15 oath is precisely the same oath that you would take in</p> <p>16 any state or federal court. And, accordingly, it</p> <p>17 carries with it the same solemnity. That is, that you</p> <p>18 have to be responsive and truthful to all questions</p> <p>19 that are asked of you. The failure to do so is a</p> <p>20 state crime. Now, that's not to suggest that you</p> <p>21 would ever commit a serious crime such as perjury, but</p> <p>22 only to warn you and impress upon you again the</p> <p>23 importance of understanding that this is a matter that</p> <p>24 is serious and your testimony is being taken under</p> <p>25 oath as sworn by the court reporter who is a court</p>	<p>page 11</p>	<p>1 are going to give you all the time that you feel is</p> <p>2 necessary to think of the question that is being asked</p> <p>3 of you, reflect upon that question, and then give a</p> <p>4 response to it.</p> <p>5 Will you do that?</p> <p>6 A. <b>Yes, I will.</b></p> <p>7 Q. Okay. In everyday conversation you</p> <p>8 anticipate what someone is going to ask of you about</p> <p>9 halfway through the question that they are asking of</p> <p>10 you, and interrupting and answering the question is</p> <p>11 not in any way indicative of being rude or</p> <p>12 discourteous in any manner. But, we ask you not to do</p> <p>13 that in these proceedings.</p> <p>14 The court reporter has to have a complete</p> <p>15 record. While everything is on videotape, it's</p> <p>16 recorded actually digitally, both audio and video. In</p> <p>17 that regard, it's important that the court reporter,</p> <p>18 Miss Kelly, have a full question and the full answer,</p> <p>19 rather than half a question, answer, and the rest of</p> <p>20 the question. So we would like to try to make her job</p> <p>21 as easy as we possibly can on her because it's tough</p> <p>22 enough as it is already. Okay?</p> <p>23 A. <b>Okay.</b></p> <p>24 Q. All right. Similarly, Miss Kelly can't</p> <p>25 pick up nodding of the head and shaking of the head to</p>	<p>page 13</p>

<p style="text-align: right;">page 14</p> <p>1 indicate affirmative and negative responses. So go 2 ahead and respond "yes" or "no" audibly. Very, very 3 frequently I have to remind somebody in the course of 4 the deposition, "Is that a 'yes?'" when they nod their 5 head or they otherwise go "uh-huh." And so I'm 6 probably going to have to do that to you at one point, 7 as I did with your father, and we do it with all 8 deponents. 9 <b>A. Yes.</b> 10 <b>Q.</b> And, again, it's not to demonstrate any 11 disrespect for your answer, only to make sure that 12 we're doing our job. We are the ones that have to 13 make sure that we are creating a correct, proper 14 record in this matter. So bear with me if I do that. 15 Again, it's not meant as any disrespect to you. Okay? 16 <b>A. Okay.</b> 17 <b>Q.</b> All right. I'm never going to ask you 18 about speculating about anything in this deposition. 19 I may ask you what your best reasoned judgment of a 20 particular matter was, what is your best recollection, 21 or what you derived from the course of a conversation 22 based upon the fact that you're a reasonably 23 intelligent and experienced businessman. 24 The difference between speculating and 25 giving your reasoned judgment as to what the events</p>	<p style="text-align: right;">page 16</p> <p>1 respect to what was said by whom and what party with 2 that sort of specificity. The law only demands that 3 you recall the conversation to the best of your 4 ability using words that were used or words to the 5 effect that were used. 6 Do you understand the difference? 7 <b>A. Yes.</b> 8 <b>Q.</b> Okay. So while you may not recall the 9 exact words that were used with a great deal of 10 precision, what we need is, if you can't recall that, 11 are words to the effect. Okay, would you do that? 12 <b>A. Okay. Yes, I will.</b> 13 <b>Q.</b> Okay. And another thing is that we want 14 your testimony in this matter. We don't want your 15 attorney's testimony. So you can't look to him for 16 the answers in this proceeding. 17 There is going to be certain objections 18 and your attorney is entitled to make objections to 19 the form of the question, that there is something that 20 he views as defective in the question. We are going 21 to resolve that at a later point in time in front of a 22 judge. Okay? 23 <b>A. Okay.</b> 24 <b>Q.</b> That doesn't mean that you don't answer 25 the questions. The only time you don't answer a</p>
<p style="text-align: right;">page 15</p> <p>1 were that you either observed, participated in, or 2 were told about can be illustrated as follows. 3 You can look at this, particularly given 4 the fact that you're in the construction business, and 5 you can look at this table and you could say, "Okay, 6 this table is about 20 feet long or so." But if I 7 asked you how long the dining room table is in my 8 living room, you would have to speculate. First of 9 all, you've never been in my living room. You don't 10 even know if I have a dining room table, let alone how 11 long it is. Okay? But you can basically tell me, 12 ballpark how this fits into your view of what the 13 length of something might be. 14 Do you understand the difference between 15 the two? 16 <b>A. Yes.</b> 17 <b>Q.</b> Okay. Another thing that I'm never going 18 to ask you to do is to answer with specificity the 19 exact language that may have been used in a particular 20 conversation, unless of course you actually recall it 21 because of something that was so remarkable about the 22 conversation and was such that you would never forget 23 it. 24 Now, what do I mean by that? Well, the 25 law doesn't demand that you answer a question with</p>	<p style="text-align: right;">page 17</p> <p>1 question is relating to a matter of privilege. Okay? 2 And with respect to matters of privilege, you may be 3 directed not to answer a particular question, and we 4 are not going to seek to go around a claim of 5 privilege in this proceeding. We are not going to 6 argue with one another about it. We will present that 7 at a later point in time and the jury, or the judge, 8 rather, will decide whether or not that was 9 appropriately invoked as a privilege or it was 10 inappropriately invoked with the ruling coming from 11 the Court, not from us hashing it out here. At least 12 in most respects we don't do that. Okay? 13 <b>A. Okay.</b> 14 <b>Q.</b> All right. Is there anything that we have 15 discussed thus far about the process that you don't 16 understand or would like further clarification on? 17 <b>A. No, I don't think so.</b> 18 <b>Q.</b> Okay. At the end of these proceedings, by 19 that, at the point in time which the deposition has 20 been concluded, Ms. Kelly is going to prepare a 21 verbatim transcript of everything that occurred in 22 this deposition. You will have an opportunity to 23 review that transcript and if you so desire to make 24 certain changes in the transcript. 25 Now, frequently such changes are</p>

<p style="text-align: right;">page 18</p> <p>1 ministerial or scrivener in nature. That is to say, 2 there might be a misspelling of a word or it may have 3 been a Mr. as opposed to a Ms. or a Mrs. that was 4 described. But if you change your testimony in any 5 material way, that is to say, for example, if this 6 were a car collision case and you said, "The light was 7 green." And then after the deposition upon further 8 reflection that your answer was not helpful to you and 9 changed your testimony to say that, "The light was 10 red," that would be a material deviation which would 11 call into question your honesty and truthfulness in 12 responding to a question under oath. In other words, 13 that could be used to impeach your testimony saying 14 you prevaricated or lied at one time or another, and 15 that's something that is to be avoided. 16 You of course understand that? 17 <b>A. Yes.</b> 18 <b>Q. Okay.</b> 19 Is there any other information you feel 20 you need to go forward with your deposition here 21 today? 22 <b>A. No.</b> 23 <b>Q. Okay.</b> 24 <b>A. I don't think so.</b> 25 <b>Q. You're not -- I presume that you are</b></p>	<p style="text-align: right;">page 20</p> <p>1 population at one time. Different circumstances. 2 <b>A. Seven hours of a different conversation.</b> 3 <b>Q. Exactly.</b> 4 So we generally will run this for seven 5 hours. We will take a break of 15 minutes during the 6 morning, a 15-minute break in the afternoon, about 7 half-an-hour break for lunch. If we do run over, we 8 can deal with that; but we will get in seven hours of 9 testimony today, unless we feel that we need 10 additional time and we will apply to the Court at a 11 later point in time. 12 With all that, I'm going to start your 13 testimony at this point. Okay? 14 <b>A. Okay.</b> 15 <b>Q. Okay. What did you do to prepare for your</b> 16 <b>testimony?</b> 17 <b>A. I reviewed through some of the emails that</b> 18 <b>were produced by our attorney to you to get</b> 19 <b>refamiliarized with. It's been four years. And I was</b> 20 <b>trying to reacquainted with I guess what items I could</b> 21 <b>look at to try to refresh my memory.</b> 22 <b>I reviewed, there was a Haas &amp; Wilkerson</b> 23 <b>report that had been generated back then. I scanned</b> 24 <b>through that again to get familiar with it. I</b> 25 <b>reviewed through part of the management committee</b></p>
<p style="text-align: right;">page 19</p> <p>1 not -- 2 (Cell phone interruption.) 3 MR. GORMLEY: Sorry. Let me turn it off. 4 BY MR. CAMPBELL: 5 <b>Q. I presume that you're not suffering from</b> 6 <b>any cognitive disability or any influence by any drug</b> 7 <b>or narcotic, whether administered by a physician or</b> 8 <b>not; is that correct?</b> 9 <b>A. No, sir.</b> 10 <b>I did just get back from picking my son</b> 11 <b>from Colombia, so my stomach is a little. So after</b> 12 <b>lunch if I need to finish a question and go to the</b> 13 <b>bathroom, I might need to share that. But it's --</b> 14 <b>Q. You have a boy in Colombia?</b> 15 <b>A. Just got back, yeah.</b> 16 <b>Q. Just got back?</b> 17 <b>A. From a mission down there, yes.</b> 18 <b>Q. From the country as opposed to the</b> 19 <b>academic institution?</b> 20 <b>A. Yes, he was in Medellin, Colombia.</b> 21 <b>Q. I'm very, very familiar with Medellin.</b> 22 <b>A. It's beautiful.</b> 23 <b>Q. Yeah. So is Phil or Sammy. Sam got</b> 24 <b>married in Colombia.</b> 25 <b>I just tried to incarcerate half the</b></p>	<p style="text-align: right;">page 21</p> <p>1 <b>operating agreement just to become familiar with it</b> 2 <b>again.</b> 3 <b>Aside from that, just meeting with counsel</b> 4 <b>a little bit.</b> 5 <b>Q. Okay. How many meetings did you have with</b> 6 <b>counsel between the termination of your father's</b> 7 <b>deposition and your appearance here today?</b> 8 <b>A. I think two.</b> 9 <b>Q. Where did they take place?</b> 10 <b>A. We met at John's office one day, and I was</b> 11 <b>on the phone one day.</b> 12 <b>Q. Okay. And who else was in attendance?</b> 13 <b>A. When we met, Tom Welch was in attendance</b> 14 <b>yesterday, my brother Chet came in for part of it. He</b> 15 <b>wasn't able to sit there that long to attend the whole</b> 16 <b>thing. And Cass Butler, who's a personal attorney.</b> 17 <b>Q. Anyone else?</b> 18 <b>A. No.</b> 19 <b>Q. How long did that preparation meeting last</b> 20 <b>yesterday?</b> 21 <b>A. I think we started around 10:00 and</b> 22 <b>finished around 5:00.</b> 23 <b>Q. Okay.</b> 24 <b>And you said that there was also a</b> 25 <b>preparation telephone conference call of sorts at some</b></p>

<p style="text-align: right;">page 22</p> <p>1 point?</p> <p>2 <b>A. Yeah. For about three hours. I forget</b></p> <p>3 <b>what day it is today. Thursday. So I think Tuesday,</b></p> <p>4 <b>Monday or Tuesday afternoon.</b></p> <p>5 Q. Okay. And you were located where, in</p> <p>6 Utah?</p> <p>7 <b>A. Yeah, I was in my office in Utah.</b></p> <p>8 Q. And who were the participants in the</p> <p>9 conference call that occurred on that day?</p> <p>10 <b>A. John, Tom.</b></p> <p>11 Q. Welch? Mr. Welch?</p> <p>12 <b>A. Tom Welch, yeah, sorry. And Cass Butler.</b></p> <p>13 Q. Okay. That lasted how long?</p> <p>14 <b>A. I believe it was about three hours.</b></p> <p>15 Q. Okay. Did you review any testimony?</p> <p>16 <b>A. When you say "testimony," what do you</b></p> <p>17 <b>mean?</b></p> <p>18 Q. Thank you for alerting me. It was a</p> <p>19 poorly drafted question, and I agree with you.</p> <p>20 Did you review any testimony of any</p> <p>21 witness that has been taken in this matter?</p> <p>22 <b>A. I don't think I reviewed any. I was in</b></p> <p>23 <b>attendance at my father's deposition. So I was</b></p> <p>24 <b>familiar with what he said. But it was more talking</b></p> <p>25 <b>about the way questions are phrased and to make sure I</b></p>	<p style="text-align: right;">page 24</p> <p>1 <b>A. I think I went through like 10 or 12 or so</b></p> <p>2 <b>pages on it.</b></p> <p>3 Q. And did that help refresh your</p> <p>4 recollection?</p> <p>5 <b>A. You know, I wasn't reading it as much to</b></p> <p>6 <b>reflect my recollection, because I was kind of</b></p> <p>7 <b>counseled not to read them, because it needs to be</b></p> <p>8 <b>what I recall, not what somebody else testified.</b></p> <p>9 <b>But, again, having gone through a</b></p> <p>10 <b>deposition before, I was looking to see what your</b></p> <p>11 <b>style is. When I was deposed before, I felt pretty</b></p> <p>12 <b>manipulated by the attorney that was asking questions</b></p> <p>13 <b>in the way they were presented. And I was trying to</b></p> <p>14 <b>get a feel of was that your style or are you more</b></p> <p>15 <b>professional.</b></p> <p>16 Q. Any other depositions that you reviewed</p> <p>17 besides Shane's?</p> <p>18 <b>A. No.</b></p> <p>19 Q. Okay. Have you reviewed any video of</p> <p>20 depositions that were conducted in this matter?</p> <p>21 <b>A. No, I have not.</b></p> <p>22 Q. Okay.</p> <p>23 I would like to talk to you a little bit</p> <p>24 about your background. You were raised in Salt Lake</p> <p>25 City or Ogden?</p>
<p style="text-align: right;">page 23</p> <p>1 <b>listen, as you counseled me already, to the whole</b></p> <p>2 <b>question. And be aware if two questions are kind of</b></p> <p>3 <b>combined into one, or if my answers are somehow</b></p> <p>4 <b>restated to me in a manner that may be a little</b></p> <p>5 <b>different than what I intended to say.</b></p> <p>6 Q. And I appreciate that. My question was</p> <p>7 more directed to did you review any testimony of any</p> <p>8 witness in this case, for example, Mr. Huish?</p> <p>9 <b>A. No.</b></p> <p>10 Q. Okay. Was any such testimony ever</p> <p>11 provided to you to be reviewed?</p> <p>12 <b>A. I received kind of an overview, I don't</b></p> <p>13 <b>want to say an overview, a copy of Shane's deposition.</b></p> <p>14 <b>I don't know if it was quite a year ago. It was quite</b></p> <p>15 <b>a while ago.</b></p> <p>16 Q. Okay.</p> <p>17 <b>A. And I had reviewed it.</b></p> <p>18 Q. You had reviewed it --</p> <p>19 <b>A. I reviewed --</b></p> <p>20 Q. -- a while ago?</p> <p>21 <b>A. -- part of it.</b></p> <p>22 Q. Okay.</p> <p>23 <b>A. I'm guessing it was maybe six months or so</b></p> <p>24 <b>ago.</b></p> <p>25 Q. Okay.</p>	<p style="text-align: right;">page 25</p> <p>1 <b>A. Ogden, Utah.</b></p> <p>2 Q. Okay. And you attended high school there?</p> <p>3 <b>A. I attended Weber High School.</b></p> <p>4 Q. Okay. And where did you go to college?</p> <p>5 <b>A. Once I graduated Weber High, I first</b></p> <p>6 <b>started attending Weber State University. Went for</b></p> <p>7 <b>about two years, got my Associate's. Wasn't real sure</b></p> <p>8 <b>what I wanted to do and be in life. So my father's</b></p> <p>9 <b>wisdom, he sent me out into the field to teach me I</b></p> <p>10 <b>don't want to grow up working in the field.</b></p> <p>11 <b>So for two years, two-and-a-half years, I</b></p> <p>12 <b>actually worked in Las Vegas for a year on a project.</b></p> <p>13 <b>And then I was relocated up to Jackson Hole, Wyoming.</b></p> <p>14 Q. What project did you work on in Las Vegas?</p> <p>15 <b>A. Down here we built an Anderson Lumber that</b></p> <p>16 <b>used to be way out in the middle of nowhere and now is</b></p> <p>17 <b>in the middle of everything.</b></p> <p>18 Q. What year was that?</p> <p>19 <b>A. Probably '90.</b></p> <p>20 Q. Okay.</p> <p>21 <b>A. '90, '91.</b></p> <p>22 Q. And how old would you have been at that</p> <p>23 time?</p> <p>24 <b>A. I would have been 20.</b></p> <p>25 Q. Okay.</p>

<p style="text-align: right;">page 26</p> <p>1 A. Give or take. I just remember being 20 in 2 Vegas wishing I was 21. 3 I then was relocated up to Jackson Hole to 4 do a project that took about a year to build. 5 After that I decided I didn't want to be 6 in the field the rest of my life. I reenrolled, I 7 applied to BYU, couldn't get in. Needed to go retake 8 some classes. So I attended a semester, and I think 9 they called it a term back then, at what was then Utah 10 Valley College. It's now Utah Valley University. 11 Then reapplied to BYU and finished my Bachelor's. 12 Went up, finished a Bachelor's degree there in 13 construction management and engineering. 14 Q. So you got a BS? 15 A. Yes. And graduated in '95. 16 Q. How old were you? 17 A. I don't know. What is '69 to '95. 23 or 18 something. I'm not good at math. 24. 19 Q. Did you get a Master's? 20 A. No. 21 Q. What did you do after your graduated from 22 college? 23 A. Lynn Wright from R&amp;O Construction, who was 24 then the operations manager, called me and offered me 25 a position at R&amp;O. My dad wouldn't hire me. He told</p>	<p style="text-align: right;">page 28</p> <p>1 Q. There are some -- yes, the shareholders 2 are the Opheikens family members? 3 A. No. There is a couple of vice presidents 4 who have some share of stock. 5 Q. And who are they? 6 A. Frank McDonough, who's an executive 7 vice president. 8 Q. And what percentage of the outstanding 9 stock does he own? 10 A. I'm guessing a little bit, because I don't 11 review it all the time. I think he is around 13 or so 12 percent. 13 Q. Okay. Who else? 14 A. Charlie Auger who is a CFO. I believe he 15 is around 1 percent. 16 Tim Gladwell. And he and a gentleman 17 named Rick Zampedri are both maybe a half a percent. 18 Q. And what are their positions? 19 A. They are both vice president of 20 operations. 21 Q. Who else owns stock? 22 A. Besides the Opheikens family? 23 Q. No, inclusive. 24 A. Oh, okay. 25 Q. Are those, are those the owners?</p>
<p style="text-align: right;">page 27</p> <p>1 me that going in. I just thought he was mean, but I 2 understand it now. 3 So he hired me with the understanding I 4 would come into the office and start working what was 5 then called a project assistant, which is almost a 6 secretarial type assistant project, to a project 7 manager with the agreement that I would take on the 8 role of computerizing our project management team 9 then. We didn't -- we weren't computerized at all on 10 our projects and that's what I had learned a lot about 11 in school. And he would teach me the nonbook approach 12 to becoming a project manager. 13 Q. Now, is Mr. Wright still with the company? 14 A. No. He retired several years ago. 15 Q. Okay. Was he the R in R&amp;O? 16 A. No. 17 Q. Who was the R in R&amp;O? 18 A. The R was a gentleman named Les Randall 19 who was a very, very good friend with my father. 20 Someone who I considered almost a grandfather to me. 21 Q. Okay. 22 The R&amp;O Construction Company is wholly 23 owned by the Opheikens family; is that correct? 24 A. Yeah. There are some shareholders within 25 R&amp;O.</p>	<p style="text-align: right;">page 29</p> <p>1 A. Those are the non. 2 Q. Non-Opheikens? 3 A. Non-Opheikens. 4 Q. Okay. 5 A. And within Opheikens you have Orluff, my 6 brother Chet and myself, and I think our stepbrother 7 Rowdy Irick, R-i -- I-r-i-c-k. 8 Q. One more time. Give me his full name. 9 A. First name is Rowdy, R-o-w-d-y. 10 Q. As in Yates? 11 A. Not sure. 12 Q. You don't know who Rowdy Yates was? 13 A. No, I don't think so. 14 Q. You are young. 15 A. Sorry. Last name is Irick, I-r-i-c-k. 16 Q. Okay. 17 A. I don't know. I think his is less than 18 1 percent or somewhere around there. I'm not 19 positive. 20 Q. Okay. Who is, who is Rowdy married to? 21 A. He is married to Angie. 22 Q. Angie who? 23 A. Irick. Is his wife. 24 Q. What was her maiden name? 25 A. I don't know.</p>

<p style="text-align: right;">page 30</p> <p>1 Q. Okay.</p> <p>2 All right. Who else in the Orluff family?</p> <p>3 <b>A. Orluff, Chet, and myself.</b></p> <p>4 Q. Okay. So the majority interest that</p> <p>5 controls the corporation is controlled by the Orluff</p> <p>6 family?</p> <p>7 <b>A. Yeah, majority is in a trust.</b></p> <p>8 MR. GORMLEY: Let me object to relevancy</p> <p>9 to this line of questioning, but go ahead.</p> <p>10 BY MR. CAMPBELL:</p> <p>11 Q. What is the name of the trust?</p> <p>12 <b>A. I don't, I don't remember.</b></p> <p>13 Q. Okay. You at one time -- how many</p> <p>14 brothers and sisters do you have?</p> <p>15 <b>A. I have one brother Chet and one older</b></p> <p>16 <b>sister Karlie.</b></p> <p>17 Q. And what is Karlie's last name?</p> <p>18 <b>A. Rairigh.</b></p> <p>19 Q. Who is she married to?</p> <p>20 <b>A. Troy.</b></p> <p>21 Q. And what does Troy do?</p> <p>22 <b>A. He works for Union Pacific Railroad.</b></p> <p>23 Q. As what?</p> <p>24 <b>A. I think it's like he fixes the switches</b></p> <p>25 <b>when they have a problem.</b></p>	<p style="text-align: right;">page 32</p> <p>1 two kids?</p> <p>2 <b>A. Three sons.</b></p> <p>3 Q. Three sons?</p> <p>4 <b>A. Cody, Rowdy, and Monte.</b></p> <p>5 Q. Okay. Got it.</p> <p>6 What other positions did you occupy after</p> <p>7 you come out and began your work with R&amp;O following</p> <p>8 your graduation from BYU?</p> <p>9 <b>A. Sorry, was coughing a little bit.</b></p> <p>10 Q. Go ahead.</p> <p>11 <b>A. I think you asked what other positions did</b></p> <p>12 <b>I hold at R&amp;O?</b></p> <p>13 Q. Yes, just kind of take me through it.</p> <p>14 <b>A. So I worked as a project assistant after</b></p> <p>15 <b>graduation. A little prior to that at R&amp;O -- you just</b></p> <p>16 <b>want R&amp;O or do you want prior to R&amp;O?</b></p> <p>17 Q. No.</p> <p>18 <b>A. Just R&amp;O.</b></p> <p>19 Q. Just give me R&amp;O.</p> <p>20 <b>A. Okay. Worked up into becoming a project</b></p> <p>21 <b>manager. I was an estimator for a short amount of</b></p> <p>22 <b>time. And then they put me, after several years as a</b></p> <p>23 <b>project manager, into chief operating officer. And</b></p> <p>24 <b>then transitioned into the role of president.</b></p> <p>25 Q. How long were you COO?</p>
<p style="text-align: right;">page 31</p> <p>1 Q. At one time you had another brother who</p> <p>2 passed away tragically in a --</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. -- in an ATV accident?</p> <p>5 <b>A. He's a stepbrother, yes.</b></p> <p>6 Q. He was a stepbrother?</p> <p>7 <b>A. Yeah. Rowdy is a stepbrother also.</b></p> <p>8 Q. How old was he when he passed away?</p> <p>9 <b>A. Almost -- couple weeks from turning 16.</b></p> <p>10 Q. What was his name?</p> <p>11 <b>A. Monte.</b></p> <p>12 Q. Last name?</p> <p>13 <b>A. Irick.</b></p> <p>14 Q. Okay. Can you, can you give me the</p> <p>15 dynamic there of who the Iricks are?</p> <p>16 <b>A. So when my father remarried his wife,</b></p> <p>17 <b>current wife, Judy Irick, these were her boys. And</b></p> <p>18 <b>she has one other son also named Cody.</b></p> <p>19 Q. Did your mother pass away?</p> <p>20 <b>A. No, they just -- they got divorced.</b></p> <p>21 Q. They got divorced, okay.</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. And then he remarried?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. Okay. And when he got remarried, Judy had</p>	<p style="text-align: right;">page 33</p> <p>1 <b>A. I believe I was COO for three or four</b></p> <p>2 <b>years.</b></p> <p>3 Q. And when did you become president?</p> <p>4 <b>A. I think it was in the spring of 2013.</b></p> <p>5 Q. And you remain in that position here</p> <p>6 today?</p> <p>7 <b>A. President.</b></p> <p>8 Q. President?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. In that position today?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. Where do you reside?</p> <p>13 <b>A. I live in North Ogden, Utah.</b></p> <p>14 Q. And are you married?</p> <p>15 <b>A. Yes, I am.</b></p> <p>16 Q. Do you have children?</p> <p>17 <b>A. Four children.</b></p> <p>18 Q. Four?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. And the bills to go along with them?</p> <p>21 <b>A. Yes. They are good kids.</b></p> <p>22 Q. Well, that's good. That's a blessing in</p> <p>23 life.</p> <p>24 What position does Chet occupy at R&amp;O?</p> <p>25 <b>A. Chet is our vice president of business</b></p>

<p style="text-align: right;">page 34</p> <p>1 development in our Las Vegas office.</p> <p>2 Q. For how many years has R&amp;O done business</p> <p>3 in Nevada?</p> <p>4 A. Since before my time. We -- I'm not</p> <p>5 positive. We were about a 39, 40-year-old company and</p> <p>6 we've had an office down here for almost 20 years.</p> <p>7 But I know they worked in Nevada before we had an</p> <p>8 office. I'm not sure how many years.</p> <p>9 Q. Could you give us an example of some, some</p> <p>10 of the, historically some of the projects that were</p> <p>11 built by R&amp;O in Las Vegas going back years ago?</p> <p>12 MR. GORMLEY: Objection. Relevancy.</p> <p>13 Go ahead.</p> <p>14 THE WITNESS: We have built hotels,</p> <p>15 Element Hotel up off I215. We built --</p> <p>16 BY MR. CAMPBELL:</p> <p>17 Q. What hotel was that?</p> <p>18 A. Element Hotel.</p> <p>19 Q. Okay.</p> <p>20 A. We have built another hotel. I think</p> <p>21 they've since renamed it. I've actually built three</p> <p>22 or four hotels down here. We have built --</p> <p>23 Q. Can you tell me the names of them?</p> <p>24 A. No.</p> <p>25 Q. Okay.</p>	<p style="text-align: right;">page 36</p> <p>1 Q. Did you build IKEA in the Ogden/Salt Lake</p> <p>2 City area?</p> <p>3 A. No.</p> <p>4 Q. Who built that one?</p> <p>5 A. I think the IKEA that is in the</p> <p>6 Salt Lake/Draper area, I believe Layton Construction</p> <p>7 but I'm not positive if it was Layton or Jacobsen.</p> <p>8 Q. Okay.</p> <p>9 A. Outside from apartments, we have done</p> <p>10 quite a few McDonald's. I don't know. Some</p> <p>11 industrial projects.</p> <p>12 Q. What are your current projects?</p> <p>13 A. We are currently working on what we call</p> <p>14 phase 3 of EVO, which is an apartment project. We are</p> <p>15 working on a student housing project that's private</p> <p>16 student housing near UNLV. It's not UNLV but will be</p> <p>17 for students there. We have several McDonald's</p> <p>18 projects going.</p> <p>19 We have a site project going called</p> <p>20 St. Rose, retail. I don't think we have been awarded</p> <p>21 the building yet, I think we are just doing site work</p> <p>22 at this time.</p> <p>23 Ken's Foods, I think we are doing another</p> <p>24 renovation at their assisting facility.</p> <p>25 I think there is some other kind of small</p>
<p style="text-align: right;">page 35</p> <p>1 A. I thought one was called Hearthside Inn</p> <p>2 years ago that I was a project manager on. I think</p> <p>3 one of them is a Hampton Inn. There's another one and</p> <p>4 I can't remember what it's called. I can visualize</p> <p>5 what it looks like.</p> <p>6 Q. Okay.</p> <p>7 A. We have done several Walmart grocery</p> <p>8 stores. We have done a few Smith's Food Centers.</p> <p>9 Q. How many Walmarts have you done?</p> <p>10 A. In Las Vegas?</p> <p>11 Q. Clark County?</p> <p>12 A. I would guess three. But, you know, I</p> <p>13 don't know.</p> <p>14 Q. Okay.</p> <p>15 A. Some stores are remodeled, others are new</p> <p>16 stores.</p> <p>17 Q. Right.</p> <p>18 A. And our Tim Gladwell, who I previously</p> <p>19 mentioned, is our vice president of operations over</p> <p>20 retail, he handles the retail side. So he would</p> <p>21 better know the exact number.</p> <p>22 Q. Smith's?</p> <p>23 A. Smith's, we have done several stores for</p> <p>24 Smith's, remodels and new stores. The IKEA we built.</p> <p>25 Done a few apartment projects.</p>	<p style="text-align: right;">page 37</p> <p>1 retail type ones that I don't remember the names of.</p> <p>2 Q. You told me the positions that are</p> <p>3 occupied by some of the individuals, including</p> <p>4 yourself and Chet and some of the executive</p> <p>5 vice presidents.</p> <p>6 Can you tell me the name of any other</p> <p>7 officers or directors of the corporation?</p> <p>8 MR. GORMLEY: Objection. Relevancy.</p> <p>9 Go ahead.</p> <p>10 THE WITNESS: So I'm president. As far as</p> <p>11 on the board of directors, is that what you're looking</p> <p>12 for, or executive committee?</p> <p>13 BY MR. CAMPBELL:</p> <p>14 Q. Yes. Board of directors and if there is</p> <p>15 also an executive committee, tell me who that is.</p> <p>16 A. So our board of directors is myself;</p> <p>17 Orluff; Charlie Auger, who is our CFO; and Frank</p> <p>18 McDonough.</p> <p>19 Q. Okay.</p> <p>20 A. Our executive committee adds to that Chet,</p> <p>21 who I mentioned; Erik Skogstad, who's our Las Vegas</p> <p>22 office manager also; Tim Gladwell; and Rick Zampedri;</p> <p>23 Cass Butler; Mike Nichols, who oversees our smaller</p> <p>24 projects operationally; Eric Stratford, who is our</p> <p>25 vice president of business development in the Ogden</p>

<p style="text-align: right;">page 38</p> <p>1 office. I don't know if I forgot anybody. I think I 2 got them all.</p> <p>3 Q. Does the board of directors have any 4 special committees?</p> <p>5 A. What do you mean by a "special committee"?</p> <p>6 Q. For example, a compliance committee, 7 regulatory or compliance committee?</p> <p>8 A. No.</p> <p>9 Q. Okay. The board of directors fulfills the 10 roles of what other corporations might have a specific 11 committee made of members of the board of directors to 12 fulfill; is that correct?</p> <p>13 A. I don't think I understand that question.</p> <p>14 Q. Thank you. It was a poorly drafted one, I 15 agree with you.</p> <p>16 In, for example, a major corporation will 17 have a number of committees. You might have the 18 corporate governance committee. You might have the 19 compliance committee. You might have the fiscal and 20 audit committee. That sort of thing.</p> <p>21 You don't have such committees on your 22 board of directors at R&amp;O?</p> <p>23 A. No. No, we do not.</p> <p>24 Q. All of those decisions are just made by 25 the board of directors as board of directors rather</p>	<p style="text-align: right;">page 40</p> <p>1 committee meetings for what we called them. With 2 president, COO, I'm guessing 10 years or so.</p> <p>3 Q. Okay.</p> <p>4 A. I am trying to remember if I had a title 5 of vice president of operations at one point in time, 6 but --</p> <p>7 Q. Somewhere along the line?</p> <p>8 A. I think before I was a COO, between being 9 a -- I think I was a vice president of operations, 10 but...</p> <p>11 (Philip Erwin arrives.)</p> <p>12 BY MR. CAMPBELL:</p> <p>13 Q. How old are you today, by the way?</p> <p>14 A. 48.</p> <p>15 Q. 48, okay.</p> <p>16 And where does the board meet physically?</p> <p>17 MR. GORMLEY: Again, objection. I'll have 18 a continuing objection if that's okay. Relevancy.</p> <p>19 MR. CAMPBELL: Yes. It's preserved 20 anyway. Yeah.</p> <p>21 BY MR. CAMPBELL:</p> <p>22 Q. Go ahead.</p> <p>23 A. The -- as the board, and again this is our 24 executive committee, just because that's typically how 25 we are all meeting, the majority of time our meetings</p>
<p style="text-align: right;">page 39</p> <p>1 than a discrete individual committee?</p> <p>2 A. I would say more so by our executive 3 committee team than board of directors, but that's --</p> <p>4 Q. Okay. So the executive committee team 5 would include not only members of the board of 6 directors but also officers of the corporation as 7 well?</p> <p>8 A. Vice presidents, yes.</p> <p>9 Q. Right. Okay, good enough.</p> <p>10 How often does the board of directors of 11 R&amp;O meet?</p> <p>12 A. When we meet, it's generally as part of 13 our executive committee. Depending on the year, some, 14 you know, some years we meet every other month, some 15 years we will meet quarterly.</p> <p>16 Q. Okay. And as a matter of course, I 17 presume as president of the corporation you attend 18 these meetings regularly?</p> <p>19 A. Yes.</p> <p>20 Q. And did so as chief operating officer and 21 other roles that you fulfilled; is that correct?</p> <p>22 A. As chief operating officer, yes.</p> <p>23 Q. Okay. And for how many years have you 24 regularly attended board of director meetings for R&amp;O?</p> <p>25 A. I would again call them the executive</p>	<p style="text-align: right;">page 41</p> <p>1 are at our office in Ogden.</p> <p>2 Q. And what is the exact location?</p> <p>3 A. 933 Wall Avenue.</p> <p>4 Q. And is that an office building?</p> <p>5 A. Yes.</p> <p>6 Q. And do you rent space or do you own that 7 building?</p> <p>8 A. It's owned.</p> <p>9 Q. Okay. Is it styled in any way? This is 10 the Campbell &amp; Williams building. Is yours styled the 11 R&amp;O building?</p> <p>12 A. I mean, it says R&amp;O Construction on the 13 front.</p> <p>14 Q. It says R&amp;O Construction on it.</p> <p>15 A. Then part of it is leased out to another 16 company that manufactures medicine of some type.</p> <p>17 Q. Okay. How many square feet is the 18 building?</p> <p>19 A. I don't know.</p> <p>20 Q. Ballpark it.</p> <p>21 A. I'm going to guess 30,000.</p> <p>22 Q. How many stories?</p> <p>23 A. Two. But that's total square footage I 24 would guess is around 30, but I don't...</p> <p>25 Q. All right. The board of directors takes</p>



<p style="text-align: right;">page 42</p> <p>1 action through votes of its members, correct?</p> <p>2 <b>A. We don't really formally meet and raise</b></p> <p>3 <b>our hand and say, yeah, we are voting on this, we</b></p> <p>4 <b>agree on it. It's probably a more casual meeting,</b></p> <p>5 <b>again, as the board and the executive committee when</b></p> <p>6 <b>we're reviewing items and discussing them.</b></p> <p>7 Q. Are votes actually recorded in any way?</p> <p>8 <b>A. When you say "votes," maybe help me</b></p> <p>9 <b>understand what you mean, because I don't --</b></p> <p>10 Q. Sure. So if there is a proposal that is</p> <p>11 proffered to, for example, undertake to build and/or</p> <p>12 approve the building of a particular project, are</p> <p>13 those votes of the members of the board of directors</p> <p>14 voting aye or nay recorded?</p> <p>15 <b>A. No. Well, two things. We don't vote like</b></p> <p>16 <b>an aye or nay. And I don't think we ever have in any</b></p> <p>17 <b>board meeting I have sat in or executive committee.</b></p> <p>18 Q. Okay.</p> <p>19 <b>A. Secondly, the level of project selection</b></p> <p>20 <b>that we are going to pursue is not the focus of the</b></p> <p>21 <b>board of directors or the executive. There's a -- we</b></p> <p>22 <b>have smaller weekly Monday morning meetings where</b></p> <p>23 <b>department heads are discussing go/no-goes on</b></p> <p>24 <b>projects, which we kind of have improved that process</b></p> <p>25 <b>over the years.</b></p>	<p style="text-align: right;">page 44</p> <p>1 minutes or a compilation of the events that transpire</p> <p>2 at these meetings?</p> <p>3 <b>A. Laurie summarizes the general discussion.</b></p> <p>4 Q. And does she keep those summaries?</p> <p>5 <b>A. I assume that she does.</b></p> <p>6 Q. Are they distributed?</p> <p>7 <b>A. No.</b></p> <p>8 Q. Okay.</p> <p>9 <b>A. Not that I'm aware of.</b></p> <p>10 Q. And can you tell me why are there are no</p> <p>11 formal minutes kept or votes taken of board of</p> <p>12 directors decisions made?</p> <p>13 <b>A. From a -- while there are no votes taken,</b></p> <p>14 <b>we just never operated that way. So I don't -- to</b></p> <p>15 <b>answer that question. What was your other question?</b></p> <p>16 Q. Or minutes?</p> <p>17 <b>A. Distributed?</b></p> <p>18 Q. Actually taken and distributed. You said</p> <p>19 summaries are, but formal minutes?</p> <p>20 <b>A. I think Laurie takes them. Years ago she</b></p> <p>21 <b>may have used to mail them out. I don't know. We're</b></p> <p>22 <b>pretty thorough in our discussions of what we are</b></p> <p>23 <b>talking about and everybody leaves with whatever</b></p> <p>24 <b>action item they need to --</b></p> <p>25 Q. But there are no formal minutes that are</p>
<p style="text-align: right;">page 43</p> <p>1 Q. All right. So irrespective of any formal</p> <p>2 memorialization of an actual vote taken, as I</p> <p>3 understand your dad's testimony, there is, however,</p> <p>4 the taking of minutes by a young lady or maybe an</p> <p>5 older lady?</p> <p>6 <b>A. Laurie Blanscett takes some notes of</b></p> <p>7 <b>the -- we call them executive meetings. I think</b></p> <p>8 <b>that's what --</b></p> <p>9 Q. Executive meetings. And she maintains</p> <p>10 those minutes?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. And, and those minutes would reflect the</p> <p>13 actions taken and proposals made and things of that</p> <p>14 nature?</p> <p>15 <b>A. Again, I don't -- when you use the term</b></p> <p>16 <b>"actions taken" and "votes," we have discussions about</b></p> <p>17 <b>what jobs we are working on, about the financial of</b></p> <p>18 <b>the company. And annually when we have our strategic</b></p> <p>19 <b>planning meeting, you know, we are reviewing what the</b></p> <p>20 <b>goals are. But we don't all sit around the table and</b></p> <p>21 <b>say we all vote yea, let's go do an IKEA. I guess</b></p> <p>22 <b>we're not that formal.</b></p> <p>23 Q. Okay. And seemingly that's, that's what I</p> <p>24 understood from your father's testimony as well.</p> <p>25 But, nevertheless, there are some sort of</p>	<p style="text-align: right;">page 45</p> <p>1 compiled and then sent for approval at the next board</p> <p>2 of directors meetings, for example?</p> <p>3 <b>A. No, there are not.</b></p> <p>4 Q. Okay. Let's talk a little bit about</p> <p>5 Cowabunga Bay, how you got involved in it, and the</p> <p>6 progression of that involvement. Okay?</p> <p>7 <b>A. Okay.</b></p> <p>8 Q. Sort of where I'm going, I want to give</p> <p>9 you, you know, a fair idea. I'm changing subjects</p> <p>10 now.</p> <p>11 Cowabunga Bay retained R&amp;O to build the</p> <p>12 park in November of 2012; is that correct?</p> <p>13 <b>A. Approximately somewhere in there.</b></p> <p>14 Q. Okay. How is it that R&amp;O became involved</p> <p>15 in that project? Who came to you and who pitched it?</p> <p>16 <b>A. I wasn't involved, so I am going to</b></p> <p>17 <b>reflect a bit --</b></p> <p>18 Q. Sure.</p> <p>19 <b>A. -- however that is.</b></p> <p>20 Q. Sure.</p> <p>21 <b>A. Our Las Vegas team, including a gentleman</b></p> <p>22 <b>named, a project manager David Cardall.</b></p> <p>23 Q. How do you spell his last name?</p> <p>24 <b>A. C-a-r-d-a-l-l, I believe.</b></p> <p>25 Q. Okay.</p>

<p style="text-align: right;">page 46</p> <p>1     <b>A.   He somehow knew a couple of the guys.</b> 2     <b>Q.   Can I stop you a moment. You said "our</b> 3 <b>Las Vegas team." Who would be in that team? I</b> 4 <b>apologize.</b> 5     <b>A.   I'm sorry. Our Las Vegas office. So Erik</b> 6 <b>Skogstad.</b> 7     <b>Q.   Erik?</b> 8     <b>A.   Yeah. And Skogstad is S-k-o-g-s-t-a-d.</b> 9     <b>Q.   What does Erik do?</b> 10    <b>A.   He's our vice president and regional</b> 11 <b>office manager --</b> 12    <b>Q.   Okay.</b> 13    <b>A.   -- for Vegas.</b> 14    <b>Q.   All right. Who else?</b> 15    <b>A.   Well, as far as the team involved on this</b> 16 <b>project?</b> 17    <b>Q.   Yes.</b> 18    <b>A.   It would have been those two.</b> 19    <b>Q.   Okay.</b> 20    <b>A.   I believe, primarily.</b> 21    <b>Q.   All right. Thank you for that. Go ahead</b> 22 <b>and pick up where you left off.</b> 23    <b>A.   So my understanding was Dave had a</b> 24 <b>relationship with, I think his name was Ben or Marv.</b> 25 <b>He went to school with two of them I think up at BYU</b></p>	<p style="text-align: right;">page 48</p> <p>1           <b>So I understand our team had given a</b> 2 <b>budget or two that the work was going to be phased.</b> 3 <b>That we would go out and initially start doing site</b> 4 <b>work and whatever improvements, because the design was</b> 5 <b>not complete.</b> 6     <b>Q.   Right.</b> 7     <b>A.   Then as the design was getting complete,</b> 8 <b>they'd give another budget to say what is the next</b> 9 <b>phase of work going to be.</b> 10    <b>Q.   Who did the design and architecture?</b> 11    <b>A.   I don't know who the original Splash, I</b> 12 <b>believe -- so when I say Splash, because I don't know,</b> 13 <b>I'm including Huishes and Splash. I don't understand</b> 14 <b>what their relationship was.</b> 15           <b>So my understanding is they had hired an</b> 16 <b>architect to do the initial design of the buildings</b> 17 <b>and site. I don't recall who that architect was.</b> 18    <b>Q.   Okay.</b> 19    <b>A.   Other than partway through, he ended up</b> 20 <b>being replaced, and they brought in a design architect</b> 21 <b>named David Almany, I think.</b> 22           <b>MR. GORMLEY: Spelling.</b> 23           <b>THE WITNESS: I think A-l-m-a-n-y. I</b> 24 <b>would need to check it, but I think that was his name.</b> 25 <b>///</b></p>
<p style="text-align: right;">page 47</p> <p>1 <b>years before. They had contacted him to see if we may</b> 2 <b>be interested in helping them construct a water park.</b> 3 <b>I wasn't involved with it back at that time.</b> 4           <b>As we started off --</b> 5     <b>Q.   Were those individuals that were</b> 6 <b>interested in building a water park connected to any</b> 7 <b>particular company or business?</b> 8     <b>A.   They -- their company name, they called</b> 9 <b>themselves Splash, I believe.</b> 10    <b>Q.   Okay. Right.</b> 11    <b>A.   And they were partnering with Huish, his</b> 12 <b>family.</b> 13    <b>Q.   Okay.</b> 14    <b>A.   Back then I didn't know what their</b> 15 <b>arrangement was.</b> 16    <b>Q.   All right.</b> 17    <b>A.   They were partners in the water park.</b> 18 <b>They had approached us initially to do the site</b> 19 <b>improvements, running utilities in, get the pads</b> 20 <b>graded.</b> 21    <b>Q.   Who?</b> 22    <b>A.   Splash and the Huishes.</b> 23    <b>Q.   Splash and the Huishes?</b> 24    <b>A.   Yeah. I don't remember what their entity</b> 25 <b>was called.</b></p>	<p style="text-align: right;">page 49</p> <p>1 <b>BY MR. CAMPBELL:</b> 2     <b>Q.   Where was he from?</b> 3     <b>A.   I believe he is local to Las Vegas. And I</b> 4 <b>think his design was to help finish out the buildings</b> 5 <b>as far as where the food sold, the restrooms, the</b> 6 <b>locker areas, offices.</b> 7     <b>Q.   Configuration work?</b> 8     <b>A.   Yeah. Well, design through to get it</b> 9 <b>permitted.</b> 10    <b>Splash had also previously hired a company</b> 11 <b>named I want to call it ADG, I think Aquatic</b> 12 <b>Development Group. They were from I believe New York</b> 13 <b>or somewhere back East. And they were designing I</b> 14 <b>think the lazy river and the wave pool. And</b> 15 <b>contracting with them to do, to do that work.</b> 16    <b>As the project progressed, I'm trying to</b> 17 <b>think through. I don't know at what point we started</b> 18 <b>doing work. And -- let me think through.</b> 19    <b>We started doing the site work and</b> 20 <b>improvements to the site. I'm not sure who had the</b> 21 <b>contractual relationship with ADG, because I want to</b> 22 <b>say Ben, I think it's Ben Howell, and Marv, I don't</b> 23 <b>remember Marv's last name with Splash. One of them</b> 24 <b>had their own contractor's license or wanted to. I</b> 25 <b>don't know, they were contracting, my understanding,</b></p>

<p style="text-align: right;">page 50</p> <p>1 directly, and they were going to do all the pools and 2 the slides and handle all that. We were going to do 3 the site work and the main building. 4 At some point along the way, I think Ben 5 or Marv, or whoever, maybe didn't have the license 6 they needed. Or either they had it and ADG didn't. 7 There was some licensing thing. And all I remember is 8 our team has learned the hard way, you don't do 9 anything in Vegas if you don't have the proper 10 license. 11 So there were transitions made along the 12 way, and we ended up contracting, I think it's 13 after -- let me back up. 14 The job got shut down because of financing 15 somewhere along the way. Payments not being made to 16 the tune of -- R&amp;O Construction had put in place 17 several million dollars. 18 If I recall, the first two pay 19 applications had been paid timely. I think the third 20 pay application got shorted with the assurance the 21 financing was being put together. 22 There was another gentleman on Splash's 23 side. It's my understanding I think Splash was the 24 party responsible to handle the financing. I do not 25 remember the third member of Splash that was involved</p>	<p style="text-align: right;">page 52</p> <p>1 So we shut the job down at that point. I 2 had flown down. I think Orluff had maybe even flown 3 down before. I don't remember how it all laid out. 4 Just to find out: What is the money problem? How are 5 we going to get it? 6 I think the other guy's name with Splash 7 was a Shawn something. And I didn't care much for 8 Shawn. I just remember riding around in a car with 9 him and he was kind of a fast talking, tell you what 10 you want to hear partner of the Splash side. So I 11 didn't get a real calming feeling with him. 12 Whereas, I had the opportunity to meet 13 Scott and Shane at that time also, and I actually had 14 a good feeling with them. And I had a good feeling 15 with Ben and Marv as far as people who were saying, 16 okay, we are in a bad spot. We thought we would have 17 financing. How do we, how do we move this thing 18 forward? 19 Orluff then did a lot more meetings. It 20 was kind of his, more of his forte or specialty is 21 understanding real estate. It's not my background. 22 To find out what are we going to do? Some of the 23 meetings that we had that we were concerned with is 24 while Nevada -- one, we have a reputation as a 25 contractor. We have been here a long time. We have</p>
<p style="text-align: right;">page 51</p> <p>1 that was trying to get the financing done. So I think 2 we had worked one more month before we shut it down. 3 And the hard part as a contractor, you put 4 work in place, you build, and then you get paid 30 5 days later. So as we sit and look at this and go, 6 "How do we get two plus million dollars in the hole?" 7 When you're working on a fast-paced project, you do 30 8 days worth of work, which you can put a million 9 dollars a month in place, you turn your billing in, 10 you have done another 30 days before payment comes 11 due. So now you're in 2 million in place before that 12 payment is due. And so that's kind of what happened 13 here. And then it went a little bit more. 14 So we got to the point we shut the job 15 down as R&amp;O Construction. That's when I became more 16 aware of -- my brother Chet had called me and said, 17 "Hey, do you know what's going on with payment on the 18 water park?" 19 Q. How much had been received at that point 20 at the time that the work was shut down by R&amp;O? 21 A. Approximately 800,000 or a million, I 22 think. 23 Q. Okay. 24 A. I'm guessing. Just going off an old 25 memory.</p>	<p style="text-align: right;">page 53</p> <p>1 great relationships and our reputation is important to 2 us. 3 And one of the -- you know, we were having 4 discussions internally as part of our executive 5 committee about you could easily -- not easily. You 6 could sit and say, well, it's a pay when paid clause. 7 But we didn't feel good about how do you stiff your 8 subs and say, "Sorry, we haven't been paid 9 unfortunately, because our team thought they had done 10 their due diligence on financing and misinterpreted 11 some of the bank qualifications in the loan." 12 Q. Who was the financial institution that was 13 supposed to fund the loan? 14 A. I, I don't remember. 15 Q. Was it a Nevada financial institution? 16 A. I believe -- well, I believe so. But then 17 there was this Shawn guy somewhere along the way was 18 talking about some hard money loan, which that may 19 have been an after the fact. And I don't want to 20 pretend to understand what hard money even is or how 21 it works. That's when I was kind of getting the 22 feeling that he was just a smooth talking of: Hey, 23 what can we do to get you going? 24 So as we got involved, we are looking at 25 our options, because Nevada also, as we look at it</p>

<p style="text-align: right;">page 54</p> <p>1 from a contractor's standpoint of we have subs who 2 this is going to hurt. And this is back in 2013, I 3 believe, early 2013. So the economy had tanked. I 4 mean, it had really, really. And Vegas was, as you 5 all know, hit really, really hard. So we have 6 subcontractors who are already financially struggling 7 and now we have put them in a position that could wipe 8 them out. 9 There's -- as we met, we were making the 10 decision of we need to get our subcontractors paid. 11 R&amp;O had the capacity to pay. We had enough working 12 capital that if -- we had that discussion where we did 13 say, "Look, if you didn't pay them and wanted to try 14 to take the road over, we don't care about our 15 reputation and drag it out through the Contractors 16 Board." I believe there is a clause in Nevada that 17 also goes on to say pay when paid unless you have the 18 capacity to pay. 19 So, yeah, that's a consideration, but 20 more -- that's not what our father taught us. And my 21 dad did get back involved. Orluff was not involved in 22 the day-to-day decisions, but he did get involved in 23 this quite extensively in how do we make it go 24 forward. 25 Q. Who was the due diligence team?</p>	<p style="text-align: right;">page 56</p> <p>1 A. Depending on the size of the project, 2 you'll usually see them 3-1/2, 4 percent. 3 Q. Okay. Somewhere in that range? 4 A. Yes. 5 Q. Okay. 6 A. If it's a really small project, the fee 7 may go higher, but. 8 Q. Understood. Okay. 9 So continue on. 10 A. Okay. 11 Q. The economic problems developed. The 12 information was not as everyone thought it was with 13 respect to the due diligence. What happened next? 14 A. As we are meeting, and like I say, Orluff 15 was having a lot of meetings with I believe Scott and 16 Shane, probably more so Scott than Shane, but I'm not 17 positive, to get a feel of what do they see in the 18 park. What's its potential? What are the 19 opportunities for financing? 20 I was still as much dealing with a lot of 21 the rest of R&amp;O, of making sure we don't run into 22 problems in other projects. 23 The -- I'm trying to think through. It 24 evolved at some point to making a decision of, okay, 25 R&amp;O is going to become not R&amp;O but Orluff was setting</p>
<p style="text-align: right;">page 55</p> <p>1 A. I believe that would be Erik Skogstad who 2 was our vice president. 3 Q. Okay. Was this a cost plus? 4 A. I believe as it started off it was a cost 5 plus of some time. It evolved into what we call a 6 cost plus guaranteed maximum price. So you give the 7 price and you say, okay, here is the price that we can 8 do it for. 9 But once, once we got into the payment 10 issues and the shutdown of the project and we're 11 trying to figure what do we do, do we just shelf it. 12 Q. And that's, and that's helpful. Your 13 response is helpful in that regard because that's what 14 I'm interested in, that time period. And I am 15 interested, in that time period, what did the contract 16 call for, was it cost plus at that point in time? 17 A. I would have to read it again. I haven't 18 looked at it for whenever 2013 was. But I don't know. 19 I think that it was, but I'm not certain. 20 Q. Okay. And do you recall what the 21 percentage was? 22 A. I don't. 23 Q. Okay. Is there a usual or customary 24 percentage that's used by R&amp;O or is there one 25 reflective of a range?</p>	<p style="text-align: right;">page 57</p> <p>1 up an entity that would become a part owner in the 2 water park. And we would take the amount of money 3 that was being put into the park as a, I don't know if 4 you call it a capital contribution to determine what 5 is the ownership percentage. 6 As they were working out the details of 7 how that would work, the Huishes were very good. I 8 felt, as I started getting more involved, it felt like 9 fair in that we were looking at it from, okay, how do 10 we make it go forward? The amount of money each party 11 puts in the ownership percentage. It's kind of simple 12 math. 13 The Splash Group seemed to have a 14 different opinion, and for some reason felt like since 15 they had worked so hard for however many years, they 16 should be rewarded with -- 17 Q. Like sweat equity? 18 A. Yeah, like 30 percent. And they had maybe 19 200 grand or something of actual money. Well, I had 20 some disagreements with the Splash guys on that. Like 21 everybody worked hard. And had you done your job, 22 Splash, none of us would be here. So I don't care how 23 hard you sweated. And you didn't get the financing 24 that their side was supposed to do, so why would you 25 be rewarded for ownership?</p>

<p style="text-align: right;">page 58</p> <p>1 That, that wasn't really working out. So</p> <p>2 we were trying to still figure out how do we help the</p> <p>3 park go forward. There were several meetings with</p> <p>4 Splash. Somewhere along the way, Orluff contacted Tom</p> <p>5 Welch, who was a good friend and very well-respected,</p> <p>6 and just a lot of wisdom.</p> <p>7 And those two had their, you know, what,</p> <p>8 what's your recommendation? I wasn't in the meeting.</p> <p>9 My father told me. You know, they kind of</p> <p>10 brainstormed.</p> <p>11 Tom got involved and helped kind of</p> <p>12 analyze what are the possibilities of being able to</p> <p>13 move forward and come up with a new agreement and</p> <p>14 entity. I don't know the proper term to call all</p> <p>15 that, that can be formed where the parties who are</p> <p>16 going to be involved going forward are owners to the</p> <p>17 extent you have made a capital contribution, and maybe</p> <p>18 to some extent willing to recognize some sweat equity</p> <p>19 but not a ridiculous amount.</p> <p>20 And there were offers made back and forth</p> <p>21 with Splash and the Huishes and the Opheikens, Orluff,</p> <p>22 whatever, how can we make this work? It ended up --</p> <p>23 I'm not the most knowledgeable about how that played</p> <p>24 out, other than Splash ended up not being willing to</p> <p>25 agree that it's money in that determines ownership.</p>	<p style="text-align: right;">page 60</p> <p>1 Zions Bank?</p> <p>2 Q. Yes. Did you receive something from a</p> <p>3 financial institution. My understanding of your</p> <p>4 previous testimony -- and correct me if I'm wrong --</p> <p>5 A. Okay. I don't think I'm following what.</p> <p>6 Q. That's okay. That's okay. I'm glad that</p> <p>7 we are getting on the same wavelength.</p> <p>8 I'm referring you back to your earlier</p> <p>9 testimony to the effect that the Las Vegas office</p> <p>10 didn't see or appreciate --</p> <p>11 A. Okay.</p> <p>12 Q. -- some clause in some sort of document</p> <p>13 that, that was obtained from a financial institution</p> <p>14 that was supposed to fund the project.</p> <p>15 A. Okay. Thank you for that clarification.</p> <p>16 The -- there was a, I believe they called</p> <p>17 it a letter of intent --</p> <p>18 Q. Okay.</p> <p>19 A. -- from a financial institution. And</p> <p>20 that's the bank's name I don't recall.</p> <p>21 Q. Right. Letter of intent to fund?</p> <p>22 A. I believe so.</p> <p>23 Q. Okay.</p> <p>24 A. That is what Erik Skogstad had received</p> <p>25 and reviewed that was given to him by the Splash/Huish</p>
<p style="text-align: right;">page 59</p> <p>1 Tom would be able to tell you more about --</p> <p>2 Q. There was a lawsuit?</p> <p>3 A. Yes, there was a lawsuit.</p> <p>4 Q. Okay. Let's stop at that point and kind</p> <p>5 of backup a little bit.</p> <p>6 A. Okay.</p> <p>7 Q. Was there ever a letter of credit that</p> <p>8 was, that was obtained by the R&amp;O offices before they</p> <p>9 got involved in this particular project; that is to</p> <p>10 say, a letter of credit from a financial institution</p> <p>11 saying we are going to fund this project?</p> <p>12 A. Help me when you say a letter of credit</p> <p>13 and at what point are you referring to?</p> <p>14 Q. Was there any financial -- let me rephrase</p> <p>15 the question.</p> <p>16 A. Okay.</p> <p>17 Q. Thank you for alerting me to the fact that</p> <p>18 you didn't understand it.</p> <p>19 Was there, was there financial reviews,</p> <p>20 charts, forecasts, letters of credit, things of that</p> <p>21 nature from a financial institution that were actually</p> <p>22 reviewed? I believe that you said yes at one point.</p> <p>23 A. I guess what I'm not understanding, are</p> <p>24 you asking did we receive something from the park or</p> <p>25 did we receive something from like Bank of Utah or</p>	<p style="text-align: right;">page 61</p> <p>1 group, I don't know who gave it to him.</p> <p>2 Q. That's what he relied upon?</p> <p>3 A. That's what he relied upon. And as I met</p> <p>4 with Erik and reviewed it, it led to a change in --</p> <p>5 there is only two people now at R&amp;O who get to review</p> <p>6 and approve financials, which is myself and our CFO.</p> <p>7 Q. Okay.</p> <p>8 A. It all looks as if it's approved until you</p> <p>9 get to like page 40 whatever, and then you see a</p> <p>10 couple of conditions of approval that is what opens</p> <p>11 the door for we may never fund it.</p> <p>12 Q. Right.</p> <p>13 A. And Erik, I don't fault him for it, he</p> <p>14 didn't know. We all learned a lot through this as a</p> <p>15 company.</p> <p>16 Q. Okay. All right. So ultimately it was</p> <p>17 determined that, that R&amp;O would become far more</p> <p>18 involved in the project at some point here?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. When that was determined, was there</p> <p>21 a new contract that was crafted?</p> <p>22 A. I believe --</p> <p>23 Q. That's a poorly crafted question.</p> <p>24 A. I believe there's either the new --</p> <p>25 Q. Was there a new contract that was</p>

<p style="text-align: right;">page 62</p> <p>1 crafted --</p> <p>2 <b>A. Between the new --</b></p> <p>3 Q. Hold on.</p> <p>4 <b>A. Okay. Sorry.</b></p> <p>5 Q. That's all right. That's okay. It</p> <p>6 happens all the time.</p> <p>7 Was there a new contract that was crafted</p> <p>8 that would memorialize the terms under which R&amp;O would</p> <p>9 take over the construction and building of the project</p> <p>10 known as Cowabunga Bay?</p> <p>11 <b>A. I'm going to say yes, there was a -- an</b></p> <p>12 <b>agreement was modified.</b></p> <p>13 Q. It was modified?</p> <p>14 <b>A. Yeah.</b></p> <p>15 Q. There was an addendum to the agreement?</p> <p>16 <b>A. Whether it's an addendum or a change order</b></p> <p>17 <b>or --</b></p> <p>18 Q. Change order? Modification?</p> <p>19 <b>A. Yes.</b></p> <p>20 Q. The original contract was supplemented or</p> <p>21 otherwise amended to reflect certain changes. Fair</p> <p>22 enough?</p> <p>23 <b>A. Correct.</b></p> <p>24 Q. Okay. Who did that?</p> <p>25 <b>A. Erik Skogstad would have been leading that</b></p>	<p style="text-align: right;">page 64</p> <p>1 testimony of your father. But it seems consistent</p> <p>2 with respect to what you told me thus but there were</p> <p>3 certain particulars that he advanced in answers to my</p> <p>4 questions.</p> <p>5 And one of them was that your father's</p> <p>6 term was that it got all -- the project got all</p> <p>7 screwed up in terms of verifying payment.</p> <p>8 Specifically he was informed or he was led to believe</p> <p>9 that there was a line of credit for about \$8 million.</p> <p>10 And, but in fact, that \$8 million line of credit, half</p> <p>11 of that had already been used to purchase land. Do</p> <p>12 you recall that?</p> <p>13 <b>A. I recall Orluff saying something like</b></p> <p>14 <b>that.</b></p> <p>15 Q. And was that your understanding as well?</p> <p>16 That was part of the calculus that created what your</p> <p>17 father said was a screw-up?</p> <p>18 <b>A. I don't recall because I, I wasn't -- it's</b></p> <p>19 <b>just been a while.</b></p> <p>20 Q. That's fine.</p> <p>21 <b>A. But if Orluff says it, I would believe it</b></p> <p>22 <b>because that was the area that he was taking.</b></p> <p>23 Q. That he was handling?</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. Got it. All right.</p>
<p style="text-align: right;">page 63</p> <p>1 <b>up on our side.</b></p> <p>2 Q. Okay.</p> <p>3 <b>A. I'm not sure on the other side if it would</b></p> <p>4 <b>have been Scott Huish or -- because at that point, I</b></p> <p>5 <b>think some of that is happening during this trying to</b></p> <p>6 <b>work stuff out with Splash too.</b></p> <p>7 Q. Okay.</p> <p>8 <b>A. But once it -- when Splash is kind of out</b></p> <p>9 <b>and we are moving forward, the other thing that</b></p> <p>10 <b>happens is part of this modification is the work, now</b></p> <p>11 <b>Splash is not there, so R&amp;O ends up taking on as part</b></p> <p>12 <b>of our scope of work, the building out of the slides</b></p> <p>13 <b>and the pools. They had already been started with</b></p> <p>14 <b>that company ADG.</b></p> <p>15 <b>So we were working hand in hand with Scott</b></p> <p>16 <b>and Shane now. And I got pretty involved at that</b></p> <p>17 <b>point to try to negotiate with subcontractors to say,</b></p> <p>18 <b>hey, let's come back to work. We want to make this</b></p> <p>19 <b>project work. We want to let you finish your</b></p> <p>20 <b>subcontracts. Get them paid for the work they had</b></p> <p>21 <b>already done. And please don't gouge us for</b></p> <p>22 <b>remobilization fees and cost escalation so we can see</b></p> <p>23 <b>if we can make it work.</b></p> <p>24 Q. Okay. Now, I think we could probably cut</p> <p>25 through a lot of this since you sat through the</p>	<p style="text-align: right;">page 65</p> <p>1 And did you understand that, that the</p> <p>2 representations that had been made with respect to</p> <p>3 that 8 million proved, as your father said, to be</p> <p>4 inaccurate because 4 million of that had already been</p> <p>5 expended on the land or some significant portion?</p> <p>6 <b>A. I think spent on something. The thing I</b></p> <p>7 <b>wonder, though, is was it spent on the slides that</b></p> <p>8 <b>were ordered from Polin, who's a company in Turkey.</b></p> <p>9 Q. Okay. They had been spent somewhere?</p> <p>10 <b>A. They had been spent somewhere, yes.</b></p> <p>11 Q. Okay. So as you understand, you were</p> <p>12 dealing with far less than the 8 million?</p> <p>13 <b>A. I don't recall the dollar amount, I'm</b></p> <p>14 <b>sorry.</b></p> <p>15 Q. Okay. But you were dealing with far less</p> <p>16 than whatever the dollar amount was supposed to be?</p> <p>17 <b>A. Well, not only far less than the dollar</b></p> <p>18 <b>amount. The dollar amount, the bank, my</b></p> <p>19 <b>understanding, wasn't going to close.</b></p> <p>20 Q. Got it.</p> <p>21 <b>A. So it wasn't there almost at all.</b></p> <p>22 Q. Okay. How much did the project eventually</p> <p>23 cost to build?</p> <p>24 <b>A. When we were -- for the work that we ran</b></p> <p>25 <b>through R&amp;O Construction, I believe came out around</b></p>

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1 **19 million.**  
2 Q. As of what date was that expended to build  
3 the project?  
4 A. **We opened in July of '14. We did some**  
5 **additional work to what we call tower 3, the surf**  
6 **safari slide. And that finished out, I think, in May**  
7 **of 2015.**  
8 Q. Um-hum.  
9 A. **So I would say through that May, Juneish**  
10 **time.**  
11 Q. Of 2015?  
12 A. **I believe so. What, what I don't**  
13 **remember, I don't recall if the surf safari was, was**  
14 **completed under a different job cost or not. I just**  
15 **don't recall.**  
16 Q. Okay. Tell me about -- but in the  
17 aggregate, as of 2015, it would have been, R&O would  
18 have been about 19 million in?  
19 A. **A contract amount. It was costs that are**  
20 **billed and ran through R&O Construction.**  
21 Q. Okay. And what -- was there a change  
22 between the time that you initially had the contract  
23 with the Splash Group entities and then got everybody  
24 retooled to go back to work with the subs and  
25 everything, was there a change in the terms of the

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1 contract? You said yes, and so my question follows on  
2 that. That's foundational. Okay? This is where I'm  
3 going now.  
4 A. **I understand where you are going. There**  
5 **is not a question in that, right?**  
6 Q. Right. It's just foundation so we are on  
7 the same wavelength.  
8 A. **Okay.**  
9 Q. And you don't think I'm trying to confuse  
10 with you. I'm trying to be fair with you.  
11 A. **Okay.**  
12 Q. All right. So at that point, okay, was it  
13 still a cost-plus contract to build Cowabunga Bay out?  
14 A. **Well, again as we use the term cost plus,**  
15 **I believe they are cost plus, but there is always a**  
16 **fixed amount. Owners like saying, yeah, it's cost**  
17 **plus to make you feel like it is good, but then it's**  
18 **capped. So any savings owners get, and any overages**  
19 **the contractor eats, that's the industry we kind of**  
20 **live in.**  
21 Q. There's a ceiling?  
22 A. **Yes.**  
23 Q. It's cost plus but you can't go beyond X  
24 amount?  
25 A. **Guaranteed max.**

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1 **But on this park, the design had not been**  
2 **completed, so this was, there were -- when I say**  
3 **continual, they may be the wrong word, there were**  
4 **several modifications or changes --**  
5 Q. Change orders?  
6 A. **-- increasing the scope and the dollar**  
7 **amount as, you know, the first one is let's get back**  
8 **to work for the scope we have so that we can get the**  
9 **park opened. That included R&O taking in the**  
10 **completion of I believe the lazy river, the kids pool,**  
11 **the VIP pools, that prior to that the Splash Group was**  
12 **going to handle.**  
13 **There were also the slide towers. By this**  
14 **time, all of the slide components are sitting in the**  
15 **parking lot that we had previously completed. We were**  
16 **paved. And there was 6 acres, it seemed like. I may**  
17 **be wrong in the amount. Just slide parts laid across**  
18 **the parking lot that had been sitting there since we**  
19 **had shut down.**  
20 Q. Um-hum.  
21 A. **They had already, that -- they had**  
22 **contracted that with a company named Polin who's based**  
23 **out of Turkey. So we now had to coordinate getting**  
24 **those slides put in place as well. And during that**  
25 **process we found out that Splash, who had negotiated**

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1 **the contract with Polin and thought they had such a**  
2 **great deal, left the stair towers out of their bid.**  
3 **So we had another modification to find out, okay, now**  
4 **great slides but no one can climb to the top.**  
5 Q. Okay. My, my inquiry is a little bit more  
6 focused and directed at what the terms of the contract  
7 was. It was a cost-plus contract, right?  
8 A. **I believe so, but I would have to check.**  
9 Q. And what was the percentage, irrespective  
10 of what the ceiling may have been?  
11 A. **I don't recall. I would be guessing in**  
12 **the 3-1/2 percent or 4 maybe.**  
13 Q. That's your best reasonable estimate based  
14 upon your experience in all of this?  
15 A. **Yes.**  
16 MR. GORMLEY: Calls for speculation.  
17 MR. CAMPBELL: Hold on.  
18 **THE WITNESS: Yes.**  
19 MR. CAMPBELL: I just wanted him to finish  
20 his answer.  
21 MR. GORMLEY: Okay, I'm sorry.  
22 BY MR. CAMPBELL:  
23 Q. Go ahead.  
24 A. **That's what I was just -- I'm guessing**  
25 **because I haven't reviewed that in a number of years.**

<p>page 70</p> <p>1 BY MR. CAMPBELL: 2 Q. Fair enough. 3 A. <b>And we have a lot of contracts.</b> 4 Q. Did that ever change? 5 A. <b>Did what change?</b> 6 Q. Did it ever change from a cost-plus 7 contract to something other than a cost-plus contract? 8 A. <b>I would have to review it again. I, I</b> 9 <b>don't know if it changed to become a stipulated sum or</b> 10 <b>not. I, I just don't know.</b> 11 Q. You said that by 2015 R&amp;O had about 12 19 million into the project. Do you recall that? 13 A. <b>Well, we ran job costs through. That's --</b> 14 <b>so we had been reimbursed for much of those costs.</b> 15 <b>There was a Bank of Utah loan since --</b> 16 Q. That's not the question, so. 17 A. <b>Okay. I just want to make sure I'm not</b> 18 <b>saying --</b> 19 Q. I'm just going back to what you said. 20 A. <b>Yes.</b> 21 Q. You said R&amp;O had about 19 million in, 22 okay. The project costs were about 19 million at that 23 point? 24 A. <b>Correct. But I just want to clarify. We</b> 25 <b>are not out of pocket 19 million.</b></p>	<p>page 72</p> <p>1 with representatives of Bank of Utah what is going to 2 happen. But I kind of gather more of the details. My 3 father is an incredible guy, he's a, I'm going to call 4 it a 30- or 50,000-foot person, and I try to make sure 5 the small things get taken care of along with -- I 6 can't remember if Royce Richard or Cass Butler, I 7 don't remember, one of our attorneys were also I think 8 helping to -- 9 Q. Understood. 10 A. <b>-- to structure that.</b> 11 Q. Understood. 12 A. <b>So I had --</b> 13 Q. Was there a previous relationship with 14 Bank of Utah and R&amp;O? 15 A. <b>Yes.</b> 16 Q. Okay. And what was that previous 17 relationship that R&amp;O had with Bank of Utah? 18 A. <b>Orluff had a -- well, Orluff had a</b> 19 <b>personal relationship with one of their employees, a</b> 20 <b>gentleman named Scott Parkinson.</b> 21 Q. Okay. 22 A. <b>But Scott is a, Scott's a business</b> 23 <b>development, or was, he's since retired. He, he</b> 24 <b>doesn't -- my impression is Scott doesn't have the</b> 25 <b>authority to say we are going to loan you. He has the</b></p>
<p>page 71</p> <p>1 Q. I'm going to get there. I'm going to get 2 there. 3 A. <b>Okay.</b> 4 Q. Trust me, I'm going to get you there. 5 Okay? 6 A. <b>All right.</b> 7 Q. Your father testified that, that at least 8 as of today, the entire project is about a \$30 million 9 project. Does that sound about right to you as well? 10 A. <b>I believe that's the number I've heard.</b> 11 Q. Okay. All right. Now I'm going to go to 12 the financing aspect of it. 13 A. <b>Okay.</b> 14 Q. Where I think you were headed. 15 A. <b>Okay.</b> 16 Q. All right. So tell us how it was 17 financed. 18 A. <b>Once, once we figured things out and</b> 19 <b>started working forward, Orluff and the Huishes had,</b> 20 <b>had met with maybe a couple of banks. But ultimately</b> 21 <b>Bank of Utah had agreed to issue a loan. I believe it</b> 22 <b>was 12, 12.2, 12-point-something million dollars.</b> 23 Q. Were you involved in that process? 24 A. <b>I was involved in getting the details done</b> 25 <b>for I think Orluff and maybe Scott, kind of working</b></p>	<p>page 73</p> <p>1 authority to walk you in the door and introduce you. 2 Q. Got it. 3 A. <b>We then were meeting with a gentleman</b> 4 <b>named, I think it was Bart Tucker back then was a</b> 5 <b>loan, I think agent, maybe. He was the guy on Bank of</b> 6 <b>Utah's side who was kind of the detail guy working</b> 7 <b>with me a little bit to say --</b> 8 Q. The loan officer? 9 A. <b>Yeah, maybe.</b> 10 Q. Okay. Who was appointed presumably by a 11 loan committee? 12 A. <b>Yeah, sounds right.</b> 13 Q. To oversee it? 14 A. <b>That sounds correct.</b> 15 Q. Okay. And so the Bank of Utah funded how 16 much initially? 17 A. <b>I believe it's, I believe it's a</b> 18 <b>\$12.2 million loan.</b> 19 Q. And who is that loan made to? 20 A. <b>I'm going to -- I think it goes to</b> 21 <b>Henderson Water Park is the entity that it goes to.</b> 22 Q. So Bank of Utah made a loan, not to Orluff 23 or not to R&amp;O Construction, but rather to a separate 24 entity known as Henderson Water Park? 25 A. <b>I believe that's who the loan was made to.</b></p>



<p style="text-align: right;">page 74</p> <p>1 Q. And what is that based upon?</p> <p>2 A. <b>What do you -- I am not sure what you</b></p> <p>3 <b>mean.</b></p> <p>4 Q. What do you base that answer upon? Why do</p> <p>5 you believe that this money didn't come directly to</p> <p>6 Orluff as a loan or directly to R&amp;O as a loan but</p> <p>7 rather directly to Henderson Water Park?</p> <p>8 A. <b>Well, I know it didn't come to R&amp;O. And</b></p> <p>9 <b>it seemed like that's why the entity was formed. The</b></p> <p>10 <b>Henderson Water Park was the culmination of Huishes, I</b></p> <p>11 <b>think it's West Coast, and the Double Ott formed</b></p> <p>12 <b>whatever entities for Henderson Water Park. And I</b></p> <p>13 <b>believe that's who the bank was making the loan to.</b></p> <p>14 Q. Okay.</p> <p>15 What involvement at that point did</p> <p>16 Mr. Welch have in the financing of the 12-1/2 million</p> <p>17 by Bank of Utah?</p> <p>18 A. <b>With Bank of Utah?</b></p> <p>19 Q. Yeah.</p> <p>20 A. <b>I, I'm not aware of Tom's involvement with</b></p> <p>21 <b>Bank of Utah. He might have -- I would be speculating</b></p> <p>22 <b>if I just guess on something.</b></p> <p>23 Q. What other involvement did Mr. Welch have</p> <p>24 at that stage?</p> <p>25 A. <b>Right at the time the loan is being done</b></p>	<p style="text-align: right;">page 76</p> <p>1 Double Ott is.</p> <p>2 A. <b>Double Ott is the entity that holds its</b></p> <p>3 <b>ownership percentage in Henderson Water Park.</b></p> <p>4 Q. All right. And it owns the ownership</p> <p>5 interest on behalf of what individuals?</p> <p>6 A. <b>I believe the individuals for Double Ott</b></p> <p>7 <b>Water Holdings, whatever, are Orluff.</b></p> <p>8 Q. You?</p> <p>9 A. <b>I don't remember if my name is listed on</b></p> <p>10 <b>that or not.</b></p> <p>11 Q. Chet?</p> <p>12 A. <b>I'm not sure.</b></p> <p>13 Q. You don't know -- so you don't know who</p> <p>14 the members are besides Orluff?</p> <p>15 A. <b>I haven't, I haven't reviewed them. My</b></p> <p>16 <b>dad has a lot of entities, so I don't -- I'm not sure.</b></p> <p>17 Q. Okay. I will represent to you that your</p> <p>18 father testified during his testimony that you were</p> <p>19 present at that he obtained a personal loan from R&amp;O.</p> <p>20 You do not recall that he testified to</p> <p>21 that fact?</p> <p>22 A. <b>Well, when he is saying a personal loan,</b></p> <p>23 <b>if he is referring to R&amp;O loaned money to Double Ott,</b></p> <p>24 <b>whatever that LLC, I believe is how that's structured.</b></p> <p>25 <b>Double Ott then invest that as, is the correct term,</b></p>
<p style="text-align: right;">page 75</p> <p>1 or --</p> <p>2 Q. At or about that time.</p> <p>3 A. <b>-- or prior?</b></p> <p>4 Q. Yeah.</p> <p>5 A. <b>Tom helped draft the paperwork to make</b></p> <p>6 <b>things, you know, the entities work. And him and</b></p> <p>7 <b>Orluff may have counseled together on certain things</b></p> <p>8 <b>or given advice. As far as the specific to the loan</b></p> <p>9 <b>agreement or the construction of the park, I, I don't</b></p> <p>10 <b>recall what Tom would have been involved with.</b></p> <p>11 Q. Are you familiar with something called</p> <p>12 Double Ott?</p> <p>13 A. Yes.</p> <p>14 Q. What is Double Ott?</p> <p>15 A. <b>Double Ott is -- well, there's -- I don't</b></p> <p>16 <b>know if it's Double Ott or if it's Double Ott Water</b></p> <p>17 <b>Holdings or something like that. Is an entity that</b></p> <p>18 <b>was formed as Orluff's side of the ownership of</b></p> <p>19 <b>Henderson Water Park.</b></p> <p>20 Q. And who crafted Double Ott? Who did the</p> <p>21 work on that?</p> <p>22 A. <b>I'm not certain. It might have been Royce</b></p> <p>23 <b>Richards. It could have been Tom, I just -- I don't</b></p> <p>24 <b>know that's what he would have done.</b></p> <p>25 Q. Well, tell us what the purpose of</p>	<p style="text-align: right;">page 77</p> <p>1 <b>the capital contribution or whatever into Henderson</b></p> <p>2 <b>Water Park.</b></p> <p>3 Q. Okay. Let me stop you there.</p> <p>4 A. Okay.</p> <p>5 Q. Did R&amp;O loan money to Orluff?</p> <p>6 A. <b>For this or for something else?</b></p> <p>7 Q. For any part, for any, for any part of the</p> <p>8 water park project known as Cowabunga Bay?</p> <p>9 A. <b>My understanding is that it was loaned to</b></p> <p>10 <b>the entity, the Double Ott.</b></p> <p>11 Q. Okay. So R&amp;O never made a personal loan</p> <p>12 to Orluff; is that correct?</p> <p>13 A. <b>I don't believe so. I believe it was to</b></p> <p>14 <b>the entity.</b></p> <p>15 Q. Do you recall him saying that there was a</p> <p>16 personal loan that he received from R&amp;O that he used</p> <p>17 to fund Double Ott?</p> <p>18 A. <b>Well, I could see Orluff saying it that</b></p> <p>19 <b>way.</b></p> <p>20 Q. Okay.</p> <p>21 A. <b>Because to him he, one, he is</b></p> <p>22 <b>R&amp;O Construction. And, two, he is Double Ott. So as</b></p> <p>23 <b>you watched --</b></p> <p>24 Q. So there is an identity and interest?</p> <p>25 A. <b>Yeah. And as you watched his energy level</b></p>

<p style="text-align: right;">page 78</p> <p>1 <b>completely drop during his deposition, I can easily</b> 2 <b>see him --</b> 3 Q. This is pretty early on his deposition 4 before we had the recess. 5 <b>A. Okay. But I guess I would just -- my</b> 6 <b>opinion, I can see him saying "I got a loan," but</b> 7 <b>that's --</b> 8 Q. You're saying that it wasn't a personal 9 loan to him, but rather it was a loan that he obtained 10 from R&amp;O because he is R&amp;O, which in fact was, was 11 going to fund the water park. Fair enough? 12 <b>A. R&amp;O agreed to, to loan money to the entity</b> 13 <b>I believe is what the loan document says.</b> 14 Q. Henderson Water Park? 15 <b>A. No, to Double Ott.</b> 16 Q. Double Ott, okay. 17 <b>A. And then Double Ott invests that as their</b> 18 <b>capital contribution.</b> 19 Q. Okay. And that loan was memorialized, 20 there were contracts -- 21 <b>A. There is a loan agreement.</b> 22 Q. What are the terms of the loan agreement? 23 <b>A. I, I don't recall. Our CFO Charlie Auger</b> 24 <b>and possibly Royce Richards would have that.</b> 25 Q. Okay. And was this a separate loan from</p>	<p style="text-align: right;">page 80</p> <p>1 <b>loan agreements in place for some developments that</b> 2 <b>he's done.</b> 3 BY MR. CAMPBELL: 4 Q. And do you know how many? Just ballpark 5 it. 6 <b>A. I'm, I'm guessing two.</b> 7 Q. And what are they? 8 <b>A. One is a development called Eagle Ridge.</b> 9 <b>The other one I just, I call it The Ranch. I don't</b> 10 <b>know what.</b> 11 Q. What is Eagle Ridge? 12 <b>A. Eagle Ridge is a housing development</b> 13 <b>located in Eden.</b> 14 Q. Okay. And the other one? 15 <b>A. It's a barn on some land that was</b> 16 <b>purchased to look at developing.</b> 17 Q. Where? 18 <b>A. In the North Ogden area.</b> 19 Q. Okay. Any other loans made to Orluff by 20 R&amp;O for his other projects? 21 <b>A. Not that I'm aware of.</b> 22 Q. Okay. Has the R&amp;O loan to Double -- that 23 Orluff got for Double Ott been repaid? 24 <b>A. Not in full. It makes -- let me just</b> 25 <b>clarify what you said because I get confused.</b></p>
<p style="text-align: right;">page 79</p> <p>1 the loan that was obtained from Bank of Utah? 2 <b>A. Yes.</b> 3 Q. Okay. And who was it that was responsible 4 for repaying the loan in the event once the loan was 5 made to Double Ott? 6 <b>A. Double Ott has to make payments back to</b> 7 <b>R&amp;O.</b> 8 Q. And who are the guarantors on the note? 9 <b>A. On the Double Ott note?</b> 10 Q. Yes. To R&amp;O? 11 <b>A. I, I would assume that's Orluff who had</b> 12 <b>signed it.</b> 13 Q. Did you sign it as well? 14 <b>A. I don't recall signing it.</b> 15 Q. Do you know if Chet did? 16 <b>A. I don't recall Chet signing, but I don't</b> 17 <b>know.</b> 18 Q. Okay. 19 Do you know whether or not R&amp;O has ever 20 loaned Orluff any money to use in any of the entities 21 that he has formed in the past other than Double Ott? 22 MR. GORMLEY: Let me object again. 23 Relevancy. 24 But go ahead. 25 <b>THE WITNESS: Yeah, I believe they've had</b></p>	<p style="text-align: right;">page 81</p> <p>1 <b>Double Ott makes payments to R&amp;O each</b> 2 <b>year.</b> 3 Q. Right. Okay. What is the outstanding 4 balance? 5 <b>A. I'm not sure.</b> 6 Q. The total amount of the loan was, did you 7 say, 5 million? 8 <b>A. Well, I think it's up to 9.</b> 9 Q. Now? 10 <b>A. Yeah, I think it was up to 9, 9.2, 9.4.</b> 11 Q. There was an additional funding? 12 <b>A. Yes.</b> 13 Q. When did that take place? 14 <b>A. As we were discovering that scopes of</b> 15 <b>work, like I had mentioned, the slide towers and</b> 16 <b>things were not put in place, both Huishes and</b> 17 <b>Double Ott were helping to come up with more money to</b> 18 <b>put into the park.</b> 19 Q. That was part of the nightmare scenario 20 that your father was telling us about? 21 <b>A. Yes.</b> 22 Q. Okay. 23 <b>A. Correct.</b> 24 Q. So it was getting worse and worse as you 25 were going along?</p>

<p style="text-align: right;">page 82</p> <p>1     <b>A. It was getting bigger.</b> 2     Q. Bigger. The liability for the funding? 3     <b>A. The cost.</b> 4     Q. Right. Okay. 5         So, so is there just one more, one more 6 loan or were there a succession of loans? As I 7 understand, the first loan was between 4- and 8 5 million as you recall? 9     <b>A. I don't recall what the first one was.</b> 10    Q. And I don't need mathematical precision. 11    <b>A. Okay.</b> 12    Q. But that's ballpark? 13    <b>A. I don't recall.</b> 14    Q. I will tell you that's what your dad said. 15    <b>A. Okay, it may have been. So our CFO</b> 16 <b>handles that.</b> 17    Q. All right. And given that your dad was 18 the one that has got the loan, I would assume you 19 would trust his recollection in that regard? 20    <b>A. Yeah.</b> 21    Q. Now tell me your recollection with respect 22 to the funding of the rest of it that brought you up 23 to 9. Is that one additional loan or successive 24 loans? 25    <b>A. I don't recall. I'd have to ask Charlie,</b></p>	<p style="text-align: right;">page 84</p> <p>1 obtained by Orluff and then goes to Double Ott, as I 2 understand it, increases the capital contribution of 3 Double Ott in the Henderson Water Park as you 4 previously testified? 5     <b>A. I believe that's correct.</b> 6     Q. Okay. Were the, were the Huishes on that, 7 any loan to R&amp;O, were they guarantors of any? 8     <b>A. Not on a loan to R&amp;O, no.</b> 9     Q. Okay. 10         Did Double Ott make any additional capital 11 contributions to Henderson Water Park? 12    <b>A. I don't know. Do you mean in addition to</b> 13 <b>the 9.4 or whatever the number is?</b> 14    Q. Correct. Right. 15    <b>A. I don't believe so.</b> 16    Q. Okay. Did R&amp;O ever waive any fees on its 17 construction contract? 18    <b>A. We have -- so I'm going to say yes. When</b> 19 <b>we say waive, we were -- we didn't receive the fee of,</b> 20 <b>I can't remember, some portion like 250,000 or some</b> 21 <b>dollar amount that had not been paid to R&amp;O as a fee.</b> 22    Q. And what was that fee for? 23    <b>A. For work put in place on the project.</b> 24    Q. What else? 25    <b>A. That's, that's what it was. That was our</b></p>
<p style="text-align: right;">page 83</p> <p>1 <b>who is our CFO, if he did it in two steps or not.</b> 2     Q. Okay. And was Charlie responsible for the 3 additional loans as well? 4     <b>A. Well, Charlie handles the accounting. He</b> 5 <b>is our CFO.</b> 6     Q. For R&amp;O? 7     <b>A. For R&amp;O.</b> 8     Q. Okay. 9     <b>A. And for Orluff's entities.</b> 10    Q. Got it. 11    <b>A. Between him and a gentleman names Royce</b> 12 <b>Richards.</b> 13    Q. Do you know when the last funding of loans 14 to Double Ott took place that was obtained by Orluff 15 through R&amp;O? 16    <b>A. Are you asking when is the last time money</b> 17 <b>from R&amp;O was loaned to Double Ott?</b> 18    Q. That's the question. It was much better 19 crafted than mine. 20    <b>A. Okay. I, I'm assuming it's during</b> 21 <b>construction, which is early 2014. But I...</b> 22    Q. Okay. 23    <b>A. Unless the Polin third tower comes into</b> 24 <b>play, that goes into early 2015.</b> 25    Q. So the money that's loaned by R&amp;O that's</p>	<p style="text-align: right;">page 85</p> <p>1 <b>contractor's fee based on --</b> 2     Q. And how much is R&amp;O owed today? 3     <b>A. Well, you have the loan from Double Ott</b> 4 <b>back to R&amp;O for, I don't know the current balance on</b> 5 <b>that.</b> 6     Q. How much is R&amp;O owed by Cowabunga Bay for 7 the construction? 8     <b>A. Well, if the fee was taken into</b> 9 <b>consideration, there is -- I believe it's around 200-,</b> 10 <b>\$250,000. And it, it didn't get put into applied</b> 11 <b>owner equity, it didn't --</b> 12    Q. And I understand that, and I'm asking a 13 different question now. Okay? 14    <b>A. Okay.</b> 15    Q. That was waived. The 250, the quarter of 16 a million is gone. R&amp;O didn't get it. 17         MR. GORMLEY: Let me object to the 18 extent -- 19 BY MR. CAMPBELL: 20    Q. Here's my question. 21         MR. GORMLEY: If I may. 22         To the extent it calls for a legal 23 conclusion regarding what is a waiver. 24 BY MR. CAMPBELL: 25    Q. That's why I just said that --</p>

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1     **A.    Okay.**  
2     Q.    -- you know, in common nomenclature. It's  
3    gone. Okay. R&O didn't get it.  
4     **A.    We would still like it.**  
5     Q.    Okay. So how much is R&O owed on the  
6    construction project as of today for the work that  
7    they did to build the place?  
8     **A.    The fee that hasn't been paid is what R&O**  
9   **is owed.**  
10    Q.    250?  
11    **A.    Yes.**  
12    Q.    It's not owed any other moneys?  
13    **A.    Well, we are owed from Double Ott for the**  
14 **amount that was loaned, the 250 --**  
15    Q.    And that's 9-1/2 million?  
16    **A.    I think it was 9.4.**  
17    Q.    Okay.  
18    **A.    We did some improvement work out there**  
19 **this last year. We had to do some road improvement**  
20 **work under a separate contract. I believe we have**  
21 **been paid for that. It was couple hundred grand.**  
22    Q.    So as of today, how much has R&O actually  
23    received for the construction of the park?  
24    **A.    I don't know.**  
25    Q.    Well, I presume it's -- is it close to

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1   \$30 million, the total, the price?  
2   **A.    No. Because -- so when I say when we ran**  
3 **the costs of approximately 19 million or so through**  
4 **our company --**  
5    Q.    Right.  
6    **A.    -- between Double Ott paying us -- let me**  
7 **tell you. So we ran 19 million in costs through**  
8 **R&O Construction of the 28 or 30. I think that 28 and**  
9 **30 probably includes land value and slides purchased**  
10 **by whoever.**  
11        **So R&O has received -- what did we**  
12 **receive? We haven't received the 9.4 that was loaned**  
13 **to Double Ott.**  
14    Q.    That's still outstanding?  
15    **A.    Yeah. That's still outstanding as loan**  
16 **payments back to R&O.**  
17    Q.    Okay.  
18    **A.    The difference between that we have**  
19 **received and that's what the Bank of Utah loan was**  
20 **covering those subcontractor costs.**  
21    Q.    So R&O received the 12-1/2 million?  
22    **A.    The 12.2 million from Bank of Utah --**  
23    Q.    Yeah.  
24    **A.    -- some portion of that came to R&O to pay**  
25 **the monthly draws for subcontractor work and our**

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1   **general conditions, staffing. I think part of that**  
2 **also went to fund the Huishes had, like the kid, the**  
3 **kid pool has some slides. I don't believe that was**  
4 **ran through R&O. There were --**  
5    Q.    What do you mean you don't believe that  
6    was ran through?  
7    **A.    Well, there were, there were costs that,**  
8 **materials and equipment that they were providing.**  
9    Q.    The Huishes were providing?  
10   **A.    Yes.**  
11    Q.    Okay.  
12    **A.    So it wasn't part of R&O Construction's**  
13 **contract.**  
14    Q.    And when they were installed, R&O  
15    installed them?  
16    **A.    No.**  
17    Q.    They got somebody else to install them?  
18    **A.    They had -- yeah. I know, I know the**  
19 **kiddie pool had somebody else that installed that**  
20 **slide assembly.**  
21    Q.    All right. Okay. So as I understand it,  
22    are you saying that R -- that with respect to the  
23    construction --  
24    **A.    Okay.**  
25    Q.    -- of the park, that R&O has been paid all

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1   amounts that they have billed save and except for the  
2   250,000 that was waived?  
3   **A.    I would, I would say yes, because the**  
4 **amount still owing is a loan from Double Ott to R&O.**  
5    Q.    All right. And was the amount that was  
6    paid an amount that included the, not just the hard  
7    costs that were experienced by R&O, but also profit?  
8    **A.    I don't believe we got our fee. I think**  
9 **early on, as we were building percent complete, we**  
10 **received part of our fee. I also don't believe we**  
11 **increased our fee above that base.**  
12        **And if I recall correctly, when the**  
13 **contract grew from whatever it initially was up to 19,**  
14 **there is some part of that 250,000 that wasn't**  
15 **received and it wasn't counted as equity. So it's**  
16 **confusing.**  
17    Q.    And as you sit here today, are you telling  
18    me that R&O did not make a profit on this project?  
19    **A.    Absolutely not. I mean --**  
20    Q.    That --  
21    **A.    -- no, we didn't, we didn't make a profit.**  
22    Q.    You didn't make a profit?  
23    **A.    No.**  
24    Q.    So R&O performed and did not make a profit  
25    from the building of this park; is that correct?

<p style="text-align: right;">page 90</p> <p>1     <b>A.    So when we, when I say didn't make a</b> 2 <b>profit, we covered our costs.</b> 3     Q.    I understand that. 4     <b>A.    We didn't receive our full fee on top of</b> 5 <b>that.</b> 6     Q.    I understand that. Okay. 7     <b>A.    So we may have made some money. We didn't</b> 8 <b>make our full fee. And that's what that 250,000.</b> 9     Q.    And you don't know how much you made or 10 how much you should have made; is that correct? 11    <b>A.    I could look it up. Yeah, as I sit here,</b> 12 <b>I don't know.</b> 13    Q.    And the best person to ask that is Charlie 14 Auger? 15    <b>A.    Probably Charlie and Erik Skogstad.</b> 16       MR. GORMLEY: Want to take a short break? 17       MR. CAMPBELL: Sure, if you'd like. 18       THE VIDEOGRAPHER: We are going off the 19 record. The time is approximately 11:12 a.m. 20       (Recessed from 11:12 a.m. to 11:29 a.m.) 21       THE VIDEOGRAPHER: We are going back on 22 the record. The time is approximately 11:29 a.m. 23 BY MR. CAMPBELL: 24    Q.    With respect to the, any changes that were 25 made in the construction contract, who would be the</p>	<p style="text-align: right;">page 92</p> <p>1           And I would like to talk to you about your 2 involvement in it, who else is involved, what's the 3 extent of the involvement, that sort of thing. Okay? 4    <b>A.    Okay.</b> 5    Q.    So that's where I'm going. 6    <b>A.    Okay.</b> 7    Q.    I'm not going to try to trick you or 8 surprise you or anything else. 9    <b>A.    All right.</b> 10   Q.    There is an operating agreement for your 11 involvement in the Cowabunga Bay project, correct? 12   <b>A.    For Henderson Water Park, I believe?</b> 13   Q.    Yes. 14   <b>A.    Yes.</b> 15   Q.    Okay. And, and that operating agreement 16 is one that has a lot of, a lot of covenants and 17 procedures in it that you've reviewed; is that 18 correct? 19   <b>A.    Yes, I reviewed it in the past.</b> 20   Q.    I think that's one of the things that you 21 said you reviewed in preparation for giving your 22 deposition here today? 23   <b>A.    Yes.</b> 24   Q.    Okay. 25   <b>A.    Two sections I mainly looked at.</b></p>
<p style="text-align: right;">page 91</p> <p>1 best person to talk to about that from R&amp;O? 2    <b>A.    Erik Skogstad.</b> 3    Q.    He is the local gentleman? 4    <b>A.    Yes.</b> 5    Q.    Okay. 6       And who would be responsible for approving 7 any changes in the actual terms of the contract to 8 build the water park that Erik may have negotiated? 9    <b>A.    On the R&amp;O construction side?</b> 10   Q.    Right. I presume somebody in Utah is 11 looking at him on that? 12   <b>A.    Erik is very qualified. So whatever he is</b> 13 <b>drafting or if he sent scope of work up to me to</b> 14 <b>possibly review it or it might have been either one of</b> 15 <b>us or --</b> 16   Q.    Auger? 17   <b>A.    No, Charlie doesn't get into the</b> 18 <b>contracts. He's the financial side.</b> 19   Q.    Okay. 20   <b>A.    I would say most likely handled by Erik.</b> 21   Q.    Okay. 22       So let's talk a little bit about the 23 actual operation of Cowabunga Bay. Sort of moving 24 into a different area now and giving you a preview of 25 the transition. Okay?</p>	<p style="text-align: right;">page 93</p> <p>1    Q.    Okay. What two sections did you mainly 2 look at? 3    <b>A.    I believe it was Article or Section 6,</b> 4 <b>6.1, something like that.</b> 5    Q.    And what did it deal with, do you recall? 6    <b>A.    Talked about the rights and authority of</b> 7 <b>the management committee.</b> 8    Q.    All right. And why was it important for 9 you to review that? 10   <b>A.    Just to get reacquainted with what I had</b> 11 <b>reviewed years ago.</b> 12   Q.    Okay. But, that's sort of the question. 13 Why did you want to get reacquainted with that 14 particular provision in a multi, multipage document? 15   <b>A.    Because it seemed to be one that had the</b> 16 <b>most relevancy to what is being talked about --</b> 17   Q.    How so? 18   <b>A.    -- in this case.</b> 19       Because it talks about the rights and 20 authority of a management committee. 21   Q.    Right. 22   <b>A.    Some of the other sections as you look at</b> 23 <b>them are kind of the here is how the organization is</b> 24 <b>set up, here is how things are dealt with. But that</b> 25 <b>one more particularly talks about as a management</b></p>

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1 **committee what we can do, or I don't know if you'd**  
2 **say -- yeah, can and can't do.**  
3 Q. So why don't we just give you that and  
4 mark that document.  
5 MR. MIRKOVICH: This will be Exhibit 40.  
6 (Deposition Exhibit 40 marked.)  
7 BY MR. CAMPBELL:  
8 Q. You have presently before you what has  
9 been marked in this action as Exhibit 40. And we give  
10 each document that we mark in these, in these  
11 depositions a particular number which tracks it  
12 throughout the course of the litigation. So at time  
13 of trial you'll probably see that document again with  
14 the same number on it.  
15 So when I refer to Exhibit No. 40, what  
16 I'm referring to is an Operating Agreement for  
17 Henderson Water Park, LLC, a Nevada Limited Liability  
18 Company, correct?  
19 **A. Correct.**  
20 Q. This is what we -- this is one integrated  
21 document here that we're going to be referring to. So  
22 if I refer to Exhibit No. 40, I'm referring to this --  
23 **A. Okay.**  
24 Q. -- understood?  
25 Okay. So turn, if you will, to page 7,

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1 which I believe starts Article 6 which I think you  
2 were referring to in your previous answer.  
3 **A. Okay.**  
4 Q. On page 7 of Exhibit No. 40 is Article 6,  
5 The Management Committee, correct, that's the styling?  
6 **A. Correct.**  
7 Q. All right. And 6.1 provides that:  
8 "All management rights, powers and  
9 authority over the business, affairs and  
10 operations of the company shall be solely and  
11 exclusively vested in the management  
12 committee."  
13 Correct?  
14 **A. That's correct.**  
15 Q. All right. And as of May of 2015, this in  
16 fact was the operational document for Henderson Water  
17 Park, correct?  
18 **A. You say May of 2015?**  
19 Q. Yes.  
20 **A. Is it -- I think it's in place before**  
21 **that.**  
22 Q. It was.  
23 **A. Okay.**  
24 Q. It was. But I'm saying it was in place in  
25 May of 2015.

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1 **A. Okay, correct.**  
2 Q. That's when Leland drowned.  
3 **A. That's correct.**  
4 Q. That's why I'm using that, that date.  
5 Okay?  
6 **A. Okay.**  
7 Q. All right. I'm not trying to fly a fast  
8 ball by you.  
9 **A. I understand.**  
10 Q. Now, as you will see, 6.1 has subsections.  
11 And subsection (a), okay, states that:  
12 "The management committee shall have  
13 the full right..."  
14 **A. Where are you at, in subsection (a) you**  
15 **said?**  
16 Q. Yeah, subsection (a). Are you with me?  
17 **A. Yes.**  
18 Q. Okay.  
19 "The management committee shall have  
20 the full right, power and authority to do all  
21 things deemed necessary or desirable by it,  
22 in its reasonable discretion, to conduct the  
23 business affairs and operations of the  
24 company."  
25 Correct?

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1 **A. Correct.**  
2 Q. And that includes under subsection (b):  
3 "The making of any expenditures..."  
4 Correct?  
5 **A. Correct.**  
6 Q. Okay. And under section (b),  
7 paragraph (iii):  
8 "The use of the assets of the company  
9 (including, without limitation, cash on hand)  
10 for any purpose and on any terms the  
11 management committee deems appropriate,  
12 including, without limitation, the financing  
13 of the conduct of the operations of the  
14 company, the lending of funds to other  
15 persons and the repayment of obligations of  
16 the company."  
17 Is that correct?  
18 **A. That's correct.**  
19 Q. Such powers also include under  
20 subsection (b)(vi):  
21 "The selection and dismissal  
22 of employees..."  
23 Correct?  
24 **A. Correct.**  
25 Q. Those employees to include, as stated

<p>1 therein: 2 "...such officers and subordinate 3 officers as deemed necessary." 4 Correct? 5 <b>A. Correct.</b> 6 Q. "...and outside attorneys. 7 accountants, consultants and 8 contractors..." 9 Correct? 10 <b>A. Correct.</b> 11 Q. As well as: 12 "The determination of their 13 compensation and other terms of employment." 14 Correct? 15 <b>A. Correct.</b> 16 Q. Okay. All right. How are the members of 17 the management committee selected? 18 <b>A. On Orluff's side under Double Ott, he 19 selected myself, Chet, and Tom. As far as how they 20 are selected, that's who he picked.</b> 21 Q. Okay. 22 <b>A. On Huishes side, I understand who they are 23 as being Scott, Shane, and Craig.</b> 24 <b>You asked how, I don't know what you mean 25 by how are they selected other than...</b></p>	<p>page 98</p> <p>1 <b>A. He was the majority shareholder or 2 whatever you would call it, investor.</b> 3 Q. Right. And that's because he put the most 4 in and had the most at risk through loans and -- 5 MR. GORMLEY: Objection. 6 <b>THE WITNESS: Well --</b> 7 MR. CAMPBELL: You have to wait until I 8 finish my question. 9 MR. GORMLEY: I thought you finished, I'm 10 sorry. 11 BY MR. CAMPBELL: 12 Q. He had the most at risk through loans and 13 capital investment, correct? 14 <b>A. Yes.</b> 15 MR. GORMLEY: Objection. Lack of 16 foundation. 17 Go ahead. 18 BY MR. CAMPBELL: 19 Q. Go ahead. 20 <b>A. Okay. So if I understand it correctly, 21 yes, Orluff had put via Double Ott loaned the most 22 money into the park.</b> 23 Q. Right. And he was, he was personally on 24 the hook as he told us, correct? 25 <b>A. He has signed personally.</b></p> <p>page 100</p>
<p>1 Q. What I mean by that is, and I think you 2 told me, Orluff selected them? 3 <b>A. Yes.</b> 4 Q. Okay. 5 <b>A. On our side.</b> 6 Q. Right. Okay. Fair enough. 7 All right. Why did Double Ott and Orluff 8 get to pick the majority of the members of the 9 committee? 10 <b>A. Being that there were four on his side, 11 you mean?</b> 12 Q. Right. Four votes as opposed to three. 13 <b>A. My understanding or recollection at the 14 time this was being formed was Orluff would be a vote, 15 if you will, if there was a -- in the event of I think 16 they called it a tie or if for some reason a decision 17 came up that between, I guess it would be Chet, Tom, 18 and myself, and Shane, Scott, and Craig were trying to 19 decide on something and couldn't come to agreement, 20 then Orluff would be able to be the final person to 21 say, well, here is what I think. And I believe it's 22 because he had the most money in.</b> 23 Q. Right. So control was in the Opheikens 24 and that was because Orluff had the most at risk and 25 at stake as he told us in his deposition?</p>	<p>page 99</p> <p>1 Q. The answer is "yes"? 2 <b>A. Yes, okay.</b> 3 Q. Okay. It wasn't a trick question. 4 <b>A. Sorry --</b> 5 Q. That's okay. 6 <b>A. -- but I'm who I am, so...</b> 7 Q. All right. And I'm not, and I'm not 8 criticizing you in any way. 9 <b>A. Okay. No offense taken, sir.</b> 10 Q. I don't want you to. 11 So he got to pick the majority, and the 12 majority pick was his, his sons and his good friend 13 Mr. Welch, correct? 14 <b>A. Yes.</b> 15 Q. Okay. And the Huishes were the Huishes. 16 They had their side of the equation, correct? 17 <b>A. Well, yes. Scott and Shane who were 18 always involved, and I worked a lot with them. And 19 then Craig, I don't know what Craig's, how he was 20 picked or...</b> 21 Q. Okay. And when, when did you find out 22 that you were selected to sit on the, on the 23 committee? 24 <b>A. I think when they were drafting the, going 25 through drafting the agreement --</b></p> <p>page 101</p>

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1 Q. Okay.  
2 A. -- or this operating agreement.  
3 Q. And who was it that told you that?  
4 A. **I don't recall. Probably Orluff.**  
5 Q. Okay. And did you, did you at any time  
6 decline to serve or was it always your intention to  
7 serve?  
8 A. **Well, once I was told or asked, I agreed,**  
9 **you know.**  
10 Q. Yes. You assented?  
11 A. **Yes. Dad asked me to do something, I**  
12 **generally do it.**  
13 Q. Right.  
14 What do you believe you brought to the  
15 table in terms of your selection by Orluff to be on  
16 the management committee?  
17 A. **Me personally?**  
18 Q. Right.  
19 A. **I, I tend to be more detailed in looking**  
20 **at things. If I compare it to, you know, my father, I**  
21 **have more energy. And I do not mean that as a slant**  
22 **to him at all. It's, you know, he is --**  
23 Q. I got it, I'm 65.  
24 A. **Well, so and hopefully just that he has**  
25 **confidence in me to help.**

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1 Q. And what does Chet bring to the table?  
2 MR. GORMLEY: Let me object. Lack of  
3 foundation.  
4 You can answer the question.  
5 **THE WITNESS: Okay. I --**  
6 BY MR. CAMPBELL:  
7 Q. What skill set does he bring in  
8 contributing?  
9 A. **Chet is recognized and appreciated locally**  
10 **and especially in the City of Henderson. He lives**  
11 **locally. He worked on I don't know if you'd call it**  
12 **the Henderson Chamber, whatever, he served very**  
13 **actively down there. He is also one of my father's**  
14 **sons. So my dad has trust in him as well.**  
15 Q. Okay. What did Mr. Welch bring to the  
16 table in terms of skill set to warrant him being on  
17 the management committee?  
18 MR. GORMLEY: Same objection.  
19 Go ahead.  
20 **THE WITNESS: Tom is a very trusted**  
21 **individual and life friend of my father's. And Tom**  
22 **helped to I believe draft the operating agreement.**  
23 **When I say draft, I don't know who all was involved,**  
24 **but I believe Tom helped with that in a great extent.**  
25 **///**

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1 BY MR. CAMPBELL:  
2 Q. Okay.  
3 What did Scott Huish bring to the  
4 management committee, what skill sets did he have?  
5 MR. GORMLEY: Standing objection.  
6 **THE WITNESS: Okay.**  
7 MR. CAMPBELL: Yes.  
8 **THE WITNESS: Scott, Scott had the**  
9 **experience of the Huish family in owning and operating**  
10 **different water parks, and I can't remember, the**  
11 **Family Fun Centers that the Huish family themselves**  
12 **brought. I see Scott as the -- as I met him and had**  
13 **the opportunity to work with him is a detailed person**  
14 **as well as it relates to providing budgets and**  
15 **insurances. That's primarily who I was interacting**  
16 **with.**  
17 BY MR. CAMPBELL:  
18 Q. Okay.  
19 Would you turn to the page that follows 26  
20 of Exhibit No. 40, it's styled Addendum to Operating  
21 Agreement for Henderson Water Park, LLC.  
22 Do you see that?  
23 A. **Yes, I do.**  
24 Q. Okay. And this is dated September 17th,  
25 2013, correct?

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1 A. **Correct.**  
2 Q. All right. And does your signature appear  
3 on that document?  
4 A. **Yes, it does.**  
5 Q. Okay. And do you recognize all of the  
6 other signatures as those of the management committee?  
7 A. **Yes, I do.**  
8 Q. And, and is Exhibit No. 40 a faithful,  
9 true, and correct copy of the original LLC agreement?  
10 A. **I believe so.**  
11 Q. Okay.  
12 A. **I haven't reviewed every page, but it**  
13 **appears to be.**  
14 Q. Right. You have, you have no reason to  
15 doubt that this is a true and correct copy of the  
16 operating agreement for Henderson Water Park, LLC that  
17 controlled operation of the water park as of 2015,  
18 May 2015, correct?  
19 A. **I believe it is the operating agreement, a**  
20 **copy of it.**  
21 Q. And to be fair, you said and it controlled  
22 even before that?  
23 A. **Yes.**  
24 Q. Yes.  
25 A. **Okay.**



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1 Q. Okay. Your father testified that the  
2 management committee members all had the common goals  
3 to successfully operate the business. I assume that  
4 you agree with him in that regard, correct?  
5 **A. Yes, I would agree with that.**  
6 Q. Okay. And moreover, he testified that the  
7 management committee had a duty and obligation to  
8 comply with the law and ensure that those working on  
9 behalf of the management committee did so as well, and  
10 you likewise agree with that, I assume?  
11 **A. I agree that the management committee has**  
12 **a responsibility to comply with the law.**  
13 Q. Okay. And to ensure others comply with  
14 it, correct? Working on their behalf?  
15 **A. Yes. Yes, that we -- yeah.**  
16 Q. Does the management committee of Henderson  
17 Water Park maintain voting records as to actions that  
18 they take?  
19 **A. Not that I'm aware of.**  
20 Q. Are there meeting minutes?  
21 **A. Not that I'm aware of.**  
22 Q. Are there agendas for the meetings?  
23 **A. There were. When we would have our**  
24 **meetings, I would oftentimes email a list out to the**  
25 **group saying, "When are we going to meet?"**

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1 **Scott and I and/or Shane would usually**  
2 **kind of schedule that. And I would, I would forward a**  
3 **list within, usually in the context of an email and**  
4 **say, "Here are some items that I would like to**  
5 **review." The Huishes would also --**  
6 Q. Put in their 2 cents?  
7 **A. -- generally add in of here's what they**  
8 **would like to review also.**  
9 Q. Got it.  
10 **A. And then information was brought to the**  
11 **meeting and it was discussed. But I don't recall any**  
12 **meeting minutes being taken and distributed.**  
13 Q. Okay. But I think my question was focused  
14 at that part. There were no meeting minutes and I  
15 accept that.  
16 **A. Okay.**  
17 Q. My question was agenda, that was the one  
18 that I thought you were answering that.  
19 **A. Okay.**  
20 Q. So I think you interposed minutes for  
21 agenda. We had moved on to agenda.  
22 So there may have been some sort of  
23 agenda, even if it was just in the form of emails that  
24 were exchanged, as to what people wanted to talk about  
25 at the, at the management committee meetings?

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1 **A. Yeah. So when I say from my side, I would**  
2 **usually email.**  
3 Q. And I got that.  
4 **A. And then if -- I remember one or two**  
5 **meetings possibly where the Huishes brought a more**  
6 **detailed agenda.**  
7 Q. Fair enough. That's all I was looking  
8 for.  
9 **A. Okay.**  
10 Q. Okay. Were notes taken at, at meetings of  
11 the management committee?  
12 MR. GORMLEY: Let me object. Lack of  
13 foundation. By him or? Never mind, go ahead.  
14 BY MR. CAMPBELL:  
15 Q. By anyone.  
16 **A. I don't, I don't think notes from the form**  
17 **of meeting minutes that I'm aware of were taken.**  
18 Q. Okay.  
19 **A. Sometimes on the agenda --**  
20 Q. And that's why I'm asking about notes.  
21 **A. Okay.**  
22 Q. You told me that no minutes were kept. I  
23 get it.  
24 **A. Okay.**  
25 Q. Now we are moving on to just notes. Did

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1 any -- did you make notes? Did anybody on the  
2 management committee make notes? Was there a  
3 procedure for just taking notes? Anything like that?  
4 And if there was, there was. If there wasn't, there  
5 wasn't.  
6 **A. I don't believe there is a procedure for**  
7 **it.**  
8 Q. Okay.  
9 **A. I had taken notes on some of the agendas**  
10 **with their items that I needed to follow up on or**  
11 **general comment.**  
12 Q. Did you maintain your notes from any --  
13 withdraw.  
14 Did you maintain your notes that you made  
15 on a particular matter at a management committee  
16 meeting?  
17 **A. When you say "retain," you mean --**  
18 Q. Put them in a file?  
19 **A. -- save them, put them in a file?**  
20 Q. Type them into.  
21 **A. I don't think I ever typed anything up. I**  
22 **think there were one or two that -- everything that I**  
23 **had I turned over to our counsel. I had, I think, a**  
24 **paper to our attorney to turn over. And I think I**  
25 **might have had one or two agenda items that I had made**

<p style="text-align: right;">page 110</p> <p>1 notes on, but.. 2 Q. Not as a usual course that you would keep 3 these notes? 4 A. Yeah. I wouldn't usually keep them. If 5 I, if I made a note that was "Call Polin to find out 6 what we are going to do with the slide schedule," once 7 I kind of got it, I was done with it. 8 Q. Okay. That's all I'm looking for. 9 A. Okay. 10 Q. Okay. There were sales update reports 11 that were given to the management committee meeting; 12 is that correct? 13 A. We would, we would get -- and they kind of 14 evolved from being fairly generic -- 15 Q. More detailed? 16 A. -- at the first. Budgetary forecasts or 17 costs, actual costs to date and then -- 18 Q. And you were working on budgets? 19 MR. GORMLEY: Please let him finish his 20 answer. 21 Go ahead, you were -- 22 THE WITNESS: I'm sorry. As we evolved, 23 they, they being the park, would generate a more 24 detailed sales or persons at the park. 25 ///</p>	<p style="text-align: right;">page 112</p> <p>1 A. -- through if there is any other document 2 that governs it. 3 Because by that time our contract as a 4 contractor is done and you're looking for stuff that's 5 just management committee stuff. 6 Q. Operation. Right. Let me rephrase the 7 question -- 8 A. Okay. 9 Q. -- so we're both on that same... 10 I'm just interested is there anything 11 else, okay, that governs the operation of the park 12 known as Henderson Water Park, LLC other than 13 Exhibit 40, the operating agreement? Is there 14 anything else? 15 MR. GORMLEY: Let me object. Vague and 16 ambiguous just because you might have NASCO. I mean, 17 they contracted -- 18 MR. CAMPBELL: No, I'm not talking about. 19 MR. GORMLEY: Well, I don't know what 20 you're talking about. 21 MR. CAMPBELL: Henderson Water Park, LLC. 22 BY MR. CAMPBELL: 23 Q. Let me rephrase it again. 24 A. Okay. 25 Q. Focus on Henderson Water Park, LLC.</p>
<p style="text-align: right;">page 111</p> <p>1 BY MR. CAMPBELL: 2 Q. Right. I have seen that. I get what 3 you're talking about. 4 A. Beverages. 5 Q. Right. And one other thing, you mentioned 6 budgets, and I've seen some documents where you were 7 presenting budgetary information as well. 8 A. Correct. Huishes would usually provide a 9 kind of a look ahead for the year. 10 Q. Got it. 11 A. It was as much a look ahead for the year 12 as -- I think we would get that, and it was like, 13 okay, it's June. Here is the -- but in June the cost 14 to date may be from April, because of its -- it takes 15 30 days or so to get the cost information in. 16 Q. Okay. All right. 17 Was there any other document that governed 18 the operations of Henderson Water Park, LLC other than 19 the operating agreement that appears in this action as 20 Exhibit No. 40? 21 A. I'm just trying to make sure I understand. 22 If there's any other document -- 23 Q. Let me repeat the question. 24 A. No, I'm just trying to think -- 25 Q. Sure.</p>	<p style="text-align: right;">page 113</p> <p>1 Is there anything else that governs the 2 operating of Henderson Water Park, LLC, that LLC 3 itself, other than Exhibit 40? 4 A. So for -- because the reason the word "the 5 operations" part of that, the team that was assigned 6 to operate the park did have their manuals and things 7 that they are doing. Shane and -- 8 Q. Not the question. 9 A. And I don't know if that's -- 10 Q. That's not the question. 11 A. -- what you're looking for. 12 Q. I'm just looking to see. Is there any 13 other operating agreement for the LLC known as 14 Henderson Water Park besides Exhibit 40 as of 2015? 15 A. Okay. 16 Q. Simple question. 17 A. I'm not aware of another operating 18 agreement, sorry. 19 Q. That's all I want to know. 20 A. I didn't know if -- just when you use the 21 word "operating," I'm not an operations guy. 22 Q. Right. So as of 2015, this is the only 23 one you're aware of that was effective and applicable 24 in 2015? 25 A. That is correct.</p>

<p style="text-align: right;">page 114</p> <p>1 Q. This was the only legal vehicle by which 2 you operated the park during that year of 2015, 3 correct? 4 MR. GORMLEY: Let me object. Calls for a 5 legal conclusion regarding -- 6 MR. CAMPBELL: I'll withdraw the question. 7 MR. GORMLEY: Okay. 8 BY MR. CAMPBELL: 9 Q. This is the only, this is the only 10 operating agreement that applied to the, to the park 11 at that time? 12 MR. GORMLEY: Let me object. Let me 13 object. There are other documents he talked about. 14 You didn't let him finish his answer. I know you want 15 something that was responsive -- 16 MR. CAMPBELL: That's not the question. 17 MR. GORMLEY: -- but I'm just making a 18 record, that's all. 19 MR. CAMPBELL: And it's a speaking 20 objection. So I ask that you not do that, please. 21 BY MR. CAMPBELL: 22 Q. So here's the question. 23 MR. GORMLEY: It's not a speaking 24 objection. 25 MR. CAMPBELL: It is.</p>	<p style="text-align: right;">page 116</p> <p>1 answer. You don't have to answer yes. 2 BY MR. CAMPBELL: 3 Q. Well, I think you're volunteering. But go 4 ahead. Is the answer yes? And if you want to 5 explain, I'm going to let you do that. Fair? 6 A. Okay. 7 Q. So the answer is yes? 8 A. <b>Yes, this is the operating agreement.</b> 9 Q. Okay. Now do you want to explain? 10 A. Yes. 11 Q. That the management team used? 12 A. <b>That the management used and --</b> 13 Q. In 2015? 14 A. <b>In '14 and '15 and '16.</b> 15 Q. Okay. All right. Now do you want to 16 amplify on that? 17 MR. GORMLEY: Can -- 18 MR. CAMPBELL: I'm conducting the 19 examination. 20 BY MR. CAMPBELL: 21 Q. Do you want to amplify on that? Do you 22 want to add something to that? 23 A. Yes. 24 Q. Okay. Go ahead and do it. 25 A. <b>With this operating agreement --</b></p>
<p style="text-align: right;">page 115</p> <p>1 MR. GORMLEY: Let's not argue. 2 MR. CAMPBELL: Here's the question. 3 I agree. 4 BY MR. CAMPBELL: 5 Q. During 2015, the year that Leland drowned 6 and suffered catastrophic injuries, this is the only 7 operating agreement that you're aware of, right, for 8 the park? 9 A. <b>This is, that I'm aware of, this is the</b> 10 <b>only operating agreement.</b> 11 Q. Okay. 12 A. <b>It's not the agreement that operations</b> 13 <b>persons are using to do their day-to-day.</b> 14 Q. But this is the operating agreement? 15 A. <b>Correct. This is the operating agreement.</b> 16 Q. And the management committee used this 17 operating agreement, Exhibit No. 40, okay, to fulfill 18 their functions, correct? 19 A. <b>We used this operating agreement. And</b> 20 <b>part of this operating agreement allows us to delegate</b> 21 <b>the operations of the park to a team.</b> 22 Q. Okay. 23 A. <b>Which we did.</b> 24 Q. So is the answer yes? 25 MR. GORMLEY: Well, he can answer it full</p>	<p style="text-align: right;">page 117</p> <p>1 Q. Okay. 2 A. <b>-- we have -- and I'm doing this because</b> 3 <b>you've used the word operations a couple of times,</b> 4 <b>that's just why I wanted to clarify to make sure I'm</b> 5 <b>not confusing something.</b> 6 <b>This is an operating agreement. But with</b> 7 <b>that we also had the right and authority within this</b> 8 <b>to assign people to operate the day-to-day work at the</b> 9 <b>park. That's, that's what I was trying to clarify.</b> 10 Q. In other words, there is something in 11 Exhibit 40 that allowed the management committee to do 12 what? 13 A. <b>To delegate the responsibility for the</b> 14 <b>day-to-day operations of the park.</b> 15 Q. Okay. 16 A. <b>So I'm sorry, I just --</b> 17 Q. And I -- 18 A. <b>-- trying to clarify between.</b> 19 Q. No, I get it. Okay. Now I get it, I get 20 what you're saying. 21 A. <b>Okay. Thank you.</b> 22 Q. And in that regard, there is a particular 23 section within Exhibit 40 that allowed the management 24 committee to do that; is that correct? 25 A. <b>I believe so, yes.</b></p>

<p style="text-align: right;">page 118</p> <p>1 Q. Okay. Now, what was it that was incumbent 2 upon the management committee to do insofar as the 3 appointment of any such individual or individuals to 4 carry out that function? What were the prerequisites 5 and coterminous obligations of the management 6 committee in that regard under Exhibit 40? 7 MR. GORMLEY: Let me object to the 8 question. It's vague and ambiguous regarding the 9 prerequisites and obligations. 10 He can answer the question. 11 BY MR. CAMPBELL: 12 Q. Go ahead. 13 A. I'm just -- it's kind of a long question 14 so can I restate what I think you asked? 15 Q. No. Let me reask the question. 16 A. Okay. 17 Q. Because I probably asked a poorly drafted 18 one since you didn't answer it, and it's my obligation 19 to draft a good one. 20 So what was required under the particular 21 provision that you said existed that allowed for the 22 designation of a particular person or persons to carry 23 out certain functions pursuant to Exhibit 40? 24 A. What was required? So as the management 25 committee, as it says, we have the right and authority</p>	<p style="text-align: right;">page 120</p> <p>1 you're looking for, but -- 2 Q. You aren't, but that's okay. 3 A. Okay. 4 Q. I'll let you answer. 5 A. So as part of that, I have personally the 6 opportunity to work alongside with Scott and Shane 7 through the construction of the water park to get a 8 feel of their experience. 9 I also was aware of their past experience 10 operating and owning a water park in Draper, which I 11 had personally gone to with kids prior to even knowing 12 who the Huishes were. 13 So as the operating or as the management 14 committee or representative on that, Shane was the 15 person who was selected to operate the day-to-day 16 activities at the park, of it running. 17 Q. Okay. Are you done? 18 A. I think so. 19 MR. CAMPBELL: Move to strike as 20 nonresponsive. 21 THE WITNESS: Okay. 22 MR. GORMLEY: I thought it was responsive. 23 THE WITNESS: That means it's good, right? 24 I'm just kidding, sorry. 25 MR. CAMPBELL: No, that's all right. No,</p>
<p style="text-align: right;">page 119</p> <p>1 to select people to operate the park is what I was 2 getting to. 3 Q. And how was that done? 4 A. So that was done with -- when we 5 originally started and met with the Huishes, what 6 Scott and Shane's portion of the work was always going 7 to be or the Huishes' side was they were going to be 8 the park operators, that was always an understanding. 9 As the R&amp;O Construction side, we were 10 general contractors, and -- 11 Q. Well, and taking that -- 12 MR. GORMLEY: Let him finish. You 13 interrupted him. 14 MR. CAMPBELL: It's a narrative. You are 15 kind of giving me a narrative. 16 MR. GORMLEY: Well, you have to let him 17 finish. 18 MR. CAMPBELL: And I'll get you there. 19 Just give me a chance. 20 MR. GORMLEY: I would like for him to 21 finish his answer. 22 BY MR. CAMPBELL: 23 Q. Finish whatever answer you want and I'll 24 move to strike. 25 A. I'm hoping I'm getting to the answer</p>	<p style="text-align: right;">page 121</p> <p>1 that's okay. 2 BY MR. CAMPBELL: 3 Q. Do you remember what the question was? 4 A. You asked about the rights and 5 responsibilities. No, you didn't. You asked what was 6 incumbent upon -- I can't remember -- us to select 7 somebody. 8 Q. Correct. What did Exhibit No. 40, okay, 9 provide in that regard? All right. 10 A. So it gave us -- 11 Q. It gave -- 12 A. Gives us the right and the authority to -- 13 Q. Let me see if I can encapsulate it and get 14 you through this. Okay? 15 A. Okay. Sorry. 16 Q. Did you understand that Exhibit No. 40 17 said you had that right, but you had to do certain 18 things. And one of the things is you had to vote on 19 it and say, okay, this is the person or persons who is 20 going to do it. Right? 21 A. Well, as far as having to vote on it, we 22 had to have an agreement on it which we had. 23 Q. And, and how was that agreement 24 memorialized? How was the decision memorialized that 25 Huish would be responsible for all phases of the</p>

<p style="text-align: right;">page 122</p> <p>1 operations of the park? How was it memorialized?</p> <p>2 <b>A. When you say "memorialized"?</b></p> <p>3 Q. Well, you said agreement. I want to</p> <p>4 know --</p> <p>5 <b>A. This agreement allows us to --</b></p> <p>6 MR. GORMLEY: Don't respond until he is</p> <p>7 finished. You are going back and forth here.</p> <p>8 <b>THE WITNESS: Okay.</b></p> <p>9 BY MR. CAMPBELL:</p> <p>10 Q. You are interrupting me and that happens</p> <p>11 all the time. Okay?</p> <p>12 <b>A. I'll wait.</b></p> <p>13 Q. It's not a big deal.</p> <p>14 Okay. So what I'm saying is you are</p> <p>15 saying, "We had the power to do that. We had the</p> <p>16 power to appoint and we did appoint Huish to operate</p> <p>17 the park." Correct?</p> <p>18 <b>A. That is correct.</b></p> <p>19 Q. Okay.</p> <p>20 <b>A. That's who is operating the park.</b></p> <p>21 Q. Now, when you made that decision, did that</p> <p>22 decision have to be memorialized in some fashion? Did</p> <p>23 it have to be recorded? Preserved? Reflected in some</p> <p>24 particular document?</p> <p>25 <b>A. I don't think so.</b></p>	<p style="text-align: right;">page 124</p> <p>1 MR. CAMPBELL: He hasn't answered the</p> <p>2 question, that's --</p> <p>3 MR. GORMLEY: I understand. I thought he</p> <p>4 did. You didn't like it.</p> <p>5 BY MR. CAMPBELL:</p> <p>6 Q. Go ahead.</p> <p>7 <b>A. I think the actions of the parties on the</b></p> <p>8 <b>management committee reflect what the intent was.</b></p> <p>9 Q. Okay. My question is different.</p> <p>10 <b>A. I understand that.</b></p> <p>11 Q. All right. You're saying what the actions</p> <p>12 are. My question is different.</p> <p>13 Other than what you are saying, is there a</p> <p>14 document that says that? Is there a document that</p> <p>15 says we selected him for all of these reasons and this</p> <p>16 is what we are doing here today pursuant to Exhibit</p> <p>17 No. 40? Is there some document that says that?</p> <p>18 <b>A. I don't, I don't know if there is a formal</b></p> <p>19 <b>document that says it in that manner.</b></p> <p>20 Q. Okay.</p> <p>21 <b>A. Like I say, by title that he was given, by</b></p> <p>22 <b>him being a paid general manager to operate the water</b></p> <p>23 <b>park, that was the vehicle that we used to designate</b></p> <p>24 <b>Shane as in charge of the day-to-day operations of the</b></p> <p>25 <b>park.</b></p>
<p style="text-align: right;">page 123</p> <p>1 Q. Okay. Had it been required, you would</p> <p>2 have done it?</p> <p>3 <b>A. Well, had it been required would we have</b></p> <p>4 <b>done it? I'd probably answer yes to. But Shane's</b></p> <p>5 <b>title and the paid employee of -- he's the general</b></p> <p>6 <b>manager. He's the compensated employee as a member of</b></p> <p>7 <b>the management committee at the park, I guess in my</b></p> <p>8 <b>mind memorializes that that is his role.</b></p> <p>9 Q. But I'm not asking about what is in your</p> <p>10 mind.</p> <p>11 <b>A. It's not in my mind, that's on all the</b></p> <p>12 <b>payroll records too.</b></p> <p>13 Q. I understand that, but you're saying that</p> <p>14 that's what is in your mind.</p> <p>15 <b>A. Okay.</b></p> <p>16 Q. I'm asking something different.</p> <p>17 <b>A. Okay.</b></p> <p>18 Q. What I'm saying, okay, irrespective of a</p> <p>19 title, is there some memorialization of what you</p> <p>20 previously said? That all of the operational duties</p> <p>21 and responsibilities, okay, were assumed by Shane upon</p> <p>22 the selection of him by the management committee, the</p> <p>23 selection of which was later approved?</p> <p>24 MR. GORMLEY: Objection. Asked and</p> <p>25 answered.</p>	<p style="text-align: right;">page 125</p> <p>1 Q. Right. But there is not a document that</p> <p>2 says all that?</p> <p>3 <b>A. To me that's the document.</b></p> <p>4 Q. Okay. To you that is. But that's not</p> <p>5 what Exhibit 40 says is required, is it?</p> <p>6 <b>A. What does Exhibit 40 say? If you can take</b></p> <p>7 <b>me to where it says I need to have a document</b></p> <p>8 <b>designating a general manager of the park.</b></p> <p>9 Q. Sure, I'm happy to show you.</p> <p>10 <b>A. Okay.</b></p> <p>11 Q. Go to the third addendum to the operating</p> <p>12 agreement.</p> <p>13 <b>A. Do you know what page?</b></p> <p>14 Q. Sure, let me get it. Let me get you to</p> <p>15 it.</p> <p>16 MR. CAMPBELL: Find it for him, will you.</p> <p>17 MR. MIRKOVICH: 2508.</p> <p>18 MR. CAMPBELL: I can't read that little.</p> <p>19 MR. GORMLEY: The third addendum.</p> <p>20 MR. MIRKOVICH: CB2508, it's the third</p> <p>21 addendum to the operating agreement.</p> <p>22 MR. GORMLEY: Okay. Thank you. Jeez, I</p> <p>23 can't read that.</p> <p>24 BY MR. CAMPBELL:</p> <p>25 Q. Okay. Go to the page that follows 2508.</p>

<p style="text-align: right;">page 126</p> <p>1 Go to the next page.</p> <p>2 <b>A. Okay.</b></p> <p>3 Q. Is that your signature?</p> <p>4 <b>A. Yes, it is.</b></p> <p>5 Q. Okay. And this -- okay. And this</p> <p>6 document which is styled Third Addendum to Operating</p> <p>7 Agreement for Henderson Water Park, LLC, was</p> <p>8 apparently created on or about the 5th day of May,</p> <p>9 2013. Do you see that?</p> <p>10 <b>A. Yes, I do.</b></p> <p>11 Q. And under, it states that under</p> <p>12 section 6.1, and that's the section that you</p> <p>13 previously said you reviewed.</p> <p>14 <b>A. Correct.</b></p> <p>15 Q. And we talked about earlier in your</p> <p>16 deposition, correct?</p> <p>17 <b>A. Correct.</b></p> <p>18 Q. That you said controlled the operations,</p> <p>19 correct?</p> <p>20 <b>A. Part of it, yes.</b></p> <p>21 Q. Okay. It says:</p> <p>22 "6.1 is amended by adding the</p> <p>23 following now subparagraph," looks like (xii)</p> <p>24 as follows, that all members of the</p> <p>25 management committee "shall be decided by</p>	<p style="text-align: right;">page 128</p> <p>1 <b>had about Shane being the designated general manager</b></p> <p>2 <b>for the park --</b></p> <p>3 Q. Yes.</p> <p>4 <b>A. -- we were all in agreement on that. So</b></p> <p>5 <b>I --</b></p> <p>6 Q. Different question.</p> <p>7 <b>A. In my mind, that's -- we vote, yeah,</b></p> <p>8 <b>that's who we want to have.</b></p> <p>9 Q. Was there a formal vote?</p> <p>10 <b>A. Describe to me what a formal vote is.</b></p> <p>11 Q. Somebody says I agree, and I vote that we</p> <p>12 do that?</p> <p>13 <b>A. Okay. Well, that's not how we ran the</b></p> <p>14 <b>LLC --</b></p> <p>15 Q. And that's fine.</p> <p>16 <b>A. -- portion of --</b></p> <p>17 Q. So the answer is --</p> <p>18 <b>A. -- we approached it differently.</b></p> <p>19 Q. You didn't vote?</p> <p>20 <b>A. No, we came to an agreement.</b></p> <p>21 Q. Okay. That's fine. I'm not arguing with</p> <p>22 you.</p> <p>23 <b>A. I just think how vote is interpreted in</b></p> <p>24 <b>one organization versus another is...</b></p> <p>25 Q. Go to the next, go to the next part:</p>
<p style="text-align: right;">page 127</p> <p>1 majority vote of the managing members. In</p> <p>2 the case of a tie vote, the chairman shall</p> <p>3 cast the deciding vote."</p> <p>4 Correct?</p> <p>5 <b>A. It probably says. I'm sorry, I just lost</b></p> <p>6 <b>where you started.</b></p> <p>7 Q. Right here.</p> <p>8 <b>A. Oh, okay. I was at the one below.</b></p> <p>9 MR. GORMLEY: The section on top, just for</p> <p>10 the record.</p> <p>11 MR. CAMPBELL: It's the second, it's the</p> <p>12 second full paragraph that I just read it.</p> <p>13 MR. GORMLEY: Thank you.</p> <p>14 BY MR. CAMPBELL:</p> <p>15 Q. Okay. Now go below that.</p> <p>16 <b>A. Okay.</b></p> <p>17 Q. You said that's what you guys did, right?</p> <p>18 <b>A. We agreed that --</b></p> <p>19 Q. You agreed. Did you vote?</p> <p>20 <b>A. Well, the way we do our votes, we had an</b></p> <p>21 <b>agreement of what we were doing.</b></p> <p>22 Q. I'm asking, was there a vote?</p> <p>23 <b>A. That's our way of voting.</b></p> <p>24 Q. Are you saying yes, there was a vote?</p> <p>25 <b>A. I'm saying that the conversations that we</b></p>	<p style="text-align: right;">page 129</p> <p>1 "Section 6.1 is also amended by adding</p> <p>2 the following new subparagraph (xiv) as</p> <p>3 follows: By majority vote..."</p> <p>4 Do you see that where it says the "vote"?</p> <p>5 <b>A. Yeah.</b></p> <p>6 Q. Okay.</p> <p>7 "...which vote shall be documented in</p> <p>8 the minutes of the management committee</p> <p>9 meeting..."</p> <p>10 <b>A. Okay.</b></p> <p>11 Q. All right.</p> <p>12 "...by written authorization executed</p> <p>13 by a majority of the managing members of the</p> <p>14 management committee."</p> <p>15 <b>A. Okay.</b></p> <p>16 Q. That was not done, correct?</p> <p>17 <b>A. I don't know that there is a meeting</b></p> <p>18 <b>minute that says that.</b></p> <p>19 Q. Right. Even though here it was mandatory</p> <p>20 that it shall be documented, correct?</p> <p>21 MR. GORMLEY: I'm going to object to the</p> <p>22 extent it calls for a legal conclusion regarding</p> <p>23 "mandatory."</p> <p>24 BY MR. CAMPBELL:</p> <p>25 Q. Go ahead. That was not done?</p>

<p style="text-align: right;">page 130</p> <p>1     <b>A. Let me read through. Well, we feel like</b> 2 <b>we did it in a different way when we assigned Shane</b> 3 <b>the title. So in our minds, we had an agreement of</b> 4 <b>who it was. He was receiving the title. He was</b> 5 <b>receiving the compensation. And he is the employed</b> 6 <b>employee from the management committee.</b> 7         MR. CAMPBELL: Move to strike as 8 nonresponsive. 9 BY MR. CAMPBELL: 10     Q. This is a question -- 11         MR. GORMLEY: It was responsive. 12         MR. CAMPBELL: And I ask that you not 13 argue -- 14         MR. GORMLEY: I'm not arguing. 15         MR. CAMPBELL: -- and make speaking 16 objections. Yes, you are. 17 BY MR. CAMPBELL: 18     Q. And I'm going to ask you the same question 19 in front of a jury. 20     <b>A. That's okay. I will answer it to best of</b> 21 <b>my ability.</b> 22     Q. And it's a simple yes or no. 23         Was there, as required, okay, a vote that 24 was documented in the minutes of the management 25 committee meeting by written authorization executed by</p>	<p style="text-align: right;">page 132</p> <p>1 committee as a whole because it was his time to do so, 2 right? 3     <b>A. Just recently, yes.</b> 4     Q. He said he was getting older and he felt 5 he should do that? 6     <b>A. Yes.</b> 7     Q. Okay. But in reality, the entire 8 management committee was restructured, wasn't it? 9     <b>A. Yes. Yes, it has been recently.</b> 10     Q. So it was restructured in such a 11 fashion -- well, tell me how it was restructured. 12     <b>A. So it has put in place the team who is</b> 13 <b>currently actively managing the water park with</b> 14 <b>Marc Glissman as the general manager; Scott Huish, who</b> 15 <b>is the chairman; and I believe is it, I think Shane on</b> 16 <b>there. The people who are doing the day-to-day</b> 17 <b>operations at the park.</b> 18         MR. MIRKOVICH: 41, please. 19         (Deposition Exhibit 41 marked.) 20 BY MR. CAMPBELL: 21     Q. You now have before you Exhibit No. 41, 22 that's the Fourth Addendum to the Operating Agreement 23 for Henderson Water Park, LLC, correct? 24     <b>A. Correct.</b> 25     Q. All right. And this is the document that</p>
<p style="text-align: right;">page 131</p> <p>1 a majority of the managing members of the management 2 committee? 3         The answer is yes or it's no. 4     <b>A. We had an agreement, I don't know that it</b> 5 <b>is documented in a meeting minute.</b> 6     Q. I'll take that as a no. 7     <b>A. Okay.</b> 8     Q. Next question. 9         Your father testified that recently he 10 resigned his position as chairman of the management 11 committee. Do you recall his testimony? 12     <b>A. Can I bounce back to one other thing?</b> 13     Q. No. I'm moving on. 14     <b>A. Okay. Well, I just --</b> 15     Q. If you want. 16     <b>A. -- would like to read 6.2. It wasn't</b> 17 <b>modified.</b> 18     Q. I'm, I'm moving on, okay. 19     <b>A. Okay.</b> 20     Q. If you want to bring out something through 21 your counsel, he's entitled to do that. Okay? 22     <b>A. Okay. Just make a note for 6.2 of the</b> 23 <b>operating agreement.</b> 24     Q. Your father testified that he resigned 25 from his position as chairman of the management</p>	<p style="text-align: right;">page 133</p> <p>1 you say memorializes the change, correct? 2     <b>A. The recent change, yes.</b> 3     Q. And the appointment of operators, correct? 4     <b>A. I believe so, yes.</b> 5     Q. Okay. 6     <b>A. Let me read through it again.</b> 7     Q. So here there was a meeting of the 8 management committee held on February 27th, 2018, 9 correct? 10     <b>A. That is correct.</b> 11     Q. It was "attended by a quorum," correct? 12     <b>A. That is correct.</b> 13     Q. "The management committee approved 14 changes to the current composition of the 15 management committee and the method of 16 appointing future managing partners who 17 will be members of the management committee." 18         Correct? 19     <b>A. That is correct.</b> 20     Q. Now, this meeting took place in Utah, did 21 it not? 22     <b>A. Yes, it did.</b> 23     Q. At the offices of R&amp;O, correct? 24     <b>A. That's incorrect.</b> 25     Q. Where, where did it take place?</p>

<p style="text-align: right;">page 134</p> <p>1     <b>A. It took place at the Maverick corporate</b> 2 <b>office.</b> 3     Q. Mr. Welch's office? 4     <b>A. Well, at Maverick's corporate office where</b> 5 <b>Tom does work, yes.</b> 6     Q. Is that where his office is located? 7 Simple question. 8     <b>A. Sorry, sometimes simple questions are -- I</b> 9 <b>want to be clear. Yeah, we met in a conference room</b> 10 <b>at Maverick. It was downtown Salt Lake.</b> 11     Q. Different question. 12 Does Mr. Welch have his offices there? 13     <b>A. I believe so.</b> 14     Q. Thank you. 15 Okay. This fourth addendum also goes on 16 to state that: 17 "Section 1.5 of the operating 18 agreement is hereby amended by deleting in 19 its entirety and replacing it with the 20 following." 21 And then it has: 22 "1.5 Management Committee. The 23 management committee of the company consists 24 of three managing members, sometimes referred 25 to as the managing partners, who shall manage</p>	<p style="text-align: right;">page 136</p> <p>1 of the management committee for discussion at 2 the meeting. Double Ott Water Holdings, LLC 3 shall have the right to have a nonvoting 4 member (sic) attend all meetings of the 5 management committee, whether in person or by 6 telephone. Double Ott Water Holdings, LLC 7 shall be promptly given a copy of any action 8 taken by the management committee by written 9 consent." 10 Correct? 11     <b>A. Correct.</b> 12     Q. And that was all done by a proper vote, 13 properly recorded in this addendum, correct? 14     <b>A. At the meeting it was discussed, reviewed,</b> 15 <b>and this was generated and signed.</b> 16     Q. And you actually signed it? 17     <b>A. Signed this? No. Scott, Orluff, and Tom</b> 18 <b>have signed this.</b> 19     Q. Okay. But this was done in accordance? 20     <b>A. It was discussed at the meeting that we</b> 21 <b>had.</b> 22     Q. And this is the memorialization of it, 23 this is the document that reflects that -- 24     <b>A. Yes.</b> 25     Q. -- correct?</p>
<p style="text-align: right;">page 135</p> <p>1 the affairs of the company. West Coast Water 2 Park, LLC shall have the right to designate 3 all three managing members, one of whom shall 4 be designated as the chairman of the 5 management committee." 6 Who is West Coast Water Parks? 7     <b>A. West Coast Water Parks is the Huishes --</b> 8     Q. Okay. 9     <b>A. -- which I understand to be Scott, Shane,</b> 10 <b>and Craig.</b> 11     Q. So this is now stating that: 12 "As of February 27th, 2018, West Coast 13 Park, LLC has designated Scott Huish, Shane 14 Huish, and Marc Glissman as the members of 15 the management committee and Scott Huish as 16 chairman." 17 Correct? 18     <b>A. That is correct.</b> 19     Q. All right. It goes on to say: 20 "Double Ott Water Holdings, LLC shall 21 have the right to receive, at the same time 22 as they are sent to the management committee, 23 notices of any management committee meeting 24 and a copy of any board package or similar 25 written materials circulated to the members</p>	<p style="text-align: right;">page 137</p> <p>1     <b>A. Yes, sir.</b> 2     Q. Now, there was some restriction with 3 respect to incurring obligations in the aggregate 4 amount greater than half a million dollars, correct? 5     <b>A. Yeah, as outlined in this section 6.35(a).</b> 6     Q. And what was your understanding of that 7 restriction? 8     <b>A. My understanding was it allowed the</b> 9 <b>management committee to do what they needed to do to</b> 10 <b>operate the park. But if there were to be a</b> 11 <b>substantial cost consideration, that a member of the</b> 12 <b>majority, whatever you call it, I'm going to say</b> 13 <b>Double Ott is referred to, would be able to have an</b> 14 <b>opinion, or be able to be informed of what they are</b> 15 <b>considering.</b> 16     Q. Why was Exhibit No. 41 and the actions 17 which it memorialized undertaken? 18     MR. GORMLEY: Let me object on the grounds 19 of relevancy. It's three years later. 20 Go ahead and answer the question. 21     <b>THE WITNESS: Okay. As my father --</b> 22     MR. CAMPBELL: I got have to have -- 23 again, I'm going to object. 24     MR. GORMLEY: Well -- 25     MR. CAMPBELL: Excuse me. Relevance is</p>



<p style="text-align: right;">page 138</p> <p>1 all preserved. You made another speaking objection. 2 I'm just asking you as politely and collegially as I 3 can, please don't do that. 4 BY MR. CAMPBELL: 5 Q. Please answer the question. 6 MR. GORMLEY: I'm asking you politely and 7 collegially as you can let him finish. You cut him 8 off in many instances in answering the question. You 9 have been very professional. I'm not arguing that, 10 but sometimes you have to let him answer, finish 11 answering a question. 12 BY MR. CAMPBELL: 13 Q. Go ahead, sir. 14 MR. GORMLEY: Thank you. 15 <b>THE WITNESS: So as my father had talked</b> 16 <b>with me, even prior to that meeting, of him being a</b> 17 <b>chairman on, on the Henderson Water Park, or whatever</b> 18 <b>you call it, the other operating agreement was he</b> 19 <b>didn't feel -- I don't know, like I said, his energy</b> 20 <b>level has substantially changed. And I think it's</b> 21 <b>caused a lot of stress. So he didn't feel like he was</b> 22 <b>from a health standpoint able to continue doing</b> 23 <b>whatever that role was.</b> 24 We had also had discussions of the 25 confidence that we have seen with Huishes in managing</p>	<p style="text-align: right;">page 140</p> <p>1 memorializes the placing of the Huishes in control of 2 the operations of the park except for expenditures in 3 excess of about half a million dollars, correct? 4 <b>A. Huishes and Marc Glissman.</b> 5 Q. Correct? 6 <b>A. Yes.</b> 7 Q. Thank you. 8 Now, there was, there was also as a, as a 9 necessarily -- as a -- there was also as a necessary 10 result of this decision-making process, which produced 11 Exhibit No. 41, a result to the effect that neither 12 you, your father, Mr. Welch, nor your brother were any 13 longer in charge of any, in charge of any form or 14 fashion of the operations of the park; is that 15 correct? 16 MR. GORMLEY: Let me object to the extent 17 it calls for a legal conclusion regarding the 18 document. 19 BY MR. CAMPBELL: 20 Q. Go ahead. 21 <b>A. So we weren't in charge of operating the</b> 22 <b>park before. We had --</b> 23 Q. Ever? 24 <b>A. -- the right and authority -- well, no, we</b> 25 <b>delegated from the beginning the operations of the</b></p>
<p style="text-align: right;">page 139</p> <p>1 the financial side of the park. And, and that they 2 have done a good job. 3 So the discussion as we talked about it 4 was put the people who are actively managing, 5 directing the operations on a day-to-day basis at the 6 water park in charge of the management committee 7 instead of having us. 8 BY MR. CAMPBELL: 9 Q. And that's what is reflected in Exhibit 10 No. 41, right? 11 <b>A. Yes. And reserving some right like as</b> 12 <b>previously discussed, that if there was a large</b> 13 <b>expense, if they wanted to go out and purchase a new</b> 14 <b>\$4 million attraction, that we, Double Ott, Orluff,</b> 15 <b>however you would say it, would have the opportunity</b> 16 <b>to be able to hear about how that is going to work as</b> 17 <b>a key investor.</b> 18 And I believe there was also a provision 19 that distributions would, you know, in 6.35(b), 20 something related to the distributions would be 21 reviewed. 22 Q. Do you recall what the original question 23 was? 24 <b>A. Probably not.</b> 25 Q. Okay. Exhibit No. 41 actually</p>	<p style="text-align: right;">page 141</p> <p>1 <b>park to Shane.</b> 2 Q. Did you have any involvement in 3 operations? You? 4 <b>A. No, not in --</b> 5 Q. None? 6 <b>A. Not in operations --</b> 7 Q. Okay. All right. 8 <b>A. -- of the park.</b> 9 Q. You've answered my question. 10 <b>A. Okay.</b> 11 Q. Okay. That just saved a lot of additional 12 questions. 13 When Exhibit 41 was adopted, was there any 14 discretion between or among any of the Opheikens side 15 and Double Ott that this should be done because it was 16 believed that this would in some fashion lessen your 17 liability of going forward in the future? 18 <b>A. There is an element of that in --</b> 19 Q. What was the discussion in that regard to 20 the effect that this was being done in part to limit 21 the liability of the Opheikens family in the water 22 park going forward? 23 <b>A. So from the discussion that was had about</b> 24 <b>do we limit our liability, was how do we control</b> 25 <b>still -- not so much control, but still have some</b></p>

<p style="text-align: right;">page 142</p> <p>1 influence on what the park is doing and how it's</p> <p>2 performing; but that if something does happen, we are</p> <p>3 not always sued for every little thing that happens.</p> <p>4 And it's -- it wasn't the primary role but it was</p> <p>5 discussed.</p> <p>6 Q. Okay. Where did that discussion take</p> <p>7 place?</p> <p>8 A. I think my father and I were sitting in my</p> <p>9 office talking about it.</p> <p>10 Q. All right. And were those discussions</p> <p>11 engaged in with others, including your brother or</p> <p>12 Mr. Welch?</p> <p>13 A. I don't recall --</p> <p>14 Q. Okay.</p> <p>15 A. -- as far as having a conference call or</p> <p>16 anything with everybody.</p> <p>17 Q. But it was certainly a discussion that was</p> <p>18 had between you and your father, correct?</p> <p>19 A. It was component of when we were talking</p> <p>20 about and he was -- his health has changed a lot.</p> <p>21 MR. CAMPBELL: Would you please reask the</p> <p>22 question. And listen to the question.</p> <p>23 (Record played as follows:)</p> <p>24 "Q. But it was certainly a discussion</p> <p>25 that was had between you and your father,</p>	<p style="text-align: right;">page 144</p> <p>1 (Record played as follows:)</p> <p>2 "Q. That person who carried a title</p> <p>3 of general manager was who?"</p> <p>4 BY MR. CAMPBELL:</p> <p>5 Q. Again, it's before 41, I asked before 41.</p> <p>6 A. And I --</p> <p>7 Q. Who was the person who was the GM?</p> <p>8 A. I don't remember the exact date Marc</p> <p>9 Glissman was put in as general manager. I thought it</p> <p>10 was before this date.</p> <p>11 Q. Okay. Who was it before Glissman?</p> <p>12 A. Before Glissman, at the very first it was</p> <p>13 Shane Huish. It transitioned from Shane. And</p> <p>14 actually I'm not sure who that was in between. If</p> <p>15 Richard Woodhouse became the general manager or if it</p> <p>16 stayed with Shane as general manager title.</p> <p>17 Q. Who was general manager in May of 2015</p> <p>18 when Leland Gardner became --</p> <p>19 A. Shane Huish.</p> <p>20 Q. -- catastrophically injured?</p> <p>21 A. Shane Huish was general manager.</p> <p>22 Q. Okay. Who is Glissman?</p> <p>23 A. Marc Glissman was introduced to us from</p> <p>24 the IAM company, which was the company that came in I</p> <p>25 think late 2015 and took over the responsibility for</p>
<p style="text-align: right;">page 143</p> <p>1 correct?"</p> <p>2 THE WITNESS: It was a component of the</p> <p>3 discussion that we had.</p> <p>4 BY MR. CAMPBELL:</p> <p>5 Q. Would it be true that -- withdraw.</p> <p>6 Before Exhibit No. 41, the fourth</p> <p>7 addendum, was created and signed and put in place on</p> <p>8 or about February 27th, 2018, at a meeting of the</p> <p>9 management committee that approved these changes to</p> <p>10 the composition of the management committee, the</p> <p>11 method of appointing future managing partners,</p> <p>12 et cetera, the Cowabunga Bay Water Park had a general</p> <p>13 manager who carried that title, correct?</p> <p>14 A. Correct.</p> <p>15 Q. That person who carried a title of general</p> <p>16 manager was who?</p> <p>17 A. Well, Marc Glissman has been the general</p> <p>18 manager. Shane Huish originally --</p> <p>19 MR. CAMPBELL: I'm going to object, move</p> <p>20 to strike.</p> <p>21 Reask the question.</p> <p>22 You really have to listen to the question.</p> <p>23 THE WITNESS: Okay.</p> <p>24 MR. CAMPBELL: Okay. Go ahead.</p> <p>25 ///</p>	<p style="text-align: right;">page 145</p> <p>1 lifeguards. Marc was then introduced to us by them in</p> <p>2 2017 and came in, I believe, as a general manager</p> <p>3 position to be overseeing the park. But it's -- that</p> <p>4 was I'd say late 2017.</p> <p>5 Q. During the period of time, and more</p> <p>6 specifically, in May of 2015, when Shane Huish was the</p> <p>7 general manager of the park, did he have duties and</p> <p>8 responsibilities for the day-to-day operations?</p> <p>9 A. Shane was responsible for the day-to-day</p> <p>10 operations of the park in May of 2015.</p> <p>11 Q. Okay. Do you believe that his position as</p> <p>12 general manager of the park in 2015 was an important</p> <p>13 position?</p> <p>14 A. Yes, I do.</p> <p>15 Q. What characteristics did you look for in a</p> <p>16 GM of Cowabunga Bay before he was appointed as general</p> <p>17 manager?</p> <p>18 A. The characteristics are someone who has</p> <p>19 experience owning and operating a water park.</p> <p>20 Q. And what experience did Shane have in that</p> <p>21 regard?</p> <p>22 A. Shane had his experience that I was</p> <p>23 personally familiar with of the Draper Cowabunga Bay</p> <p>24 Water Park. Prior to that, he had worked at other</p> <p>25 water parks. I don't recall the names of them and the</p>

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1 exact roles.  
2 I had also worked side by side with Shane  
3 for many months as we were constructing the park. But  
4 getting to the attributes, it's somebody who has an  
5 attention to detail, someone who is concerned with how  
6 the park is operating and looking. Someone who is  
7 concerned about the public.  
8 Q. Are you done?  
9 A. Someone who also can follow somewhat as  
10 far as the financial side and the safety side.  
11 Q. Done?  
12 A. I think so.  
13 Q. Okay. Taking all the time you feel is  
14 necessary to do so, please detail for me all of the  
15 experience that you relied upon and which you were  
16 aware of at the time he was appointed GM that Shane  
17 Huish had at the Draper water park?  
18 A. From what I recall, Shane had been at the  
19 Draper water park for six or seven or eight years.  
20 That the Huish family owned that park. Prior to that,  
21 there were two or three other water parks he had been  
22 affiliated with and worked at, and...  
23 Q. I didn't ask you that question. I'm going  
24 to get to it in a second if you'll give me an  
25 opportunity to get to it.

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1 A. Okay. Maybe I thought --  
2 Q. This is going to go a lot faster, and I'm  
3 not going to have to go back to court and ask to come  
4 back and take your deposition with more time because  
5 you are not answering the questions and limiting  
6 yourself to the questions. Okay?  
7 A. Okay. Well, maybe I misunderstood the  
8 question. I'm sorry, I thought --  
9 Q. The question was specifically, okay,  
10 taking all the time you feel is necessary, what  
11 exactly was his experience at the Draper water park?  
12 What did he do there, okay, that you relied upon?  
13 A. My understanding was he was an owner and  
14 an operator at that park --  
15 Q. Okay.  
16 A. -- overseeing day-to-day things that go  
17 on.  
18 Q. And when you say your understanding was  
19 that, what document was that based upon?  
20 A. I believe he had a resume that was given  
21 at one point.  
22 Q. To whom?  
23 A. I don't know if it was given to the whole  
24 management committee or if it's just something we saw  
25 or as far as he outlined what his experience was.

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1 Q. Do you know why that was never turned over  
2 pursuant to the discovery procedures in place in this  
3 case?  
4 MR. GORMLEY: I object. Lack of  
5 foundation.  
6 BY MR. CAMPBELL:  
7 Q. Go ahead.  
8 A. I don't know. And I don't know if it was  
9 summarized in a formal document or I just read  
10 somewhere Shane's past experience.  
11 Q. But you can't point me to what that  
12 document was that you read?  
13 A. No, I cannot.  
14 Q. You can't tell me what it was styled, what  
15 it was titled?  
16 A. I don't recall.  
17 Q. You don't know how many pages it was?  
18 A. One or two. It wasn't an extensive.  
19 Q. You don't know where it is today?  
20 A. I do not.  
21 Q. Okay. You don't have a copy of it?  
22 A. I do not.  
23 Q. Compare, if you will, the Draper water  
24 park to Cowabunga Bay. How do they differ in terms of  
25 attractions, complexity, and number of rides and type

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1 of rides or features.  
2 A. The Draper water park has, I would say, a  
3 similar number of slides as far as a slide tower goes.  
4 It has a lazy river as well. It does not have a wave  
5 pool. I think it has a -- well, I know it has a kid,  
6 a kid area also. Sizewise Cowabunga Bay located in  
7 Las Vegas is much more spread out. The lazy river is  
8 longer.  
9 Q. Cowabunga Bay dwarfs Draper, correct?  
10 A. From a size standpoint, as far as acres or  
11 square footage it --  
12 Q. It does not have a wave pool?  
13 A. No, it does not have a wave pool.  
14 Q. Now, you also -- do you know what, do you  
15 know what title Scott Huish had at the Draper  
16 facility?  
17 A. I don't recall.  
18 Q. Okay.  
19 A. You said Scott, correct?  
20 Q. Excuse me, I'm sorry, I meant Shane.  
21 A. I don't recall.  
22 Q. All right. You also said that in his  
23 appointment as general manager, you relied upon the  
24 fact that he had aquatic experience at other parks.  
25 Now, taking all the time you feel is

<p style="text-align: right;">page 150</p> <p>1 necessary to do so, detail for us all of that 2 knowledge that you had and upon which you relied to 3 the effect that Mr. Shane Huish had experience at 4 other aquatic parks. 5 <b>A. I saw a summary of Shane's past experience</b> 6 <b>along the, the way as we became acquainted with</b> 7 <b>Huishes. I don't recall if that was during</b> 8 <b>construction preliminarily or at what point. And it</b> 9 <b>referenced some of his past experience in working.</b> 10 Q. What were those experiences? That's what 11 I'm trying to get at. 12 <b>A. Well, I don't remember the name of the</b> 13 <b>water parks exactly that he did work at.</b> 14 Q. Did he say what he did at them? 15 <b>A. I believe it did outline what his</b> 16 <b>responsibilities were.</b> 17 Q. And were his responsibilities at the water 18 park related to the actual operation of the aquatic 19 features or were they instead related to marketing and 20 more administrative commercial activities? 21 <b>A. If I recall correctly, I think one of them</b> 22 <b>was the marketing. I think one of them -- and then in</b> 23 <b>addition to that, the Draper was more the operating.</b> 24 Q. I'm not asking about Draper. Again, sir, 25 you are changing the question. I'm asking about these</p>	<p style="text-align: right;">page 152</p> <p>1 online? 2 <b>A. I, I'm not aware of them posting it. When</b> 3 <b>we came in as ownership with Henderson Water Park and</b> 4 <b>partnering with the Huish group, they were already,</b> 5 <b>that was their role. That's what they were going to</b> 6 <b>be before we ever arrived. And I gained -- besides</b> 7 <b>Shane's resume of experience, I gained confidence in</b> 8 <b>the Huishes, both Scott and Shane, by working through</b> 9 <b>some very difficult decisions in trying to get a park</b> 10 <b>open to having a confidence of their decision-making</b> 11 <b>and honesty.</b> 12 MR. CAMPBELL: Move to strike as 13 nonresponsive. 14 BY MR. CAMPBELL: 15 Q. Do you recall what the question was? 16 <b>A. Maybe you should repeat it.</b> 17 Q. I'll be happy to. 18 Was the general manager position ever 19 posted online before it was assumed by Shane Huish at 20 the, at the approval of the management committee? 21 <b>A. I'm not sure.</b> 22 Q. Is there anything that you can tell me 23 that would help refresh your recollection as to 24 whether or not it was posted online as an opening? 25 <b>A. I don't know if they posted it before I</b></p>
<p style="text-align: right;">page 151</p> <p>1 other places. 2 <b>A. Okay. I think one was the more the</b> 3 <b>managing marketing side and I believe one was involved</b> 4 <b>the aquatic side.</b> 5 Q. And you can't tell me which was which or 6 the names of any of these parks? 7 <b>A. I'm sorry, I can't.</b> 8 Q. And you have no document that you can 9 point me to that I can go and see what you saw; is 10 that correct? 11 <b>A. I do not have it, no.</b> 12 Q. Thank you. 13 Once he was appointed general manager, 14 Shane Huish was responsible to report to the 15 management committee, correct? 16 <b>A. He would provide reports to us, yes.</b> 17 Q. Okay. And you were a member of that 18 management committee in 2015, correct? 19 <b>A. That is correct.</b> 20 Q. And so one of the individuals he would 21 report to would be you, correct? 22 <b>A. He would provide reports to us, yes.</b> 23 Q. Okay. Before you selected Shane Huish as 24 the general manager, was his -- was the job opening 25 for general manager at Cowabunga Bay ever posted</p>	<p style="text-align: right;">page 153</p> <p>1 <b>became involved.</b> 2 Q. Okay. But certainly before you 3 participated in the decision to appoint him general 4 manager, you were not aware of any such posting, 5 correct? 6 <b>A. No, I'm not aware of a posting.</b> 7 Q. You didn't endeavor to post it online, 8 correct, before you appointed him as manager? 9 <b>A. I did not feel we had a need to post it</b> 10 <b>online.</b> 11 Q. Is the answer no, you did not post it 12 online? 13 <b>A. No, I did not post it --</b> 14 Q. Thank you. 15 <b>A. -- personally online.</b> 16 Q. Okay. Did anyone that you know of post it 17 online before the decision was made? 18 <b>A. Not that I'm aware of.</b> 19 Q. Okay. Were any headhunters in the 20 industry, in the aquatics industry ever interviewed 21 for the position of general manager by the management 22 committee? 23 <b>A. To my knowledge, not that I'm aware of.</b> 24 Q. Okay. 25 <b>A. You're talking --</b></p>

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1 Q. Did you consult with any contractors about  
2 finding a potential applicant for an aquatic  
3 professional to operate Cowabunga Bay?  
4 **A. So just to clarify, when we originally**  
5 **started, it was Shane's role. When we brought in IAM**  
6 **in late 2015, we were consulting with people who were**  
7 **taking over.**  
8 **You just used the word aquatics, and**  
9 **that's why I'm referring to that, because we brought**  
10 **in IAM and they took over seeing and managing the**  
11 **aquatics side.**  
12 Q. The question was directed with respect to  
13 foundationally in time that period of time before he  
14 was actually appointed, Shane was actually appointed  
15 as a GM by the management committee that you sat on.  
16 **A. Okay.**  
17 Q. Okay? So, again, the question is, did you  
18 consult with any contractors about finding a potential  
19 applicant for that position as an aquatics expert in  
20 the operation of Cowabunga Bay?  
21 **A. I, I don't recall --**  
22 Q. Thank you.  
23 **A. -- trying to find somebody.**  
24 Q. Thank you.  
25 Was there any sort of an interview of

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1 Shane before the management committee determined that  
2 they would name him as the general manager of the  
3 water park?  
4 **A. As I said, as far as a sitdown formal**  
5 **interview specific to the position, I did not sit on**  
6 **that. I formed my opinion of Shane's capabilities by**  
7 **working with him prior to the park opening.**  
8 Q. Nor did the management committee actually  
9 meet to request and review his CV or what is otherwise  
10 known as a resume; is that correct?  
11 **A. Well, as I previously said, at some point**  
12 **I saw a summary of his experience, so I don't recall**  
13 **if it was in a management committee meeting or if it**  
14 **was -- where I saw it at, I did see a summary.**  
15 Q. But mine was directed specifically at the  
16 management committee meeting, considering his resume  
17 in a meeting and discussing it with him. You cannot  
18 recall that having taken place?  
19 MR. GORMLEY: Asked and answered.  
20 BY MR. CAMPBELL:  
21 Q. You don't recall that having taken place?  
22 It's not a trick question.  
23 **A. Well, I don't recall if it was in a**  
24 **meeting where I saw it or if it was somewhere else.**  
25 Q. Not the question.

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1 MR. CAMPBELL: Please reask the question.  
2 I didn't ask where you saw it:  
3 (Record played as follows:)  
4 "But mine was directed specifically at  
5 the management committee meeting, considering  
6 his resume in a meeting and discussing it  
7 with him. You cannot recall that having  
8 taken place?"  
9 BY MR. CAMPBELL:  
10 Q. What is the answer to that question?  
11 **A. I don't recall if I was sitting in a**  
12 **management meeting when I saw a copy of it or if I was**  
13 **somewhere else. You are asking was I, do I recall if**  
14 **I was in a management meeting when we reviewed it, and**  
15 **I --**  
16 Q. I'm going to ask you this one more time.  
17 **A. Okay.**  
18 Q. Okay.  
19 MR. GORMLEY: I'm going to object. I  
20 think you are harassing the witness. It's getting to  
21 the --  
22 MR. CAMPBELL: No, I'm not.  
23 MR. GORMLEY: He says he doesn't recall.  
24 MR. CAMPBELL: No, you're saying that.  
25 You're saying that.

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1 MR. GORMLEY: No, that's what he said.  
2 MR. CAMPBELL: No.  
3 MR. GORMLEY: Should we read it back?  
4 MR. CAMPBELL: I'm not going to argue or  
5 debate it with you anymore.  
6 MR. GORMLEY: Well, I'm not going to argue  
7 and debate it with you.  
8 MR. CAMPBELL: Okay. So kindly just allow  
9 me to ask my questions.  
10 MR. GORMLEY: He is answering your  
11 questions, that's my problem.  
12 MR. CAMPBELL: And please lower your  
13 voice.  
14 BY MR. CAMPBELL:  
15 Q. Here's the question. Do you recall  
16 sitting in a management committee meeting when the  
17 management committee, including you and others,  
18 possibly Mr. Welch sitting over there, or your father  
19 or your brother had a resume in front of you, more  
20 than one person, when you looked at it, were  
21 considering it and were interviewing Shane about it  
22 before he was appointed? Do you recall that?  
23 **A. I recall seeing something with Shane's**  
24 **experience and reviewing it. I don't recall where I**  
25 **was at, who all was there. I don't know how else to**

<p style="text-align: right;">page 158</p> <p><b>1 say that.</b></p> <p>2 Q. You do not recall as you sit here today</p> <p>3 that there was such a meeting, correct?</p> <p>4 MR. GORMLEY: You're badgering the</p> <p>5 witness.</p> <p><b>6 THE WITNESS: Asked and answered.</b></p> <p>7 MR. CAMPBELL: Okay. I would like a copy</p> <p>8 of this and his response in that regard and we're</p> <p>9 going to reserve all rights.</p> <p>10 MR. GORMLEY: Sure.</p> <p>11 MR. CAMPBELL: So I want a separate DVD</p> <p>12 for the judge on this, please.</p> <p>13 THE VIDEOGRAPHER: Will do.</p> <p>14 MR. CAMPBELL: Thanks.</p> <p>15 BY MR. CAMPBELL:</p> <p>16 Q. Please detail for me all references that</p> <p>17 were contacted and provided information with respect</p> <p>18 to Shane Huish's abilities as a potential prospect for</p> <p>19 general manager of an aquatics park such as</p> <p>20 Cowabunga Bay.</p> <p><b>21 A. I did not call any references on Shane.</b></p> <p>22 Q. Do you know of anyone on the management</p> <p>23 committee that did so, that called upon references and</p> <p>24 sought references with respect to Shane Huish's</p> <p>25 qualifications to operate as general manager of</p>	<p style="text-align: right;">page 160</p> <p>1 management committee that did?</p> <p><b>2 A. I do not know if Scott or others may have,</b></p> <p><b>3 I don't know.</b></p> <p>4 Q. Did you ever commission a background</p> <p>5 report on Shane?</p> <p><b>6 A. Not that I'm aware of.</b></p> <p>7 Q. Why not?</p> <p><b>8 A. I didn't know that it was necessary to run</b></p> <p><b>9 a background report. He was an owner involved in the</b></p> <p><b>10 water park before we got involved. His role was</b></p> <p><b>11 already to be one that was going to operate the park</b></p> <p><b>12 and he seemed very qualified and competent in doing</b></p> <p><b>13 that based on my experience with him and the decisions</b></p> <p><b>14 he made --</b></p> <p>15 Q. Okay.</p> <p><b>16 A. -- during construction and improving the</b></p> <p><b>17 park.</b></p> <p>18 Q. So you were satisfied that Shane had the</p> <p>19 required expertise with respect to aquatics</p> <p>20 management?</p> <p><b>21 A. My opinion in working with him was that he</b></p> <p><b>22 had that experience.</b></p> <p>23 Q. Okay. Did you ever -- did anyone ever</p> <p>24 come -- withdraw.</p> <p>25 Did you or anyone to your knowledge ever</p>
<p style="text-align: right;">page 159</p> <p>1 Cowabunga Bay?</p> <p><b>2 A. I think from in talking with Orluff when</b></p> <p><b>3 he came down to get to know the Huishes with Scott and</b></p> <p><b>4 Shane, he was asking some of those questions. That's</b></p> <p><b>5 when he came down to get a comfort feeling with them</b></p> <p><b>6 and their roles.</b></p> <p>7 Q. I'm going to reask the question.</p> <p>8 Do you know of any member of the</p> <p>9 management committee that reached out and contacted</p> <p>10 references that supported the decision-making that</p> <p>11 Shane Huish was qualified to run as general manager of</p> <p>12 Cowabunga Bay aquatic park?</p> <p><b>13 A. Outside of speaking with the Huish family</b></p> <p><b>14 about his experience, I'm not aware of other</b></p> <p><b>15 references that were contacted.</b></p> <p>16 Q. Thank you.</p> <p>17 Was there any attempt to contact any of</p> <p>18 the other amusement parks or recreational facilities</p> <p>19 that Shane Huish had worked at in the past to gain an</p> <p>20 understanding as to what the terms of his departure</p> <p>21 from employment at those water parks was?</p> <p><b>22 A. I did not reach out and contact any.</b></p> <p>23 Q. Or recreational parks?</p> <p><b>24 A. I, I did not reach out and contact any.</b></p> <p>25 Q. Do you know of any member of the</p>	<p style="text-align: right;">page 161</p> <p>1 learn that Shane had actually acknowledged that he did</p> <p>2 not have all of the expertise necessary for the</p> <p>3 management of Cowabunga Bay Water Park?</p> <p>4 MR. SMITH: Foundation. Facts not in</p> <p>5 evidence.</p> <p>6 MR. CAMPBELL: I'm asking him the question</p> <p>7 to see if they are going to be in evidence.</p> <p>8 BY MR. CAMPBELL:</p> <p>9 Q. Go ahead.</p> <p><b>10 A. I don't know that I understood the</b></p> <p><b>11 question. Could you repeat it, please.</b></p> <p>12 MR. CAMPBELL: Sure. Please repeat the</p> <p>13 question.</p> <p>14 I hate the new system by the way.</p> <p>15 COURT REPORTER: I can stop it if you</p> <p>16 want.</p> <p>17 MR. CAMPBELL: I prefer you to that.</p> <p>18 (Record read as follows:)</p> <p>19 "Q. Did you or anyone to your</p> <p>20 knowledge ever learn that Shane had actually</p> <p>21 acknowledged that he did not have all of the</p> <p>22 expertise necessary for the management of</p> <p>23 Cowabunga Bay Water Park?"</p> <p>24 MR. SMITH: Same objection.</p> <p><b>25 THE WITNESS: No. I, I have not heard</b></p>

<p style="text-align: right;">page 162</p> <p>1 <b>Shane state that.</b> 2 BY MR. CAMPBELL: 3 Q. Do you know if he ever stated that in any 4 form or fashion to anybody? 5 MR. SMITH: Same objection. 6 <b>THE WITNESS: Not that I recall.</b> 7 MR. CAMPBELL: Okay. 8 And by the way, she is the best court 9 reporter in the state, and that's why I prefer her 10 over that. 11 MR. GORMLEY: You have to listen to your 12 own voice. 13 MR. CAMPBELL: She's just, she's just 14 superb. 15 MR. GORMLEY: She's good, yeah. 16 MR. CAMPBELL: She's superb. You could 17 sit through depositions from now until Timbuktu and 18 never ever interrupt you. She's just superb. 19 MR. GORMLEY: It's 12:53. 20 MR. CAMPBELL: All right. You want to 21 take a break? Because I'm going to move on to 22 something else now anyway. 23 MR. GORMLEY: Is it okay with you? 24 MR. CAMPBELL: Yeah. How much time do you 25 want?</p>	<p style="text-align: right;">page 164</p> <p>1 to the function he was fulfilling according to your 2 testimony at Cowabunga Bay? 3 <b>A. I, I don't recall a written summary.</b> 4 Q. Okay. Were, were Shane's duties as GM 5 ever reduced or in any way changed? 6 <b>A. Yes.</b> 7 Q. When? 8 <b>A. Following July, August of 2015.</b> 9 Q. Okay. Was that the only time? 10 <b>A. Well, that, that's when by a decision of</b> 11 <b>management committee, we had reduced them.</b> 12 Q. Was that, was that the first time they 13 were reduced? 14 <b>A. I believe so.</b> 15 Q. Were they reduced thereafter? 16 <b>A. He asked, I think last year before we</b> 17 <b>brought Marc Glissman in, Shane had requested that.</b> 18 <b>Shane or, I think Shane and Scott had spoke, but</b> 19 <b>anyways brought to our attention by Scott that Shane</b> 20 <b>would like to have his responsibilities further</b> 21 <b>reduced. He would be able to focus on the marketing</b> 22 <b>and the events and things like that.</b> 23 Q. And when was that? 24 <b>A. Mid June, late July -- or, sorry, mid</b> 25 <b>June, early July, I believe, of 2017.</b></p>
<p style="text-align: right;">page 163</p> <p>1 MR. GORMLEY: We have to go get something 2 to eat someplace, someplace down the road. 45 3 minutes. 4 MR. CAMPBELL: Okay. 5 THE VIDEOGRAPHER: We are going off the 6 record. 7 MR. CAMPBELL: We will do an hour. We'll 8 do an hour, that's fine. 9 THE VIDEOGRAPHER: The time is 10 approximately 12:54 p.m. 11 (Recessed from 12:54 p.m. to 2:00 p.m.) 12 THE VIDEOGRAPHER: We are going back on 13 the record. The time is approximately 2:00 p.m. 14 BY MR. CAMPBELL: 15 Q. Irrespective of the fact that the 16 management committee minutes or documentation does not 17 memorialize the, all the duties that were assumed by 18 Shane Huish, according to your testimony, was Shane 19 Huish ever provided with any such materials that 20 memorialized all of his responsibilities in the scope 21 of his duties? 22 <b>A. I'm not sure.</b> 23 Q. Okay. Have you ever seen any such 24 materials that memorialized what Shane Huish's 25 responsibilities and scope of duties were with respect</p>	<p style="text-align: right;">page 165</p> <p>1 Q. Okay. And was that after the death of the 2 second drowning victim? 3 <b>A. Yes, it was.</b> 4 Q. And did he say why he wanted his duties 5 reduced? 6 <b>A. When I spoke with Scott about it, my, my</b> 7 <b>impression was I don't know if Shane just felt</b> 8 <b>overwhelmed, because he, he didn't have the</b> 9 <b>responsibility of the lifeguards at that point, but</b> 10 <b>for whatever reason, he was feeling a lot of personal,</b> 11 <b>I'm putting words in his mouth because he didn't talk</b> 12 <b>to me, I don't know, regrets or something, and was</b> 13 <b>having a hard time coping with the loss of Daqone. I</b> 14 <b>can't remember his first name, Bankston.</b> 15 Q. Daquan? 16 <b>A. Daquan, thank you.</b> 17 Q. Why did he want his duties reduced in 18 2015? 19 <b>A. In 2015 --</b> 20 MR. GORMLEY: Let me object. Calls for 21 speculation. 22 You can state your mind. 23 <b>THE WITNESS: Okay.</b> 24 MR. CAMPBELL: Speaking objection. 25 <b>THE WITNESS: 2015, Shane didn't request</b></p>

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1 his duties get reduced.  
2 BY MR. CAMPBELL:  
3 Q. Okay. Why were they reduced?  
4 A. In late July of 2015 is when we learned  
5 about the lifeguard count having been reduced. And  
6 Scott and I met and decided we were -- we then called  
7 other members of the management committee, that we  
8 were removing Shane to have -- from having any  
9 responsibility over lifeguards.  
10 Q. Okay. So when you say the lifeguard count  
11 was reduced, do you mean the lifeguard count was not  
12 the count that was required by the, by the Southern  
13 Nevada Health District?  
14 A. Yeah, there was a, there was a number that  
15 was required, and, and Shane did not have that number  
16 in, in place.  
17 Q. And the number that was required at that  
18 time for lifeguards at the wave pool was how many?  
19 A. From, from what I learned in the, first in  
20 the newspaper articles that had been sent or sent out,  
21 they were saying there were 17 lifeguards that were  
22 required.  
23 Q. And at the time of, of the drowning in  
24 2015 of my client and his catastrophic injuries, how  
25 many lifeguards were on duty at the wave pool when he

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1 drowned?  
2 A. I've heard two different numbers, one was  
3 three and one was five.  
4 Q. And where did you hear the number five  
5 from?  
6 A. I heard the number five from Shane.  
7 Q. Where did you hear the number three from?  
8 A. I heard the number three from the  
9 newspapers or news channel.  
10 Q. So which is it, do you know?  
11 A. I, I don't know.  
12 Q. Did you bother to try to find out?  
13 A. I, I asked. I asked Shane where -- "how  
14 many lifeguards were there?" His reply was that he  
15 didn't know. "There were two," I think he referred to  
16 them as "roamers," which I didn't understand that term  
17 for lifeguards. He didn't know at the time of the  
18 accident where they were located.  
19 Q. So he didn't know whether there were three  
20 there or there were an additional two who were roamers  
21 that were there?  
22 A. That's my understanding.  
23 Q. And so what did you do to further gain an  
24 understanding of the precise number that were there?  
25 A. Well --

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1 Q. Taking all time you feel is necessary to  
2 do so --  
3 A. Okay.  
4 Q. -- tell me what you and/or your other  
5 committee members did to find out the exact number of  
6 lifeguards that were present when my client was  
7 drowning.  
8 A. Okay. Well, first of all, when the, when  
9 the incident happened, I was contacted by Scott and  
10 given notice of it. And I called, tried to get in  
11 touch with Shane, and Shane got back in touch with me.  
12 And then maybe -- I'm trying to make sure I answer  
13 your question without expanding into stuff you don't  
14 care about, so let me think for a sec that I answer  
15 your question and not --  
16 Q. Do you want me to repeat the question?  
17 A. If you're asking what did I do to find out  
18 the number of lifeguards, and it does, I guess, maybe  
19 kind of start that day, because I was asking Shane --  
20 Q. Let me reask the question.  
21 A. Okay.  
22 Q. You said you didn't know whether there  
23 were three or five. And in fact Shane didn't know  
24 whether there were three or five because there were  
25 three plus there were two roamers.

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1 A. Correct.  
2 Q. So here's my question.  
3 A. Okay.  
4 Q. Tell me all that you did or anyone on the  
5 management committee did to find out exactly how many  
6 lifeguards were present when my client was drowning  
7 that day.  
8 A. Okay. Well, I've asked Shane how many  
9 lifeguards were there. I've asked Richard Woodhouse  
10 if he knew how many lifeguards were there. I, I was  
11 told that NASCO was doing an investigation, that the  
12 police department was doing an investigation, that the  
13 health department was doing an investigation.  
14 I'm trying to think, because it seems like  
15 there was one other party that was researching that.  
16 Well, I think the insurance, but I don't know that  
17 really is relevant. To get that information back and  
18 I didn't find out the day of the incident how many  
19 lifeguards were there.  
20 I had heard I think three days later or  
21 six days later the health department had gone out and  
22 there was eight, I believe, stationed at the wave  
23 pool, I think was the report.  
24 Q. On the day that the health department went  
25 out?



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1     **A. I think so. And I don't remember what**  
2 **date that was.**  
3     Q. Okay. Here's the question again. Okay.  
4         The question is what you or any member of  
5 the management committee did to determine the exact  
6 number there, you, or any member of the management  
7 committee. Not anyone else. What did you do or any  
8 member of the management committee that you're aware  
9 of they have done?  
10    **A. Okay. When, when I did talk to Shane and**  
11 **asked for copies of witness statements from, from the**  
12 **accident, I reviewed the witness statements.**  
13    Q. Did you ever review, for example, any  
14 documents that, from Cowabunga Bay that said how many  
15 were there in the scheduling?  
16    **A. I have not seen that, no.**  
17    Q. Why? Why did you not go to the schedule  
18 and see who was there that day?  
19    **A. There were two to three other entities**  
20 **that were already doing their investigations to see**  
21 **what was happening when I became aware that the**  
22 **required number was not there. I felt my**  
23 **responsibility was as much how do we go forward and**  
24 **make sure the park is run safely, and let those who**  
25 **were doing the investigation of the incident put the**

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1 **details together for, for what had actually happened.**  
2    Q. Your father testified that when Shane's  
3 duties were reduced following the drowning of my  
4 client, that IAM I was hired to hire, to handle some  
5 of the aquatics management. And that you did not  
6 along with Scott. Do you recall that testimony?  
7    **A. I recall Orluff talking about it.**  
8    Q. Okay.  
9    **A. I can clarify what actually, how that**  
10 **actually came about. I did not hire IAM. Scott and I**  
11 **met at the park on early August, I believe, it was**  
12 **August 4th or 6th. And prior to having a management**  
13 **meeting, because we had just found out -- when I say**  
14 **just found out, that, you know, Shane had told us he**  
15 **did not have the required number.**  
16         Prior to that, we were reading the news  
17 article or hearing it on the news. Scott and I talked  
18 and Scott approached me and said he wanted to talk  
19 before we met with everybody. And said he understood  
20 that we were all upset about, not just what had  
21 happened, but that Shane had made a decision for  
22 whatever reason to have the lifeguards there. And  
23 we --  
24    Q. Or rather not have the lifeguards there?  
25    **A. To not have them there.**

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1    Q. Right.  
2    **A. Yes. And he understood if we needed to**  
3 **terminate Shane at that point, which is August, like I**  
4 **say, very early August. And we walked through what**  
5 **options. What are our options to fulfill that**  
6 **position and make sure the park continues to operate**  
7 **safely for the rest of the season.**  
8         **Scott then mentioned, and I don't recall**  
9 **if he mentioned IAM at that particular point other**  
10 **than they were aware of a company who specialized in**  
11 **this that they could get in touch with which**  
12 **ultimately became IAM that they selected.**  
13    Q. Did you interview IAM or anyone from IAM?  
14    **A. I did not personally interview IAM, no.**  
15    Q. Did you review any of their, their  
16 materials, work materials or proposals, anything of  
17 that nature?  
18    **A. I did see, I did see a proposal from them.**  
19    Q. Did you see their experience presentation?  
20    **A. When you say "presentation," I'm not sure.**  
21    Q. Withdraw the question.  
22         Did you see any, any presentation created  
23 by that firm with respect to their experience in the  
24 field of aquatics?  
25    **A. So from a presentation, I saw a, a resume,**

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1 **kind of a summary of what IAM does. And I saw a**  
2 **resume for Chris. And I'm drawing a blank on Chris'**  
3 **last name right now, he's the aquatics manager that**  
4 **they brought on board.**  
5    Q. And unlike the resume that you said that  
6 you may have seen with respect to Shane Huish, the  
7 actual resume and experience history for IAM was in  
8 fact obtained by the management committee of  
9 Cowabunga Bay and in fact turned over in this  
10 litigation, correct?  
11    **A. I don't know --**  
12         MR. SMITH: Objection. Assumes.  
13         **THE WITNESS: I don't know what was turned**  
14 **over or not turned over. I feel like there is two**  
15 **questions in that one.**  
16         I did see a resume, kind of a summary of  
17 Shane's experience. I think, I don't know if the  
18 whole management committee all reviewed that to get  
19 together.  
20         But, yeah. And then at Chris's, I don't  
21 think the whole management committee was sitting in a  
22 room reviewing Chris's at the time either. But we did  
23 receive a copy. I don't know if that...  
24    Q. Are you done?  
25    **A. I think so.**

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1 Q. Okay.

2 What was the, what was the proposal with

3 respect to the economic impact of hiring IAM after my

4 client drowned and suffered his catastrophic injuries?

5 A. I don't know. When you say what's the

6 economic impact.

7 Q. How much did it cost to hire IAM?

8 A. I don't recall what, what the dollar

9 amount was.

10 Q. Do you recall if it was generally 75,000?

11 A. I remember a 60 number for something.

12 Yeah, I don't remember, I would have to see it again.

13 Q. Was there a vote to in fact hire IAM

14 eventually?

15 A. There was a discussion. Again, I don't

16 think it was any management committee meeting where we

17 all raised our hand and say this is what we want to

18 do. There was a discussion amongst the group that

19 would be a good direction to go.

20 Q. What was the ultimate decision with

21 respect to what the responsibilities of IAM would be

22 following the drowning of my client?

23 A. My understanding is IAM would come in.

24 They would put their employee on site. And, again,

25 his name was Chris. And I apologize, I forgot his

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1 last name. On site. They would take over the

2 lifeguards, including the training, the certification

3 and the, I believe the payroll, rotations. Everything

4 to do with lifeguards became IAM's responsibility.

5 Q. Did -- was there a consequential change in

6 the pay of Shane Huish following the time that he

7 relinquished your appointment of him to supervise

8 aquatic management?

9 MR. SMITH: Objection to relevance.

10 Subsequent remedial measure.

11 THE WITNESS: I don't, I don't recall if

12 Shane's salary was reduced. My focus was how do we,

13 how do we make sure the park is being operated safely.

14 I wasn't worried about what is the cost impact.

15 BY MR. CAMPBELL:

16 Q. Did, did he continue to retain the title

17 of general manager of Cowabunga Bay Las Vegas?

18 A. I don't recall.

19 Q. Are there any memorandums, meeting notes,

20 minutes of any decision you made with respect to the

21 replacement of Shane's duties with those to be assumed

22 by IAM following my client's drowning?

23 A. I'm not aware of any meeting minutes or I

24 believe you used the word memorandum. I don't know if

25 there was even an email sent out about it. I don't

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1 recall. It was a discussion we had.

2 Q. What is Shane Huish's role today at

3 Henderson Water Park?

4 A. Shane oversees the, the marketing of the

5 park, the events, scheduling of group events, kind of

6 the theming, if you will, more that side of the fill

7 and experience.

8 Q. He is no longer the general manager,

9 correct?

10 A. He is no longer the general manager, no,

11 sir.

12 Q. And when did he -- when was he relieved of

13 the duties and styling, executive styling of general

14 manager?

15 A. I don't recall when that title change,

16 when the title itself changed. The, the scope or

17 responsibility of work, which included the whole park

18 and all lifeguards, was changed by that August 4th or

19 6th date, I can't recall what the date of the meeting

20 was.

21 Q. Are you aware that Shane has publicly

22 represented himself to be the general manager of

23 Cowabunga Bay this year?

24 MR. SMITH: Facts not in evidence.

25 THE WITNESS: No, I'm not aware of that.

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1 BY MR. CAMPBELL:

2 Q. If you learned that, would that result in

3 any sort of discipline to him or any cautionary

4 instruction or any directive?

5 MR. SMITH: Calls for speculation.

6 MR. GORMLEY: Objection. Calls for

7 speculation.

8 Go ahead.

9 BY MR. CAMPBELL:

10 Q. I don't want you to speculate. I want it

11 based on your --

12 A. I --

13 Q. You have to wait until I'm done with the

14 question.

15 A. Okay, sir.

16 Q. I don't want speculation. I want that

17 based on what you reasonably believe may have or could

18 have occurred.

19 MR. SMITH: Calls for speculation. Facts

20 not in evidence.

21 THE WITNESS: Is the question if, if I

22 hear today Shane is promoting himself as the general

23 manager when he is not, what action would I take? Is

24 that --

25 ///

<p style="text-align: right;">page 178</p> <p>1 BY MR. CAMPBELL:</p> <p>2 Q. Correct.</p> <p>3 A. -- correct?</p> <p>4 MR. SMITH: Incomplete hypothetical.</p> <p>5 <b>THE WITNESS: Am I supposed to answer?</b></p> <p>6 BY MR. CAMPBELL:</p> <p>7 Q. Yes.</p> <p>8 A. Okay. I would likely make a phone call to</p> <p>9 ask, "Why are you using the title of general manager?"</p> <p>10 Whether that was directly with Shane or with my role</p> <p>11 as it is today, I would likely contact Scott to do</p> <p>12 that, where he is the chairman of the management</p> <p>13 committee now.</p> <p>14 Q. Okay. With respect to Mr. Huish, do you</p> <p>15 believe him to be an honest person?</p> <p>16 A. Can you clarify?</p> <p>17 MR. SMITH: Assumes facts not in evidence.</p> <p>18 <b>THE WITNESS: Shane Huish?</b></p> <p>19 MR. GORMLEY: You just said Huish.</p> <p>20 <b>THE WITNESS: Shane or Scott?</b></p> <p>21 BY MR. CAMPBELL:</p> <p>22 Q. Shane. I'm sorry, I apologize. Let me</p> <p>23 reask the question.</p> <p>24 A. Okay.</p> <p>25 Q. Do you believe Shane Huish to be an honest</p>	<p style="text-align: right;">page 180</p> <p>1 recommended for denial of a liquor license by the</p> <p>2 Henderson Police Department because he failed to</p> <p>3 disclose three separate arrests that he had suffered</p> <p>4 irrespective of the fact that he was specifically</p> <p>5 asked to list all arrests?</p> <p>6 A. I have become aware of that through these</p> <p>7 proceedings. I was not aware of that before.</p> <p>8 Q. Okay. And with respect to that liquor</p> <p>9 license, is it your testimony that it was your</p> <p>10 understanding that he was in fact licensed at the time</p> <p>11 and that's how the liquor license had been granted?</p> <p>12 A. I, I didn't know who got the liquor</p> <p>13 license. I wasn't involved. At that phase --</p> <p>14 Q. Okay.</p> <p>15 A. -- my focus was getting Polin to get, to</p> <p>16 get done.</p> <p>17 Q. Okay. During the period of time before</p> <p>18 Shane was relieved as general manager, did the</p> <p>19 management committee at any time conduct any type of</p> <p>20 performance review or evaluation with respect to</p> <p>21 Shane's performance?</p> <p>22 A. So from the standpoint of performance</p> <p>23 review of sit down and ask a lot of questions one on</p> <p>24 one, I did not personally do that.</p> <p>25 Q. Did anybody on the management committee?</p>
<p style="text-align: right;">page 179</p> <p>1 person?</p> <p>2 MR. SMITH: Improper opinion evidence.</p> <p>3 <b>THE WITNESS: My, my impression with Shane</b></p> <p>4 <b>was that he was and is honest. I was more than</b></p> <p>5 <b>disappointed with whatever decision he made to have</b></p> <p>6 <b>fewer lifeguards. And I don't understand. That's</b></p> <p>7 <b>where I lost some, not some, the confidence of the</b></p> <p>8 <b>honesty from why was he telling us -- why didn't he</b></p> <p>9 <b>tell us that there were fewer, other than what I</b></p> <p>10 <b>learned is in his mind, for whatever reason, he seems</b></p> <p>11 <b>to think he had approval down to seven or eight. But</b></p> <p>12 <b>that still is not the three or five that were there.</b></p> <p>13 BY MR. CAMPBELL:</p> <p>14 Q. And was this the first occasion when you</p> <p>15 came to doubt his honesty or had there been occasions</p> <p>16 in the past where events came to your attention that</p> <p>17 caused you to question his honesty?</p> <p>18 A. I don't recall any prior event that would</p> <p>19 have me question Shane's honesty.</p> <p>20 Q. With respect to opening of the park, one</p> <p>21 of the, one of the issues was the acquisition of a</p> <p>22 liquor license. Do you recall that?</p> <p>23 A. I recall they were applying for a liquor</p> <p>24 license.</p> <p>25 Q. Do you recall that Shane Huish was</p>	<p style="text-align: right;">page 181</p> <p>1 A. I don't know if, I don't know if Scott</p> <p>2 did. As we had our management committee meetings and</p> <p>3 we would ask questions about how are things being done</p> <p>4 and giving feedback to Shane on what we thought could</p> <p>5 be done differently, what could be done better, what</p> <p>6 we could improve, there was that type of feedback when</p> <p>7 we had our, our management meetings.</p> <p>8 Q. Did you contribute to the management of</p> <p>9 the park?</p> <p>10 A. Can you clarify when you say "the</p> <p>11 management."</p> <p>12 MR. GORMLEY: Objection. Vague.</p> <p>13 BY MR. CAMPBELL:</p> <p>14 Q. Did you contribute to the management of</p> <p>15 the park in any way?</p> <p>16 A. So --</p> <p>17 Q. That's a yes or no, and then I'll explore</p> <p>18 it from that point.</p> <p>19 A. Okay. As a member of the management</p> <p>20 committee there were things that I did as it related</p> <p>21 to insurance, for instance, to make sure the limits</p> <p>22 were in place and the proper entities were listed as</p> <p>23 additional insured.</p> <p>24 Q. Um-hum.</p> <p>25 A. I early on was making sure that the slide</p>

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1 certifications are done and in place.  
2 The -- I requested our insurance carrier  
3 provide a third-party audit on the park to -- and that  
4 was in kind of mid to late 2014. And I asked him to  
5 come in and audit the park from a risk management  
6 standpoint.  
7 Q. And I think your dad testified to all  
8 those things if you recall --  
9 A. Well --  
10 Q. -- that's what you did. And I'm not  
11 suggesting you didn't do them.  
12 A. No. And I did, but I think it's important  
13 to understand I'm not a water park expert by any  
14 means.  
15 Q. And I think --  
16 A. So from my -- sorry, I'm touching the  
17 microphone.  
18 From my perspective of how can I help when  
19 I'm not an expert in it, it is by gathering experts to  
20 come out and, and do the due diligence to make sure  
21 that those we have delegated the responsibility to  
22 that we are doing it correctly.  
23 And based on the report we got back, which  
24 was very, very detailed, and it was not all  
25 complimentary, I, I felt good about the operations of

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1 the park.  
2 I also had our own insurance carrier go  
3 down and do an inspection. As far as other  
4 management, as I would coordinate with Scott just for  
5 feedback on budgets or bank items, but that was pretty  
6 well my management role.  
7 MR. CAMPBELL: Okay. Move to strike as  
8 nonresponsive.  
9 BY MR. CAMPBELL:  
10 Q. Your father testified that you had no  
11 involvement in the operations of the park. Do you  
12 agree with that?  
13 A. I agree that the day-to-day operations of  
14 the park was not my role. That was what we delegated  
15 to Shane and to Rich Woodhouse who was his assistant.  
16 Q. And there were no occasions in which you  
17 were involved in the day-to-day operations of the  
18 park; is that correct?  
19 A. Yeah. I was not involved in the  
20 day-to-day operations.  
21 Q. Okay. Would that be the case both before  
22 and after by client drowned?  
23 A. I, I believe so.  
24 Q. Okay. Did you expect safety to be the top  
25 priority at Cowabunga Bay?

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1 A. Yes, I did.  
2 Q. Before the park initially opened, there  
3 had to be a lifeguard permitting plan that had been  
4 approved by the Southern Nevada Health District,  
5 correct?  
6 A. Yes, there was. My understanding was  
7 there was a, I refer to it as a submittal package.  
8 Part of that, from what I understand, had a lifeguard  
9 plan of some type. I believe there was a signage  
10 component. And then from the general contractor's  
11 side, we had certain tests and inspections and  
12 sign-offs that had to be turned in with that.  
13 Q. The answer is "yes"?  
14 A. Yes, there -- yes.  
15 Q. When was it that you first learned that  
16 the initial lifeguard plan had been rejected?  
17 A. I don't know if it was prior to the park  
18 opening. I heard they had had to resubmit the package  
19 to the health department. It seemed like it had a  
20 couple of components to it, something with lifeguards,  
21 I think there was additional signage, those that were  
22 required also. I wasn't in the detail of it.  
23 Q. Did you learn this at a meeting on  
24 April 10th, 2014?  
25 A. I don't believe so.

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1 Q. When did you first learn that the park  
2 couldn't open because the initial lifeguard plan was  
3 rejected?  
4 A. I don't, I don't think I ever heard that  
5 it couldn't open because of that. I thought I'd heard  
6 they had to resubmit additional information, which  
7 from what I do is not uncommon in construction, we  
8 have to resubmit things.  
9 Q. Okay.  
10 MR. MIRKOVICH: 42, please.  
11 (Deposition Exhibit 42 marked.)  
12 BY MR. CAMPBELL:  
13 Q. I hand you what has been marked as Exhibit  
14 No. 42 in this action. You'll see that this is an  
15 aggregate exhibit, we call it an aggregate exhibit  
16 because it consists of more than just one particular  
17 document. This one is an email that has email  
18 attachments of photos to it.  
19 Do you see that, sir?  
20 A. Yes, sir.  
21 Q. Okay. You will see that this is from you,  
22 correct, your email address?  
23 A. That's correct.  
24 Q. At R&O Construction, correct?  
25 A. Yes, that's my email address.

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1 Q. The date of it is July 5, 2014 at  
2 8:00 p.m., correct?  
3 A. **Correct.**  
4 Q. It is sent to Shane Huish, correct?  
5 A. **Correct.**  
6 Q. And Craig?  
7 A. **Correct.**  
8 Q. All right. And then there is also a  
9 huish@aol.com. And who is that?  
10 A. **That is Scott Huish's email address.**  
11 Q. Okay. And the subject of this is  
12 lifeguards, correct?  
13 A. **"Lifeguard tips for slides."**  
14 Q. Have you reviewed this document recently  
15 before coming to this deposition?  
16 A. **No, I have not.**  
17 Q. Okay. When you sent this to the Huishes,  
18 this was on the subject of lifeguards, correct?  
19 A. **Can I have a second to review through it?**  
20 Q. Sure.  
21 A. **Okay.**  
22 (Brief pause in the proceedings.)  
23 **THE WITNESS: Okay.**  
24 BY MR. CAMPBELL:  
25 Q. This is on the subject of lifeguards,

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1 right?  
2 A. **Well, lifeguards, types of tubes that**  
3 **should be used on each slide, size of tubes that**  
4 **should be used on each ride, how many riders are**  
5 **allowed to go down each ride. And a lot of that is**  
6 **based off the slide certification testing we had just**  
7 **completed as a contractor with Polin to make sure they**  
8 **understand what is and is not allowed.**  
9 Q. Okay. Let's see if we can be more  
10 directed.  
11 A. **Okay.**  
12 Q. You specifically told him to:  
13 "Make sure lifeguard knows (sic) the  
14 rules of the slide they are in charge of."  
15 Correct?  
16 A. **Yes, that is true.**  
17 Q. All right. And you directed that to them  
18 in terms of a safety consideration, correct?  
19 A. **Well, a safety and a training. So, yes, I**  
20 **sent it to the, to Shane and Craig and Scott.**  
21 Q. I'm not going to take you through the  
22 entire thing. I just want to identify this --  
23 A. **No, that's --**  
24 Q. -- for the record as to what they  
25 generally are. Okay?

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1 A. **That's okay.**  
2 **And like I say, each slide has different**  
3 **requirements, so they can't --**  
4 Q. There is no pending question.  
5 MR. GORMLEY: There's no question.  
6 BY MR. CAMPBELL:  
7 Q. There's no pending question.  
8 A. **Oh, okay, I thought you were expanding.**  
9 Q. Nope.  
10 Tell me what Evernote is.  
11 A. **Evernote is an app I used to use that you**  
12 **could take, keep some notes in. I haven't used it in**  
13 **a long time.**  
14 Q. Who created this entire document, you?  
15 A. **Which document, sir?**  
16 Q. It's, excuse me, 42, aggregate Exhibit 42.  
17 A. **Yes, I, I believe this was created by me.**  
18 **And again, it's a summary of what we learned during**  
19 **the testing and certification of the slides.**  
20 Q. No. I'm -- Exhibit No. 42 has attached to  
21 it pictures taken where?  
22 A. **Which picture are you at, sir? I see**  
23 **them, but I don't --**  
24 Q. Okay. Where was this picture taken, the  
25 first one in order?

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1 A. **So this, the first picture 4955 is at the**  
2 **top of what we call tower 1.**  
3 Q. Okay. And 4956?  
4 A. **4956 is also at the top of tower 1.**  
5 Q. Okay. 4957?  
6 A. **4957 is also at the top of Gardner vs.**  
7 **Henderson Water Park, et al. - notice of expedite**  
8 **request tower 1.**  
9 Q. Okay. You will see underneath that  
10 picture, that particular picture there is a second  
11 paragraph that begins:  
12 "My experience at this slide tower is  
13 you need a very competent person in charge  
14 moving up and down the tower often. We have  
15 too many rotations and this is causing some  
16 issues."  
17 A. **Yes.**  
18 Q. "I suggest you get specialists on  
19 this."  
20 Is that correct?  
21 A. **Correct. That's what I wrote out, and I**  
22 **later found out I'm not an experienced aquatic manager**  
23 **type person, because I was corrected by the aquatics**  
24 **people that if you leave lifeguards in a particular**  
25 **spot too long and don't rotate them, they get bored**

<p style="text-align: right;">page 190</p> <p>1 and don't pay as much attention. So that's what the 2 operations guys on site and NASCO decided to do. 3 Q. But here you were in fact basing it upon 4 your experience, correct? 5 A. Yes, my experience which was a week and a 6 half of riding slides and observing people. 7 Q. And this was an operational matter, 8 correct? 9 A. I don't know that it's operational from 10 the -- part of this is what, what may work well, what 11 would be efficient and the -- 12 Q. You -- 13 A. -- same thing from a contractor. 14 Q. You suggested to get specialists on the 15 matter; is that correct? 16 A. No. It says, "My experience" -- let's 17 see. 18 "We have too many rotations, it's 19 (sic) causing some issues. I suggest you get 20 specialists." 21 It's a recommendation, which I have the 22 right and authority to do as a member of the 23 management committee. They, as the operations team, 24 are the ones responsible to be able to decide what is 25 being done. And they tweaked it, and I'm not aware</p>	<p style="text-align: right;">page 192</p> <p>1 forwarding -- 2 A. But that is the subject, that's the 3 subject line of the email. 4 Q. Okay. And this is your email, right? 5 A. This is my email that I'm forwarding to 6 Shane and Craig and Scott, yes. 7 Q. On 7/6/2014, correct? 8 A. Correct. 9 Q. Okay. You said you were sending this 10 because you wanted them to, quote: 11 "...learn from what others have paid 12 for already." 13 Correct? 14 A. Correct, it says that. 15 Q. All right. In term of, in terms of jury 16 verdicts for not having done what they should have 17 done, correct? 18 A. Well, in terms of there was an accident 19 that led to -- an incident that led to an accident. 20 So my -- anytime we have the opportunity to learn from 21 our own mistakes or someone else's mistakes, I think 22 it's prudent to consider it. 23 Q. Is the answer, is the answer that, yes, 24 you wanted, okay, to make sure that they knew that 25 this was based upon judgments that had been entered as</p>
<p style="text-align: right;">page 191</p> <p>1 that they've had any incidents with this. 2 MR. CAMPBELL: Let's go to five, please. 3 MR. MIRKOVICH: 43. 4 (Deposition Exhibit 43 marked.) 5 BY MR. CAMPBELL: 6 Q. Exhibit No. 43. Once again, this is from 7 you, correct? 8 A. Yes, it is. 9 Q. And this to Shane Huish, correct? 10 A. Yes, it is. 11 Q. And the subject matter of this was 12 detailed by you as, quote, "Negligent maintenance and 13 operation of water park tub - Jury Verdicts"? 14 A. I believe that's a title from the article 15 that had been forwarded to me that I had read. 16 Q. And you put that in as the subject matter, 17 correct? 18 (Cell phone interruption.) 19 MR. CAMPBELL: Let's wait until he turns 20 off his phone again, please. 21 MR. GORMLEY: I'm sorry. 22 THE WITNESS: Whether I put that in or 23 this was forwarded to me, I don't recall. 24 BY MR. CAMPBELL: 25 Q. Does it see -- does it show up</p>	<p style="text-align: right;">page 193</p> <p>1 a result of others' negligence in their operation of 2 the water park? 3 A. I think the -- will you restate your 4 question. 5 Q. You want to know something, I'm going to 6 withdraw that question. 7 A. Okay. 8 Q. Do you see the part where you said: 9 "I really think we need to have 10 specialists at the mat racer"? 11 A. I do. 12 Q. Do you see that? 13 A. I do, yes. 14 Q. So this is the second time you talk about 15 the specialists; is that correct? 16 A. Yes. And it's the second time that I was 17 taught at water parks that's not how they operate. 18 Q. But, nevertheless, this is what you were 19 saying that you thought was needed operationally at 20 the mat racer, correct? 21 A. It's, it's my thoughts is what it says. 22 My thoughts from standing and observing. And, again, 23 as a management committee member, I have the right and 24 authority to make suggestions for them to consider. 25 Q. And you also say:</p>

<p style="text-align: right;">page 194</p> <p>1 "These are all real comments that need 2 to be shared with frequent rotations and too 3 many new faces the message may not get 4 relayed as well as it should be." 5 In other words, with the personnel at the 6 park, correct? 7 <b>A. Yeah, wanting to make sure that they are</b> 8 <b>taking into consideration how are they training,</b> 9 <b>training to do the position. Based on my experience</b> 10 <b>in construction, you were more efficient when somebody</b> 11 <b>specializes at a task. And I learned in lifeguarding</b> 12 <b>that is not the best approach.</b> 13 Q. Let's go to the next in order, please. 14 MR. MIRKOVICH: 44, please. 15 (Deposition Exhibit 44 marked.) 16 BY MR. CAMPBELL: 17 Q. Have you ever seen this document before? 18 <b>A. I haven't seen it yet, sorry.</b> 19 Q. Okay. 20 Have you ever seen this document before? 21 <b>A. Can I scan it for a sec?</b> 22 Q. Absolutely. 23 <b>A. Yes, this is a document that I drafted.</b> 24 Q. Again, this is from you, Mr. Opheikens, 25 and it's to Shane Huish, correct?</p>	<p style="text-align: right;">page 196</p> <p>1 Q. Okay. Could you go to the second page of 2 that document. 3 <b>A. Yes.</b> 4 Q. When you direct Mr. Huish, quote: 5 "Please make temporary signs ASAP and 6 note to all lifeguards, let them know to tell 7 our guests that heavier persons are going too 8 fast and we are going -- and we are more 9 concerned with their safety than anything 10 else to protect them." 11 This directive that you were asking him to 12 give was one that you determined should be given? 13 <b>A. I think it's my recommendation of being</b> 14 <b>courteous to guests and letting them know that when</b> 15 <b>you have a, you have a 20- or 21-year-old lifeguard</b> 16 <b>standing there and a larger person walks up to want to</b> 17 <b>go down a tube, some of them may take offense. And I</b> 18 <b>thought it was more important that we make sure that</b> 19 <b>rider's safety comes before if somebody gets offended</b> 20 <b>and wants to leave the park.</b> 21 Q. Pretty simple question. Isn't it a fact 22 that you said: 23 "Please make temp signs ASAP." 24 You told him to do that, correct? 25 <b>A. The temp parts are for the weights that,</b></p>
<p style="text-align: right;">page 195</p> <p>1 <b>A. Yes, it is.</b> 2 Q. And the subject matter is "Critical items 3 for Cowabunga," correct? 4 <b>A. That is correct.</b> 5 Q. Okay. And in this regard, it also 6 incorporates an earlier email, does it not, of 7 July 9th, 2014? 8 <b>A. It does.</b> 9 Q. All right. And that also was from you to 10 Shane Huish, correct? 11 <b>A. It's to Shane, to Scott, to Rich</b> 12 <b>Woodhouse, to Dean Langston and to Craig Nielsen and</b> 13 <b>then I also cc Mark Lee and Jeff Contenta.</b> 14 Q. And this email relates to safety matters; 15 is that correct? 16 <b>A. This, it is related to safety from the</b> 17 <b>perspective of as a contractor we had the</b> 18 <b>responsibility to get the slides certified by Polin.</b> 19 <b>And during that certification process it's determined</b> 20 <b>what is the, the max rider rate, whether it's a single</b> 21 <b>rider or a double rider on each slide.</b> 22 <b>So I'm relaying the information that we</b> 23 <b>received back from the testing and certification to</b> 24 <b>make sure that the operations team at the water park</b> 25 <b>has the correct signage in place.</b></p>	<p style="text-align: right;">page 197</p> <p>1 <b>as I described earlier, that are in line with the side</b> 2 <b>certification.</b> 3 Q. Is the answer, yes, you put it down there? 4 <b>A. Yes, I asked him to make temp signs noting</b> 5 <b>the weights that were approved.</b> 6 Q. And you also said that he should: 7 "Note to all lifeguards to let them 8 know to tell our guests that heavier persons 9 are going too fast." 10 You said that as well, correct? 11 <b>A. Yes, I'm asking them to note that as</b> 12 <b>passing that on, customer service.</b> 13 MR. CAMPBELL: Next document, please. 14 <b>THE WITNESS: I do think safety is more</b> 15 <b>important.</b> 16 MR. CAMPBELL: Move to strike. 17 Volunteering information. 18 <b>THE WITNESS: Sir, I read the rest of the</b> 19 <b>question, the rest of the thing.</b> 20 MR. CAMPBELL: Move to strike as 21 argumentative. 22 (Deposition Exhibit 45 marked.) 23 MR. CAMPBELL: I'm going to tell you, I'm 24 going to go back in, because he is taking way, way too 25 long. I ask him what time it is and he's telling me</p>

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1 how to make a Rolex, so I'm going to ask for more  
2 time. So I'm just putting that on the record now.  
3 Giving you fair warning.  
4 BY MR. CAMPBELL:  
5 Q. Have you ever used the phrase that "we all  
6 have liability"?  
7 **A. Probably.**  
8 Q. In connection with operations at  
9 Cowabunga Bay?  
10 **A. Probably.**  
11 Q. Calling your attention to Exhibit No. 45.  
12 Have you ever seen this before?  
13 **A. Yes, I have.**  
14 Q. Did you send this out?  
15 **A. It appears to be a text message that I**  
16 **sent out.**  
17 Q. Okay. You indicate that:  
18 "Having an alcohol license may sell  
19 more tickets but it," quote, "honestly scares  
20 the shit of me."  
21 Are those the words you used?  
22 **A. Yes, it is.**  
23 Q. Okay. And you also use words.  
24 "Who is going to manage it because the  
25 18-year-old lifeguards can't hardly deal with

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1 the sober persons."  
2 Is that correct?  
3 **A. That's correct.**  
4 Q. Please detail for me all ways in which  
5 your 18-year-old lifeguards could, quote, to use your  
6 words, "hardly deal with sober persons"?  
7 **A. Well, my concern is if you have somebody**  
8 **who has a stubborn attitude, and, as I referenced**  
9 **earlier, larger in size coming up to them. We had**  
10 **already had discussions of how do they tell somebody**  
11 **like that, no, they can't get on a particular ride.**  
12 **To the extent -- and sir, I'm not, I'm not**  
13 **trying to expand other than to let you know where I'm**  
14 **coming from.**  
15 **But I had even sent one of our**  
16 **superintendents, who was a big man, over to Wet 'N**  
17 **Wild to see how they were dealing with it from a**  
18 **customer service.**  
19 Q. He was from R&O, right?  
20 **A. He was from R&O Construction, yes.**  
21 Q. Okay.  
22 **A. And so with that, you know, I had heard**  
23 **that part of the lifeguards' challenges was how do**  
24 **you, how do you address that with persons. So my**  
25 **concern whenever you mix liquor with, with any event,**

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1 **people's behavior changes and they can get more rowdy.**  
2 **They can get more cocky. They can get just offensive.**  
3 **And I raised the concern of how if we sell liquor, how**  
4 **is that going to be controlled so that the lifeguards**  
5 **essentially can focus on their main task at hand?**  
6 MR. CAMPBELL: Move to strike as  
7 nonresponsive and volunteered.  
8 BY MR. CAMPBELL:  
9 Q. My question specifically dealt with your  
10 statement that your lifeguards could, quote, hardly  
11 deal with sober persons.  
12 Please detail for me all that you meant in  
13 that and the circumstances under which you meant it  
14 besides the weight issue.  
15 **A. Okay. Well, the weight issue was my, my**  
16 **primary concern. I, I can try to think if there is**  
17 **another one, but I was describing the behavior of**  
18 **people who drink. Many of us grown adults can't deal**  
19 **with people who drink. I don't think 18-year-old,**  
20 **20-year-old lifeguards can deal with them any better.**  
21 **And that's my point that I was raising. I didn't have**  
22 **a specific other, item other than a concern.**  
23 Q. But those were the words that you used,  
24 correct?  
25 **A. Yes, those are words that I used. And**

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1 **above that, I said:**  
2 **"It scares the shit out of me for**  
3 **liability, slips, trips, stumbles, falls,**  
4 **wave pool exhaustion, increased argumentative**  
5 **attitude with drunken persons."**  
6 Q. In the operations of the park, correct?  
7 **A. Well, the people who are drinking, yes,**  
8 **they are in the park and we have to manage them, we**  
9 **have more liability.**  
10 Q. Yeah, that's what operations is all about,  
11 right?  
12 **A. Well, operations is operating the park.**  
13 Q. Right. And that's what you're talking  
14 about there, correct?  
15 **A. I'm not -- if you're asking if I'm**  
16 **operating the park, no, I'm as a management.**  
17 Q. You are talking about operations there,  
18 right?  
19 **A. As a management committee I'm asking our**  
20 **operations personnel how are they going to handle it.**  
21 Q. No, you aren't. You directed somebody  
22 from R&O to actually go to Wet 'N Wild, didn't you?  
23 You did more than that.  
24 **A. No.**  
25 Q. You're not asking, you actually directed.



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1     **A. Well, somebody from R&O is R&O**  
2 **Construction.**  
3     Q. Please, sir, stop interrupting.  
4     **A. Okay.**  
5         MR. GORMLEY: He is not interrupting you.  
6         **THE WITNESS: I'm sorry.**  
7         MR. CAMPBELL: I would like, I would like  
8 a clip of that right there --  
9         MR. GORMLEY: Yeah.  
10         MR. CAMPBELL: -- so we can all have an  
11 understanding of what is taking place here.  
12         MR. GORMLEY: Oh, yeah.  
13         **THE WITNESS: I'm sorry for cutting you**  
14 **off.**  
15 BY MR. CAMPBELL:  
16     Q. That's okay. That's okay. I just want a  
17 clear record.  
18     **A. Okay.**  
19     Q. So you actually sent someone from R&O to  
20 Wet 'N Wild, correct?  
21     **A. Yes.**  
22     Q. You did that?  
23     **A. Yes, I did.**  
24     Q. All right. And that was related to their  
25 operations, correct?

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1     **A. To see how their lifeguards interacted**  
2 **with customers.**  
3     Q. And that you could thereafter use that  
4 information at Cowabunga Bay, correct?  
5     **A. Ryan Thompson was our superintendent**  
6 **brought that information back to exchange with our**  
7 **operations people to see what, if anything, can we**  
8 **learn from it.**  
9     Q. Thank you.  
10         MR. CAMPBELL: Next in the order, please.  
11         MR. MIRKOVICH: 46, please.  
12         (Deposition Exhibit 46 marked.)  
13 BY MR. CAMPBELL:  
14     Q. When is the last time you saw that  
15 document?  
16     **A. Can you give me just one sec.**  
17     Q. Sure.  
18         This is Exhibit 46 and it too is an  
19 aggregate exhibit.  
20     **A. Okay. This is the Wet 'N Wild visit.**  
21 **Maybe a couple years.**  
22     Q. Okay. And this is the Wet 'N Wild recon  
23 visit of 7/10/14?  
24     **A. Yes, it is.**  
25     Q. And this is Ryan Thompson reporting back

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1 you on your directive that he go to Wet 'N Wild,  
2 correct?  
3     **A. Yes, that I asked him to go there.**  
4     Q. Okay. And one of the things he reports  
5 back on is the wave pool, correct?  
6     **A. Yes. He, he reports somewhere about the**  
7 **wave pool.**  
8     Q. And he reports on safety signs for each  
9 ride, correct?  
10     **A. I believe so.**  
11     Q. He also reports on something known as the  
12 color-coded wristband system, correct?  
13     **A. Yes, he does.**  
14     Q. And what is the color-coded wristband  
15 system?  
16     **A. My -- can I read it again?**  
17     Q. Sure.  
18     **A. Just so I'm accurate in what it is.**  
19 **If you know where it describes it in here,**  
20 **I can --**  
21     Q. "Most rides and attractions..."  
22     **A. Get --**  
23     Q. "Most rides and attractions have a  
24 color coded wristband system. Certain  
25 colors are only allowed on certain rides. And

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1 some colors are only allowed if they are  
2 wearing a life jacket (wave pool and  
3 lazy river)."  
4         Do you see that?  
5     **A. I do see that.**  
6     Q. Okay. And this again, as you stated  
7 earlier, is with respect to the operations that are  
8 being conducted at Wet 'N Wild, correct?  
9     **A. That was their approach, yes.**  
10     Q. Right.  
11         And the purpose of that is to see if that  
12 could be employed as an operational approach at  
13 Cowabunga Bay, correct?  
14     **A. When I asked Ryan to go over and his -- he**  
15 **was going over to get the feel of --**  
16     Q. Can I stop you there. The answer is  
17 either it is correct or it is not correct. And I'll  
18 allow you to explain it afterwards. Is that correct?  
19     **A. Will you restate the question.**  
20         MR. CAMPBELL: Sure. Kindly do so for the  
21 gentleman.  
22         (Record read as follows:)  
23         "Q. And the purpose of that is to see  
24 if that could be employed as an operational  
25 approach at Cowabunga Bay, correct?"

<p style="text-align: right;">page 206</p> <p>1       <b>THE WITNESS: When you say the purpose of</b> 2 <b>his visit was to see how lifeguards interacted with</b> 3 <b>our, with their customers, the additional information</b> 4 <b>that he brought back was a very detailed summary that</b> 5 <b>we did share with our operations team.</b> 6 BY MR. CAMPBELL: 7     Q.   And that detailed summary included a 8 scheme of color-coding wristbands, correct? 9     <b>A.   That's an option that Wet 'N Wild</b> 10 <b>employed. I was actually discussed and told by one of</b> 11 <b>our lifeguard supervisors in a meeting that they</b> 12 <b>didn't feel that having to look at a colored wristband</b> 13 <b>while somebody is in a wave pool would be good for</b> 14 <b>them, they thought it would cause additional stress.</b> 15     Q.   Who told you that? 16     <b>A.   One of the lifeguard supervisors.</b> 17     Q.   When? 18     <b>A.   I don't remember the date. It's back when</b> 19 <b>we distributed this out and was talking with --</b> 20     Q.   So it would have been on or about July of 21 2014? 22     <b>A.   I think, I think it was later than that.</b> 23     Q.   When? 24     <b>A.   I don't remember when I had my, one of my</b> 25 <b>visits down and we were doing the slide. It was</b></p>	<p style="text-align: right;">page 208</p> <p>1 right? 2     <b>A.   Yes.</b> 3     Q.   Okay. I'm talk -- I want to just stick to 4 what we have in front of us, okay, at this point? 5     <b>A.   Okay. I was just going to share why they</b> 6 <b>said it's not a good idea.</b> 7         MR. MIRKOVICH: 47. 8         (Deposition Exhibit 47 marked.) 9 BY MR. CAMPBELL: 10    Q.   You have before you yet another one of 11 your emails to Shane Huish, correct? 12    <b>A.   Yes.</b> 13    Q.   Dated 7/15 of '14. So July 15th, correct? 14    <b>A.   That is correct.</b> 15    Q.   You styled it "Critical items for 16 Cowabunga," correct? 17    <b>A.   That is correct.</b> 18    Q.   Okay. You had walked the park that day 19 and you wanted to comment on what you saw with respect 20 to the operations that occurred, correct? 21    <b>A.   Can you give me a second to review it,</b> 22 <b>please.</b> 23    Q.   Sure. 24         (Brief pause in the proceedings.) 25         <b>THE WITNESS: Okay. What was your</b></p>
<p style="text-align: right;">page 207</p> <p>1 <b>probably -- if we're in '14, I think it's back to when</b> 2 <b>I'm working on the blue Surf Safari slide which is</b> 3 <b>fall, fall of 2014 into spring of 2015.</b> 4     Q.   Okay. Before my client drowned in your 5 pool, right? 6     <b>A.   Yes.</b> 7     Q.   Okay. Now, you said that this meeting 8 that took place where lifeguards were distributed this 9 document, who distributed it to them? 10    <b>A.   I don't, I don't -- apologize. I didn't</b> 11 <b>say the document was distributed to lifeguards. There</b> 12 <b>was a discussion about having colored wristbands worn</b> 13 <b>by persons and a discussion came up about in a wave</b> 14 <b>pool and this lifeguard supervisor, who was a girl --</b> 15    Q.   Who you don't know the name of? 16    <b>A.   It was a girl. I don't, I don't remember</b> 17 <b>her name.</b> 18    Q.   There is no memorialization of this in any 19 of our records. 20    <b>A.   No.</b> 21    Q.   You didn't memorialize this? 22    <b>A.   No.</b> 23    Q.   So what you are telling me is based upon 24 your recollection, as opposed to any materials that 25 you can present to me that confirm this in any way,</p>	<p style="text-align: right;">page 209</p> <p>1 <b>question again?</b> 2         MR. CAMPBELL: Repeat the question to him, 3 please. 4         (Record read as follows:) 5         "Q. You had walked the park that day 6 and you wanted to comment on what you saw 7 with respect to the operations that occurred, 8 correct?" 9         <b>THE WITNESS: Yes. My observation of</b> 10 <b>walking the park, that is correct, any things that I</b> 11 <b>think the operations team can improve and --</b> 12 BY MR. CAMPBELL: 13    Q.   And one of them you actually styled in 14 upper case letters bold, "Urgent!" 15    <b>A.   Correct.</b> 16    Q.   No. 4, correct? 17    <b>A.   Correct.</b> 18    Q.   Saying: 19         "Please, please get all," again upper 20 case bold, "signs for maximum weights posted 21 ASAP." 22         Correct? 23    <b>A.   Correct.</b> 24    Q.   Okay. Going to 3, you also talk about the 25 fact that you didn't want certain lifeguards</p>

<p style="text-align: right;">page 210</p> <p>1 distracted and you certainly didn't want to have to 2 pay for another lifeguard, do you see that? 3 <b>A. You're on item 3?</b> 4 Q. Yep. 5 <b>A. Let me find where you're at.</b> 6 <b>Okay.</b> 7 Q. Correct? 8 <b>A. I'm reading it, sorry.</b> 9 <b>Yes, so what I'm talking about is having a</b> 10 <b>lifeguard stationed at the bottom.</b> 11 Q. Correct? Is the answer to my question 12 correct? 13 <b>A. What is your question again?</b> 14 MR. CAMPBELL: Repeat it for him, please. 15 (Record read as follows:) 16 "Q. Going to 3, you also talk about 17 the fact that you didn't want certain 18 lifeguards distracted and you certainly 19 didn't want to have to pay for another 20 lifeguard, do you see that?" 21 "A. You're on item 3?" 22 "Q. Yep. 23 "A. Let me find where you're at. 24 "Okay. 25 "Q. Correct?"</p>	<p style="text-align: right;">page 212</p> <p>1 MR. GORMLEY: Objection. It's taken out 2 of context. 3 You already explained that. And he's 4 asked the question now three times. 5 BY MR. CAMPBELL: 6 Q. I'm asking you again. Are those your 7 words or are they somebody else's words? 8 <b>A. Are you -- I'm sorry, I didn't want to cut</b> 9 <b>you off.</b> 10 Q. That's the question. 11 <b>A. All of the words in here are my words --</b> 12 Q. Thank you. 13 <b>A. -- and they should be taken in full</b> 14 <b>context of everything written.</b> 15 Q. Thank you. 16 Did you ever become aware of the fact that 17 the lack of proper lifeguard coverage at Cowabunga Bay 18 resulted in restaurant employees, restaurant service 19 employees being assigned the duties of lifeguards on 20 particular days when there were shortages? 21 MR. SMITH: Facts not in evidence. 22 <b>THE WITNESS: No, I've never heard that.</b> 23 BY MR. CAMPBELL: 24 Q. No one has ever brought that to your 25 attention at any time --</p>
<p style="text-align: right;">page 211</p> <p>1 <b>THE WITNESS: Okay. I see that, and I see</b> 2 <b>you're taking about 10 words out of a full paragraph</b> 3 <b>of what is being talked about.</b> 4 <b>So to answer the question, I'm observing</b> 5 <b>an area that I think we need to do something to</b> 6 <b>improve safety at, and I'm saying we need to do</b> 7 <b>something. I don't want to spend money if we don't</b> 8 <b>need to. But we need to do something because I also</b> 9 <b>say I don't want to have an injury either.</b> 10 BY MR. CAMPBELL: 11 Q. The words that I expressed to you are in 12 fact your words that are documented at No. 3, are they 13 not? 14 <b>A. They are, but I don't think it's fair to</b> 15 <b>take the context of taking part of one sentence,</b> 16 <b>and --</b> 17 Q. I'm simply asking if you used those words, 18 if they are your words? That's all I'm asking. 19 MR. GORMLEY: The witness has the right to 20 explain. 21 And do explain. 22 BY MR. CAMPBELL: 23 Q. That's all I'm asking, whether those are 24 your words or were those words that were created by 25 somebody else?</p>	<p style="text-align: right;">page 213</p> <p>1 <b>A. Not that I recall.</b> 2 Q. -- under any circumstances? 3 <b>A. Not that I recall.</b> 4 Q. Okay. 5 MR. CAMPBELL: Next in order. 6 MR. MIRKOVICH: 48, please. 7 (Deposition Exhibit 48 marked.) 8 BY MR. CAMPBELL: 9 Q. Exhibit No. 48. This again is a 10 compilation. Exhibit No. 48 you will see is from you 11 on 8/15, on August the 15th, 2014, it's has an 12 attachment of a progress report; is that correct? 13 <b>A. Yes, it does.</b> 14 Q. And who created this progress report? 15 <b>A. I believe Scott Huish.</b> 16 Q. And who was it presented to? 17 <b>A. Well, it's emailed out to myself, Orluff,</b> 18 <b>Craig, Shane, Tom, Craig, and Charlie.</b> 19 Q. And -- 20 <b>A. Actually -- yeah, that's it. I'm sorry.</b> 21 Q. Okay. And could you turn to the second 22 page of it. One of the subject matters is the wave 23 pool; is that correct? 24 <b>A. Yes, it is.</b> 25 MR. CAMPBELL: Next in order, please.</p>

<p style="text-align: right;">page 214</p> <p>1 MR. MIRKOVICH: 49, please. 2 (Deposition Exhibit 49 marked.) 3 BY MR. CAMPBELL: 4 Q. Exhibit No. 49 is now in front of you. 5 This is an email of 9/17 of 2014 from you, correct? 6 <b>A. Yes, it is.</b> 7 Q. To who? 8 <b>A. Well, this, this shows that it's going to</b> 9 <b>Orluff.</b> 10 Q. Okay. And the subject is? 11 <b>A. "Cowabunga owner meeting request."</b> 12 Q. It states: 13 "All, I would like to set up a date in 14 mid October that we can get together and go 15 over the park. Discuss financials, 16 successes, things of change, how to pay for 17 it, cost overruns, tower 3 and other 18 challenges yet to address." 19 Is that correct? 20 <b>A. That's correct.</b> 21 Q. What was the purpose of having, of sending 22 this out? 23 <b>A. To set up a management committee meeting.</b> 24 Q. Okay. To discuss all of those items, 25 correct?</p>	<p style="text-align: right;">page 216</p> <p>1 <b>A. Correct.</b> 2 Q. 10/30/14, right? 3 <b>A. Correct.</b> 4 Q. Again, these are your words, right? 5 <b>A. Yes, it is.</b> 6 Q. Okay. Along with an attachment, Cowabunga 7 owner meeting agenda, right? 8 <b>A. Yes.</b> 9 Q. And that's an agenda that you recreated? 10 <b>A. Yes.</b> 11 Q. Okay. It states: 12 "All, After speaking with Scott and 13 Craig, we have changed the date for the 14 Cowabunga owner meeting to Thursday, 15 October 30th. This meeting will start at 16 8:00 a.m. and go until about 5:00 p.m. I am 17 attaching an agenda of items to discuss. 18 Please review and comment, and Scott and 19 Shane, please review which of these items 20 relate to you. If we all bring the 21 applicable reports and even email them out 22 this week to all parties, this meeting will 23 be more efficient. I (sic) want to add 24 anything, please let me know. I have also 25 attached a copy of the risk analysis audit to</p>
<p style="text-align: right;">page 215</p> <p>1 <b>A. Well, as I said, as I'd said earlier, I</b> 2 <b>would send out oftentimes of: Here is some things I</b> 3 <b>want to address. And then when we got closer to</b> 4 <b>having a meeting other items would get added.</b> 5 <b>So, yes, this was the start of setting up</b> 6 <b>a meeting with items like that.</b> 7 Q. Correct, yes? 8 <b>A. Yes.</b> 9 Q. Thank you. 10 MR. CAMPBELL: Next in the order, please. 11 MR. MIRKOVICH: Exhibit 50. 12 (Deposition Exhibit 50 marked.) 13 BY MR. CAMPBELL: 14 Q. Okay. And, in fact, this is a subsequent 15 email on that matter, correct? It is from you, Slade 16 Opheikens, correct? 17 <b>A. Yes.</b> 18 Q. All right. And, again, this is going out 19 to Scott, and Shane, and others, correct? 20 <b>A. Correct.</b> 21 Q. There is a specific cc to Mr. Welch, 22 correct? 23 <b>A. Correct.</b> 24 Q. All right. And the subject is "Cowabunga 25 owner meeting agenda."</p>	<p style="text-align: right;">page 217</p> <p>1 discuss and a list of items by Mark Lee to 2 discuss." 3 Who is Mark Lee? 4 <b>A. Just one clarification on when you read</b> 5 <b>it. It's "If you want to add anything," small</b> 6 <b>clarification.</b> 7 <b>And then Mark Lee was our superintendent</b> 8 <b>who oversaw the construction of the site.</b> 9 Q. Thank you. 10 <b>A. And the risk analysis is that Haas &amp;</b> 11 <b>Wilkerson audit had been done that I attached.</b> 12 Q. Okay. Could you go to the next page. 13 This apparently was the rescheduled meeting, right, 14 rescheduled to October 30th and 31st? 15 <b>A. Yes, it occurred on October 30th.</b> 16 Q. All right. "Items to Discuss: Park 17 financial performance," correct? 18 <b>A. Correct.</b> 19 Q. Okay. "Park financial forecast." Were 20 you responsible for any of those? 21 <b>A. No, that's -- usually those are the</b> 22 <b>documents that Scott would prepare the budgets and the</b> 23 <b>costs and that would be the information they would</b> 24 <b>provide to present to us.</b> 25 Q. Okay. But you prepared this document; is</p>

<p style="text-align: right;">page 218</p> <p>1 that correct?</p> <p>2 <b>A. Yes, I -- the agenda.</b></p> <p>3 Q. Yes.</p> <p>4 <b>A. Yes, I did.</b></p> <p>5 Q. Same document we have been talking about</p> <p>6 here for the last few minutes. You prepared this,</p> <p>7 correct?</p> <p>8 <b>A. Yes, I did.</b></p> <p>9 Q. Okay. Go down to where it says, "Discuss</p> <p>10 how costs to be paid will/can be funded."</p> <p>11 Do you see that?</p> <p>12 <b>A. Yes.</b></p> <p>13 Q. Why is that information blacked out? Why</p> <p>14 is it redacted?</p> <p>15 <b>A. I, I didn't black it out. I don't know</b></p> <p>16 <b>why it's blacked out on this. You have to ask</b></p> <p>17 <b>probably the, or counsel that provided the</b></p> <p>18 <b>information.</b></p> <p>19 Q. Okay. Go back up to where it says "Park</p> <p>20 financial performance."</p> <p>21 <b>A. Okay.</b></p> <p>22 Q. It says:</p> <p>23 "Identify fixed costs and variable</p> <p>24 costs to determine breakdown (sic) analysis."</p> <p>25 What is a fixed cost?</p>	<p style="text-align: right;">page 220</p> <p>1 <b>A. In my opinion, that, that would be a large</b></p> <p>2 <b>component of it --</b></p> <p>3 Q. Right.</p> <p>4 <b>A. -- because there are a lot of lifeguards</b></p> <p>5 <b>compared to other positions at the park. But I don't</b></p> <p>6 <b>know as a percentage are lifeguards 70 percent or</b></p> <p>7 <b>55 percent, I don't know.</b></p> <p>8 Q. But they are the majority of the labor</p> <p>9 component?</p> <p>10 <b>A. I would guess --</b></p> <p>11 MR. GORMLEY: Object. Lack of foundation.</p> <p>12 Go ahead.</p> <p>13 <b>THE WITNESS: I would guess that they are.</b></p> <p>14 BY MR. CAMPBELL:</p> <p>15 Q. And when you say, "I would guess," that's</p> <p>16 because you dealt with that issue, that variable cost</p> <p>17 issue, correct, lifeguards?</p> <p>18 <b>A. Well, no. It's because as I look at the</b></p> <p>19 <b>number of bodies at the park, I didn't go into the</b></p> <p>20 <b>kitchen and count how many people are serving and how</b></p> <p>21 <b>many staff are in the offices, but my impression --</b></p> <p>22 Q. No, you've got schedules for that, right?</p> <p>23 <b>A. Well, no, I don't review the schedules.</b></p> <p>24 Q. You've got numbers that you can look at,</p> <p>25 correct?</p>
<p style="text-align: right;">page 219</p> <p>1 <b>A. A fixed cost is a cost that you have</b></p> <p>2 <b>regardless of whether the park is, is open or not</b></p> <p>3 <b>open. For instance, a bank loan that you are going to</b></p> <p>4 <b>have. Variable costs is when you're open, you'll more</b></p> <p>5 <b>likely be using more power, you'll be hopefully</b></p> <p>6 <b>consuming more food. You will have labor. You will</b></p> <p>7 <b>have variable costs.</b></p> <p>8 Q. So lifeguards are a variable cost,</p> <p>9 correct?</p> <p>10 <b>A. That would be correct.</b></p> <p>11 Q. Is, is the -- in terms of the labor as a</p> <p>12 variable cost as a whole and lifeguards being a</p> <p>13 component of that variable expense, are -- do</p> <p>14 lifeguards comprise the largest budgetary component of</p> <p>15 the fixed -- of the labor component?</p> <p>16 MR. GORMLEY: Object on lack of</p> <p>17 foundation.</p> <p>18 Go ahead.</p> <p>19 <b>THE WITNESS: I didn't ever see it broke</b></p> <p>20 <b>out lifeguards separate than all labor. If -- so I</b></p> <p>21 <b>haven't seen it broken out that way.</b></p> <p>22 BY MR. CAMPBELL:</p> <p>23 Q. Do you know?</p> <p>24 <b>A. Do I know if it cost more?</b></p> <p>25 Q. Yes.</p>	<p style="text-align: right;">page 221</p> <p>1 <b>A. Well, again, the numbers that I would see</b></p> <p>2 <b>when we would get reports, labor I believe was one</b></p> <p>3 <b>lump sum item.</b></p> <p>4 Q. Okay.</p> <p>5 <b>A. I don't recall seeing it broke out.</b></p> <p>6 Q. And you know that the vast majority of the</p> <p>7 labor is lifeguards as opposed to fry cooks, correct?</p> <p>8 MR. GORMLEY: Objection. Misstates his</p> <p>9 testimony. He's already testified he doesn't know the</p> <p>10 percentage.</p> <p>11 MR. CAMPBELL: Okay. And I'd like this</p> <p>12 clip as well, please.</p> <p>13 BY MR. CAMPBELL:</p> <p>14 Q. Go ahead.</p> <p>15 MR. GORMLEY: One for me too.</p> <p>16 <b>THE WITNESS: I --</b></p> <p>17 MR. CAMPBELL: And make sure you charge</p> <p>18 him for it, not me.</p> <p>19 <b>THE WITNESS: I don't know the ratio, sir,</b></p> <p>20 <b>of how many, that's --</b></p> <p>21 BY MR. CAMPBELL:</p> <p>22 Q. I didn't ask you the ratio.</p> <p>23 <b>A. I know, but I'm saying I don't know -- my</b></p> <p>24 <b>gut --</b></p> <p>25 Q. Are their more lifeguards than fry cooks?</p>

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1     **A. I believe so.**  
2     Q. Are there more lifeguards than busboys,  
3 busgirls?  
4     **A. I would assume.**  
5     Q. Okay. More lifeguards than ticket takers?  
6     **A. I would assume so. But when you add**  
7 **busboys and people that are running food back and**  
8 **forth and the ticket takers and the managers in the**  
9 **offices, I don't know what the total difference is.**  
10    Q. Okay. Are there video cameras installed  
11 at Cowabunga Bay?  
12    **A. I'm not aware of video cameras there.**  
13    Q. Are there video cameras over any of the,  
14 the cash registers?  
15    **A. I don't know.**  
16    Q. Are video cameras present anywhere in the  
17 park?  
18    **A. I don't know.**  
19    Q. Okay.  
20        With respect to the satisfaction of debt  
21 that the park had, was there a balloon payment due and  
22 owing by any entity --  
23    **A. So --**  
24    Q. You got to wait until I'm --  
25    **A. I'm sorry. You paused and --**

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1     Q. -- at the end of the initial season's  
2 operations?  
3     **A. The -- I believe there was a balloon**  
4 **payment. I don't recall if it's the first two years**  
5 **or the first three years. But I think it's in**  
6 **Septemberish timeframe, whether that's when it was**  
7 **required to be paid or if that's when we were paying**  
8 **it. I just don't know if it's September or December.**  
9 **But, yes, there was a balloon payment.**  
10    Q. Was that balloon payment made?  
11    **A. Yes, it was.**  
12    Q. And was that balloon payment approximately  
13 a couple hundred thousand dollars?  
14    **A. No, so -- not on the exact --**  
15    Q. Is the answer no?  
16    **A. Well, it's more than a couple hundred.**  
17    Q. Okay. How much was it?  
18    **A. I believe the first two years it was**  
19 **approximately 700,000. And then I believe it reduced**  
20 **in year three. I may have that, that number off.**  
21    Q. You do.  
22    **A. I'm sorry.**  
23    Q. I think the first year was 200,000, wasn't  
24 it?  
25    **A. I'm sorry, I don't remember. Maybe it was**

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1 **year two and three went up.**  
2     Q. And the next year was 700,000?  
3     **A. Okay.**  
4     Q. Correct?  
5     **A. Okay.**  
6     Q. And there was a shortfall the next year,  
7 was there not?  
8     **A. I don't recall a -- a shortfall.**  
9     Q. Was there ever a shortfall on the payments  
10 of any of the balloon payments?  
11    **A. I don't believe so.**  
12    Q. Okay. Could you turn to the last page.  
13    **A. Which attachment?**  
14    Q. Of the exhibit you presently have in front  
15 of you.  
16        MR. GORMLEY: 50.  
17        **THE WITNESS: 50?**  
18 BY MR. CAMPBELL:  
19    Q. Can you please explain to me then based  
20 upon your last answers your statement as follows:  
21        "Scott projected approximately a  
22 600,000 shortfall on bank loan."  
23    **A. I don't. I don't recall what it's in**  
24 **relation to. If Scott is doing a budget. I don't**  
25 **know that that's in regards to a balloon payment or if**

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1 **that's a year end as he is doing budget forecast, if**  
2 **he is saying this is what could be. So we have to**  
3 **meet to go through and say, okay, where are we at or**  
4 **does it require an additional capital contribution.**  
5     Q. Well, the reason I'm asking you that  
6 question, these are your words.  
7     **A. Correct.**  
8     Q. Okay.  
9     **A. Okay.**  
10    Q. You also put the words:  
11        "Is this the correct amount. Slade  
12 will provide shortfall on bank loan to cover  
13 construction cost overruns."  
14        Correct?  
15    **A. Yes.**  
16    Q. Okay. Thank you.  
17    **A. And --**  
18        MR. CAMPBELL: No pending question.  
19        MR. MIRKOVICH: 51, please.  
20        **THE WITNESS: Okay.**  
21        (Deposition Exhibit 51 marked.)  
22 BY MR. CAMPBELL:  
23    Q. Tell me what 51 is, please.  
24    **A. It says it's a Cowabunga conference call.**  
25 **Looks like a meeting or an email from Scott Huish to**

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1 several of us.  
2 Q. Okay. And you were a participant?  
3 A. What is the date? March 10th, 2015.  
4 Discussed budget and ownership percentages. I was  
5 probably a participant.  
6 Q. Okay. And this was to discuss budget that  
7 was given to Bank of Utah, correct?  
8 A. That's one of the items.  
9 Q. And the budget would be based upon  
10 projections with respect to both fixed and variable  
11 costs, correct?  
12 A. I would assume so.  
13 Q. And there had been a budget that had  
14 previously been submitted on or about December 2014 to  
15 the bank, correct?  
16 A. I don't know. Okay. "Draft given to Bank  
17 of Utah in December." So, yes, it's referencing  
18 something given to Bank of Utah.  
19 Q. Thank you.  
20 That was the budget, correct, that's what  
21 it's referencing?  
22 A. I believe so.  
23 Q. Thank you.  
24 Next in order, please.  
25 MR. MIRKOVICH: 52.

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1 (Deposition Exhibit 52 marked.)  
2 BY MR. CAMPBELL:  
3 Q. You'll see that this is a compilation.  
4 The document indicates that you were responding to an  
5 email that you actually get from Shane Huish, do you  
6 see?  
7 A. Yes.  
8 Q. Okay. And the date of this is a  
9 March 31st, 2015 email from Shane Huish to you,  
10 correct?  
11 A. Yes. I don't know if it's just to me  
12 or --  
13 Q. And then you thereafter respond the  
14 following day, April 1, correct?  
15 A. That is correct.  
16 Q. Okay. Shane's email to you at 9:06 p.m.  
17 says:  
18 "Hello. It keeps getting better.  
19 Another record day (and it still is not over,  
20 online sales keep coming in). Total  
21 attendance today was 1,942, and sales so far  
22 are at \$75,287. The best news of the day is,  
23 I was able to persuade the Southern Nevada  
24 Health District..."  
25 That's what NSHD is, correct?

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1 A. Correct, yes.  
2 Q. "... to revise the codes, to revise  
3 the codes which allows us to determine the  
4 best number of lifeguards to operate the park.  
5 We are no longer required to staff lifeguards  
6 based on square footage of pools or the  
7 number of slides. We will be able to submit  
8 a revised plan allowing us to operate  
9 attractions based on our needs and not some  
10 stupid code."  
11 Do you see that?  
12 A. Yes, I do.  
13 Q. All right. Do you believe that that  
14 actually occurred?  
15 A. I believe --  
16 MR. SMITH: Objection. Speculation.  
17 THE WITNESS: Okay. You asked me what  
18 occurred. The meeting occurred or that which --  
19 MR. CAMPBELL: I'll withdraw.  
20 BY MR. CAMPBELL:  
21 Q. Do you believe, did you believe at the  
22 time that the representations that were made by Shane  
23 Huish to you with respect to the lifeguard issue were  
24 true and correct?  
25 A. I believe that he had received, as you

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1 read through this, that subject to him resubmitting a  
2 revised plan, he would be able to get approval to  
3 reduce the number of lifeguards. Because that is what  
4 he says in this. He's saying I will have it, I need  
5 to submit.  
6 "we will be able to submit a revised  
7 plan allowing us to operate attractions..."  
8 Q. But it's more particularized than that.  
9 It says not only to reduce the number of lifeguards,  
10 but it says a revised plan, quote:  
11 "Allowing us to operate attractions  
12 based on our needs."  
13 Correct?  
14 A. He does say that.  
15 Q. Okay.  
16 Did you ever question that at any time in  
17 any form, in any capacity?  
18 A. I did not question it because he needed to  
19 submit a revised plan to get approval.  
20 Q. There was never any statement by the  
21 Nevada -- or by the Southern Nevada, I should say,  
22 Health District to the effect that you could operate a  
23 lifeguard plan based upon your needs, correct?  
24 MR. SMITH: Facts not in evidence.  
25 THE WITNESS: I, I haven't seen anything

<p style="text-align: right;">page 230</p> <p><b>1 that, that talks about operating on our needs.</b></p> <p><b>2 BY MR. CAMPBELL:</b></p> <p><b>3 Q. Correct.</b></p> <p><b>4 A. I know what Shane is referring to.</b></p> <p><b>5 Q. I'm not asking you --</b></p> <p><b>6 A. It's word play.</b></p> <p><b>7 Q. I'm not asking you about word play or</b></p> <p><b>8 anything else.</b></p> <p><b>9 A. Okay.</b></p> <p><b>10 Q. I'm asking a very simple question, and I</b></p> <p><b>11 think you've answered it.</b></p> <p><b>12 You've never seen anything from the</b></p> <p><b>13 Southern Nevada Health District that says you're</b></p> <p><b>14 allowed to operate attractions based on your needs?</b></p> <p><b>15 A. No, I have not seen --</b></p> <p><b>16 Q. Thank you.</b></p> <p><b>17 A. -- a document that states that.</b></p> <p><b>18 Q. Okay. What did you mean when you said how</b></p> <p><b>19 that he deserved:</b></p> <p><b>20 "Bigger congratulations on getting the</b></p> <p><b>21 lifeguard count down"?</b></p> <p><b>22 A. I was aware that Shane had been working</b></p> <p><b>23 with a committee. My understanding was a group of</b></p> <p><b>24 people, including Southern Nevada Health Department,</b></p> <p><b>25 for some time. And that the Southern Nevada Health</b></p>	<p style="text-align: right;">page 232</p> <p><b>1 question.</b></p> <p><b>2 MR. CAMPBELL: Kindly again capture that</b></p> <p><b>3 one for me.</b></p> <p><b>4 MR. GORMLEY: Me too.</b></p> <p><b>5 BY MR. CAMPBELL:</b></p> <p><b>6 Q. But I'm happy to allow you to supplement</b></p> <p><b>7 that if you think it needs to be.</b></p> <p><b>8 A. Okay.</b></p> <p><b>9 Q. And what's -- so what is it that needs to</b></p> <p><b>10 be supplemented?</b></p> <p><b>11 A. The -- you had asked me what did I mean by</b></p> <p><b>12 "Even bigger congratulations on getting the lifeguard</b></p> <p><b>13 count down."</b></p> <p><b>14 So I was explaining, I understand that</b></p> <p><b>15 Shane had been working on a committee with others,</b></p> <p><b>16 including the Southern Nevada Health Department, to</b></p> <p><b>17 get I believe it's a regulation, I don't know if code</b></p> <p><b>18 is the correct word, to get the regulation more in</b></p> <p><b>19 line with the national standard. Because I had heard</b></p> <p><b>20 Shane and others felt like that was a safer approach</b></p> <p><b>21 to do a, I believe it was a response time versus a how</b></p> <p><b>22 many square feet of surface area of water. And he had</b></p> <p><b>23 been working on that.</b></p> <p><b>24 And there were opinions out there that</b></p> <p><b>25 that was a safer and more widely accepted approach.</b></p>
<p style="text-align: right;">page 231</p> <p><b>1 Department or whatever had a regulation that required</b></p> <p><b>2 more than normal as far as the national average is how</b></p> <p><b>3 I had it explained to me.</b></p> <p><b>4 Q. Was Wet 'N Wild operating under those same</b></p> <p><b>5 conditions?</b></p> <p><b>6 A. I don't know.</b></p> <p><b>7 Q. Did you ever ask anyone that?</b></p> <p><b>8 A. I don't, I don't recall asking.</b></p> <p><b>9 Q. Did you ever receive any information to</b></p> <p><b>10 the effect that Wet 'N Wild operated under the exact</b></p> <p><b>11 same terms and conditions? And when asked by your</b></p> <p><b>12 representatives, that is Cowabunga's representatives,</b></p> <p><b>13 as to why they didn't plan to seek a reduction, that</b></p> <p><b>14 they thought the optics of that would be bad in the</b></p> <p><b>15 event that there was a drowning?</b></p> <p><b>16 A. I, I was not aware of that, no sir. It --</b></p> <p><b>17 Q. All right.</b></p> <p><b>18 A. Can I finish your first question you had</b></p> <p><b>19 asked.</b></p> <p><b>20 Q. I think you already finished answering</b></p> <p><b>21 that.</b></p> <p><b>22 MR. GORMLEY: Finish answering, go ahead.</b></p> <p><b>23 MR. CAMPBELL: Wait a second. I am</b></p> <p><b>24 happy --</b></p> <p><b>25 MR. GORMLEY: Let him finish answering the</b></p>	<p style="text-align: right;">page 233</p> <p><b>1 And, as a matter of fact, today the health department</b></p> <p><b>2 actually issued a variance and that's the very plan</b></p> <p><b>3 that we are operating under is what he had been</b></p> <p><b>4 working to get approved.</b></p> <p><b>5 Q. Was that, was that a plan that it was</b></p> <p><b>6 operating on when my little client drowned in your</b></p> <p><b>7 pool?</b></p> <p><b>8 A. Unfortunately, I think Shane was operating</b></p> <p><b>9 thinking -- whether he was thinking he had approval or</b></p> <p><b>10 not, he did not have approval to operate by the health</b></p> <p><b>11 department or us as a management committee at the time</b></p> <p><b>12 of Leland's drowning.</b></p> <p><b>13 Q. The answer the question is no? You were</b></p> <p><b>14 not operating under any sort of --</b></p> <p><b>15 A. Not at the time.</b></p> <p><b>16 Q. -- revised plan?</b></p> <p><b>17 A. The answer is no, correct.</b></p> <p><b>18 Q. And, in fact, even, even though you did</b></p> <p><b>19 get a variance at one point, that variance did not</b></p> <p><b>20 permit you to operate that wave pool at any time under</b></p> <p><b>21 any circumstances with only three lifeguards?</b></p> <p><b>22 A. No, it did not.</b></p> <p><b>23 Q. Okay. Why was his persistence something</b></p> <p><b>24 that you felt you should congratulate him on?</b></p> <p><b>25 A. Because if, if that truly is a safer way</b></p>



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1 to operate a, a park, and it's what the national -- I  
2 mean, if 50 of 52 states are operating under a  
3 regulation that has been proven safer and Nevada is  
4 requiring something more, I think it's a good thing to  
5 move into a safer direction.  
6 Q. Was it an economic pressure point for  
7 Cowabunga Bay as to what their lifeguard expenses  
8 were?  
9 A. No, sir, it was -- we never talked about  
10 decreasing number of lifeguards due to a budgetary  
11 cost.  
12 MR. CAMPBELL: Okay.  
13 MR. MIRKOVICH: 53, please.  
14 (Deposition Exhibit 53 marked.)  
15 BY MR. CAMPBELL:  
16 Q. Now, this, Mr. Opheikens, is from you to  
17 Orluff and Charlie Auger, correct?  
18 A. Yes.  
19 Q. And, again, Charlie Auger is this chief  
20 financial officer, not of Cowabunga Bay, not of  
21 Double Ott, but of R&O Construction?  
22 A. Yes, but to clarify one thing. The way  
23 these are generated on our company server, there is  
24 likely a matching email that copies the other people  
25 on the management committee; because as they are

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1 produced, it only grabs people within R&O and on a  
2 separate it is typically outside. So just to clarify,  
3 there is likely more copied on that.  
4 Q. I would like you to answer the question.  
5 MR. CAMPBELL: Could you repeat the  
6 question.  
7 (Record read as follows:)  
8 "Q. And again, Charlie Auger is this  
9 chief financial officer not of Cowabunga Bay,  
10 not of Double Ott but of R&O Construction?"  
11 THE WITNESS: Charlie Auger is the CFO of  
12 R&O Construction, yes.  
13 BY MR. CAMPBELL:  
14 Q. Okay. Has -- does Charlie Auger get any  
15 compensation of any kind or type by Cowabunga Bay or  
16 Henderson Water Park or Double Ott for work he does in  
17 connection with Cowabunga Bay?  
18 A. I don't believe so, but he does do work  
19 for Double Ott. I don't know if he is compensated  
20 separately for that or not.  
21 Q. Okay. So as you sit here today, you can  
22 point me to no evidence that Charlie Auger, who is the  
23 CFO of R&O Construction, has ever received a dime of  
24 compensation from Cowabunga Bay or any of its  
25 associated entities, correct?

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1 A. I, I believe that's a true statement, he  
2 has not.  
3 Q. Okay.  
4 Okay. And, basically, these are, as you  
5 say, "notes from yesterday." And it has from Slade,  
6 you, at R&O Construction to Slade Opheikens, is that  
7 it?  
8 A. Where are you? Oh, down here.  
9 Q. Yeah.  
10 A. Yes.  
11 Q. You are sending it to yourself as well?  
12 A. Yes.  
13 Q. Okay. And the second bullet point that  
14 you're talking about was shade for the lifeguards.  
15 "Shane got two quotes, one at 15K and  
16 one at 45."  
17 Those are for the potential shades that  
18 could be installed on the towers of the, for the  
19 lifeguards to guard them against the sun?  
20 A. Yes.  
21 Q. Okay. What were the operational issues  
22 with respect to the lifeguards and their not having  
23 shade on the towers?  
24 A. The -- it gets hot up there. So this,  
25 this is April of 2015. So Shane had, he had presented

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1 two quotes, as it says. And when it says one at 15  
2 and one at 45 to do all three towers, he was  
3 presenting that for a request to the management  
4 committee to say: Can we add that as an item? And  
5 the issue was lifeguards are, that it gets hot. And  
6 at those higher, if I recall correctly, they are about  
7 60 feet in the air, the wind is little bit more  
8 havocal on.  
9 Q. The fourth bullet point deals with you  
10 getting pictures of umbrellas to possibly sell at the  
11 parks; is that correct?  
12 A. Yeah. And that was related to guests who  
13 may come in if they were -- because guests were also  
14 previously asking about getting additional shade for  
15 the park. So one of the options was there are  
16 umbrellas that we could supply for them.  
17 Q. The eighth bullet point or the fifth one  
18 from the bottom, you state:  
19 "Bank of Utah - when is the transition  
20 happening with the loan?"  
21 What transition are you speaking of there?  
22 A. Oh, fifth from this bottom, okay.  
23 Q. Bank of Utah.  
24 A. "When is the transition happening with  
25 the loan? Ask Spencer if he cares how the

<p style="text-align: right;">page 238</p> <p>1 loan payment is made." 2 So we were -- this is 2015. There was, I 3 don't know if covenant is the correct word. But when 4 the loan would transition from being a construction 5 loan to a I'm going to call it a long-term loan. 6 Q. Right. 7 A. And that was -- it was deemed going to 8 happen at the end of construction. With that third 9 tower, the Surf Safari still under construction until 10 this like April or May of 2015, it was a follow-up 11 item for me to get with Bank of Utah, because we were 12 still paying against that or billing against that to 13 say when did they make, when did they consider the 14 transition to start. 15 Q. The next bullet point that you have there 16 is: 17 "Insurance limits 2 million per 18 occurrence and 3 million umbrella." 19 Is that correct? 20 A. That's correct. 21 Q. Okay. You say: 22 "Insurance increased about 19,000 this 23 year and the rate is based on admissions but 24 it is also an unauditale rate." 25 A. Correct.</p>	<p style="text-align: right;">page 240</p> <p>1 the insurance certificates seemingly with respect to 2 liability and that those are going to be sent: 3 "...copies of insurance certificates 4 to R&amp;O office for our records." 5 Correct? 6 A. That is how it reads here. 7 Q. Right. 8 A. But again, we were still under 9 construction on the slide, so... 10 Q. But you understand that what we are 11 talking about there is, forget about construction of 12 the slide, liability, correct? 13 A. Well -- 14 Q. During operations, correct? 15 A. But it's also during construction. 16 Q. But during operations, correct? 17 A. Well, I might not be understanding your 18 question of -- 19 Q. Then I'll repeat it. Just let me know and 20 I'm happy to repeat it. 21 A. Okay. 22 Q. Okay. What you're talking about in 23 millions, in terms of limits of 2 million and 24 3 million umbrella, those particular, those particular 25 insurance premiums that are due are due in connection</p>
<p style="text-align: right;">page 239</p> <p>1 Q. Meaning you didn't have the opportunity to 2 go back and audit admissions and then seek a 3 reimbursement? 4 A. Just a little bit different. That they 5 gave us a fixed price for 19,000; and if our 6 attendance went up, they don't get to audit us. 7 Q. Okay. 8 A. It's not us auditing them, but them 9 auditing us for more. 10 Q. Okay. Now, you also say that: 11 "Scott will send out copies of 12 insurance certificates to R&amp;O for our 13 records." 14 Meaning, our records meaning R&amp;O's 15 records, correct? 16 A. Yes, it should be. I'm trying to think 17 why I would have R&amp;O or if that's why that slide is 18 still under construction if we're still being listed 19 as an additional insured, because we are still working 20 on that tower 3, if it's covered under builder's risk 21 or not. I don't remember that far back. 22 Q. Well, we are talking about -- if you look, 23 you are looking at limits of liability on operations? 24 A. Correct. 25 Q. Okay. And you follow that up again with</p>	<p style="text-align: right;">page 241</p> <p>1 with operations of the park? 2 A. That is correct. 3 Q. Thank you. 4 A. Now, the -- okay, there is not another 5 question. 6 Q. And those insurance certificates were ones 7 that contained the, that contained the unauditale 8 rate; is that correct? 9 A. The increase, yes. 10 Q. Okay. 11 A. So the quote we had that year included the 12 unauditale rate. 13 Q. Okay. And those certificates, those were 14 the certificates that you were speaking of in sending: 15 "...copies of the insurance 16 certificates to R&amp;O for our records." 17 Correct? 18 A. They may be. But it's a different bullet 19 point and I may be questioning builder's risk, I don't 20 recall, I'm sorry. 21 Q. Do you see anywhere in there where there 22 is any discussion at all about builder's risk? 23 A. No, but it's a separate bullet point 24 and -- 25 Q. The answer is no, you don't see anything</p>

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1 about construction or builder's risk or anything of  
2 that nature at all?  
3 **A. No, but if it's R&O Construction, we are**  
4 **there as a contractor actively working on site.**  
5 Q. Is the answer to my question no, there is  
6 no mention of construction or builder's risk?  
7 MR. GORMLEY: You can explain your answer.  
8 **THE WITNESS: There is not a mention of**  
9 **builder's risk in this individual bullet point.**  
10 BY MR. CAMPBELL:  
11 Q. Thank you.  
12 Will you go down to the third from the  
13 bottom:  
14 "Shane will send out weekly update on  
15 sales on Mondays."  
16 Sales of what? Of those advance tickets?  
17 **A. No. He had, Shane had talked about I**  
18 **think they were using a new tracking system that they**  
19 **would be able to give feedback on number of persons**  
20 **coming into the park on a weekly basis versus**  
21 **receiving it monthly.**  
22 Q. Okay. You then have:  
23 "Scott and Shane will forward what an  
24 operating cost per day is for a slow day  
25 versus a busy day."

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1 **A. Correct.**  
2 Q. Okay. What would, what would be the  
3 components for operating on a slow day versus a busy  
4 day?  
5 **A. When you, when you say the components,**  
6 **like people so --**  
7 Q. What would go into the calculus of what a  
8 slow day is as opposed to a busy day?  
9 **A. To me, the fixed costs are going to stay**  
10 **the same. The variable costs of labor and food and**  
11 **beverages and power and that may change.**  
12 Q. Okay.  
13 **A. And we're trying to get a feel of how does**  
14 **the two work.**  
15 Q. The next bullet point states:  
16 "R&O has not included their original  
17 fee in the ownership equity calculations and  
18 also has not included potential moneys to  
19 collect from Polin which Slade is trying to  
20 negotiate receiving."  
21 Detail for me what is meant, what you  
22 meant by that.  
23 **A. So the first half, the original fee is**  
24 **what we talked about earlier this morning as far as**  
25 **the construction management fee that we did not**

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1 **include in our owner equity calculation. I think**  
2 **we're saying it was 250,000 or so.**  
3 **The second is Polin is the slide**  
4 **manufacturer that we were working with on tower 3 that**  
5 **I've said we're still under construction on that**  
6 **trying to get it open in 2015.**  
7 Q. Um-hum.  
8 **A. And had been incurring costs due to some**  
9 **rework that Polin had caused. So we are tracking that**  
10 **cost and we are negotiating with Polin to find out how**  
11 **much are they going to reimburse us for.**  
12 Q. Who is Spencer at the Bank of Utah?  
13 **A. Spencer after -- he's I guess you call the**  
14 **bank loan officer.**  
15 Q. Okay. And who is Taft?  
16 **A. Taft Myer is more up on loan committee**  
17 **possibly. I think Spencer reports to Taft.**  
18 Q. Okay. Did Cowabunga Bay have its accounts  
19 at Wells Fargo?  
20 **A. I'm not sure.**  
21 Q. With respect to the calculus of what a  
22 slow day versus a busy day was, what form did those,  
23 those reports take? How are they reported to you?  
24 **A. I don't remember if they came in an Excel**  
25 **spreadsheet. It was -- I think what I was looking**

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1 **more for was to get an idea during your off-season**  
2 **months of is it worth opening on a Thursday or Friday.**  
3 Q. So my point is simply the form that they  
4 came in, and you believe it was an Excel spreadsheet?  
5 **A. I would assume --**  
6 Q. Okay.  
7 **A. -- but I'm not positive.**  
8 Q. Okay. Do you know what day my client  
9 drowned in your pool?  
10 **A. May 27th of 2015.**  
11 Q. I'm showing you --  
12 MR. CAMPBELL: Do we have -- what number  
13 do we have in front of him now?  
14 MR. MIRKOVICH: I believe 54.  
15 54, please.  
16 (Deposition Exhibit 54 marked.)  
17 BY MR. CAMPBELL:  
18 Q. When is the last time you saw Exhibit 54  
19 in any form?  
20 **A. Just a few minutes ago when you put it in**  
21 **front of me.**  
22 Q. And before that?  
23 **A. A couple years. This is the Wet 'N Wild**  
24 **recon visit.**  
25 Q. But this is a forwarding of the

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1 Wet 'N Wild recon visit, correct?  
2 **A. Yes. This is forwarded, yes.**  
3 Q. And what this is is from you,  
4 Mr. Opheikens, Slade Opheikens, which you sent out at  
5 6:46 p.m. after Leland drowned in your pool, correct?  
6 **A. Yes.**  
7 Q. Okay. And you were forwarding Wet 'N Wild  
8 recon visit that had previously taken place on  
9 7/10/14, correct?  
10 **A. That's correct.**  
11 Q. You say:  
12 "FYI," for your information, "these  
13 are the notes from Ryan's recon of  
14 Wet 'N Wild. Note one idea they have is  
15 certain persons have to have a colored  
16 wristband that relates to what they can or  
17 cannot do. Says their wave pool and lazy  
18 river have wristbands that require life  
19 jackets with a certain color. I assume that  
20 is so lifeguards can help see if anyone -- if  
21 someone is not in a jacket that should be."  
22 Correct?  
23 **A. That is correct.**  
24 Q. All right. Is this the only document that  
25 you were aware discussing that particular topic of the

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1 colored bands that's in a document?  
2 **A. Okay. I just want to make sure you were**  
3 **done, first of all.**  
4 Q. Yes.  
5 **A. The previous email, so when I originally**  
6 **sent it I thought, I thought we sent one that may have**  
7 **been a different date and then this would be the**  
8 **second time.**  
9 Q. I'm talking about you, where you discussed  
10 this. Okay?  
11 **A. Okay.**  
12 Q. This is the only email that you, you  
13 actually discuss that wristband system, correct?  
14 **A. Well, as I mentioned earlier, I had at**  
15 **some point talked with one of the lifeguard gals about**  
16 **the challenge --**  
17 Q. Withdraw the question.  
18 **A. -- that --**  
19 Q. Withdraw the question.  
20 **A. Okay. I'm sorry.**  
21 Q. This is the only memorialization in  
22 writing that exists with respect to you commenting in  
23 writing on the wristband issue, correct?  
24 **A. There might be another one.**  
25 Q. Are you aware of any other one?

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1 **A. I'm not aware of another one, but...**  
2 Q. Okay. So the only one that you are aware  
3 of where you're actually discussing this and provably  
4 so by a document is where you send this out on 5/27 at  
5 6:46, correct?  
6 **A. Well, the first time I forwarded it out to**  
7 **them was the document, the other exhibit we already**  
8 **discussed.**  
9 MR. CAMPBELL: Move to strike is  
10 nonresponsive.  
11 Please ask him the question again.  
12 (Record read as follows:)  
13 "Q. So the only one that you are  
14 aware of where you're actually discussing  
15 this and provably so by a document is where  
16 you send this out on 5/27 at 6:46, correct?"  
17 BY MR. CAMPBELL:  
18 Q. You, you. Not anybody else, you?  
19 **A. Okay, sir, and maybe I'm not**  
20 **understanding, but Exhibit No. 40 --**  
21 Q. Right.  
22 **A. -- is from me to Shane and Scott --**  
23 Q. Yes, I know that.  
24 **A. -- and Craig on July 11th --**  
25 Q. Right.

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1 **A. -- almost a year earlier.**  
2 Q. I understand that. But it has no comment  
3 from you at all on the wristband system; is that  
4 correct?  
5 **A. Well, no, I say excellent information.**  
6 **But it's me forwarding it.**  
7 Q. Here's the question once again.  
8 **A. Okay.**  
9 Q. You did not have in that forwarding any  
10 comments by you specific to the wristband system,  
11 correct?  
12 **A. That is correct in that one.**  
13 Q. Thank you.  
14 You did include such comments on 5/27 of  
15 2015, correct?  
16 **A. Correct.**  
17 Q. And that's, and that's the only document  
18 that you are aware of containing your comments on the  
19 wristband system, correct?  
20 **A. As we sit here right now, yes.**  
21 Q. And that's after my client drowned in your  
22 pool, correct?  
23 **A. That is correct.**  
24 Q. Thank you.  
25 Did you send out any emails on -- did you

<p style="text-align: right;">page 250</p> <p>1 send out any emails following the drowning of my 2 client in your pool on May 27th, 2015 that preceded in 3 time this 6:46 p.m. email? 4 <b>A. I don't recall. If you have one, I can</b> 5 <b>look at it. I don't recall.</b> 6 Q. I don't have one. 7 <b>A. Okay.</b> 8 Q. This looks to be the very first thing you 9 send out right after you find out that Leland has 10 drowned in your pool. 11 MR. GORMLEY: You're assuming facts in 12 evidence that he knew that he had drowned by the time 13 of this email. You never asked that question or 14 established it. 15 BY MR. CAMPBELL: 16 Q. Go ahead. 17 I'm not aware of any other email you sent 18 out following Leland's drowning other than this one. 19 <b>A. Okay.</b> 20 Q. Before the hour of 6:46, okay? 21 <b>A. Okay.</b> 22 Q. And you are not aware of one as you sit 23 here today either? 24 <b>A. I don't recall.</b> 25 Q. Okay. So as far as --</p>	<p style="text-align: right;">page 252</p> <p>1 <b>had posted.</b> 2 Q. Okay. Why did you direct him to do this? 3 <b>A. Well, I, I asked for copies of that. I</b> 4 <b>had also asked for copies of the incident or witness</b> 5 <b>statements, that I believe were also sent to me the</b> 6 <b>same day from Shane, to get a feel of what happened,</b> 7 <b>look at our signage.</b> 8 <b>And to me when something happens, I, I</b> 9 <b>want to understand what are we doing right and what do</b> 10 <b>we need to improve.</b> 11 Q. How did you first learn about my client's 12 drowning in your pool? 13 <b>A. Scott Huish called me.</b> 14 Q. What did he tell you? 15 <b>A. Scott said, to the best of my</b> 16 <b>recollection, that there had been, I think they called</b> 17 <b>it a rescue and they may have called it a near</b> 18 <b>drowning, that a boy had been pulled from the pool. I</b> 19 <b>think at the time I don't know that he had a lot of</b> 20 <b>detail yet other than to let me know something had</b> 21 <b>happened and the boy had been pulled out and was, had</b> 22 <b>been taken to the hospital.</b> 23 <b>An hour or two later is when I was able to</b> 24 <b>talk to Shane to get additional information on what</b> 25 <b>had happened.</b></p>
<p style="text-align: right;">page 251</p> <p>1 <b>A. Phone conversations --</b> 2 Q. Okay. 3 <b>A. -- but I don't know if I had an email.</b> 4 Q. So as far as you know, this is the first 5 email that went out following the drowning of Leland 6 by you? 7 <b>A. If we don't have anything else, then that</b> 8 <b>may be it.</b> 9 Q. Thank you. 10 MR. CAMPBELL: Next, please. 11 MR. MIRKOVICH: 55. 12 (Deposition Exhibit 55 marked.) 13 BY MR. CAMPBELL: 14 Q. What is 55? 15 <b>A. Email from Shane to me regarding signage.</b> 16 <b>It says:</b> 17 <b>"Attached are signs at the wave pool</b> 18 <b>and also at the front of the park."</b> 19 Q. And what park are you speaking of? 20 <b>A. Cowabunga.</b> 21 Q. And did you ask him to get copies of these 22 signs? 23 <b>A. I, I may have.</b> 24 Q. For what purpose? 25 <b>A. To review what our rules were and what we</b></p>	<p style="text-align: right;">page 253</p> <p>1 Q. Okay. And what did Shane tell you? 2 <b>A. Shane had said that a young boy, I think</b> 3 <b>at the time they thought he may have been 8 years old,</b> 4 <b>had, had gone under. That he had been pulled from the</b> 5 <b>pool. That he had received the rescue, I don't know</b> 6 <b>what you call, revived and chest compressions and</b> 7 <b>things, and turned over to the medical staff. Not the</b> 8 <b>EMTs, but whoever actually shows up and takes him to</b> 9 <b>the hospital.</b> 10 <b>He did not know the condition of the boy.</b> 11 <b>I asked, after I asked how the boy was doing, I asked</b> 12 <b>how the lifeguards were doing, because I assumed that</b> 13 <b>has to be a very traumatic experience.</b> 14 Q. Did you ask how many lifeguards were on 15 duty at the time my client drowned in the pool? 16 <b>A. I don't recall asking how many.</b> 17 Q. Okay. 18 <b>A. I had asked how they were doing. I asked</b> 19 <b>Shane how he was doing. He was -- you know, in his</b> 20 <b>voice you could tell he was upset. I did ask if he</b> 21 <b>had witness statements being collected and done which</b> 22 <b>he said Richard Woodhouse was gathering.</b> 23 Q. Anything else? 24 <b>A. Well, he said, he said that the team that</b> 25 <b>showed up said the lifeguards did a good job.</b></p>

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1 Q. What team said the lifeguards did a good  
2 job?  
3 A. He referred to them as the medical  
4 responders. I don't know if you call them first  
5 responders or whoever had gotten there.  
6 Q. Paramedics?  
7 A. I think so.  
8 Q. Okay. Did you communicate the information  
9 that was forwarded to you by Shane to any other person  
10 after you got off the phone from talking to Shane?  
11 A. About this incident, correct?  
12 Q. Right.  
13 A. Yes. I called Orluff.  
14 Q. Okay.  
15 A. I believe I called Tom Welch, and I think  
16 I called Chet.  
17 Q. Okay. And you conveyed all that  
18 information that had been conveyed by Shane to  
19 Mr. Welch, to your father, and to your brother?  
20 A. I believe so.  
21 Q. Okay.  
22 MR. MIRKOVICH: 56.  
23 (Deposition Exhibit 56 marked.)  
24 MR. CAMPBELL: 56, did you say?  
25 MR. MIRKOVICH: Yep.

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1 BY MR. CAMPBELL:  
2 Q. Showing you Exhibit No. 56, this appears  
3 to be yet one more email from you, Mr. Opheikens, to  
4 your brother Chet, correct?  
5 A. That is correct.  
6 Q. And it is:  
7 "Re: Breaking: Family of young boy  
8 sues Cowabunga Bay - story from Las Vegas  
9 Now."  
10 Is that correct?  
11 A. That is correct.  
12 Q. Your comment on that story was as follows:  
13 "They definitely know how to make a  
14 story even though it is not at all accurate."  
15 Correct?  
16 A. That's correct.  
17 Q. All right. Detail for me, taking as much  
18 time as you feel is necessary to do so, all of the  
19 inaccuracies in that story.  
20 A. Well, the inaccuracies that the way they  
21 looked at it. They were saying, I believe, that our  
22 lifeguards were not certified. They were stating that  
23 we did not have the right number of lifeguards. I, I  
24 don't recall if this report said anything else. But  
25 as they went on to talk about it, my understanding is

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1 that our lifeguards had been certified and that we did  
2 have the correct number. And July 30th, I believe, is  
3 the day that Shane actually let's us know that he did  
4 not have after this comes out.  
5 Q. So you were wrong about that?  
6 A. I was wrong, yes.  
7 Q. Thank you.  
8 MR. CAMPBELL: Go to next in order,  
9 please.  
10 MR. MIRKOVICH: 57.  
11 (Deposition Exhibit 57 marked.)  
12 BY MR. CAMPBELL:  
13 Q. Two hours, two hours later you sent out  
14 another email, Exhibit No. 57 -- or it's saying Shane  
15 Huish sent out another email, Exhibit No. 57; is that  
16 correct?  
17 A. Can you repeat?  
18 Q. Sure.  
19 A. Shane sent it or I sent it?  
20 MR. MIRKOVICH: It's the second page of  
21 the last exhibit.  
22 MR. CAMPBELL: Oh, I'm looking at the  
23 wrong one, I'm sorry.  
24 MR. MIRKOVICH: Exhibit 19, Mr. Opheikens.  
25 Sorry, the exhibit --

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1 THE WITNESS: This is 56?  
2 MR. MIRKOVICH: 56, correct.  
3 THE WITNESS: Okay.  
4 MR. CAMPBELL: Now I'm lost.  
5 MR. MIRKOVICH: You turned the page.  
6 MR. WELCH: Most recent is 57.  
7 MR. MIRKOVICH: This is still 56.  
8 MR. CAMPBELL: Oh, this is still 56.  
9 Okay.  
10 BY MR. CAMPBELL:  
11 Q. Second page of 56. Are you there? This  
12 is from Shane. Second page.  
13 A. Yes.  
14 Q. Are you with me?  
15 A. Yes.  
16 Q. From Shane two hours later to you, Slade  
17 Opheikens, correct?  
18 A. Correct.  
19 Q. He says:  
20 "Hi Slade, I think this is great and  
21 we should push for correct information to be  
22 put out and try to have the RJ print a  
23 retraction for all the misinformation."  
24 What was great? What did you understand  
25 he was, he was indicating was great?

<p style="text-align: right;">page 258</p> <p>1 MR. GORMLEY: Calls for speculation on his 2 part in Shane's mind. But he can answer the question 3 if he can. 4 <b>THE WITNESS: I believe the --</b> 5 MR. CAMPBELL: Speaking objection again. 6 BY MR. CAMPBELL: 7 Q. But go ahead. 8 <b>A. I believe the emails or discussions that</b> 9 <b>are happening at this time relate to RJ printed in, in</b> 10 <b>our mind, what was very inaccurate information. And</b> 11 <b>we had asked about how do we, how do we get someone to</b> 12 <b>get the correct story out? And I think that's what</b> 13 <b>this response of Shane is, is we should push to get</b> 14 <b>the correct information out and make RJ print a</b> 15 <b>retraction.</b> 16 At this point in time, my understanding is 17 still that RJ, the information they printed is 18 inaccurate. 19 So I don't know what he thinks is great 20 other than does he think it's great that we want to 21 push to get the correct information gathered and 22 somehow published. 23 Q. And, again, so again at this point, he 24 hasn't told you that in fact the information published 25 about the lack of proper lifeguard numbers at the pool</p>	<p style="text-align: right;">page 260</p> <p>1 application to the Henderson Police Department and 2 said that he had never been arrested when in fact he 3 had been arrested three times in his life, correct? 4 <b>A. I, I haven't seen it to know it. And</b> 5 <b>again through these proceedings I'm being told that --</b> 6 Q. You've learned it? 7 <b>A. I've learned of it, yes, very recently.</b> 8 Q. Okay. Were you aware that there was also 9 a false certification of one of the lifeguards on duty 10 when my client drowned in the wave pool? 11 MR. SMITH: Facts not in evidence. 12 <b>THE WITNESS: No, I'm not aware of that.</b> 13 BY MR. CAMPBELL: 14 Q. Is this the first you are hearing of that? 15 <b>A. I, I heard in reading the, this that they</b> 16 <b>had said lifeguard certifications were not in place</b> 17 <b>due to a NASCO change. But I've learned more -- but I</b> 18 <b>don't know the, the -- what did you say? The</b> 19 <b>lifeguards are not certified?</b> 20 Q. Were you aware that the lifeguard, one of 21 the principal lifeguards that was present when my 22 client was drowning had in fact not received his 23 certification that year, but rather that the documents 24 that purportedly said he did, had been forged? 25 MR. SMITH: Facts not in evidence.</p>
<p style="text-align: right;">page 259</p> <p>1 at the time my client drowned was in fact accurately 2 reported by the press? 3 <b>A. He had not. He had told us he had the</b> 4 <b>correct number.</b> 5 Q. So he had lied to you about that? 6 <b>A. Yes.</b> 7 Q. And, again, that's not the first time that 8 he had ever lied in his operational duties at 9 Cowabunga Bay, correct? 10 MR. SMITH: Calls for speculation. 11 Improper opinion testimony. 12 <b>THE WITNESS: I, I don't recall the prior</b> 13 <b>time. This, this was the event that where I lost some</b> 14 <b>confidence in Shane about lifeguards. I don't</b> 15 <b>remember --</b> 16 BY MR. CAMPBELL: 17 Q. We also covered the fact that he had lied 18 in his application for his liquor license, correct? 19 <b>A. Well --</b> 20 MR. GORMLEY: Objection. Misstates his 21 testimony. 22 MR. CAMPBELL: I didn't say what his 23 testimony was. 24 BY MR. CAMPBELL: 25 Q. Correct? You now know that he lied in his</p>	<p style="text-align: right;">page 261</p> <p>1 MR. GORMLEY: Misstates the evidence. 2 BY MR. CAMPBELL: 3 Q. Go ahead. 4 <b>A. I had not heard that.</b> 5 Q. This is the first time you are hearing 6 that? 7 <b>A. I'm trying to remember if you covered that</b> 8 <b>with Orluff, because there was something --</b> 9 Q. I didn't. 10 <b>A. -- discussed about a certification, but I</b> 11 <b>don't --</b> 12 Q. I didn't. I'm asking you. 13 <b>A. -- I don't know if I'm mixing NASCO</b> 14 <b>certification.</b> 15 Q. That's what I'm asking you. 16 <b>A. I don't recall hearing it. Somebody --</b> 17 Q. This is the first time you've ever heard 18 that from anybody? 19 <b>A. I believe so.</b> 20 Q. Okay. 21 MR. GORMLEY: Want to take a short break? 22 MR. CAMPBELL: Yeah. 23 THE VIDEOGRAPHER: We are going off the 24 record. The time is approximately 4:05 p.m. 25 (Recessed from 4:05 p.m. to 4:24 p.m.)</p>

<p style="text-align: right;">page 262</p> <p>1 THE VIDEOGRAPHER: We are going back on 2 the record. The time is approximately 4:24 p.m. 3 BY MR. CAMPBELL: 4 Q. Did you have the opportunity to speak to 5 your counsel during the break? 6 <b>A. No.</b> 7 MR. CAMPBELL: All right. This is -- got 8 it. 9 BY MR. CAMPBELL: 10 Q. Handing you what has been marked as 11 Exhibit No. 57. This is an email from Chet to you, 12 correct? 13 <b>A. Correct.</b> 14 Q. Dated July 22, 2015. With respect to a 15 Cowabunga Bay owner meeting, right? 16 <b>A. Correct.</b> 17 Q. All right. And it is forwarding around an 18 email from you; is that correct? 19 <b>A. Correct.</b> 20 Q. Saying that that's going to take place on 21 August 4th: 22 "...to discuss financials, future 23 budgets, Polin, anything else on the list 24 below." 25 Correct?</p>	<p style="text-align: right;">page 264</p> <p>1 Q. "I have not seen any information 2 relating to any incidents at the park." 3 Would you like to see an update -- "would 4 like to see an update outlining any we have 5 had and type." 6 <b>A. Correct. I usually requested that about 7 once a year to, to get an understanding where we have 8 them. Because on the construction side if you 9 understand it, you review it and you see what could 10 you do to prevent it from happening again.</b> 11 Q. Okay. 12 MR. CAMPBELL: Let's go to the next one, 13 please. 14 MR. MIRKOVICH: 58. 15 (Deposition Exhibit 58 marked.) 16 BY MR. CAMPBELL: 17 Q. 58 is a compilation of two emails. The 18 first is appears -- actually, I think it's three. But 19 the first is from Mr. Huish to you regarding the 20 September snapshot. Do you see that? 21 <b>A. Are you down at the bottom?</b> 22 Q. At the bottom. 23 <b>A. Okay. Yes. Okay.</b> 24 Q. Comes in at September 16, 2015 at 3:54. 25 Do you see that?</p>
<p style="text-align: right;">page 263</p> <p>1 <b>A. Yes.</b> 2 Q. The next page details some of those items 3 including financials, incomes and expenses, right? 4 <b>A. Yes.</b> 5 Q. And you say that we: 6 "Would really like to dial down and 7 see and understand each of the items on the 8 reports represent and what our mix of 9 attendees are." 10 What did you mean by that? 11 <b>A. The -- to understand in a given day if 500 12 people show up, how many of them are a season pass 13 holder, how many of them are a daily pass holder.</b> 14 Q. Okay. You also talk about: 15 "Budget forecast. Look ahead based on 16 what we have learned thus far to see how our 17 budget looks for the remainder of the year." 18 Is that correct? 19 <b>A. Yes.</b> 20 Q. All right. And why did you want to do it 21 at that time? 22 <b>A. It's just what we would usually do at an 23 owner meeting is review budgets.</b> 24 Q. Okay. You also have down "Incidents." 25 <b>A. Yes.</b></p>	<p style="text-align: right;">page 265</p> <p>1 <b>A. Okay. Yes.</b> 2 Q. Okay. Subject is "September snapshot." 3 "Here is a running update for 4 September. I would like to propose 5 October 2, 6 or 16 for our end of summer 6 management meeting." 7 Who would attend the end of summer 8 management meeting? 9 <b>A. That is usually --</b> 10 Q. Everyone there? 11 <b>A. It's usually the management committee 12 members that are invited to that.</b> 13 Q. Okay. All of the individuals that this 14 goes to? You send it to -- you are first in line 15 always, then Tom Welch, et cetera? 16 <b>A. Yeah. Charlie sometimes would, sometimes 17 would not.</b> 18 Q. Okay. Charlie wasn't a member of the 19 management committee but would on occasion actually 20 attend and participate by phone -- 21 <b>A. Correct.</b> 22 Q. -- correct? 23 Okay. He goes on to state, this again is 24 Mr. Huish, and this Shane Huish, right? 25 <b>A. No, this is Scott Huish.</b></p>



<p style="text-align: right;">page 266</p> <p>1 Q. Scott Huish, excuse me. 2 "I think we need to break this into 3 two parts, one being operations, the 4 day-to-day issues the managers deal with, and 5 second, the big picture problems and where do 6 we go in the second full year." 7 Right? 8 <b>A. Correct.</b> 9 Q. Okay. 10 MR. CAMPBELL: Let's go to the next, 11 please. 12 MR. MIRKOVICH: 59. 13 (Deposition Exhibit 59 marked.) 14 BY MR. CAMPBELL: 15 Q. Okay. 59 again is a compilation of emails 16 and you will see at the bottom, it's from Slade 17 Opheikens. 18 <b>A. Yes.</b> 19 Q. Do you see that? 20 <b>A. Yes.</b> 21 Q. To Scott Huish? 22 <b>A. Yes.</b> 23 Q. Was sent on Saturday, September 26th, 2015 24 at 8:29 p.m. "Subject: August financials &amp; next 25 owner meeting date." Right?</p>	<p style="text-align: right;">page 268</p> <p>1 <b>Spencer. I don't know that I've seen Taft again, that</b> 2 <b>in generality we talked.</b> 3 Q. Have they been provided updates on this 4 litigation? 5 <b>A. To the extent of letting them know we are</b> 6 <b>having depositions taken.</b> 7 Q. Okay. What have you told them about this 8 litigation besides the fact that you're now undergoing 9 discovery, specifically depositions? 10 <b>A. I believe they received a copy of the</b> 11 <b>lawsuit that was filed.</b> 12 Q. Okay. And who provided them with the 13 lawsuit? 14 <b>A. I don't recall if I would have forwarded</b> 15 <b>them a copy or if Scott may have forwarded, I don't</b> 16 <b>recall.</b> 17 Q. And when were they provided with a copy of 18 the lawsuit? 19 <b>A. I don't -- I would guess that it would</b> 20 <b>have been sometime after it was filed. I, I think in</b> 21 <b>our loan documents or even just from a relationship we</b> 22 <b>would have a requirement to notify them.</b> 23 Q. There is a covenant that requires you to 24 report material matters to the bank in connection with 25 your loan, right?</p>
<p style="text-align: right;">page 267</p> <p>1 <b>A. Yes, that's correct.</b> 2 Q. You ask him: 3 "Scott, how soon will we have August 4 financials? I need to meet with the Bank of 5 Utah." 6 Why were you meeting with the Bank of 7 Utah? 8 <b>A. I met with the Bank of Utah not just on</b> 9 <b>this project but on other projects. And I'm trying to</b> 10 <b>remember if we are in September of 2015 if there's</b> 11 <b>something specific.</b> 12 <b>I did have a relationship with Spencer</b> 13 <b>Richins and Taft Myer. So I don't know if they had</b> 14 <b>asked or if I'm preparing in the meeting that I'm</b> 15 <b>going to be having with them for whatever the topic</b> 16 <b>may be. If the topic of Cowabunga comes up and how</b> 17 <b>are we doing, I want to be prepared.</b> 18 Q. Have you talked to either Spence or Taft 19 about this litigation? 20 <b>A. A year or so ago, I talked to them about</b> 21 <b>it.</b> 22 Q. And is it over the phone or in person? 23 <b>A. I think we called them on the phone to let</b> 24 <b>them know what was going on. I have since seen Scott,</b> 25 <b>I don't -- I'm sorry, I said -- Spencer. Since seen</b></p>	<p style="text-align: right;">page 269</p> <p>1 <b>A. Okay.</b> 2 Q. Standard covenant -- 3 <b>A. Yes.</b> 4 Q. -- right? 5 And in compliance with that standard 6 covenant of the loan documents, you provided them with 7 this lawsuit because it was material to the operations 8 of the park, correct? 9 <b>A. That's correct. I just don't know if I</b> 10 <b>did it or who did it.</b> 11 Q. But it was provided because it's material 12 to the operations of the park? 13 <b>A. I would say yes.</b> 14 Q. Okay. And in the event of a default in 15 compliance with a loan document covenant, there can be 16 a declaration of default, breach, and demand for 17 immediate payment if you failed to honor your 18 obligations under the loan documents, correct? 19 <b>A. Sounds like a correct statement.</b> 20 Q. Okay. Continuing on with Exhibit No. 59, 21 you say that you want to: 22 "...circulate an agenda of the items 23 that they (sic) will be discussing" at the 24 meeting. 25 And you have, quote, "financial," or you</p>

<p>page 270</p> <p>1 have asterisk.</p> <p>2 "Financials, shade at the top of the</p> <p>3 towers is an item to discuss, and I think</p> <p>4 Shane had a quote for about 15,000 each</p> <p>5 tower, total of 45. Need to discuss lights</p> <p>6 for nights, for this we will need to know the</p> <p>7 cost to install which I can have Erik get a</p> <p>8 bid on, and really need to identify the</p> <p>9 additional profit we made by running nights,</p> <p>10 by this I mean we identify persons who came</p> <p>11 versus season pass holders. Then compare</p> <p>12 additional costs for lifeguards."</p> <p>13 Correct?</p> <p>14 <b>A. That's correct.</b></p> <p>15 Q. Why did you need the additional costs of</p> <p>16 the lifeguards?</p> <p>17 <b>A. The -- so this is in the context of</b></p> <p>18 <b>talking about adding, adding lights for night events.</b></p> <p>19 <b>You are going to have a couple of components that I'm</b></p> <p>20 <b>asking them to analyze is, one, if we are going to add</b></p> <p>21 <b>lights so that the park can stay open later, first of</b></p> <p>22 <b>all, are the customers, are we getting more customers</b></p> <p>23 <b>who are coming to pay for the additional time that the</b></p> <p>24 <b>park is open? Or are essentially season pass holders</b></p> <p>25 <b>just going to have the luxury of staying longer? For</b></p>	<p>page 272</p> <p>1 Correct?</p> <p>2 <b>A. Correct.</b></p> <p>3 Q. All right. Why was the issue of</p> <p>4 certifications at -- why was the issue of</p> <p>5 certifications something that was, that you thought</p> <p>6 was important to discuss at this meeting?</p> <p>7 <b>A. If this is 2015, I believe one of the</b></p> <p>8 <b>things that had come out in 2015 was that NASCO's --</b></p> <p>9 <b>at some point they had said NASCO's certification of</b></p> <p>10 <b>lifeguards was not being recognized or there was</b></p> <p>11 <b>something with it that had to be changed.</b></p> <p>12 <b>So that was, that was one component. The</b></p> <p>13 <b>other side is this, I believe is also where we are</b></p> <p>14 <b>transitioning to IAM is coming in late in 2015, and</b></p> <p>15 <b>one of the things that IAM, I believe, is taking on --</b></p> <p>16 <b>do you I have that right? I mean, let me just think</b></p> <p>17 <b>through the year. 2014, 2015, I believe it is late</b></p> <p>18 <b>2015 when IAM, and that's one of the things they are</b></p> <p>19 <b>going to be taking on is lifeguards and certifications</b></p> <p>20 <b>if that, if that goes forward.</b></p> <p>21 <b>I'm not sure the timing of which one</b></p> <p>22 <b>happened when. I don't think IAM is until October or</b></p> <p>23 <b>November.</b></p> <p>24 MR. WELCH: November.</p> <p>25 MR. CAMPBELL: You know better, you're a</p>
<p>page 271</p> <p>1 a kind of a cost benefit analysis.</p> <p>2 But, also, if you are going to stay open</p> <p>3 longer, a lifeguard who shows up in the morning at</p> <p>4 whatever time the park opens is not going to be able</p> <p>5 to stay later. So they are going to have to, to</p> <p>6 increase in some way -- there is an additional</p> <p>7 variable cost. If you have more people for staying</p> <p>8 open later, that needs to be a consideration and a</p> <p>9 cost benefit analysis.</p> <p>10 Q. And the lifeguards are a variable cost?</p> <p>11 <b>A. I would say yes.</b></p> <p>12 Q. Okay.</p> <p>13 Under the asterisk of insurance, you go on</p> <p>14 to say:</p> <p>15 "Insurance: Need to discuss limits</p> <p>16 for next year. Want to review all</p> <p>17 incidents/accidents and status of each, which</p> <p>18 slide they occurred on, what could have</p> <p>19 prevented them, current update on where they</p> <p>20 are at. Blue slide: Polin - are we going to</p> <p>21 require them to do any additional work.</p> <p>22 Lifeguard certifications and numbers required</p> <p>23 for next year. Any new rulings on numbers</p> <p>24 allowed and what certifications are we doing</p> <p>25 for the next year."</p>	<p>page 273</p> <p>1 lawyer.</p> <p>2 <b>THE WITNESS: Sorry. Did I do something?</b></p> <p>3 MR. CAMPBELL: No, you didn't do anything</p> <p>4 wrong.</p> <p>5 <b>THE WITNESS: Oh, okay.</b></p> <p>6 In regard to prior to that, again I'm</p> <p>7 asking about the incident and accidents where they</p> <p>8 happen because that -- from the construction side,</p> <p>9 it's -- you know, I -- part of me wishes I had done</p> <p>10 something maybe sooner as I'm knowing that NASCO is</p> <p>11 doing their investigation and everybody else is doing</p> <p>12 theirs. But it's how do I get the information so we</p> <p>13 can sit down at our management committee meeting and,</p> <p>14 and review what happened and how do you, how do you</p> <p>15 avoid it whether it's a tub (sic) stoning -- excuse</p> <p>16 me, tub stubbing or dehydration or bumped head.</p> <p>17 But, so that's, that's the agenda, and</p> <p>18 I -- so...</p> <p>19 BY MR. CAMPBELL:</p> <p>20 Q. Are you done?</p> <p>21 <b>A. I didn't know if you wanted to go through</b></p> <p>22 <b>the other items on there or not.</b></p> <p>23 Q. Do you recall what the question was?</p> <p>24 <b>A. No, actually, I don't know that I do.</b></p> <p>25 Q. Did NASCO ever provide any documentation</p>

<p style="text-align: right;">page 274</p> <p>1 on what they were doing or not doing?</p> <p>2 <b>A. I, I understood they were doing</b></p> <p>3 <b>inspections. I did not see a report from the</b></p> <p>4 <b>inspections or the investigations.</b></p> <p>5 Q. As you sit here today, you are not aware</p> <p>6 of any documentation NASCO provided, correct?</p> <p>7 <b>A. No. No, sir.</b></p> <p>8 Q. No, sir, you're not aware?</p> <p>9 <b>A. No, sir, I'm not aware of --</b></p> <p>10 Q. Any documentation?</p> <p>11 <b>A. -- any documentation.</b></p> <p>12 Q. Okay. This email is signed off as Slade,</p> <p>13 president R&amp;O Construction --</p> <p>14 <b>A. Correct.</b></p> <p>15 Q. -- correct?</p> <p>16 <b>A. Correct.</b></p> <p>17 Q. And you were president of R&amp;O Construction</p> <p>18 at the time that you sent this out, correct?</p> <p>19 <b>A. That is correct. I'm also a managing</b></p> <p>20 <b>committee member of Henderson Water Park. All my</b></p> <p>21 <b>emails come from the same email address.</b></p> <p>22 MR. MIRKOVICH: I think we covered all</p> <p>23 that.</p> <p>24 MR. CAMPBELL: Thank you. Yeah, that was</p> <p>25 my thought.</p>	<p style="text-align: right;">page 276</p> <p>1 approved staffing plan."</p> <p>2 What he is talking about there is the</p> <p>3 variance on the lifeguards that was ultimately granted</p> <p>4 by the Southern Nevada Health District, correct?</p> <p>5 <b>A. That is correct.</b></p> <p>6 Q. Okay. And you received this as</p> <p>7 essentially your first notification of the actual</p> <p>8 variance that had been granted, correct?</p> <p>9 <b>A. He may have told me he had it earlier. I</b></p> <p>10 <b>wanted a copy for our file, so yes.</b></p> <p>11 Q. But it was on or about?</p> <p>12 <b>A. Yes. I don't know what the date of the</b></p> <p>13 <b>variance was.</b></p> <p>14 Q. But it was on or about May of 2016, right?</p> <p>15 <b>A. I think that's fair to say.</b></p> <p>16 Q. This would have been in excess of a year</p> <p>17 that he first told you incorrectly and falsely that</p> <p>18 you could staff pursuant to the Southern Nevada Health</p> <p>19 District's approval of it as-needed basis?</p> <p>20 <b>A. Well --</b></p> <p>21 Q. Right?</p> <p>22 <b>A. -- I don't believe that Shane had told me</b></p> <p>23 <b>in May or whatever the prior year that he had the</b></p> <p>24 <b>approval. I, I think in his mind, I believe --</b></p> <p>25 Q. Withdraw the question.</p>
<p style="text-align: right;">page 275</p> <p>1 Let's go to this one, please.</p> <p>2 You are right and I'm wrong.</p> <p>3 MR. GORMLEY: Say that again, please.</p> <p>4 MR. CAMPBELL: He is right, as he usually</p> <p>5 is, and I'm wrong.</p> <p>6 MR. GORMLEY: We want to get that down.</p> <p>7 MR. LOGAN: Separate disk.</p> <p>8 MR. MIRKOVICH: 60, please.</p> <p>9 (Deposition Exhibit 60 marked.)</p> <p>10 BY MR. CAMPBELL:</p> <p>11 Q. Do you have Exhibit 60 in front of you?</p> <p>12 <b>A. Yes, I do.</b></p> <p>13 Q. This is an email from Shane Huish to you,</p> <p>14 correct?</p> <p>15 <b>A. Correct.</b></p> <p>16 Q. And this involves the variance approvals,</p> <p>17 correct?</p> <p>18 <b>A. Yes, that's correct.</b></p> <p>19 Q. The date of this email is Friday,</p> <p>20 May 13th, 2016, at 10:06 a.m. Greenwich Time, right?</p> <p>21 Meridian Time?</p> <p>22 <b>A. I don't know. I call it Mountain Time.</b></p> <p>23 Q. Yeah. Slade Opheikens, okay.</p> <p>24 "Hi, Slade, I resent the email that</p> <p>25 had the variance approval as well as the</p>	<p style="text-align: right;">page 277</p> <p>1 <b>A. Okay.</b></p> <p>2 Q. This comes to you a full year and one</p> <p>3 month after you congratulated Shane on being so</p> <p>4 persistent, right?</p> <p>5 <b>A. When he gets the variance, that, that is</b></p> <p>6 <b>correct.</b></p> <p>7 Q. That's the question.</p> <p>8 If you look at 52 where you're</p> <p>9 congratulating him for being so persistent?</p> <p>10 <b>A. Yes.</b></p> <p>11 <b>Do you want me to grab that, is that what</b></p> <p>12 <b>you're asking?</b></p> <p>13 Q. Yes. I don't want you to think I'm trying</p> <p>14 to pull a quick one on you here.</p> <p>15 <b>A. No, I -- okay.</b></p> <p>16 Q. That email was in fact on April Fool's</p> <p>17 Day --</p> <p>18 <b>A. Okay.</b></p> <p>19 Q. -- coincidentally and probably apropos.</p> <p>20 <b>A. I was on vacation, so...</b></p> <p>21 MR. GORMLEY: It's my birthday.</p> <p>22 BY MR. CAMPBELL:</p> <p>23 Q. On 2015, right?</p> <p>24 <b>A. That is correct.</b></p> <p>25 Q. And the variance -- and it's a variance,</p>

<p style="text-align: right;">page 278</p> <p>1 it's not any sort of as-needed plan approval, comes in 2 a full year and one month later approximately, 3 correct? 4 <b>A. I believe so.</b> 5 Q. Okay. Did -- withdraw. 6 MR. MIRKOVICH: 61. 7 (Deposition Exhibit 61 marked.) 8 BY MR. CAMPBELL: 9 Q. 61 is a Henderson Water Park meeting 10 reminder, correct? 11 <b>A. Yes.</b> 12 Q. Sent to you on or about Tuesday, the 24th 13 of January 2017, correct? 14 <b>A. Correct.</b> 15 Q. Reminding that the meeting is Thursday 16 from 10:00 till 3:00 at R&amp;O's Salt Lake City office, 17 correct? 18 <b>A. Correct.</b> 19 Q. Who was in attendance at that meeting? 20 <b>A. Ultimately I don't, I don't recall who all</b> 21 <b>attended. I, I would assume that the persons listed</b> 22 <b>in the invite were all in attendance; but I'm, I'm not</b> 23 <b>positive if Craig and Tom made it or not or...</b> 24 Q. Well, the import of this is in fact that 25 there is going to be some special guest visitors,</p>	<p style="text-align: right;">page 280</p> <p>1 <b>A. I don't know if that was given to the, to</b> 2 <b>the bank or not.</b> 3 Q. There was a management report as well, 4 correct, what was up, what was down? 5 <b>A. Yes, it says that.</b> 6 Q. There was an insurance update from Lance 7 Barnwell; is that correct? 8 <b>A. It says that, yes.</b> 9 Q. Okay. There was an update from the Bank 10 of Utah regarding the line of credit; is that correct? 11 <b>A. Well, it says there is a working lunch</b> 12 <b>with Spencer from 12:00 to 12:45, and then it says</b> 13 <b>there is a line of credit. So I don't know if Spencer</b> 14 <b>stays for the line of credit refinance of the loan or</b> 15 <b>not.</b> 16 Q. Well, what was the talk about with respect 17 to refinancing of the loan, do you recall? 18 <b>A. I don't. I mean, I could guess. There</b> 19 <b>had been discussions about a possible refinance and I</b> 20 <b>don't, I don't recall if they're meeting with Spencer</b> 21 <b>to see how it would work.</b> 22 Q. Why was there discussions about 23 refinancing the loan? 24 <b>A. I don't, I don't recall why there was.</b> 25 Q. Was, was there a failure to meet timely</p>
<p style="text-align: right;">page 279</p> <p>1 correct? 2 <b>A. We will have a couple of guest visitors,</b> 3 <b>yes, from IAM.</b> 4 Q. James Harhi from IAM; is that correct? 5 <b>A. Yes.</b> 6 Q. The lifeguard group. And Spencer Richins 7 from the Bank of Utah, right? 8 <b>A. Yes.</b> 9 Q. Why did you want Spencer -- why was 10 Spencer Richins going to attend this meeting at which 11 James Harhi was going to be present? 12 <b>A. I don't recall, but I think they came in</b> 13 <b>at two different times. Scott had scheduled that and</b> 14 <b>arranged it. So I could look down through the agenda</b> 15 <b>to try to refresh.</b> 16 Q. Well, there was a new lifeguard management 17 contract, right? 18 <b>A. Yes. There was by -- this is what date?</b> 19 <b>This is 2017.</b> 20 Q. And that management contract, that new 21 lifeguard management contract had been provided to the 22 bank, correct? 23 <b>A. I don't know.</b> 24 Q. The loan committee or the loan officer, I 25 should say?</p>	<p style="text-align: right;">page 281</p> <p>1 payments on the loan obligation? 2 <b>A. I don't believe so.</b> 3 Q. Okay. So you just can't offer any 4 explanation for that? 5 <b>A. Well, I don't recall at the --</b> 6 Q. If you don't recall, you don't recall, 7 okay. We can get it another way. Don't worry about 8 it. 9 <b>A. No, that's okay.</b> 10 Q. That's all right. 11 MR. MIRKOVICH: 62. 12 (Deposition Exhibit 62 marked.) 13 BY MR. CAMPBELL: 14 Q. This is an email from you, Slade Opheikens 15 to Chet Opheikens regarding IAM Corporate 16 Cowabunga Bay Management 2017 PDF. 17 <b>A. Correct.</b> 18 Q. And Marc Glissman? 19 <b>A. Correct.</b> 20 Q. RES 2016 document. 21 <b>A. Correct.</b> 22 Q. All right. What's this all about? 23 <b>A. This was -- well, let me look at it again</b> 24 <b>before I guess.</b> 25 <b>But this -- the timing and summary is, as</b></p>

<p style="text-align: right;">page 282</p> <p>1 I stated earlier, after the drowning of, and I 2 apologize, I say his name wrong, Daquan Bankston. 3 Scott had approached us and said Shane had 4 approached him about getting a new person, getting 5 someone else involved as the general manager because 6 he couldn't handle it. And Marc Glissman with IAM 7 was, I believe, the one who had been recommended. 8 So this information had been sent to me 9 and to Chet and to Craig. I don't think Chet was able 10 to open it the first time, so I re-forwarded it to him 11 and it was the packet of information on I believe Marc 12 Glissman's resume and background. 13 Q. Okay. And that was considered by the 14 management committee? 15 A. Yes. 16 Q. Okay. Do you recall I asked you a 17 question earlier today with respect to Shane Huish 18 saying that he didn't have enough experience in 19 running a water park or aquatic features? 20 A. I recall you asking that, yes. 21 Q. Okay. And do you recall telling me that 22 you never had any information to that effect? 23 A. I don't recall Shane telling me he didn't 24 have enough experience to run a park. 25 Q. I asked you whether or not you had ever</p>	<p style="text-align: right;">page 284</p> <p>1 MR. MIRKOVICH: 63. 2 MR. CAMPBELL: -- 63. 3 BY MR. CAMPBELL: 4 Q. You will see in this email that Shane 5 sends to his brother Scott, who is also a member of 6 the management committee for Cowabunga Bay, a 7 discussion regarding major concerns with aquatics and 8 risk management. Do you see that? 9 A. Can I take a sec to read it, I don't 10 recall seeing this before. 11 Q. Sure. It starts right here. "That I 12 have..." That's the part I'm going to ask you about. 13 A. Okay. I'm just going to browse it real 14 quick. 15 Q. That's fine. You take all the time you 16 feel is necessary. 17 (Brief pause in the proceedings.) 18 THE WITNESS: Okay. 19 BY MR. CAMPBELL: 20 Q. So what he is telling you, and you can go 21 to an earlier part of the email, what he's saying, 22 what Shane is saying is he is sending this out and he 23 is saying this. Okay, subject matter that he is 24 covering with Scott, okay, is dealing with an 25 additional proposal by IAM Aquatics Management Group.</p>
<p style="text-align: right;">page 283</p> <p>1 received that information from any source at all, do 2 you recall my asking you that question? 3 A. I don't recall how you phrased it, but to 4 answer it, I don't recall ever receiving anything like 5 that. 6 Q. Okay. Or being informed of anything like 7 that? 8 A. Of, of Shane's ability to manage the park? 9 Q. Right. 10 A. I don't recall receiving that. 11 MR. CAMPBELL: Could we go to the next in 12 order. 13 MR. MIRKOVICH: 63, please. 14 (Deposition Exhibit 63 marked.) 15 BY MR. CAMPBELL: 16 Q. I'm going to go back in time now from 17 this, from the email 62, which was on June 30th, 2017, 18 okay, and I'm now going back in time to December 1 of 19 2015. This is about six months, seven months or so 20 after my client drowns in your pool. Are you with me? 21 A. Yes. 22 Q. Okay. 23 A. Can I get a copy of the exhibit, sorry. 24 MR. MIRKOVICH: There you go. 25 MR. CAMPBELL: This is Exhibit --</p>	<p style="text-align: right;">page 285</p> <p>1 And he says that, quote: 2 "I really feel we need the expertise 3 to help us manage for a season or two and 4 help set up the aquatics department." 5 Do you see that? 6 A. Yes. 7 Q. Okay. And you will further see, as I 8 represented correctly, this is about seven months or 9 so after my client drowns in your pool, December 1, 10 2015 correct? 11 A. That is correct. 12 Q. Okay. He says that: 13 "I feel absolutely confident with 14 other areas of the park." 15 What other areas of the park would be 16 entailed besides aquatics? 17 MR. GORMLEY: Let me object. Calls for 18 speculation. 19 THE WITNESS: Well, aside from aquatics, I 20 don't know if he -- I am guessing he is referring 21 to -- 22 BY MR. CAMPBELL: 23 Q. Marketing? 24 A. Marketing and food and beverage or 25 maintenance is my assumption.</p>

<p style="text-align: right;">page 286</p> <p>1 Q. So he is feeling, he is feeling he is 2 qualified in that area, but he is not confident in his 3 qualifications for the aquatics department, correct? 4 MR. SMITH: Misstates the exhibit. 5 <b>THE WITNESS: He says he has:</b> 6 <b>"...major concerns with the aquatics</b> 7 <b>and risk management and I strongly feel we</b> 8 <b>need to bring in experts to set up programs,</b> 9 <b>training and policies to make our aquatics</b> 10 <b>department top notch. I really need help in</b> 11 <b>this area. Don't feel confident Rich or</b> 12 <b>myself have the experience to bring the</b> 13 <b>department to where I would like it to be."</b> 14 BY MR. CAMPBELL: 15 Q. Right. He doesn't feel he's up to the 16 task, right? 17 MR. GORMLEY: I'm going to object to 18 speculation of this witness. 19 MR. CAMPBELL: I want that on there, 20 please. 21 BY MR. CAMPBELL: 22 Q. Go ahead. 23 A. <b>So I'm --</b> 24 Q. He is saying he is not confident? 25 A. <b>He is doubting himself at this point.</b></p>	<p style="text-align: right;">page 288</p> <p>1 <b>THE WITNESS: Yeah, he is saying -- I</b> 2 <b>mean, he's saying: "</b> 3 <b>I really need help in this area, I</b> 4 <b>don't feel confident that Rich or myself have</b> 5 <b>the experience to bring it to where I would</b> 6 <b>like it to be."</b> 7 <b>I don't know if I interpret that to mean I</b> 8 <b>want it to be -- I actually interpret it to mean I</b> 9 <b>want it to be better than what it has been and I don't</b> 10 <b>think I can get it there, if I am interpreting --</b> 11 BY MR. CAMPBELL: 12 Q. He wants an expert brought in, right? 13 A. <b>Yeah, he wants to raise the bar, I believe</b> 14 <b>is what he is saying.</b> 15 Q. From his very, very low bar, right? 16 MR. GORMLEY: Let me object. He didn't 17 say that. 18 BY MR. CAMPBELL: 19 Q. I'm going to ask you all these questions 20 in front of a jury. 21 A. <b>That's okay.</b> 22 Q. Okay. 23 MR. GORMLEY: And they'll be objected to. 24 BY MR. CAMPBELL: 25 Q. Do you believe his bar was a lower bar</p>
<p style="text-align: right;">page 287</p> <p>1 Q. Right. He doesn't have enough experience, 2 right? 3 MR. SMITH: Misstates the exhibit. 4 MR. CAMPBELL: I'd like that one as well, 5 please. 6 <b>THE WITNESS: "I don't feel confident</b> 7 <b>that Rich and myself have the experience to</b> 8 <b>bring the department to where I would like it</b> 9 <b>to be."</b> 10 BY MR. CAMPBELL: 11 Q. He actually used the words, "I don't feel 12 confident," right? 13 A. <b>Correct.</b> 14 Q. He also says that: 15 "We need expertise to help us manage 16 for a season or two to help set up the 17 aquatics department." 18 Correct? 19 A. <b>Correct.</b> 20 Q. So we know that within months of my client 21 drowning, he is actually memorializing the fact that 22 he is not up to the task, that you need an expert in 23 there to run that aquatics department, correct? 24 MR. SMITH: Misstates the exhibit. 25 MR. GORMLEY: Calls for speculation.</p>	<p style="text-align: right;">page 289</p> <p>1 than IAM? 2 A. <b>I don't believe Shane set a low bar. I</b> 3 <b>think Shane made a bad judgment call in the lifeguard</b> 4 <b>count. But from everything that I had seen previously</b> 5 <b>to that and other areas of the park, he had done a</b> 6 <b>good job.</b> 7 Q. That's how you characterize it? A bad 8 judgment in violating the directive of the Southern 9 Nevada Health District? 10 MR. GORMLEY: Objection. Argumentative. 11 BY MR. CAMPBELL: 12 Q. That's how you're characterizing it? 13 A. <b>That is bad judgment. It's definitely not</b> 14 <b>good judgment.</b> 15 Q. Is there anything else that you can 16 characterize it as? 17 A. <b>Horrific. I don't know. I wished, I</b> 18 <b>wished he never would have made that decision. I</b> 19 <b>also, you know.</b> 20 Q. But despite those unqualified reservations 21 in the exhibit that Shane himself was sharing with a 22 member of the management committee, the responsibility 23 for the aquatics operation at the park were never 24 surrendered by him through any sort of a directive by 25 the management committee until Daquan Bankston died,</p>

<p style="text-align: right;">page 290</p> <p>1 correct?</p> <p>2 <b>A. That's not correct.</b></p> <p>3 Q. Okay. So he surrendered those duties at</p> <p>4 the direction of the management committee before</p> <p>5 Daquan Bankston died?</p> <p>6 <b>A. The oversight of the aquatics on or about</b></p> <p>7 <b>when Scott and I met in August 4th, I believe was the</b></p> <p>8 <b>date we identified of 2015, Shane was relieved of</b></p> <p>9 <b>overseeing the aquatics at that point in time. And</b></p> <p>10 <b>that's when he we met with Richard Woodhouse and let</b></p> <p>11 <b>Richard know that was his responsibility to take on</b></p> <p>12 <b>and that he had --</b></p> <p>13 Q. What happened after Daquan died? Tell us</p> <p>14 what happened after Daquan died with respect --</p> <p>15 <b>A. Can I finish --</b></p> <p>16 Q. No.</p> <p>17 <b>A. -- my last answer?</b></p> <p>18 Q. I'm withdrawing the question.</p> <p>19 <b>A. No.</b></p> <p>20 Q. Tell us what happened with respect to the</p> <p>21 duties of Shane after Daquan died, how did they</p> <p>22 change?</p> <p>23 MR. GORMLEY: Objection. Relevancy.</p> <p>24 <b>THE WITNESS: Shane asked if he could have</b></p> <p>25 <b>lesser -- not be the general manager. And we had</b></p>	<p style="text-align: right;">page 292</p> <p>1 MR. CAMPBELL: Withdraw the question.</p> <p>2 BY MR. CAMPBELL:</p> <p>3 Q. When did Daquan Bankston die?</p> <p>4 <b>A. June approximately 16th or 17th of 2017.</b></p> <p>5 Q. And so the aquatics department and in fact</p> <p>6 the park itself was thereafter run by IAM, correct?</p> <p>7 <b>A. IAM and Chris and all lifeguards were</b></p> <p>8 <b>brought in at the end of the 2015 season and put under</b></p> <p>9 <b>IAM. So that's approximately a year and a half prior</b></p> <p>10 <b>to Daquan's drowning, I think, if I'm looking at that</b></p> <p>11 <b>correctly.</b></p> <p>12 Q. Is that your answer?</p> <p>13 <b>A. If we are basing it off when Daquan</b></p> <p>14 <b>drowned, IAM was brought in in late -- I'm trying to</b></p> <p>15 <b>think and I make sure I have the date right, late</b></p> <p>16 <b>2015.</b></p> <p>17 Q. Do you recall the question?</p> <p>18 <b>A. Well, I don't know because you asked me</b></p> <p>19 <b>two or three.</b></p> <p>20 MR. CAMPBELL: Could you repeat the</p> <p>21 question that I asked the gentleman.</p> <p>22 (Record read as follows:)</p> <p>23 "Q. When did Daquan Bankston die?"</p> <p>24 "A. June approximately 16th or 17th</p> <p>25 of 2017.</p>
<p style="text-align: right;">page 291</p> <p>1 brought in -- Scott had interviewed the IAM or however</p> <p>2 they got brought in with Marc Glissman who was brought</p> <p>3 in for the rest of that year, to see how the park was</p> <p>4 working and operating as a general manager.</p> <p>5 Q. And they took over all operational duties,</p> <p>6 correct?</p> <p>7 <b>A. That is, that is in June, July, whatever</b></p> <p>8 <b>the date is of 2017, I believe.</b></p> <p>9 Q. Right.</p> <p>10 <b>A. But Shane --</b></p> <p>11 Q. When did Daquan --</p> <p>12 <b>A. -- had been relieved of aquatics --</b></p> <p>13 Q. -- Bankston die?</p> <p>14 <b>A. Shane had been relieved of aquatics in</b></p> <p>15 <b>2015 --</b></p> <p>16 Q. When did Daquan Bankston die?</p> <p>17 MR. GORMLEY: You have to let him finish</p> <p>18 his answer.</p> <p>19 MR. CAMPBELL: No, he is now volunteering.</p> <p>20 MR. GORMLEY: No, he is not.</p> <p>21 BY MR. CAMPBELL:</p> <p>22 Q. When did Daquan Bankston die, before or --</p> <p>23 MR. GORMLEY: I'm objecting to continued</p> <p>24 questioning without him having an opportunity to</p> <p>25 complete his answer.</p>	<p style="text-align: right;">page 293</p> <p>1 "Q. And so the aquatics department</p> <p>2 and in fact the park itself was thereafter</p> <p>3 run by IAM, correct?"</p> <p>4 BY MR. CAMPBELL:</p> <p>5 Q. Is that correct or is it incorrect?</p> <p>6 <b>A. Okay. After Daquan, that is correct that</b></p> <p>7 <b>IAM comes in and -- but they are, but the aquatics was</b></p> <p>8 <b>being run by IAM prior to that also.</b></p> <p>9 Q. Thank you.</p> <p>10 So have you received any reservation of</p> <p>11 rights notice by any insurance company with respect to</p> <p>12 liability coverage in this case?</p> <p>13 <b>A. I've heard that term, but I don't, I don't</b></p> <p>14 <b>understand what it is.</b></p> <p>15 Q. Where the insurance company says we are</p> <p>16 not saying we are paying for any liability that is</p> <p>17 caused by your negligence and is found to have been so</p> <p>18 caused, we are reserving our right to reject any such</p> <p>19 request for coverage.</p> <p>20 <b>A. I've heard the term, so I may have</b></p> <p>21 <b>received something. I just don't recall if I did or</b></p> <p>22 <b>not.</b></p> <p>23 Q. Who do you believe you may have received</p> <p>24 it from?</p> <p>25 <b>A. Well, I would guess if I received it, that</b></p>

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1 it would likely go to, from the insurance company to,  
2 to Scott and then Scott would forward it on to us. I  
3 don't know if the insurance company would send it to  
4 our counsel and to us if we in fact received it, I'm  
5 just not sure.  
6 Q. Have you met with any insurance  
7 investigators at any time?  
8 A. I met with the insurance attorney. And  
9 I'm sorry, I draw a blank on. But I don't believe I  
10 met with an investigator.  
11 Q. Well, you said that there was an  
12 investigation right after my client drowned in your  
13 pool by the insurance company, do you recall that?  
14 A. I believe, I believe I was told that. I  
15 had heard NASCO was doing an investigation, that the  
16 police, that the health department. How soon, when I  
17 say the insurance company, once they are notified that  
18 they are doing whatever they do. I, I don't know how  
19 in depth their investigation is.  
20 Q. Do you recall what the question was?  
21 A. You asked if I had the insurance company,  
22 knew the insurance company did an investigation, I  
23 think.  
24 Q. No, you already told me that much earlier  
25 in your testimony.

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1 A. Okay.  
2 Q. Okay. That investigation that was  
3 conducted by an insurance company, was that ever  
4 shared with you?  
5 A. When I say investigation, they are  
6 gathering all the documents. So maybe I, when I say  
7 investigation --  
8 Q. I'm using the terms you used under oath.  
9 It wasn't a term I selected. It was one that you  
10 selected. So here is the question.  
11 A. Okay.  
12 Q. It's based upon your use of that term  
13 repeatedly.  
14 Did you receive any report of the  
15 investigation conducted by the insurance company?  
16 A. I don't know if I received -- I received  
17 verbal summaries from the insurance counsel of what  
18 they had.  
19 Q. Of the insurance company?  
20 A. Yes.  
21 Q. Okay. Who was that?  
22 A. I, I don't remember his name. If you said  
23 it, I'm sure I would recognize it.  
24 Q. But it was the insurance company's lawyer  
25 that was telling you what their investigation had

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1 disclosed?  
2 A. Yes.  
3 Q. Okay. And that took place within how many  
4 weeks or months of the drowning of my client?  
5 A. I, I don't recall.  
6 Q. Okay. Relative -- within six months?  
7 A. I would guess within six months. But they  
8 were going through their discovery period of gathering  
9 information, so I really don't know.  
10 Q. Is it your testimony that you never met  
11 with anyone from the insurance company regarding --  
12 A. No, I --  
13 Q. -- this event?  
14 A. I, I think we had met with the insurance  
15 attorney. I don't recall --  
16 Q. I'm not talking about defense attorneys  
17 provided to you by the insurance company.  
18 A. Okay.  
19 Q. You're talking about actual attorneys that  
20 represent the insurance company --  
21 A. Correct.  
22 Q. -- and not you, right?  
23 A. Correct, I'm referring --  
24 Q. Okay. Right.  
25 A. -- to counsel who represents the insurance

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1 company.  
2 Q. Right.  
3 A. I know I spoke with him several times. I  
4 don't recall if I met him. I don't recall meeting  
5 with an investigator.  
6 Q. Where was he located when you spoke to  
7 him?  
8 A. The gentleman for the insurance company?  
9 Q. That's the question.  
10 A. I believe he is based in Las Vegas.  
11 Q. Okay. And this was over the phone?  
12 A. Most our conversations were over the  
13 phone.  
14 Q. Were you the only participant in the phone  
15 call with the insurance company's representative  
16 lawyer or were other members of the management  
17 committee participants?  
18 A. I believe when we would have phone calls  
19 with them, there were other people on the call.  
20 Q. Did Mr. Welch participate in those  
21 discussions?  
22 A. I, I don't recall.  
23 Q. Did Orluff participate?  
24 A. I think Orluff would have been on a call.  
25 Q. And why do you think that?



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1 A. Because he's, I guess, just there with me.  
2 You know, I don't know who else may or may not have  
3 been on the call. I don't know if our own counsel  
4 would have been on or not.  
5 Q. You tried to acquire more insurance  
6 coverage for the incident involving my client's  
7 drowning shortly after the incident occurred, correct?  
8 A. I, I contacted, I believe, Lance Barnwell  
9 is the insurance agent for the park. And I believe my  
10 question as we found out the severity of this, of this  
11 accident, was to inquire again with Lance of "Do we  
12 have, do we" -- I don't know how I worded it. "Do we  
13 have sufficient coverage?"  
14 I believe Lance's response was that, "You  
15 do, but should the" -- I don't know if he said a  
16 perfect storm or something like that -- "hit and you  
17 had another incident in that same," I don't know if  
18 they used the term calendar year or policy year "were  
19 to occur, you may not have sufficient limits."  
20 And so I had asked him or we had asked him  
21 to get us quotes for additional limits to finish the  
22 year out.  
23 Q. Did you ever seek, either you or your  
24 father ever seek additional coverage for this  
25 particular incident involving Leland Gardner?

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1 A. I don't, I don't know how we would get  
2 post insurance for something that already --  
3 Q. Right.  
4 A. -- had occurred.  
5 Q. But do you know that that was the subject  
6 of discussion?  
7 A. To get additional insurance for the --  
8 Q. Post. Yeah, post incident?  
9 A. Well, I had discussions with Lance about  
10 getting additional insurance to finish the year out,  
11 but I don't recall it being about how do we get it for  
12 this item. I wish there was, but I don't think you  
13 can do that.  
14 Q. You understand that my client Leland  
15 Gardner is catastrophically injured for life?  
16 A. Yes, I do.  
17 Q. And you understand that there was a  
18 certain amount of coverage, correct?  
19 A. Yes.  
20 Q. Liability coverage through an insurance  
21 policy?  
22 A. That's correct.  
23 Q. And you understand that the liability  
24 coverage is -- that amount of coverage would be  
25 completely inadequate to cover his life care expenses,

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1 correct?  
2 MR. GORMLEY: Let me object. Lack of  
3 foundation regarding his knowledge of that.  
4 BY MR. CAMPBELL:  
5 Q. Go ahead.  
6 Do you know how much the policy is for?  
7 A. The policy I believe is total of  
8 5 million.  
9 Q. Right. How much are your policy limits  
10 now?  
11 A. I think we are at 9 or 10.  
12 Q. You don't know?  
13 A. I think we are, I can't remember.  
14 Q. Okay. But in any event, the policy limits  
15 for Leland Gardner under the policies as existing at  
16 that time of the incident were just 5 million,  
17 correct?  
18 A. Well, they were 5 million and that was at  
19 the advice of the insurance carriers that I asked  
20 prior to having them, what is their recommendation?  
21 And they recommended that 5 million would be  
22 sufficient for this type and location of water park.  
23 So I relied on them. And I even got a second opinion  
24 from, at some point, from Moreton & Company to say  
25 where should our limits be?

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1 Q. And has there been any, any decision made  
2 of any kind or type -- withdraw.  
3 Has there been any discussion concerning a  
4 demand upon those insurance carrier representatives to  
5 indemnify you in any way for the advice to the effect  
6 that 5 million was sufficient coverage?  
7 A. I don't know if a demand has been made.  
8 I, I do think a question was asked of is there -- are  
9 they at fault for their recommendation? You know.  
10 And I don't even know if I had that conversation with  
11 Orluff in brainstorming or who, who it may have been  
12 with, because I, I don't understand how that works. I  
13 do not know if a demand has been made to that  
14 insurance company.  
15 Q. Has there been any formal communication in  
16 writing with the insurance company to that effect;  
17 that is why, "Why do we only have \$5 million of  
18 coverage for an event involving the operation of a  
19 water park at which children are attending and can  
20 die?"  
21 A. Well, on a couple of occasions, I believe  
22 I had emailed Lance Barnwell. Not just the initial,  
23 but I believe a couple of times inquiring about what  
24 should the limits be or do we have sufficient  
25 coverage? And I believe each time he had said, "Yes,

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1 you do," with the exception of when we had the  
2 accident with Leland. He said, "You probably ought to  
3 consider more in case there is another accident." I  
4 don't think that, I don't think that he had ever come  
5 back and said you should have substantially more than  
6 that.  
7 Q. Do you recall the question?  
8 A. I believe so. I think you asked if there  
9 was anything in writing and my writing is my emails  
10 back and forth with me and Lance asking about limits.  
11 Q. Okay. But do those emails go to the issue  
12 of why did we only have this limited amount of  
13 coverage when we are operating a water park that  
14 caters to children and children can drown?  
15 A. I don't recall if I worded anything in  
16 that manner.  
17 Q. Do you know if anyone from Cowabunga  
18 management team or operations has done that?  
19 A. I don't know if they did. It would most  
20 likely be either Scott or myself. We were the ones  
21 that usually interacted with Lance.  
22 Q. Has Scott Huish communicated with the  
23 insurance carrier's representatives on that issue;  
24 that is, being underinsured for a catastrophic event  
25 involving the drowning of a child?

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1 A. I don't know if he has or not. I don't  
2 recall if he has.  
3 Q. Okay. Given the fact that Cowabunga Bay  
4 markets to families; that is, couples and single folks  
5 and adults that have children, the safety of children,  
6 you would agree, is, is an essential component to  
7 providing an adequate system to protections for their  
8 tender years, correct?  
9 A. I would agree with that, yes.  
10 Q. Okay. In that regard, because you have so  
11 many kids there, I would like to ask you a question  
12 with respect to your background --  
13 A. Okay.  
14 Q. -- investigations.  
15 Do you do any background investigations on  
16 any of your employees with respect to their history of  
17 sexual predation or assaults or harassment, anything  
18 of that nature?  
19 A. We have done -- are you referring to at  
20 R&O Construction or, or Henderson Water Park?  
21 Q. No, all of it. I know they are all  
22 connected as you told me before. Go ahead and tell me  
23 for all of them.  
24 A. Okay. Henderson Water Park, I don't know.  
25 I'm not involved in the hiring --

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1 Q. Okay.  
2 A. -- of employees there.  
3 At R&O Construction, we have done some  
4 background checks. I don't conduct those. And I  
5 don't know to what extent that they, that they do  
6 those. I believe if we have to have somebody working  
7 on a federal base, we have to do additional --  
8 Q. Oh, of course.  
9 A. -- additional research to, to make sure  
10 they can get through the gate.  
11 Q. Um-hum. But my question is more directed  
12 to the kids. Okay?  
13 A. Okay.  
14 Q. Would you, would you agree with me that  
15 background checks should be done on employees who are  
16 in close proximity on a daily basis with children?  
17 MR. GORMLEY: Let me object. It's  
18 improper hypothetical, calls for expert opinion.  
19 BY MR. CAMPBELL:  
20 Q. Go ahead, sir.  
21 MR. GORMLEY: Lack of foundation.  
22 BY MR. CAMPBELL:  
23 Q. Go ahead, sir.  
24 A. I, I don't know. I mean --  
25 Q. You don't know?

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1 A. Well, I think every indus- -- many, many  
2 industries are dealing with children. These children  
3 aren't alone in a classroom like a school teacher may  
4 be, or. So I haven't thought of that in a pool where  
5 everything is open and visible. I hadn't thought of  
6 that.  
7 Q. Do any of the children who attend your  
8 park go the bathroom in bathrooms?  
9 A. I would assume that they do.  
10 Q. Do they have lockers where they can  
11 change?  
12 MR. GORMLEY: Objection. Irrelevancy.  
13 Go ahead.  
14 THE WITNESS: There are -- there is a  
15 locker area. I don't know if it's -- I don't recall  
16 if it's in a secured room or not.  
17 BY MR. CAMPBELL:  
18 Q. But you would agree that employees of  
19 Cowabunga Bay are in close proximity with children on  
20 a daily basis, right?  
21 A. With children and families.  
22 Q. Is it your contention that background  
23 checks should not be done on your employees that are  
24 working with children? That can be simply answered  
25 yes or no.

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1     **A. I, I don't -- as I sit here, I don't**  
2 **believe that the background check needs to be done**  
3 **solely for that, for that purpose.**  
4     **Q. Oh, I agree. But do you believe that that**  
5 **is one of the purposes a background check should be**  
6 **done for your employees that are in close proximity**  
7 **with children on a daily basis?**  
8     **MR. GORMLEY: Again, calls for expert**  
9 **opinion. Lacks foundation. Incomplete hypothetical.**  
10 **Irrelevancy.**  
11     **THE WITNESS: I haven't -- I have never**  
12 **thought of it or considered that it would be done. I**  
13 **haven't considered the water park --**  
14 **BY MR. CAMPBELL:**  
15     **Q. I'm asking you now.**  
16     **A. So I don't, I don't believe a background**  
17 **check, if you're referring to everybody who ever works**  
18 **there. I think I would be as more concerned with the**  
19 **visitors who come in and how do we --**  
20     **Q. No, you are changing my question.**  
21     **A. Okay.**  
22     **Q. I'm not -- I don't want you to ask**  
23 **yourself your own question and answer it. My question**  
24 **is simply this.**  
25     **A. Okay.**

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1     **Q. Do you believe that the employees of**  
2 **Cowabunga Bay that are in daily proximity with**  
3 **children should undergo background checks?**  
4     **A. I mean, sitting here talking about it, it**  
5 **could be a good idea.**  
6     **Q. Thank you.**  
7     **A. I don't -- I don't know that it's being**  
8 **done.**  
9     **Q. Okay. Nor has it ever been done, correct?**  
10     **A. I'm not sure if it's ever been done, I**  
11 **don't know.**  
12     **Q. And that's -- but that is a safety issue**  
13 **as well, you would agree, correct?**  
14     **A. It's -- it's a -- whether you categorize**  
15 **under -- it's definitely an issue and a concern.**  
16     **Q. Right.**  
17     **A. As it is in everything we ever do.**  
18     **Q. Sure. Yeah.**  
19     **A. Including coming here.**  
20     **Q. Yeah. But I mean, when you're dealing**  
21 **with kids that can't protect themselves on many**  
22 **occasions, the issue of being assaulted or harassed or**  
23 **touched inappropriately could have life-altering**  
24 **consequences on them, do you agree?**  
25     **MR. GORMLEY: Continued objection.**

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1     **THE WITNESS: I think I could say that**  
2 **about everywhere in the United States.**  
3 **BY MR. CAMPBELL:**  
4     **Q. But certainly your park, your park falls**  
5 **in that range too, right?**  
6     **A. I think it could happen anywhere in the**  
7 **United States.**  
8     **Q. Including your park where kids are**  
9 **gathered in large amounts every day, correct?**  
10     **A. And seen by many people.**  
11     **Q. Um-hum. So you would agree with me in**  
12 **that regard?**  
13     **A. I would agree that there is a potential**  
14 **that it could happen and it could happen anywhere,**  
15 **including my own church room.**  
16     **Q. Right. Exactly. Exactly.**  
17     **Are background checks done in the offices**  
18 **of R&O Construction?**  
19     **A. Not on all of our employees, no.**  
20     **Q. On what employees are they done on?**  
21     **A. As I mentioned, when we have employees who**  
22 **have to work on a federal base, we've had to do**  
23 **background checks.**  
24     **Q. Any others?**  
25     **A. I'd probably have to check with our HR**

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1 **person to see if they do background checks on other**  
2 **employees or not, I'm not sure.**  
3     **Q. Who was the head of HR at Cowabunga Bay in**  
4 **2015?**  
5     **A. I don't know. I don't recall who that is.**  
6     **Q. Has there ever been a bad faith letter**  
7 **directed to your insurance company by any of your**  
8 **counsel claiming a failure on their part to declare**  
9 **this a catastrophic event?**  
10     **MR. GORMLEY: I'm going to object to the**  
11 **extent, I have to instruct him not to answer. It**  
12 **seems like you are invading the privilege. Has he**  
13 **ever seen a letter?**  
14     **MR. CAMPBELL: No, of course not.**  
15     **Read it back so he can hear it again.**  
16     **(Record read as follows:)**  
17     **"Q. Has there ever been a bad faith**  
18 **letter directed to your insurance company by**  
19 **any of your counsel claiming a failure on**  
20 **their part to declare this a catastrophic**  
21 **event?"**  
22     **MR. GORMLEY: My objection is to the**  
23 **extent that it invades the privilege, you can't talk**  
24 **about it. If you discussed it or anything along those**  
25 **lines, the question is have you seen such a letter,**

<p>page 310</p> <p>1 you can answer that question. 2 BY MR. CAMPBELL: 3 Q. I'm not interested in whether or not you 4 discussed with your counsel -- 5 <b>A. Okay.</b> 6 Q. -- the particulars of sending a bad faith 7 letter to your insurance company for the failure to 8 declare this a catastrophic event. 9 I'm asking you whether or not such a 10 letter was sent by your counsel to your insurance 11 company declaring their failure to declare this a 12 catastrophic event to be bad faith? 13 <b>A. I don't know. I don't know that I</b> 14 <b>understand what the term "catastrophic event" in the</b> 15 <b>insurance policy, what that triggers.</b> 16 Q. In the same way that we both agreed that 17 this has been a catastrophic event insofar as Leland 18 Gardner is concerned. 19 <b>A. Okay.</b> 20 Q. That he is brain impaired, bodily function 21 impaired in a catastrophic way for the rest of this 22 life. That's how I mean that term. 23 <b>A. I, I understand that. What I, what I</b> 24 <b>don't understand is in the insurance terminology if we</b> 25 <b>give them notice of bad faith, I don't, I don't recall</b></p>	<p>page 312</p> <p>1 <b>catastrophic event was, I believe his analogy was an</b> 2 <b>airliner crashes and 100 people are dead or severely</b> 3 <b>injured and there are massive, massive responses, not</b> 4 <b>a, not an individual has been injured.</b> 5 Q. And did you ask him where that limitation 6 was posted in the policy? 7 <b>A. I don't recall if I asked him where the</b> 8 <b>limitation was. He had sent me that explanation, or</b> 9 <b>told me that explanation, I should say.</b> 10 Q. But am I to understand that no bad faith 11 letter has been sent to the insurance company on the 12 basis of their failure to declare this incident 13 catastrophic under the terms of the policy? 14 <b>A. That I don't know.</b> 15 Q. Okay. 16 <b>A. I don't.</b> 17 Q. When did you receive a copy of the lawsuit 18 that was filed in this action for the first time? 19 <b>A. I think it's late July or early August of</b> 20 <b>2015.</b> 21 Q. And who gave it to you? How were you 22 provided it? 23 <b>A. I'm going to assume I had a copy emailed</b> 24 <b>to me. I, I don't recall who it came from.</b> 25 Q. Okay. Did you read it?</p>
<p>page 311</p> <p>1 <b>seeing something, but I don't think I understand what</b> 2 <b>that, what that means.</b> 3 Q. What catastrophic means? 4 <b>A. I understand what catastrophic, but the</b> 5 <b>term, and maybe where I'm confused, the term</b> 6 <b>"catastrophic" I remember seeing in the policy had to</b> 7 <b>do with PR. That they had a catastrophic event</b> 8 <b>clause --</b> 9 Q. That's right. 10 <b>A. -- that could trigger them coming out and</b> 11 <b>doing PR.</b> 12 Q. Right. 13 <b>A. I --</b> 14 Q. And advance \$250,000 towards that end, 15 correct? 16 <b>A. I don't recall the dollar amount.</b> 17 Q. All right. And they said this was not a 18 catastrophic event, correct? 19 <b>A. As it related -- okay. So as it related</b> 20 <b>to that issue and PR, I had a conversation with them</b> 21 <b>about that. I don't recall the gentleman's name.</b> 22 <b>And what I was explained is that, yeah,</b> 23 <b>that coverage -- this is catastrophic from the extent</b> 24 <b>of what happened to Leland.</b> 25 <b>Their explanation of definition of</b></p>	<p>page 313</p> <p>1 <b>A. Yeah, I believe I read it.</b> 2 Q. What were your thoughts upon reading it? 3 <b>A. If I recall, when it was alleging</b> 4 <b>insufficient lifeguards. And I don't remember if</b> 5 <b>certifications was one of it. And water clarity not</b> 6 <b>being accurate or something.</b> 7 <b>I, I believe I received it and read it a</b> 8 <b>day or two or so after the news reports that we had</b> 9 <b>talked about had come out, and Shane had actually told</b> 10 <b>us that he did not have the right number of</b> 11 <b>lifeguards, or correct number, whatever, at that time.</b> 12 <b>So I guess at that point, when I'm reading</b> 13 <b>the lawsuit, I know it more to be accurate with, with</b> 14 <b>some of the statements.</b> 15 Q. So you knew that, shortly after receiving 16 the lawsuit, you found out that it was in fact true 17 that Shane did not have the correct amount of 18 lifeguards present, correct? 19 <b>A. Yeah, sometime, I'm guessing days before</b> 20 <b>is when we had learned that, that he didn't have the</b> 21 <b>correct number.</b> 22 Q. So what you mean to say is that sometime 23 relatively soon after the event, the catastrophic 24 event to my client took place in your pool, you did 25 determine that he did not have the required number of</p>

<p style="text-align: right;">page 314</p> <p>1 lifeguards present, correct?</p> <p>2 <b>A. I believe it's July 30th is --</b></p> <p>3 Q. Okay. The answer is --</p> <p>4 <b>A. -- when we found out.</b></p> <p>5 Q. -- yes, a couple of days?</p> <p>6 <b>A. Well, it's -- I'm sorry, sir, but you said</b></p> <p>7 <b>relatively soon.</b></p> <p>8 Q. Yeah. I mean, exactly.</p> <p>9 <b>A. I, I thought that could be May 28th and so</b></p> <p>10 <b>it -- I don't know.</b></p> <p>11 Q. Let's reask the question.</p> <p>12 <b>A. Okay.</b></p> <p>13 Q. Okay.</p> <p>14 Sometime after May 27th, within reasonably</p> <p>15 close proximity, you found out that Shane didn't have</p> <p>16 the required number of lifeguards on duty at the wave</p> <p>17 pool on the day that my client drowned, correct?</p> <p>18 <b>A. Just a little over -- well, July 30th, so</b></p> <p>19 <b>it's almost two months.</b></p> <p>20 Q. That's when you found out for the first</p> <p>21 time?</p> <p>22 <b>A. We, we heard in, in I think reports</b></p> <p>23 <b>started coming out in June in different newspapers --</b></p> <p>24 Q. Okay.</p> <p>25 <b>A. -- that were stating it.</b></p>	<p style="text-align: right;">page 316</p> <p>1 on the day this little boy drowned in your pool,</p> <p>2 right?</p> <p>3 <b>A. That is correct.</b></p> <p>4 Q. Okay. And when you read that, you knew</p> <p>5 that to be true, correct, that the allegation of</p> <p>6 Mr. and Mrs. Leland -- of Mr. and Mrs. Gardner</p> <p>7 regarding that allegation was true, that the required</p> <p>8 number of lifeguards weren't present that day when</p> <p>9 their boy drowned, right?</p> <p>10 <b>A. That is correct.</b></p> <p>11 Q. Okay. Did, did you ever deny that in any</p> <p>12 way, shape, or form on --</p> <p>13 <b>A. So -- okay. I'm sorry, go ahead.</b></p> <p>14 Q. Did you ever deny that in any way, shape,</p> <p>15 or form in any capacity or did Cowabunga Bay deny it</p> <p>16 in any way, shape, or form or any capacity, that is,</p> <p>17 the truthfulness of that allegation?</p> <p>18 MR. GORMLEY: Let me object. I mean, it's</p> <p>19 vague and ambiguous regarding Cowabunga Bay. He</p> <p>20 doesn't have all the knowledge.</p> <p>21 MR. CAMPBELL: Speaking objection. Again,</p> <p>22 again --</p> <p>23 MR. GORMLEY: Mark it down, will you,</p> <p>24 please.</p> <p>25 MR. CAMPBELL: But that doesn't mean that</p>
<p style="text-align: right;">page 315</p> <p>1 Q. All right.</p> <p>2 <b>A. And it's July --</b></p> <p>3 Q. So you found out within, what? Weeks?</p> <p>4 <b>A. Well, the -- what is coming out in the</b></p> <p>5 <b>papers is claiming that, alleging it, yes.</b></p> <p>6 Q. And you find out that in fact it's true</p> <p>7 that Shane did not have the required number of</p> <p>8 lifeguards, right?</p> <p>9 <b>A. When -- prior to the July 30th date, we</b></p> <p>10 <b>were being told he had the correct number.</b></p> <p>11 Q. Okay. And you thereafter received, after</p> <p>12 you were informed that in fact the correct number of</p> <p>13 lifeguards were not present, you were sued?</p> <p>14 Cowabunga Bay was sued?</p> <p>15 <b>A. We were. And there was an email, I'm</b></p> <p>16 <b>trying to think, there's email in --</b></p> <p>17 Q. Is the answer yes?</p> <p>18 <b>A. -- June.</b></p> <p>19 Q. You were sued after you found that out?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. Okay. And after you were sued, you read</p> <p>22 the Complaint, correct, you read the lawsuit?</p> <p>23 <b>A. Correct.</b></p> <p>24 Q. And the lawsuit in fact alleged just that,</p> <p>25 that there was not the required coverage of lifeguards</p>	<p style="text-align: right;">page 317</p> <p>1 you continue to violate the rules with impunity.</p> <p>2 MR. GORMLEY: Doesn't mean you continue</p> <p>3 it. We have gone over this area about five times</p> <p>4 already today. And so, therefore, I'm letting you go.</p> <p>5 But no, that's not good enough. You want to argue</p> <p>6 every time we make some slight objection, which I</p> <p>7 think is proper for the record.</p> <p>8 You've been doing it a long time, so have</p> <p>9 I. Never had this type of problem before.</p> <p>10 But it's been asked and answered. And he</p> <p>11 I think has a lack of foundation regarding everything,</p> <p>12 everything regarding Cowabunga Bay.</p> <p>13 MR. CAMPBELL: Again, speaking objection.</p> <p>14 MR. GORMLEY: Sure.</p> <p>15 BY MR. CAMPBELL:</p> <p>16 Q. What is the answer to my question?</p> <p>17 <b>A. Can you repeat it, please.</b></p> <p>18 Q. Sure. Do you know whether anyone from the</p> <p>19 management of Cowabunga Bay or Cowabunga Bay or any of</p> <p>20 its associated entities ever denied the truthfulness</p> <p>21 of the allegation contained in the Gardner's Complaint</p> <p>22 to the effect that Cowabunga Bay did not have the</p> <p>23 required number of lifeguards on the day their little</p> <p>24 boy suffered catastrophic injuries?</p> <p>25 MR. SMITH: Calls for speculation. Calls</p>

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1 for a legal conclusion.  
2 MR. GORMLEY: Same objection.  
3 MR. CAMPBELL: They really don't want you  
4 to answer that question, do they?  
5 **THE WITNESS: Well, and it's --**  
6 MR. SMITH: Objection to the form of that  
7 question.  
8 **THE WITNESS: Can I speak for what I know?**  
9 BY MR. CAMPBELL:  
10 Q. Just answer the question, how about that?  
11 **A. Okay. For myself and we've already**  
12 **reviewed one of my emails in June sometime, where I**  
13 **was still under the impression that we had the correct**  
14 **number. And, you know, I make the statement in an**  
15 **email to whoever is copied on it that we need -- why**  
16 **are they stating all this incorrect information?**  
17 **If that's when I'm aware of that, I don't**  
18 **think I'm doing it to deny it. My understanding or**  
19 **impression at that time is: Why are they doing this?**  
20 **Where is this information coming from?**  
21 **So I don't recall if, I don't recall if**  
22 **Shane made a statement or email at some point publicly**  
23 **or to others that --**  
24 Q. Respectfully, sir, you have reframed the  
25 question. You're asking yourself your own question.

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1 **A. Okay.**  
2 Q. You've established a different foundation.  
3 That's not what I'm asking. I'm asking --  
4 MR. GORMLEY: Objection. Argumentative.  
5 BY MR. CAMPBELL:  
6 Q. I'm asking after the suit was filed.  
7 **A. After the suit was filed. I'm sorry, I**  
8 **thought you said ever. Okay.**  
9 Q. The timeframe is after the suit was filed.  
10 Remember I took you through it all. I'm going to take  
11 you through it all again. The suit was filed, right?  
12 **A. Okay. Okay.**  
13 Q. You saw in there an allegation by Mr. and  
14 Mrs. Gardner that in fact Cowabunga Bay did not have  
15 the required number of lifeguards, correct?  
16 **A. That allegation.**  
17 Q. You told me you saw that.  
18 **A. That's in the --**  
19 Q. Right?  
20 **A. That's in the claim, yeah.**  
21 Q. And you know that to be correct. That  
22 that allegation that they made in their lawsuit is  
23 true. You didn't have the required number of  
24 lifeguards, right?  
25 **A. I have been told that they don't have the**

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1 **right number of lifeguards and it was being**  
2 **investigated.**  
3 Q. And you knew that at the time that you saw  
4 the Complaint, the lawsuit, right?  
5 **A. I knew there weren't 17.**  
6 Q. Right. They didn't have the required  
7 number, right?  
8 **A. At that time, yes.**  
9 Q. And you knew that the allegation to that  
10 effect that they didn't have the required number that  
11 was made by Mr. and Mrs. Gardner was truthful, that  
12 was accurate, right?  
13 **A. At that time, yes.**  
14 Q. Yes. It absolutely was at that time and  
15 thereafter has remained true, correct? That  
16 allegation in the original Complaint was true. At the  
17 event the event took place, they didn't have the  
18 number of lifeguards that they needed, right?  
19 **A. I believe that's correct.**  
20 Q. Okay, thank you.  
21 Now, next question.  
22 **A. You can ask --**  
23 Q. Did you ever deny that in any way, shape,  
24 or form, the truthfulness of that allegation? You?  
25 **A. I'm trying to recall if I --**

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1 MR. GORMLEY: We can't have conversations  
2 with attorneys, so I don't think he is meaning to  
3 debate that.  
4 **THE WITNESS: Okay.**  
5 BY MR. CAMPBELL:  
6 Q. Did you ever deny that allegation?  
7 **A. I'm trying to think if I denied that**  
8 **allegation, sir.**  
9 Q. Okay. Go ahead.  
10 **A. And is it the specific allegation of we**  
11 **didn't have the right number of lifeguards as --**  
12 Q. The required number of lifeguards.  
13 **A. Required number of lifeguards.**  
14 Q. That's the issue that I have been  
15 discussing with you for about 15 minutes now. Yes,  
16 that's it. As alleged by the Gardners in their  
17 Complaint that they filed that you read.  
18 **A. Okay.**  
19 Q. And that you admitted those allegations  
20 were true. Did you ever deny them despite the fact  
21 that you knew that they were in fact true?  
22 **A. When you use the word --**  
23 MR. GORMLEY: After. Go ahead.  
24 **THE WITNESS: After, if denying it because**  
25 **it's under investigation, I don't know if I have**

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1 something out there that says this isn't true, it  
2 probably goes to -- I don't know. I don't recall  
3 denying it. But I, I don't know.  
4 BY MR. CAMPBELL:  
5 Q. Do you know whether or not Double Ott ever  
6 denied it?  
7 A. After the --  
8 Q. After the lawsuit was initially filed?  
9 A. I don't know if they did.  
10 Q. Okay. Do you know whether or not  
11 Henderson Water Park ever denied the truthfulness of  
12 that affidavit -- of that allegation after the Lelands  
13 (sic) made it in their initial lawsuit?  
14 A. I don't recall.  
15 MR. GORMLEY: Shane, how much time do we  
16 have?  
17 THE VIDEOGRAPHER: About 33 minutes.  
18 MR. CAMPBELL: Let's take a quick break.  
19 THE VIDEOGRAPHER: We are going off the  
20 record at approximately 5:42 p.m.  
21 (Recessed from 5:42 p.m. to 5:49 p.m.)  
22 THE VIDEOGRAPHER: We are back on the  
23 record. The time is approximately 5:49 p.m.  
24 BY MR. CAMPBELL:  
25 Q. How is your calendar kept? Is it on your

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1 computer? Is it handwritten?  
2 A. I do both.  
3 Q. Okay. Let's talk about on your computer.  
4 A. Okay.  
5 Q. How is it maintained?  
6 A. I have meetings in Outlook calendar.  
7 Q. Okay. And your meetings are located in  
8 Outlook, and those meetings would include meetings  
9 that you have for R&O Construction?  
10 A. Yes.  
11 Q. For Cowabunga Bay?  
12 A. Yeah, they could be in there also.  
13 Q. Would it indicate travel?  
14 A. I don't, I don't know if it would indicate  
15 travel or not.  
16 Q. It might?  
17 A. It might.  
18 Q. Would it indicate when you're at the park?  
19 A. If it was like a committee meeting that  
20 specifically said we are meeting this location, this  
21 day, then it likely would.  
22 Q. Would it indicate those days in which you  
23 were touring the park and finding issues with respect  
24 to the floats, the signage, things of that nature?  
25 A. I, I don't know that it would have that,

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1 because when I'm in Vegas, I'm not always just at the  
2 water park. Sometimes I'm hitting job sites or maybe  
3 stopping by the water park. And usually when I'm  
4 doing those kind of visits, they are not calendared  
5 in.  
6 Q. You do stop by the water park?  
7 A. I have.  
8 Q. Okay. And do you have a calendar that's  
9 kept in another form besides Outlook?  
10 A. No.  
11 Q. So that's the only form you keep your  
12 calendar in?  
13 A. Well, on my, on my iPhone I think it's  
14 called something different, but that's what it syncs  
15 with.  
16 Q. Okay. And what is it called in your  
17 iPhone?  
18 A. Whatever the app is on --  
19 Q. Whatever the iPhone app is?  
20 A. Called iCal or something like that or  
21 whatever it is.  
22 Q. Okay. And was that your custom and  
23 practice from 2014 through and inclusive of today, to  
24 keep your calendar in that fashion?  
25 A. I believe I have used it that way for that

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1 long. I don't know that I always enter every meeting  
2 that I, that I have, but...  
3 Q. Who maintains your calendar for you?  
4 A. I do myself.  
5 Q. Do you have an executive assistant?  
6 A. No.  
7 Q. Have you ever had an executive assistant?  
8 A. Laurie, Laurie Blanscett at our office  
9 does some things as far as when we are scheduling  
10 company events that I will ask her to coordinate. But  
11 as far as travels or meetings or anything like that, I  
12 do it myself.  
13 Q. Okay. When you travel to Las Vegas,  
14 Nevada, do you travel on a common carrier?  
15 A. I primarily use Southwest or Delta.  
16 Q. Okay. And do you maintain a Delta  
17 SkyMiles account?  
18 A. Yes, I do.  
19 Q. Do you maintain a Southwest SkyMiles  
20 account?  
21 A. Yes, I do.  
22 Q. Do you have a Delta credit card or  
23 Delta-sponsored credit card?  
24 A. I have, I have an American Express.  
25 Q. Okay. Is all your travel billed to your

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1 American Express?  
2 **A. No.**  
3 Q. Okay. What is it billed to?  
4 **A. It depends if I'm coming for -- actually,**  
5 **most the time it's to my, if it's work-related,**  
6 **R&O Construction Visa.**  
7 Q. Okay. Is that R&O Visa, is that an R&O  
8 Visa account?  
9 **A. Yes, sir.**  
10 Q. Okay. Does, does Double Ott have any  
11 credit accounts?  
12 **A. Not, not that I'm aware of. I don't know.**  
13 Q. When you travel for Double Ott or  
14 Cowabunga Bay, what account is charged for that, for  
15 your travel?  
16 **A. I believe I'm coding it to --**  
17 Q. R&O?  
18 **A. R&O. But when I say normally, when I'm**  
19 **coming down I may be doing multiple things.**  
20 Q. I understand.  
21 **A. So early on when I was just coming to**  
22 **Cowabunga, some of those costs may have been cost**  
23 **coded as we were the contractor on the job.**  
24 Q. Right. But after the park was open, okay?  
25 **A. Yes.**

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1 Q. And you traveled to the park for park  
2 business, that would be charged to R&O?  
3 **A. Yeah, I don't believe I charged it to the**  
4 **park, so I believe you are correct.**  
5 Q. Okay. And the R&O charge card is what  
6 kind of charge card, AMEX?  
7 **A. No, it's a Visa.**  
8 Q. It's a Visa?  
9 **A. Yes.**  
10 Q. Does it have an AMEX -- do you an AMEX  
11 card for R&O?  
12 **A. You mean American Express when you say**  
13 **that?**  
14 Q. Yes.  
15 **A. No, I have a personal AMEX card, but I --**  
16 Q. Okay.  
17 **A. -- usually only use it for personal**  
18 **travel.**  
19 Q. Right. Not for business related to  
20 Cowabunga Bay?  
21 **A. No.**  
22 Q. Okay. Who is responsible for keeping  
23 those records on your business expenses related to  
24 Cowabunga Bay at R&O? Would that be the CFO,  
25 Mr. Auger?

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1 **A. I just want to make sure I understand your**  
2 **question.**  
3 Q. Sure.  
4 **A. If I have an expense that I incurred that**  
5 **I want to charge to the --**  
6 Q. Let me, let me ask you a different  
7 question.  
8 **A. Okay.**  
9 Q. Okay. If I want to see the records of R&O  
10 for your travel related --  
11 **A. Okay.**  
12 Q. -- to Cowabunga Bay, where would I go in  
13 R&O's offices?  
14 **A. I would assume we would have to ask our**  
15 **CFO if, if there is a history of Visa that far back.**  
16 Q. And, and that would be Mr. Auger?  
17 **A. That's -- yes, that's who I would ask to**  
18 **print first.**  
19 Q. Okay. Do you have a cell phone?  
20 **A. Yes, I do.**  
21 Q. Do you have more than one cell phone?  
22 **A. No, I do not.**  
23 Q. Do you have an iPad?  
24 **A. Yes.**  
25 Q. Do you have more than one iPad?

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1 **A. No, I do not.**  
2 Q. Do you have any other digital  
3 communication device?  
4 **A. I have my computer that I use at work.**  
5 Q. Okay. And that's, and that's a desktop?  
6 **A. It's a laptop.**  
7 Q. Oh, you have a laptop?  
8 **A. Yeah, I don't use a desktop.**  
9 Q. Okay. Now, on all those communication  
10 devices, do you have Overlook?  
11 **A. I'm not familiar with that.**  
12 Q. Overnote? Evernote, that's right. I'm  
13 sorry. The app Evernote is on all those?  
14 **A. No, I had Evernote for maybe a year or two**  
15 **that was on my iPad.**  
16 Q. Right.  
17 **A. There was an app I was trying to see how**  
18 **does this work versus Microsoft Word or something.**  
19 Q. Um-hum.  
20 **A. But I don't -- I haven't used it for I**  
21 **don't know how long.**  
22 Q. All your -- you sound like you are like  
23 me, you use Apple for everything?  
24 **A. No. Because I get frustrated with Apple.**  
25 **Most everything we have, it's backed up to our, our**



<p style="text-align: right;">page 330</p> <p>1 server --</p> <p>2 Q. At R&amp;O?</p> <p>3 A. -- at R&amp;O, on ShareFile.</p> <p>4 Q. Right.</p> <p>5 A. So our IT guy is pretty strict that he has</p> <p>6 all the data control.</p> <p>7 Q. Got it.</p> <p>8 A. And that we don't use -- he doesn't like</p> <p>9 some of those Apple products.</p> <p>10 Q. You said you only have one cellular phone?</p> <p>11 A. Correct.</p> <p>12 Q. And what's that the phone number today?</p> <p>13 A. It's (801)430-1303.</p> <p>14 Q. How long that has been your cell phone?</p> <p>15 A. As long as I can remember. 15, 20. 2002</p> <p>16 I had that number. So however long that is, a long</p> <p>17 time.</p> <p>18 Q. Okay. Does your father own a ranch?</p> <p>19 A. He calls it a ranch.</p> <p>20 Q. Okay. And does he have buildings on that</p> <p>21 ranch?</p> <p>22 A. There is a riding arena and some stables.</p> <p>23 Q. For equestrian use?</p> <p>24 A. Yes.</p> <p>25 Q. And are there horses on the ranch?</p>	<p style="text-align: right;">page 332</p> <p>1 BY MR. CAMPBELL:</p> <p>2 Q. And when you say personal use, you mean</p> <p>3 your father's personal use?</p> <p>4 A. Yeah, he has a couple of riding horses.</p> <p>5 Q. Okay. And is that the ranch that you</p> <p>6 referred earlier to that was loaned money by R&amp;O?</p> <p>7 A. That's the ranch I was referring to.</p> <p>8 Q. How much, how much was loaned by R&amp;O to</p> <p>9 your father for his ranch?</p> <p>10 A. I'm, I'm going to guess, but I thought the</p> <p>11 number I had heard back then was about 800,000. I may</p> <p>12 be wrong on that.</p> <p>13 Q. Okay.</p> <p>14 A. I believe that had been paid back since</p> <p>15 then.</p> <p>16 Q. Okay.</p> <p>17 A. I'm not sure, it's a while back.</p> <p>18 Q. Was any money loaned to your father for</p> <p>19 the purchase or operation of an aircraft?</p> <p>20 A. No. We haven't had an aircraft for a long</p> <p>21 time.</p> <p>22 MR. CAMPBELL: Okay. Pass the witness.</p> <p>23 Reserving whatever time I may need to go back into</p> <p>24 testimony with respect to documents that were</p> <p>25 improperly redacted or otherwise not turned over.</p>
<p style="text-align: right;">page 331</p> <p>1 A. I think there is a few horses.</p> <p>2 Q. Okay. Is there any other stock on the</p> <p>3 ranch?</p> <p>4 A. I don't, I don't believe so.</p> <p>5 Q. Is there any sort of buildings for human</p> <p>6 occupancy on the ranch?</p> <p>7 A. I think in the top of the barn there is a</p> <p>8 room built out, that if somebody wanted to stay in it,</p> <p>9 they could.</p> <p>10 Q. Okay.</p> <p>11 A. There's not a --</p> <p>12 Q. Is this ranch operated for commercial</p> <p>13 purposes?</p> <p>14 MR. GORMLEY: Objection to relevancy.</p> <p>15 BY MR. CAMPBELL:</p> <p>16 Q. Go ahead, sir.</p> <p>17 MR. GORMLEY: Go ahead.</p> <p>18 THE WITNESS: So, for a little while he</p> <p>19 had a guy who rented it from him, leased it from him,</p> <p>20 whatever, to the guy was a reining, reining coach or</p> <p>21 whatever, horseman that would train other people's</p> <p>22 horses and kids.</p> <p>23 That gentleman is no longer there and I</p> <p>24 just think it's personal use. I don't know if</p> <p>25 somebody is renting the stable or not.</p>	<p style="text-align: right;">page 333</p> <p>1 Otherwise, today, I thank you for coming,</p> <p>2 giving your testimony, and I appreciate it.</p> <p>3 And I have no further questions of the</p> <p>4 witness at this time.</p> <p>5 MR. GORMLEY: I have no questions.</p> <p>6 Any other questions?</p> <p>7 MS. MASTRANGELO: I don't have any</p> <p>8 questions.</p> <p>9 MR. SMITH: No questions.</p> <p>10 MR. GORMLEY: Shane, how much time?</p> <p>11 THE VIDEOGRAPHER: 22 minutes.</p> <p>12 This concludes the video deposition of</p> <p>13 Slade Opheikens taken on May 24, 2018.</p> <p>14 We are going off the record at</p> <p>15 approximately 6:01 p.m.</p> <p>16 COURT REPORTER: Ms. Mastrangelo, would</p> <p>17 you like a copy of the transcript?</p> <p>18 MS. MASTRANGELO: Yes.</p> <p>19 COURT REPORTER: Mr. Smith, would you like</p> <p>20 a copy of the transcript?</p> <p>21 MR. SMITH: I think we will need one.</p> <p>22 COURT REPORTER: Mr. Duesman, would you</p> <p>23 like a copy of the transcript?</p> <p>24 MR. DUESMAN: Yes, please.</p> <p>25 COURT REPORTER: Mr. Gormley, would you</p>

<p>1 like a copy? page 334</p> <p>2 MR. GORMLEY: Yes, copy. I'd like a rough</p> <p>3 draft.</p> <p>4 COURT REPORTER: When would you like it?</p> <p>5 MR. GORMLEY: Next week. Not tomorrow.</p> <p>6 Next week.</p> <p>7 (Whereupon, the deposition adjourned at 6:03 p.m.)</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</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>1 CERTIFICATE OF REPORTER page 336</p> <p>2</p> <p>3 STATE OF NEVADA )</p> <p>4 ) ss</p> <p>5 COUNTY OF CLARK )</p> <p>6</p> <p>7 I Denise R. Kelly, a Certified court</p> <p>8 Reporter, duly licensed by the State of Nevada do</p> <p>9 hereby certify:</p> <p>10 That I reported the deposition of JEFFREY</p> <p>11 SLADE OPHEIKENS, commencing on Thursday, May 24, 2018,</p> <p>12 at the hour of 9:33 a.m.</p> <p>13 That prior to being deposed, the deponent</p> <p>14 was duly sworn by me to testify to the truth;</p> <p>15 That I thereafter transcribed my said</p> <p>16 stenographic notes into written form;</p> <p>17 That the typewritten transcript is a</p> <p>18 complete, true, and accurate transcription of my said</p> <p>19 stenographic notes;</p> <p>20 I further certify that pursuant to NRC</p> <p>21 Rule 30(e)(1) that the signature of the deponent:</p> <p>22 _X_ was requested by the deponent or a</p> <p>23 party before the completion of the deposition;</p> <p>24 _ was not requested by the deponent or a</p> <p>25 party before the completion of the deposition;</p> <p>26 I further certify that I am not a relative</p>
<p>1 CERTIFICATE OF DEPONENT page 335</p> <p>2 PAGE LINE CHANGE REASON</p> <p>3</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13 I, JEFFREY SLADE OPHEIKENS, deponent</p> <p>14 herein, do hereby certify and declare under penalty of</p> <p>15 perjury that the within and foregoing transcription,</p> <p>16 including my corrections reflected above, is a true</p> <p>17 and correct transcription of my testimony contained</p> <p>18 therein; that I have read, corrected, and hereby affix</p> <p>19 my signature to said deposition.</p> <p>20 Executed this ____ day of _____,</p> <p>21 2018, at _____.</p> <p>22 (City/State)</p> <p>23</p> <p>24</p> <p>25 JEFFREY SLADE OPHEIKENS, Deponent</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 28th 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>14 Denise R. Kelly</p> <p>15 CCR #252, RPR</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>

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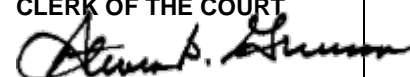
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**RPLY**

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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

**PLAINTIFFS' REPLY IN SUPPORT  
OF MOTION FOR LEAVE TO FILE  
THIRD AMENDED COMPLAINT**

Hearing Date: July 25, 2018

Hearing Time: 9:00 a.m.



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

## **POINTS AND AUTHORITIES**

### **I. INTRODUCTION**

There is an old adage in the law that “if the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table.” Suffice it to say, the Opheikens Defendants’ Opposition is a masterclass in table-pounding. Indeed, the Opheikens Defendants refer to Plaintiffs’ proposed reverse veil-piercing claim and supporting allegations as “reckless,” “regrettable,” “illogical,” “inconsistent,” “contradictory,” “bogus,” “misguided,” “factually discredited,” “legally unsustainable,” and a “misadventure.” The Opheikens Defendants likewise claim that Plaintiffs’ Third Amended Complaint (“TAC”) is premised on “misstatements of fact” and “utterly false” representations made with the “bad faith, ulterior motive to try to force a settlement” and “shak[e] down more money.” In one particularly distasteful passage, the Opheikens Defendants even go so far as to warn the Court to “be very careful in choosing to dance to Plaintiffs’ tune” because they are perpetuating a fraud and “appear hopeful that if they spread enough mistruths around the Court might just let it slide at this stage because Leland Gardner almost drowned.”<sup>1</sup>

For their part, Plaintiffs will not drag this proceeding into the gutter by returning fire with similar over-the-top rhetoric and tone-deaf attacks. Nor will Plaintiffs engage the Opheikens

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<sup>1</sup> The Opheikens Defendants’ vitriol is not limited to Plaintiffs as they also levelled vicious accusations against Third-Party Defendant William Ray. Specifically, the Opheikens Defendants assert that Mr. Ray engaged in “egregious misconduct” by leaving “Leland alone, unattended and without a life jacket in a wave pool rather than make any effort to keep him safe.” *See* Opp. at 4. Like their attempt to vilify Plaintiffs and portray themselves as victims, the Opheikens Defendants’ cruel and wholly gratuitous attack on Mr. Ray is entirely disconnected from the facts, the evidence, and the subject matter at issue in Plaintiffs’ Motion.

Defendants in a premature debate over the (abundant) evidence of their individual negligence except to state that Plaintiffs dispute nearly every factual representation in the Opposition.<sup>2</sup> The parties will address the evidence at trial. The Opheikens Defendants’ attempt to inject extraneous arguments and evidence is nothing more than a ploy to distract the Court from the straightforward issues presented by Plaintiffs’ Motion.

In order to cut through the noise created by the Opheikens Defendants’ Opposition, Plaintiffs will refocus the analysis on Plaintiffs’ request for leave to amend under NRCP 15. First, because the Opheikens Defendants have asserted that Plaintiffs’ proposed TAC is futile, the Court must determine whether reverse veil-piercing against Orluff and R&O Construction (“R&O”) is a recognized claim for relief that would survive a motion to dismiss under NRCP 12(b)(5). If the Court resolves that question in the affirmative—and it should—it must then assess whether Plaintiffs sufficiently pleaded their claim for reverse veil-piercing under NRCP 8. Here, Plaintiffs can easily overcome any challenge under NRCP 12(b)(5) and their claim for reverse veil-piercing is more than adequately pled under the lenient standard imposed by NRCP 8. As such, the Court should grant Plaintiffs’ motion for leave to file the TAC.

## II. ARGUMENT

### A. Reverse Veil-Piercing Is A Viable Claim For Relief Against R&O Based On The Predicate Cause Of Action For Negligence Against Orluff.

In support of their argument that Plaintiffs’ proposed amendment is futile, the Opheikens Defendants contend that reverse veil-piercing under the alter ego doctrine is not an independent cause of action and, therefore, must be dismissed under NRCP 12(b)(5). To begin, Plaintiffs agree that

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<sup>2</sup> By way of example, it is highly ironic that the Opheikens Defendants’ accusation that Plaintiffs intentionally concealed information from the Court directly follows their representation that Orluff did not obtain a loan from the Bank of Utah. *See* Opp. at 6 n. 4. In reality, Orluff admitted in his deposition that he personally signed for the loan and put “everything [he] owned [ ] on the line.” *Id.*, Ex. A at \_\_. This is just one of the many misstatements of fact in the Opheikens Defendants’ Opposition.

reverse veil-piercing against R&O is not a standalone cause of action that can be brought in the absence of a predicate claim against Orluff. The Opheikens Defendants, however, ignore that Plaintiffs have pleaded a tort claim for negligence against Orluff in his individual capacity. *See* Mot., Ex. 1 at 15-16. For that reason, Plaintiffs specifically alleged that R&O is the alter ego of Orluff and identified both R&O and Orluff as the targets of their reverse veil-piercing claim. *Id.* at 16. Accordingly, contrary to the Opheikens Defendants' position, Plaintiffs have not brought their claim for reverse veil-piercing against R&O as an independent cause of action as it is clearly predicated on their preexisting negligence claim against Orluff.<sup>3</sup>

The Opheikens Defendants seemingly take issue with the fact that Plaintiffs pleaded their claim for reverse veil-piercing against R&O and Orluff under the alter ego doctrine as a separate cause of action.<sup>4</sup> While reverse veil-piercing under the alter ego doctrine may not be an independent cause of action, there is no dispute that Plaintiffs are required to plead it as a claim for relief under NRCP 8. *See, e.g., EED Holdings v. Palmer Johnson Acquisition Corp.*, 387 F.Supp.2d 265, 274 (S.D.N.Y. 2004) (“[V]eil piercing claims are subject to the pleading requirements imposed by Fed.R.Civ.P. 8(a)[.]”); *Flentye v. Kethrein*, 485 F.Supp.2d 903, 913 (N.D. Ill. 2007) (“To state a veil-piercing claim, Plaintiffs typically are only required to satisfy the notice pleading standards of Rule 8(a).”); *In re Am.*

<sup>3</sup> To that end, Plaintiffs acknowledge that R&O will only be liable if they prevail on their negligence claim against Orluff *and* demonstrate that R&O is Orluff's alter ego such that reverse veil-piercing is appropriate under the circumstances. Moreover, unlike the fatal drowning of another child in Cowabunga Bay's wave pool that is the subject of separate litigation, Plaintiffs do not contend that R&O is directly liable for Leland's injuries. As such, it is unclear why the Opheikens Defendants repeatedly criticize Plaintiffs for not bringing other causes of action against R&O.

<sup>4</sup> To be clear, Plaintiffs refer to their proposed theory of reverse veil-piercing as a “claim” because the Nevada Supreme Court and Court of Appeals frequently use that same terminology in reference to the alter ego doctrine. *See, e.g., Webb v. Shull*, 128 Nev. 85, 92, 270P.3d 1266, 1272 (2012) (“In this case, the district court made several findings that relate to Webb's alter ego claim[.]”); *Sharpe v. Grundy*, 2017 WL 1806801, at \*3 (May 1, 2017) (stating the requirement elements to prevail on a “claim for alter ego”).

1 *Int'l Refinery*, 402 B.R. 728, 751 (Bankr. W.D. La. 2008) (“As far as the applicable pleading standard,  
2 Plaintiffs’ alter ego allegations are governed by the notice pleading standard of Rule 8(a)[.]”) (applying  
3 alter ego doctrine under Nevada law).<sup>5</sup>

4 For that reason, courts have rejected the argument that alter ego claims must be dismissed if  
5 pleaded as a separate cause of action. For example, in *Airbus DS Optronics GmbH v. Nivisys LLC*, the  
6 defendants argued that the plaintiffs improperly pleaded “‘piercing the corporate veil’ as a substantive  
7 cause of action, which the state of Arizona does not recognize, and therefore the claim must be  
8 dismissed.” 183 F.Supp.3d 986, 990 (D. Ariz. 2016). The *Airbus* court, however, was “not persuaded  
9 [by that argument], as Defendants advocate for an overly formulistic federal pleading requirement, in  
10 tension with Rule 8.” *Id.* The *Airbus* court then found that the plaintiffs adequately pleaded veil-  
11 piercing under the alter ego doctrine as “a form of derivative liability.” *Id.*; see also *Accurso v. Infra-*  
12 *Red Servs., Inc.*, 23 F.Supp.3d 494, 510 (E.D. Pa. 2014) (“Although veil-piercing is not a separate  
13 cause of action, but rather a basis for a cause of action against particular individuals, on a motion to  
14 dismiss (or motion for judgment on the pleadings), a court must examine whether the facts pleaded  
15 state a cause of action on a theory of piercing the corporate veil.”).

16  
17  
18 This Court should reach the same result. Plaintiffs pleaded reverse veil-piercing under the alter  
19 ego doctrine as required by NRCP 8, and predicated this derivative theory of liability on their pre-  
20 existing negligence claim against Orluff. That Plaintiffs identified reverse veil-piercing as a separate  
21 cause of action in their proposed TAC is inconsequential; the Opheikens Defendants’ argument to the  
22 contrary improperly elevates form over substance.  
23  
24  
25

26  
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).

**B. Plaintiffs Are Clearly Entitled To Pursue A Claim For Reverse Veil-Piercing Under The Alter Ego Doctrine Against R&O Prior To The Entry Of Judgment Against Orluff.**

Although they repeatedly cite *LFC Mktg. Group, Inc. v. Loomis*, 116 Nev. 896, 9 P.3d 841 (2000), the Opheikens Defendants bizarrely claim that Plaintiffs are advancing “a factually discredited and legally unsupported theory of recovery which has never been permitted by the Nevada Supreme Court or any other court in this State.” *See* Opp. at 10. As detailed in Plaintiffs’ Motion, the Nevada Supreme Court in *Loomis* plainly adopted reverse veil-piercing as a viable claim for relief and stated that this theory is “not inconsistent with traditional piercing in its goal of preventing abuse of the corporate form.” *Id.* at 903, 9 P.3d at 846. Because reverse veil-piercing is simply an offshoot of traditional veil-piercing under the alter ego doctrine, the Opheikens Defendants’ argument that Plaintiffs’ proposed claim is “legally unsupported” is incorrect.<sup>6</sup>

The Opheikens Defendants also attempt to manufacture a new element for reverse veil-piercing claims that does not exist under Nevada law. Specifically, the Opheikens Defendants argue that Plaintiffs must have an unsatisfied judgment before pursuing a reverse veil-piercing theory because the *Loomis* decision and certain other cases cited therein addressed post-judgment proceedings. *See* Opp. at 13-17. But *Loomis* never suggested, let alone held, that a party seeking to reverse pierce is required to have an unsatisfied judgment before pursuing such relief. The Nevada Supreme Court, moreover, did not limit its holding to the specific facts of that case. Rather, the *Loomis* court merely stated that a plaintiff must prove the basic elements of a traditional alter ego claim by a preponderance of the evidence. *Id.* at 904, 8 P.3d at 846-47 (a party pursuing a reverse veil-piercing theory must

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<sup>6</sup> The Opheikens Defendants devoted an entire section of their Opposition to the argument that the Nevada Supreme Court’s decision in *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 89, 405 P.3d 651 (2017) did not create a new cause of action against R&O and Orluff. *See* Opp. at 9-10. Plaintiffs, however, do not contend that *Gardner* addressed reverse veil-piercing. Nor is it necessary for Plaintiffs to rely on *Gardner* to support the viability of this proposed claim for relief. Indeed, Plaintiffs’ ability to plead the theory of reverse veil-piercing is confirmed by other binding precedent in Nevada, namely the *Loomis* decision.

1 demonstrate (i) influence and control, (ii) unity of ownership and interest, and (iii) that adherence to  
2 the corporate fiction would sanction a fraud or promote injustice).

3 Parties are regularly permitted to pursue veil-piercing claims prior to the entry of judgment as  
4 evidenced by the Nevada Supreme Court's issuance of a writ of mandamus in this case compelling the  
5 Court to allow Plaintiffs to bring alter ego claims against Henderson Water Park LLC, its member-  
6 LLCs and the Individual Defendants. *Gardner*, 405 P.3d at 655-57 and n. 1. If Plaintiffs are permitted  
7 to pursue traditional veil-piercing claims against the LLCs and Individual Defendants in this action  
8 prior to the entry of judgment, then it necessarily follows that Plaintiffs are entitled to bring a reverse  
9 veil-piercing claim against R&O and Orluff at the same time.  
10

11 The weight of authority is in accord. "A movant may seek to pierce the veil as part of the initial  
12 complaint or after a judgment has been obtained and the movant discovers that the corporate shield  
13 may be vulnerable. This difference only affects the procedure of obtaining the relief and not the nature  
14 of the remedy." *In re Howland*, 516 B.R. 163, 169 n. 3 (Bankr. E.D. Ky. 2014), *aff'd*, 579 B.R. 411  
15 (E.D. Ky. 2016), *aff'd*, 674 Fed. Appx. 482 (6th Cir. 2017). For that reason, courts routinely allow  
16 plaintiffs to pursue reverse veil-piercing claims in the original complaint rather than after the entry  
17 of judgment. *See, e.g., Allstate Ins. Co. v. TMR Medicabill Inc.*, 2000 WL 34011895, at \*16  
18 (E.D.N.Y. July 13, 2000) (entering pre-judgment writ of attachment against non-party corporations  
19 based on reverse veil-piercing theory premised on RICO and fraud claims asserted in original  
20 complaint); *McCleskey v. David Boat Works, Inc.*, 225 F.3d 654, at \*\*3-4 (4th Cir. 2000) (reversing  
21 entry of summary judgment on reverse veil-piercing claim premised on tort and contract claims  
22 asserted in the original complaint); *Smith v. Carolina Med. Ctr.*, 274 F.Supp.3d 300, 327-28 (E.D.  
23 Pa. 2017) (denying motion to dismiss reverse veil-piercing claim premised on tort claims asserted  
24 in the original complaint); *Wilson v. Davis*, 305 S.W.3d 57, 68-72 (Tex. Ct. App. 2009) (denying  
25 motion for summary judgment on reverse veil-piercing claim premised on negligence claims  
26 asserted in the original complaint).  
27  
28

1 The Opheikens Defendants cite a plethora of cases in their Opposition, but none actually  
2 support their contention that Plaintiffs' proposed reverse veil-piercing claim is premature in the  
3 absence of an unsatisfied judgment. For example, the Opheikens Defendants identify  
4 approximately 22 cases for the unremarkable proposition that an alter ego claim is not an  
5 independent, standalone cause of action. *See* Opp. at 11-14. Again, Plaintiffs do not dispute this  
6 general principle, but it certainly does not negate the operative pleading standard under NRCP 8 or  
7 require dismissal of Plaintiffs' proposed claim for relief. *See supra* at Section II.A. The Opheikens  
8 Defendants likewise rely on multiple cases where courts considered reverse veil-piercing claims in  
9 the context of post-judgment collection actions, *see* Opp. at 14-17, but none of those cases stand for  
10 the proposition that reverse piercing claims are limited to the post-judgment setting. To the  
11 contrary, Plaintiffs have conclusively demonstrated that courts routinely permit such claims in  
12 connection with original proceedings.  
13

14 The only case cited by the Opheikens Defendants that could conceivably support their  
15 position is *Higgins v. Journal Register Co.*, 2007 WL 3124731, at \*3 (D. Conn. Oct. 23, 2007). *See*  
16 Opp. at 12. The *Higgins* court did not address the viability of a reverse veil-piercing claim, but  
17 merely denied a motion to compel discovery related to an alter ego claim based on its finding that  
18 the issue should be bifurcated from the plaintiff's age discrimination claims "for sake of  
19 convenience, minimization of juror confusion, and economy." *Id.* As such, the Court should look  
20 past the voluminous nature of the Opheikens Defendants' inapposite legal authority and focus on  
21 the utter lack of substance. Quantity, in other words, is not synonymous with quality.  
22

23 Finally, Plaintiffs ask the Court to consider the practical import of the Opheikens Defendants'  
24 misguided approach. The Opheikens Defendants effectively argue that Plaintiffs should be required  
25 to proceed to trial against Orluff, obtain a judgment against him, and unsuccessfully attempt to collect  
26 on that judgment for some indeterminate amount of time. Then, Plaintiffs would be required to file a  
27 new action for reverse veil piercing against R&O and Orluff, conduct discovery anew, and proceed to  
28

1 a second trial to determine whether R&O is Orloff's alter ego. It should go without saying that the  
2 Opheikens Defendants' proposed course of action would be exceedingly costly, inefficient and  
3 contrary to the mandate of NRCP 1 that the Rules of Civil Procedure (including NRCP 15) be  
4 "administered to secure the just, speedy, and inexpensive determination of every action."

5 **C. Plaintiffs Have Adequately Pleaded The Required Elements Of Their Reverse**  
6 **Veil-Piercing Claim Under NRCP 8.**

7 In addition to the Opheikens Defendants' strained attempt to manufacture new elements for a  
8 reverse veil-piercing claim, they devote the first five pages of their Opposition to a rambling attack on  
9 the merits of Plaintiffs' proposed reverse veil-piercing claim. While Plaintiffs strongly dispute the  
10 Opheikens Defendants' confused and inaccurate portrayal of their reverse veil-piercing claim, this is  
11 neither the time nor the place to address the substantive merits of Plaintiffs' allegations. R&O and  
12 Orloff will certainly be entitled to present their defense at trial. The Opheikens Defendants concede  
13 this point when they acknowledge the Court's analysis is limited to the four corners of Plaintiffs'  
14 proposed TAC. *See* Opp. at 16 n. 10 (conceding that the Court may not consider facts or evidence  
15 outside of the proposed TAC when ruling on the instant Motion).<sup>7</sup> Accordingly, the Court should  
16 ignore the Opheikens Defendants' transparent effort to convince His Honor to pre-judge the merits of  
17 Plaintiffs' reverse veil-piercing claim based on a misleading depiction of the evidentiary record.  
18

19 Plaintiffs are merely required to allege that "(1) the corporation was influenced and governed  
20 by the person asserted to be the alter ego; (2) there was such unity of interest and ownership that one  
21 is inseparable from the other; and (3) the facts are such that adherence to the corporate fiction of a  
22 separate entity would, under the circumstances, sanction a fraud or promote injustice." *Loomis*, 116  
23

24  
25  
26 <sup>7</sup> The Opheikens Defendants also dispute whether the jury is entitled to render factual  
27 determinations in connection with Plaintiffs reverse veil-piercing claim, but it is likewise premature  
28 to debate that issue now. That said, Plaintiffs' broader point remains the same. Given that reverse  
veil-piercing is highly fact-specific and there is no "litmus test" for determining whether the  
corporate fiction should be disregarded, the resolution of a reverse veil-piercing claim is generally  
improper on a motion for summary judgment let alone a routine motion for leave to amend.



Nev. 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.

Plaintiffs' proposed TAC easily alleges sufficient facts to plead a reverse veil-piercing claim under Nevada law. *Id.* at ¶¶ 22-36, 72-81. To that end, the Opheikens Defendants do not contend in their Opposition that Plaintiffs failed to plead the general elements of a reverse veil-piercing claim as set forth by the Nevada Supreme Court in *Loomis*.<sup>8</sup> Other than arguing about the absence of an unsatisfied judgment—which, again, is not required—the Opheikens Defendants' only substantive critique of the proposed TAC is that "Plaintiffs [ ] pay no heed to the equitable concerns involved with reverse pierce theory," *i.e.*, the alleged harm to innocent shareholders. *See* Opp. at 15. But Plaintiffs plainly addressed this element in the proposed TAC and alleged that the minority shareholders who serve as executives and board members of R&O will suffer no harm if the Court pierces R&O's corporate veil. *See* Mot., Ex. 1 at ¶ 81.<sup>9</sup>

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<sup>8</sup> The Opheikens Defendants' assertion that there was no commingling between R&O and Orluff demonstrates their fundamental misunderstanding of the law. *See* Opp. at 5-6. The fact that Orluff took a multi-million dollar personal loan from R&O—as he has on multiple other occasions—and used it to fund his investment in Cowabunga Bay is the very definition of commingling. And the Opheikens Defendants' point that the money was ultimately funneled back to R&O as payment for construction costs only reinforces Plaintiffs' allegation that Orluff acted as a straw man for R&O in connection with Cowabunga Bay.

<sup>9</sup> The Opheikens Defendants argue that permitting Plaintiffs to pursue a reverse veil-piercing claim would amount to the imposition of a prejudgment writ of attachment and prevent R&O from obtaining bonding on new construction projects. This is utter nonsense. First, the Opheikens Defendants' argument concerning the equities is better suited to trial rather than a motion for leave to amend. Second, the notion that allowing Plaintiffs to plead a claim for reserve veil-piercing equates to entering a prejudgment writ of attachment ignores the strict standards and specific procedures governing such relief under NRS Chapter 31. That the Opheikens Defendants would even make this absurd argument speaks volumes about the meritless nature of their position.

Because “[t]he court should freely give leave when justice so requires,” and “[t]he liberality embodied in NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline[.]” *see Gardner*, 405 P.3d at 654, the Court should grant Plaintiffs leave to file the proposed TAC. Plaintiffs pleaded the required elements of their reverse veil-piercing theory in great detail with each allegation supported by ample evidence developed during discovery to date. R&O and Orluff will be permitted to present their defense to the merits of Plaintiffs’ claim at the appropriate time, but there is no reason for the Court to deny Plaintiffs leave to amend to pursue this viable legal theory under Nevada law.<sup>10</sup>

### 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 July, 2018.

CAMPBELL AND WILLIAMS

By /s/ Donald J. Campbell

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*Attorneys for Plaintiffs*

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<sup>10</sup> In an argument that clearly goes to the merits of Plaintiffs’ proposed claim, the Opheikens Defendants argue that Orluff owns R&O through his family trust and raise questions about identity of the trustee and whether the trust is irrevocable. *See Opp.* at 5. Even if Orluff’s undisputed ownership stake in R&O through a family trust had some significance to the reverse veil-piercing inquiry in this case—and it does not—the *Loomis* court clearly held that “the absence of corporate ownership is not automatically a controlling event.” *Id.* at 904-05, 8 P.3d at 847 (applying reverse piercing where individual did not own a single share of stock but acted as the “ultimate authority” for corporate dealings and held himself out as the “president and CEO” and “primary owner” of the company); *State v. Easton*, 647 N.Y.S.2d 904, 909 (App. Div. 1995) (allowing corporation’s assets to be reached through reverse piercing where the debtor did not own a single share of the corporation’s stock) (cited with approval in *Loomis*).

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 18th day of July, 2018 I caused the foregoing document entitled **Plaintiffs' Reply in Support of 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

IN THE STATE OF NEVADA  
DISTRICT COURT

PETER GARDNER, etc., )  
et al., )  
Plaintiffs, )  
vs. )  
HENDERSON WATER PARK, )  
LLC, etc., et al., )  
Defendants. )  
\_\_\_\_\_ )

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

REPORTER'S TRANSCRIPT

OF

PROCEEDINGS

BEFORE THE HONORABLE JERRY A. WIESE, II

DISTRICT COURT JUDGE

WEDNESDAY, JULY 25, 2018

AT 9:00 A.M.

LAS VEGAS, NEVADA

APPEARANCES: (Next page.)

REPORTED BY: KIMBERLY A. FARKAS, NV CCR No. 741

1 APPEARANCES:

2  
3 For the Plaintiffs:

4  
5 JON C. WILLIAMS, ESQ.  
6 Campbell & Williams  
7

8 For the Defendant:

9  
10 MAX E. CORRICK, II, ESQ.  
11 Olson, Cannon, Gormley,  
12 Angulo & Stoberski  
13  
14  
15

16 \* \* \* \* \*

1 LAS VEGAS, NEVADA, WEDNESDAY, JULY 25, 2018;

2  
3 P R O C E E D I N G S

4 \* \* \* \* \*

5  
6 THE COURT: Gardner versus Henderson Water  
7 Park. This is always a fun one.

8 MR. WILLIAMS: That's right, Your Honor.

9 THE COURT: It's the biggest pile. I think  
10 this is page 11.

11 MR. WILLIAMS: It is, Your Honor.

12 THE COURT: So this is on for motion for  
13 leave to file a third amended complaint. You guys are  
14 emboldened by the Supreme Court saying that you can sue  
15 anybody you want, so now you want to bring in more  
16 people; right?

17 MR. WILLIAMS: Not exactly, Your Honor.  
18 Not exactly.

19 Your Honor, Colby Williams, Bar No. 5549,  
20 on behalf of the plaintiffs. It's good to be back in  
21 front of you.

22 Your Honor, despite the emotional  
23 opposition that you've seen filed by the defendants  
24 here, we're really here on a very straightforward and  
25 simple matter, and that is motion for leave to amend

1 our complaint to assert the third amended complaint --  
2 to do two things, to name R&O Construction as a  
3 defendant, and to amplify on some of the allegations  
4 based on the recent discovery that we've conducted that  
5 we believe supports the claims that were asserted.

6 THE COURT: Can I shortcut your argument?

7 MR. WILLIAMS: Hundred percent.

8 THE COURT: I'm generally inclined to grant  
9 motions for leave to amend because the standard is  
10 different. I usually allow people to amend their  
11 complaints to bring in people and then I tell the other  
12 side to file a motion to dismiss if they think it's  
13 improper. Because the standard is obviously different  
14 on a motion to amend. Leave is supposed to be freely  
15 granted under the rule. As opposed to a motion to  
16 dismiss; you have to look at whether or not there's  
17 really a basis to have that person in there. I  
18 understand there's a futility argument as it relates to  
19 motion to amend, but I generally err on the side of  
20 allowing the amendment and look at it as a motion to  
21 dismiss later.

22 MR. WILLIAMS: Your Honor, that saves my  
23 argument. Given that we've been here before and we  
24 were on the opposite end of a ruling, I didn't want to  
25 belabor the point, but if Your Honor is so inclined,

1 then I don't want to waste any more time.

2 THE COURT: Especially based on what the  
3 Supreme Court has done with this case so far, that  
4 would be my inclination.

5 MR. WILLIAMS: Thank you, Your Honor.

6 MR. CORRICK: I got all dressed up for  
7 nothing. Max Corrick on behalf of the Opheikens,  
8 Mr. Welch, and Double Ott.

9 And I appreciate Your Honor's initial take,  
10 that generally leave is freely granted and let's see  
11 the motion to dismiss, which you know is coming, which  
12 as Loomis v. LFC is going to dictate and it's going to  
13 have to be granted. Because the plaintiffs in what  
14 they have proposed to Your Honor as being the amended  
15 pleading -- which they can't go back now and change it;  
16 that's what they're going to be stuck with -- they've  
17 alleged a cause of action, which they specifically call  
18 it. And words have meaning. And I appreciate  
19 counsel's reply saying, well, that's not what we really  
20 meant; we were intending to tie it to certain conduct.  
21 The pleading itself as it exists names reverse  
22 corporate piercing as the third cause of action.

23 There was no dispute from the reply, and I  
24 don't think they will dispute today, that reverse  
25 pierce is not a cause of action, has never been



1 recognized in Nevada as a cause of action, in fact, has  
2 never been recognized, to our knowledge, through the  
3 cases that we were able to survey in any jurisdiction  
4 as being --

5 THE COURT: It's a theory of recovery.

6 MR. CORRICK: It's a theory of recovery.

7 Absolutely right. And it's an extraordinary theory of  
8 recovery, which requires a tremendous standard to meet.

9 But because we agree it's not a cause of  
10 action, what you are doing, Your Honor, if you are  
11 going to follow your normal practice of under 5(a),  
12 it's freely granted, and let's see the motion to  
13 dismiss, you're saying as it's pled, because it's  
14 called a cause of action -- we're not reading in the  
15 tea leaves -- that you're allowing -- you're  
16 sanctioning an amended complaint which defies what  
17 you've just said, something that you know is not true.  
18 It can't be a cause of action, one.

19 Two, and I agree with Mr. Williams as well.  
20 Setting aside the emotionality on both sides with  
21 respect to this case. And it's not just on the defense  
22 side; it's certainly on the plaintiffs side as well.

23 What is going to be before you and what  
24 really has been put before you now in the context of  
25 why you shouldn't even grant motion for leave at this

1 point in time, is this question of law. Namely, can  
2 you even try to get the relief you're seeking using  
3 this theory of reverse piercing where there is no  
4 judgment, there is no judgment creditor, there is no  
5 judgment debtor, and this is not a tax case.

6 As set forth in the opposition, and,  
7 surprisingly, never pinned down in the reply brief,  
8 there is not a single jurisdiction in this United  
9 States that we were able to find that has allowed the  
10 use of reverse pierce as a theory of recovery, of  
11 relief, not a cause of action, has allowed it in the  
12 absence of judgment debtor, judgment creditor, tax  
13 case, or a confessed judgment; okay. For example --  
14 and, again, I don't want to take too much time, more  
15 than I have to. But the cases cited by the plaintiffs  
16 in their reply, not a single one of them helps them.  
17 And, in fact, gives Your Honor a clearer roadmap as to  
18 why the motion to dismiss will need to be granted.

19 They did not cite for you a single case  
20 where a reverse pierce theory of recovery has ever been  
21 permitted in the absence of a judgment debtor, judgment  
22 creditor, tax case, or confessed judgment, not one.

23 *Smith v. Carolina Medical Center*, that's  
24 pursuant to a plea agreement. *McCleskey v. David Boat*  
25 *Works*, judgment creditor/debtor. *Allstate v. TMR*

1 *Medicabill*, post-plea allocution. So it's pursuant to  
2 we agree that we owe money. *In re: Howland*, tax  
3 debtor; *In re: American International Refinery*,  
4 bankruptcy debtor case; *Flentye v. Kethrein*,  
5 post-arbitration judgment creditor debit.

6 Those are the cases that the plaintiffs in  
7 their reply have suggested to you support reverse  
8 piercing. Look, it's not a novel proposition to say  
9 reverse piercing is something that is recognized under  
10 the law in the most select of circumstances.

11 None of those cases, nor any of the cases  
12 that were considered by *Loomis*, or which have come  
13 since *Loomis*, for example, *Postal v. Coswell*. That's  
14 the most recent California Court of Appeals decision  
15 regarding the inapplicability of reverse pierce to  
16 corporations, saying, California doesn't even recognize  
17 it anymore as to corporations.

18 *State v. Favre*, that's their most recent  
19 case from the Connecticut Supreme Court, *In re:*  
20 *Phillips*, the most recent statement from the Colorado  
21 Supreme Court, and *CF v. Flight*, the most recent  
22 statement from the Supreme Court of Virginia, all of  
23 them demonstrate and make it abundantly clear, just as  
24 *Loomis* did, that in order to be able to even get your  
25 foot in the door with respect to a reverse pierce

1 theory of relief, you've got to have the condition  
2 precedent. You've got to have judgment debtor,  
3 judgment creditor, a tax case, because the federal tax  
4 laws are a little bit different, they're treated  
5 differently by the bankruptcy courts, or some course of  
6 confessed judgment, which we don't have here. It's not  
7 even pled in the proposed amended pleading.

8           It would be a more interesting issue if,  
9 for example, the plaintiffs in their proposed pleading  
10 had alleged, we are a judgment creditor. That would be  
11 interesting because that would be a false fact; okay.

12           Additionally, if they had said that Orluff  
13 Opheikens is a judgment debtor, that would be  
14 interesting because it would be a false fact. None of  
15 those things apply.

16           I appreciate, again, where I think you're  
17 going to go with this, but I think you need to be very,  
18 very careful in looking at this and just going back to  
19 the old way -- not the old way -- your usual way of  
20 viewing motions for leave to amend.

21           Even under -- not even stepping over a  
22 threshold barely is what these cases are usually looked  
23 at in terms of leave to amend, freely granted, freely  
24 granted. Even under that minuscule standard, the  
25 plaintiffs, by virtue of what they have pled, the four

1 corners of their proposed pleading, which is what they  
2 are going to be stuck with -- they can't change it --  
3 they don't meet -- they will never be able to establish  
4 any reverse pierce theory because they haven't pled the  
5 requisite facts, and the requisite facts have not  
6 occurred and may very well never occur.

7               So we would ask that you, in this instance,  
8 again, given the minuscule standard that may be applied  
9 here, you should deny the motion. Let this case  
10 proceed as intended, as -- the plaintiffs know that R&O  
11 has no actual responsibility in this case. Let this  
12 case proceed with these current parties until we get to  
13 the next dispositive motion. Thank you, Your Honor.

14              THE COURT: Well, the problem is this,  
15 especially because of the fact that the Supreme Court  
16 reversed me on the amending of other parties, if I'm  
17 going to deny the motion or if I'm going to dismiss  
18 this party because of the fact that there's not a  
19 judgment debtor or creditor relationship, doesn't it  
20 make more sense to do that on a motion to dismiss  
21 standard as opposed to a motion for leave to amend  
22 standard?

23              MR. CORRICK: I hear you loud and clear.  
24 And I do appreciate -- I think that was part of the  
25 calculus of this from the plaintiff's perspective.

1 Your Honor's decision was overturned once in this case,  
2 and, therefore, we're going to see who else can we drag  
3 into this case, as you were joking about as we walked  
4 up to the podium.

5 MR. WILLIAMS: Your Honor, needless to say,  
6 I object to all of that characterization.

7 THE COURT: I know you do. It's okay.

8 I'm going to grant it today, guys. I'm  
9 going to let you amend. I'm sure that I'm going to see  
10 a motion to dismiss on it. And I'll address the facts  
11 at that time and the law. And Mr. Corrick is going to  
12 make the same argument, I'm sure, and that's fine.

13 MR. CORRICK: I'll make a different  
14 argument, but it will be -- still be the right one.

15 THE COURT: It will be similar.

16 MR. CORRICK: It will still be the right  
17 one.

18 THE COURT: But I would prefer to rule on  
19 it based on a different standard.

20 MR. CORRICK: Very good.

21 THE COURT: Just makes more sense to me.

22 MR. WILLIAMS: Your Honor, and I don't want  
23 to waste the Court's time, but needless to say, we  
24 addressed every one of these arguments and demonstrated  
25 why they're all entirely base less.

1           And let's talk -- I just want to make one  
2 thing clear, about this "no jurisdiction has ever  
3 recognized this." Reverse piercing is an offshoot of  
4 the alter ego doctrine. Alter ego, there is a  
5 traditional forum where you seek to obtain relief  
6 against an individual when you've sued a corporation,  
7 that it's the alter ego. Here it's in the reverse.  
8 We're going to ultimately seek, if the Courts grant us  
9 leave, we're going to ultimately seek recovery against  
10 a corporation based on the liability of an individual.  
11 But, Your Honor, they're both alter ego.

12           This nonsense about having to have a  
13 judgment before you can assert the claim is ridiculous.  
14 And you don't have to look to any of these other  
15 jurisdictions. You can look to this very case. We  
16 went up to the Supreme Court, Your Honor. One of our  
17 bases was is we should be permitted to pursue an alter  
18 ego claim, albeit a traditional alter ego claim,  
19 against certain defendants in this case. His Honor  
20 originally denied our attempt to do that because there  
21 wasn't an expressed statute addressing that alter ego  
22 liability in the context of LLCs. I get that. But,  
23 Your Honor, the Supreme Court expressly said we were  
24 right; we got to amend to assert alter ego claims.

25           And what did we do? The Supreme Court

1 didn't say, you can only assert your alter ego claims  
2 once you've gotten a judgment against these defendants.  
3 They said we get to do it now. And we did it in  
4 December. And what did they do? They answered the  
5 complaint.

6 We have alter ego claims without a judgment  
7 in this case for seven months. This is a concocted  
8 argument. We'll be happy to address it when they file  
9 their bogus motion to dismiss.

10 MR. CORRICK: I'm looking forward to  
11 educating Mr. Williams on the differences between  
12 reverse piercing and traditional alter ego.

13 THE COURT: All right. Go home. Play nice  
14 on the way out. I'll see you when you file a motion to  
15 dismiss.

16 MR. WILLIAMS: Thank you, Your Honor.

17 MR. CORRICK: Thank you, Your Honor.

18 (Proceedings concluded)

19  
20 -o0o-

21 ATTEST: FULL, TRUE, AND ACCURATE TRANSCRIPT OF  
22 PROCEEDINGS.

23  
24   
25 /S/ Kimberly A. Farkas, NV CCR No. 741



	<b>addressing [1]</b> 12/21	<b>argument [6]</b> 4/6 4/18 4/23
<b>MR. CORRICK: [8]</b> 5/5 6/5	<b>again [3]</b> 7/14 9/16 10/8	11/12 11/14 13/8
10/22 11/12 11/15 11/19 13/9	<b>against [4]</b> 12/6 12/9 12/19	<b>arguments [1]</b> 11/24
13/16	13/2	<b>as [23]</b>
<b>MR. WILLIAMS: [9]</b> 3/7	<b>agree [3]</b> 6/9 6/19 8/2	<b>aside [1]</b> 6/20
3/10 3/16 4/6 4/21 5/4 11/4	<b>agreement [1]</b> 7/24	<b>ask [1]</b> 10/7
11/21 13/15	<b>al [2]</b> 1/4 1/7	<b>assert [4]</b> 4/1 12/13 12/24
<b>THE COURT: [13]</b> 3/3 3/8	<b>albeit [1]</b> 12/18	13/1
3/11 4/5 4/7 5/1 6/4 10/13	<b>all [5]</b> 5/6 8/22 11/6 11/25	<b>asserted [1]</b> 4/5
11/6 11/14 11/17 11/20 13/12	13/13	<b>attempt [1]</b> 12/20
-	<b>allegations [1]</b> 4/3	<b>ATTEST [1]</b> 13/21
<b>-o0o [1]</b> 13/20	<b>alleged [2]</b> 5/17 9/10	<b>B</b>
/	<b>allocution [1]</b> 8/1	<b>back [3]</b> 3/20 5/15 9/18
/S [1] 13/25	<b>allow [1]</b> 4/10	<b>bankruptcy [2]</b> 8/4 9/5
<b>1</b>	<b>allowed [2]</b> 7/9 7/11	<b>Bar [1]</b> 3/19
<b>11 [1]</b> 3/10	<b>allowing [2]</b> 4/20 6/15	<b>barely [1]</b> 9/22
<b>2</b>	<b>Allstate [1]</b> 7/25	<b>base [1]</b> 11/25
<b>2018 [2]</b> 1/17 3/1	<b>alter [11]</b> 12/4 12/4 12/7	<b>based [4]</b> 4/4 5/2 11/19 12/10
<b>25 [2]</b> 1/17 3/1	12/11 12/17 12/18 12/21	<b>bases [1]</b> 12/17
<b>5</b>	12/24 13/1 13/6 13/12	<b>basis [1]</b> 4/17
<b>5549 [1]</b> 3/19	<b>always [1]</b> 3/7	<b>be [24]</b>
<b>7</b>	<b>amend [10]</b> 3/25 4/9 4/10	<b>because [12]</b> 4/9 4/13 5/13
<b>741 [2]</b> 1/24 13/25	4/14 4/19 9/20 9/23 10/21	6/9 6/13 9/3 9/11 9/14 10/4
<b>9</b>	11/9 12/24	10/15 10/18 12/20
<b>9:00 [1]</b> 1/18	<b>amended [5]</b> 3/13 4/1 5/14	<b>been [5]</b> 4/23 5/25 6/2 6/24
<b>A</b>	6/16 9/7	7/20
<b>A-15-722259-C [1]</b> 1/7	<b>amending [1]</b> 10/16	<b>before [5]</b> 1/15 4/23 6/23 6/24
<b>A.M [1]</b> 1/18	<b>amendment [1]</b> 4/20	12/13
<b>able [4]</b> 6/3 7/9 8/24 10/3	<b>American [1]</b> 8/3	<b>behalf [2]</b> 3/20 5/7
<b>about [3]</b> 11/3 12/2 12/12	<b>amplify [1]</b> 4/3	<b>being [2]</b> 5/14 6/4
<b>absence [2]</b> 7/12 7/21	<b>Angulo [1]</b> 2/11	<b>belabor [1]</b> 4/25
<b>Absolutely [1]</b> 6/7	<b>answered [1]</b> 13/4	<b>believe [1]</b> 4/5
<b>abundantly [1]</b> 8/23	<b>any [5]</b> 5/1 6/3 8/11 10/4	<b>between [1]</b> 13/11
<b>ACCURATE [1]</b> 13/21	12/14	<b>biggest [1]</b> 3/9
<b>action [8]</b> 5/17 5/22 5/25 6/1	<b>anybody [1]</b> 3/15	<b>bit [1]</b> 9/4
6/10 6/14 6/18 7/11	<b>anymore [1]</b> 8/17	<b>Boat [1]</b> 7/24
<b>actual [1]</b> 10/11	<b>Appeals [1]</b> 8/14	<b>bogus [1]</b> 13/9
<b>Additionally [1]</b> 9/12	<b>APPEARANCES [2]</b> 1/22	<b>both [2]</b> 6/20 12/11
<b>address [2]</b> 11/10 13/8	2/1	<b>brief [1]</b> 7/7
<b>addressed [1]</b> 11/24	<b>applied [1]</b> 10/8	<b>bring [2]</b> 3/15 4/11
	<b>apply [1]</b> 9/15	<b>C</b>
	<b>appreciate [4]</b> 5/9 5/18 9/16	<b>calculus [1]</b> 10/25
	10/24	<b>California [2]</b> 8/14 8/16
	<b>arbitration [1]</b> 8/5	<b>call [1]</b> 5/17
	<b>are [8]</b> 3/13 6/10 6/10 8/6 9/4	<b>called [1]</b> 6/14
	9/10 9/22 10/2	

**C**

**Campbell** [1] 2/5  
**can** [7] 3/14 4/6 7/1 11/2 12/13 12/15 13/1  
**can't** [3] 5/15 6/18 10/2  
**Cannon** [1] 2/10  
**careful** [1] 9/18  
**Carolina** [1] 7/23  
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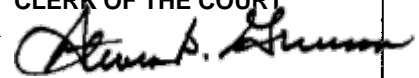
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**would** [8] 5/4 9/8 9/10 9/11 9/13 9/14 10/7 11/18

**X**

**XXX** [1] 1/8

**Y**

**you** [34]  
**you're** [5] 6/13 6/15 6/15 7/2 9/16  
**you've** [6] 3/23 6/17 9/1 9/2 12/6 13/2  
**your** [26]



**ORDR**

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*Attorneys for Plaintiffs*

**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-C  
Dept. No.: XXX

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR LEAVE TO FILE  
THIRD AMENDED COMPLAINT**

The matter before the Court is Plaintiffs' Motion for Leave to File Third Amended Complaint. The Court, having reviewed the papers and pleadings on file in this matter and having heard the oral arguments of counsel on July 25, 2018, good cause appearing and with no just reason for delay, hereby rules as follows:

**I. FINDINGS**

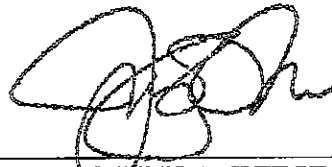
1. The Court heard Plaintiffs' Motion for Leave to File Third Amended Complaint.

**II. ORDER**

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Plaintiffs' Motion for Leave to File Third Amended Complaint is GRANTED.

DATED this 27<sup>th</sup> day of July 2018.



HON. JUDGE JERRY A. WIESE II

Respectfully submitted by:  
CAMPBELL & WILLIAMS




Donald J. Campbell, Esq. (1216)  
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Approved as to form and content by:  
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**I. FINDINGS**

1. The Court heard Plaintiffs' Motion for Leave to File Third Amended Complaint.

**II. ORDER**

IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Plaintiffs' Motion for Leave to File Third Amended Complaint is GRANTED.

DATED this \_\_\_\_ day of August, 2018.

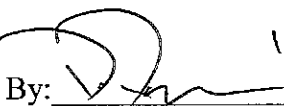
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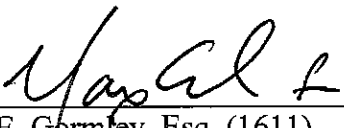
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2 & STOBERSKI

3 By:   
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6 Las Vegas, Nevada 89129

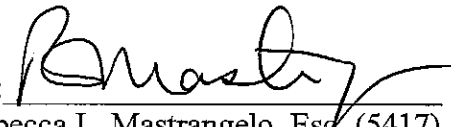
ROGERS MASTRANGELO CARVALHO  
& MITCHELL

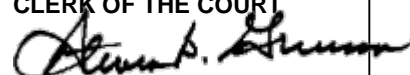
By: \_\_\_\_\_  
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11 *Attorneys for Plaintiffs*

12 **DISTRICT COURT**  
13 **CLARK COUNTY, NEVADA**

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

17 Plaintiffs, )

18 vs. )

19 HENDERSON WATER PARK, LLC dba )  
20 COWABUNGA BAY WATER PARK, a Nevada )  
21 limited liability company; WEST COAST WATER )  
22 PARKS, LLC, a Nevada limited liability company; )  
23 DOUBLE OTT WATER HOLDINGS, LLC, a Utah )  
24 limited liability company; ORLUFF OPEIKENS, an )  
25 individual; SLADE OPHEIKENS, an individual; )  
26 CHET OPHEIKENS, an individual; SHANE )  
27 HUIISH, an individual; SCOTT HUIISH, an )  
28 individual; CRAIG HUIISH, 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

**NOTICE OF ENTRY OF ORDER**

1 Please take notice that on the 27<sup>th</sup> day of July, 2018, an Order Granting Plaintiffs' Motion for  
2 Leave to File Third Amended Complaint, was duly entered in the above entitled matter, a copy of  
3 which is attached as "Exhibit 1" and by this referenced made part hereof.

4 DATED this 30<sup>th</sup> day of July, 2018.

5 CAMPBELL AND WILLIAMS

6  
7  
8 By: /s/ Sam Mirkovich  
9 Samuel R. Mirkovich, Esq. (11662)  
10 700 South 7th Street  
11 Las Vegas, NV 89101  
12 Telephone: (702) 382-5222  
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14 *Attorney for Plaintiffs*

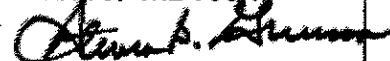
15 **CERTIFICATE OF SERVICE**

16 Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on  
17 this 27<sup>th</sup> day of July, 2018, I caused the foregoing document entitled **NOTICE OF ENTRY ORDER**  
18 to be served upon those persons designated by the parties in the E-Service Master List for the above-  
19 referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory  
20 electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and  
21 Conversion Rules.

22  
23 By: /s/ Lucinda Martinez  
24 An Employee of Campbell and Williams  
25  
26  
27  
28

# EXHIBIT 1

# EXHIBIT 1



**ORDR**

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*Attorneys for Plaintiffs*

**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 )  
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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 )  
HUIISH, an individual; SCOTT HUIISH, an )  
individual; CRAIG HUIISH, 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-C  
Dept. No.: XXX

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR LEAVE TO FILE  
THIRD AMENDED COMPLAINT**

The matter before the Court is Plaintiffs' Motion for Leave to File Third Amended Complaint. The Court, having reviewed the papers and pleadings on file in this matter and having heard the oral arguments of counsel on July 25, 2018, good cause appearing and with no just reason for delay, hereby rules as follows:

**I. FINDINGS**

1. The Court heard Plaintiffs' Motion for Leave to File Third Amended Complaint.

**II. ORDER**

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DATED this 27<sup>th</sup> day of July 2018.

  
HON. JUDGE JERRY A. WIESE II


Respectfully submitted by:  
CAMPBELL & WILLIAMS

\_\_\_\_\_  
Donald J. Campbell, Esq. (1216)  
Samuel R. Mirkovich, Esq. (11662)  
Philip R. Erwin, Esq. (11563)  
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Approved as to form and content by:  
THORNDAL ARMSTRONG et al.

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Las Vegas, Nevada 89101

By:  \_\_\_\_\_  
Kevin S. Smith, Esq. (7184)  
7425 Peak Drive  
Las Vegas, Nevada 89128



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DATED this \_\_\_\_ day of August, 2018.

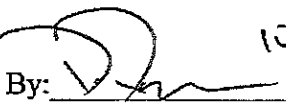
HON. JUDGE JERRY A. WIESE II

Respectfully submitted by:  
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OLSON CANNON GORMLEY ANGULO  
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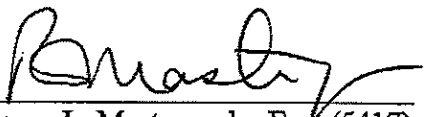
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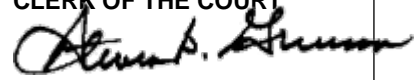
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*Attorneys for Plaintiffs*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

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

Plaintiffs, )

vs. )

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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 )

Case No.: A-15-722259

Dept. No.: XXX

**THIRD AMENDED COMPLAINT**

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.  
26  
27  
28

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

11           12. Defendant Craig Huish (“Craig”) is a Washington resident who, at all relevant times,  
12 conducted business in Clark County, Nevada and served as a member of HWP’s Management  
13 Committee. At times, Shane, Scott and Craig will be referred to collectively as the “Huish Family.”  
14

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

19           14. Defendant R&O Construction Company (“R&O”) is a Utah corporation that regularly  
20 conducts business in Clark County, Nevada. Orluff, through his family trust, owns approximately  
21 eighty-five percent (85%) of the outstanding shares in R&O and the remaining shares are owned by  
22 other executives and board members of R&O.  
23

24           15. At all times material to this Complaint, HWP’s Management Committee, through the  
25 Individual Defendants as its members, was a common or joint enterprise and the Individual Defendants  
26 acted in concert with each other and subject to the common nondelegable duties detailed herein. All  
27 actions taken by a member of HWP’s Management Committee, as its agent in furtherance of HWP’s  
28

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.  
27  
28

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  
27  
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  
25  
26  
27  
28

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 30th day of July, 2018.

CAMPBELL & WILLIAMS

By /s/ Donald J. Campbell

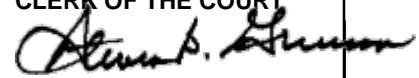
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**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 30th day of July, 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.

/s/ **Lucinda Martinez**  
An Employee of 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, and  
individual; CHET OPHEIKENS, an individual;  
SHANE HUISH, an individual; SCOTT HUISH,  
an individual; CRAIG HUISH, an individual;  
TOM WELCH, an individual; DOES I through  
X, inclusive; ROE Corporations I through X,  
inclusive; ROE Corporations I through X,  
inclusive; and ROE Limited Liability Company I  
through X, inclusive

Defendants.

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

Third-Party Plaintiff

CASE NO. A-15-722259-C

DEPARTMENT XXX

**DEFENDANT SHANE HUISH'S ANSWER  
TO THIRD AMENDED COMPLAINT**



1 vs.

2 WILLIAM PATRICK RAY, JR.; and DOES I  
3 through X, inclusive,

4 Third-Party Defendants.  
5

6 **DEFENDANT SHANE HUIISH'S ANSWER TO THIRD AMENDED COMPLAINT**

7 COMES NOW Defendant SHANE HUIISH, by and through his attorneys, STEVEN T. JAFFE,  
8 ESQ. And KEVIN S. SMITH, ESQ., of the law firm of HALL JAFFE & CLAYTON, LLP, and answers  
9 Plaintiff's Second Amended Complaint as follows:

10 1. Answering Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 18 and 19 of the Third Amended  
11 Complaint, this Answering Defendant is without sufficient knowledge or information to form a belief as  
12 to the truth or falsity of the allegations contained therein, and accordingly, those allegations are hereby  
13 denied.

14 2. Answering Paragraph 10 of the Third Amended Complaint, this Answering Defendant admits  
15 he is a Nevada resident. As to the remaining allegations this Answering Defendant is without sufficient  
16 knowledge or information to form a belief as to the truth or falsity of the allegations contained therein,  
17 and accordingly, those allegations are hereby denied.

18 3. Answering Paragraphs 15, 16 and 20 of the Third Amended Complaint, if any allegation  
19 contained in said paragraphs may be construed to be against this Answering Defendant, this Answering  
20 Defendant denies each and every allegation against him contained in said paragraphs. To the extent said  
21 paragraphs contains allegations relating to parties other than this Answering Defendant, this Answering  
22 Defendant is without knowledge or information to form a belief as to the truth of said allegations and  
23 therefore denies each and every allegation contained therein.

24 4. Answering Paragraph 17 of the Third Amended Complaint, this Answering Defendant admits  
25 that Cowabunga Bay Water Park ("Cowabunga Bay") is a water park located at 900 Galleria Drive,  
26 Henderson, Nevada 89011. As to the remaining allegations, this Answering Defendant is without  
27 sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained  
28 therein, and accordingly, those allegations are hereby denied.

1 **GENERAL ALLEGATIONS**

2 5. Answering Paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 49 and  
3 50 of the Third Amended Complaint, this Answering Defendant is without sufficient knowledge or  
4 information to form a belief as to the truth or falsity of the allegations contained therein, and  
5 accordingly, those allegations are hereby denied.

6 6. Answering Paragraphs 38, 39, 42 and 43 of the Third Amended Complaint, this Answering  
7 Defendant asserts that this Plaintiff asserts legal conclusions which this Defendant cannot answer, and  
8 accordingly, hereby denies these allegations.

9 7. Answering Paragraphs 40, 44, 45, 46, 47, 48, 51, 52, 53 and 56 of the Third Amended  
10 Complaint, this Answering Defendant denies all allegations.

11 8. Answering Paragraph 41 of the Third Amended Complaint, this Answering Defendant admits  
12 that Cowabunga Bay is a facility with a water slide and attractions, including a wave pool. As to all  
13 remaining allegations, this Answering Defendant is without sufficient knowledge or information to form  
14 a belief as to the truth or falsity of the allegations contained therein, and accordingly, those allegations  
15 are hereby denied.

16 9. Paragraphs 54 and 55 of the Third Amended Complaint does not state a claim for relief or  
17 make any allegation against this Answering Defendant. If any allegation contained in said paragraphs  
18 may be construed to be against this Answering Defendant, this Answering Defendant denies each and  
19 every allegation against him contained in said paragraphs. To the extent said paragraphs contain  
20 allegations relating to parties other than this Answering Defendant, this Answering Defendant is without  
21 knowledge or information to form a belief as to the truth of said allegations and therefore denies each  
22 and every allegation contained therein.

23 **FIRST CAUSE OF ACTION**

24 **(Negligence-Defendant HWP)**  
25 **(Alter Ego Liability Only - Defendants West Coast Water Parks, LLC,**  
**Double Ott Water Holding, LLC, and the Individual Defendants)**

26 10. Answering Paragraph 57 of the Third Amended Complaint, this Answering Defendant  
27 repeats and realleges his answers and responses to paragraphs 1 through 56 as if more fully set forth  
28 herein, and thereby incorporate them.

1 11. Answering Paragraph 58, 59, 60, 61, 62 and 63 of the Third Amended Complaint, and all  
2 sub-parts thereto, solely to the extent that the allegations contained therein refer to this Answering  
3 Defendant, this Answering Defendant denies all allegations contained therein. As to all other  
4 Defendants, this Answering Defendant is without sufficient knowledge or information to form a belief as  
5 to the truth or falsity of the allegations regarding injuries and damages contained therein, and  
6 accordingly, those allegations are hereby denied.

7 **SECOND CAUSE OF ACTION**

8 **(Negligence - Individual Defendants)**

9 12. Answering Paragraph 64 of the Third Amended Complaint, this Answering Defendant repeat  
10 and realleges his answers and responses to paragraphs 1 through 63 as if more fully set forth herein, and  
11 thereby incorporate them.

12 13. Answering Paragraph 65 of the Third Amended Complaint, this Answering Defendant is  
13 without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations  
14 contained therein, and accordingly, those allegations are hereby denied.

15 14. Answering Paragraphs 66, 67, 68, 69, 70 and 71 of the Third Amended Complaint, and all  
16 sub-parts thereto, solely to the extent that the allegations contained therein refer to this Answering  
17 Defendant, this Answering Defendant denies all allegations contained therein. As to all other  
18 Defendants, this Answering Defendant is without sufficient knowledge or information to form a belief as  
19 to the truth or falsity of the allegations regarding injuries and damages contained therein, and  
20 accordingly, those allegations are hereby denied.

21 **THIRD CAUSE OF ACTION**

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

24 15. Answering Paragraph 72 of the Third Amended Complaint, this Answering Defendant repeat  
25 and realleges his answers and responses to paragraphs 1 through 63 as if more fully set forth herein, and  
26 thereby incorporate them.

27 16. Answering Paragraphs.73, 74, 75, 76, 77, 78, 79, 80 and 81 of the Third Amended  
28 Complaint, this Answering Defendant is without sufficient knowledge or information to form a belief as

1 to the truth or falsity of the allegations contained therein, and accordingly, those allegations are hereby  
2 denied.

3 **AFFIRMATIVE DEFENSES**

4 As and for his affirmative defenses in this case, this Answering Defendant asserts the  
5 following:

6 **FIRST AFFIRMATIVE DEFENSE**

7 Defendant alleges that the Plaintiffs expressly assumed whatever risk or hazard existed at the  
8 time of the claimed incident(s) and were therefore responsible for the alleged injuries suffered and  
9 further, that the Plaintiffs were guilty of negligence on their own parts which caused or contributed to  
10 any injuries suffered by the Plaintiffs.

11 **SECOND AFFIRMATIVE DEFENSE**

12 The Third Amended Complaint fails to state a claim against the Defendant upon which relief can  
13 be granted.

14 **THIRD AFFIRMATIVE DEFENSE**

15 The cause of action set forth in the Third Amended Complaint is subject to dismissal for failure  
16 to join a necessary and indispensable party pursuant to NRCP 19.

17 **FOURTH AFFIRMATIVE DEFENSE**

18 Defendant alleges that the negligence of the Plaintiffs exceeds that of the Defendant, if any, and  
19 that the Plaintiffs are thereby barred from any recovery.

20 **FIFTH AFFIRMATIVE DEFENSE**

21 Plaintiffs have failed to mitigate their damages and, thus, monetary recovery, if any, should be  
22 reduced accordingly.

23 **SIXTH AFFIRMATIVE DEFENSE**

24 The Third Amended Complaint and each and every purported cause of action in the Third  
25 Amended Complaint fails to state facts sufficient to constitute a cause of action or to state a claim on  
26 which relief can be granted against this Defendant.

27 ...

28 ...

1                                   **SEVENTH AFFIRMATIVE DEFENSE**

2           All risks and dangers involved in the factual situation set forth in the Third Amended Complaint  
3 were open and obvious to the Plaintiffs.

4                                   **EIGHTH AFFIRMATIVE DEFENSE**

5           Defendant, without negligence on his part, was suddenly and unexpectedly confronted with peril  
6 arising from the actual presence of or appearance of imminent danger to himself or others and utilized  
7 reasonable care in responding to such emergency and therefore, Defendant's conduct is excused.

8                                   **NINTH AFFIRMATIVE DEFENSE**

9           Plaintiffs were involved in a prior accident or other form of traumatic event which caused the  
10 injuries of which they complains, and Plaintiffs must either prove causation or apportion damages, or  
11 Plaintiffs will fail to establish causation as a matter of law.

12                                  **TENTH AFFIRMATIVE DEFENSE**

13           Defendant is entitled to a finding of several liability only between the parties to this action.

14                                  **ELEVENTH AFFIRMATIVE DEFENSE**

15           The incident which is the subject matter of this action was unavoidable, wherefore, Plaintiffs are  
16 barred from any recovery against this Defendant.

17                                  **TWELFTH AFFIRMATIVE DEFENSE**

18           Defendant alleges that Plaintiffs are barred from bringing this claim as all consequences of this  
19 claim were avoidable.

20                                  **THIRTEENTH AFFIRMATIVE DEFENSE**

21           Defendant alleges that the injuries, if any, suffered by the Plaintiffs as set forth in the Plaintiffs  
22 Third Amended Complaint were caused in whole or in part by the negligence of a third party over whom  
23 Defendant had no control.

24                                  **FOURTEENTH AFFIRMATIVE DEFENSE**

25           Plaintiffs are barred from recovering any special damages herein for failure to specifically allege  
26 the items of special damages claims, pursuant to NRCP 9(g).

27 ...

28 ...

1 **FIFTEENTH AFFIRMATIVE DEFENSE**

2 Any award of punitive damages would be unconstitutional under applicable constitutional  
3 protection.

4 **SIXTEENTH AFFIRMATIVE DEFENSE**

5 Plaintiffs are not entitled to receive punitive damages based on any calculations premised upon  
6 the wealth of this Defendant, as such calculation is unconstitutional.

7 **SEVENTEENTH AFFIRMATIVE DEFENSE**

8 Plaintiffs' injuries and problems, as alleged herein, pre-existed the accident at issue in this  
9 matter, thereby barring or limiting recovery.

10 **EIGHTEENTH AFFIRMATIVE DEFENSE**

11 This Answering Defendant is owed indemnity by another entity for the injuries and damages  
12 alleged herein.

13 **NINETEENTH AFFIRMATIVE DEFENSE**

14 Plaintiffs do not belong to the class of persons a statute was designed to protect, and the  
15 Plaintiff's claimed injury is not the type any statute was intended to protect.

16 **TWENTIETH AFFIRMATIVE DEFENSE**

17 This Defendant had no actual notice of the alleged condition which the Plaintiffs allege caused  
18 injuries.

19 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

20 This Defendant had no constructive notice of the alleged condition which the Plaintiff alleges  
21 caused condition.

22 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

23 Plaintiffs, another party, or some other person or entity has intentionally or negligently destroyed  
24 critical evidence, thereby constituting spoliation of evidence, to this Defendant's prejudice.

25 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

26 The Plaintiffs' medical costs derive from unreasonable or unnecessary treatment, such costs are  
27 not usual and customary, and such costs and treatment are presented solely to improperly attempt to  
28 increase the value of this case.

1 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

2 The Plaintiffs, or their agents, are barred from asserting any claims against this answering  
3 Defendant because the alleged damages were the result of a superceding intervening cause.

4 Defendant reserves his right to assert additional affirmative defenses in the event discovery  
5 indicates that additional affirmative defenses would be appropriate.

6 WHEREFORE, Defendant requests that:

- 7 a. Plaintiffs take nothing by this action;  
8 b. A judgment of dismissal be entered in favor of Defendant;  
9 c. Defendant be awarded the costs of suit incurred; and  
10 d. Defendant be awarded such other and further relief as the court deems just and

11 proper.

12 DATED this 2<sup>nd</sup> day of August, 2018.

13 HALL JAFFE & CLAYTON, LLP

14 By:   
15 \_\_\_\_\_

16 STEVEN T. JAFFE, ESQ.

17 Nevada Bar No. 007035

18 KEVIN S. SMITH, ESQ.

19 Nevada Bar No. 007184

20 7425 Peak Drive

21 Las Vegas, Nevada 89128

22 *Attorneys for Defendant SHANE HUIISH*

**CERTIFICATE OF SERVICE**

I hereby certify under penalty of perjury that I am an employee of HALL JAFFE & CLAYTON, LLP and that on the 8<sup>th</sup> day of August, 2018, the foregoing **DEFENDANT SHANE HUISH'S ANSWER TO THIRD AMENDED COMPLAINT** was 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 e-Filing System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules, and if not on the e-serve list, was mailed via U.S. Mail, postage prepaid as noted below, as follows:

CAMPBELL & WILLIAMS  
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Las Vegas, NV 89101  
*Attorneys for Plaintiffs*

ROGERS, MASTRANGELO, CARVALHO & MITCHELL  
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Las Vegas, Nevada 89101  
*Attorneys for Defendants Scott Huish; Craig Huish;  
and Huish Brothers' LLC (West Coast Water Parks, LLC)*

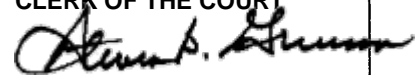
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*Attorneys for Third-Party Defendant/Third-Party Plaintiff Henderson Water Park, LLC  
dba Cowabunga Bay Water Park*

STEPHENSON & DICKINSON  
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*Attorney for Third-Party Defendant William Patrick Ray, Jr.*

  
An Employee of HALL JAFFE & CLAYTON, LLP





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3 Nevada Bar No. 001611  
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6 9950 West Cheyenne Avenue  
7 Las Vegas, Nevada 89129  
8 Telephone: 702-384-4012  
9 Facsimile: 702-383-0701  
10 Attorney for Defendants/Cross-Claimants,  
11 *DOUBLE OTT WATER HOLDINGS, LLC;*  
12 *TOM WELCH; ORLUFF OPHEIKENS;*  
13 *SLADE OPHEIKENS; and CHET OPHEIKENS*

9 **DISTRICT COURT**  
10 **CLARK COUNTY, NEVADA**

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

14 Plaintiffs,

15 v.

16 HENDERSON WATER PARK, LLC dba  
17 COWABUNGA BAY WATER PARK, a  
18 Nevada limited liability company; WEST  
19 COAST WATER PARKS, LLC, a Nevada  
20 limited liability company; DOUBLE OTT  
21 WATER HOLDINGS, LLC, a Utah limited  
22 liability company; ORLUFF OPHEIKENS,  
23 an individual; SLADE OPHEIKENS, an  
24 individual; CHET OPHEIKENS, an  
25 individual; SHANE HUIISH, an individual;  
26 SCOTT HUIISH, an individual; CRAIG  
27 HUIISH, an individual; TOM WELCH, an  
28 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,

Third-Party Plaintiff,

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

**DEFENDANTS' ANSWER TO PLAINTIFFS'  
THIRD AMENDED COMPLAINT AND  
CROSSCLAIM AGAINST WILLIAM  
PATRICK RAY, JR.**

1 v.

2 WILLIAM PATRICK RAY, JR.; and  
3 DOES I through X, inclusive,

4 Third-Party Defendant.

5 DOUBLE OTT WATER HOLDINGS,  
6 LLC, a Utah limited liability company;  
7 ORLUFF OPHEIKENS, an individual;  
8 SLADE OPHEIKENS, an individual;  
9 CHET OPHEIKENS, an individual; and  
10 TOM WELCH, an individual,

11 Cross-Claimants,

12 v.

13 WILLIAM PATRICK RAY, JR.

14 Cross-Defendant.

15 **DEFENDANTS' ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT**

16 COME NOW Defendants DOUBLE OTT WATER HOLDINGS, LLC; TOM WELCH;  
17 ORLUFF OPEIKENS; SLADE OPHEIKENS; and CHET OPEIKENS (hereinafter these  
18 "Answering Defendants") by and through their attorney of record, JOHN E. GORMLEY, ESQ. of  
19 the law firm OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, and hereby Answers  
20 the Plaintiffs' Third Amended Complaint as follows:

21 **IDENTIFICATION OF THE PARTIES**

22 1. Answering Paragraphs 1, 2, 3, 4, 6, 10, 11, 12, and 13 of the Plaintiffs' Third  
23 Amended Complaint on file herein, these Answering Defendants admit the allegations contained  
24 therein.

25 2. Answering Paragraphs 5, 7, 8, 18, and 19 of the Plaintiffs' Third Amended  
26 Complaint on file herein, these Answering Defendants are without sufficient information to form  
27 a belief as to the truth or falsity of the allegations contained therein, and upon said grounds,  
28 denies the same.

3. Answering Paragraphs 9, 14, 15, 16, 17, and 20 of the Plaintiffs' Third Amended  
Complaint on file herein, these Answering Defendants deny each and every allegation contained

1 therein.

2 **GENERAL ALLEGATIONS**

3 4. Answering Paragraphs 21 and 35 of the Plaintiffs' Third Amended Complaint,  
4 these Answering Defendants admit the allegations contained therein.

5 5. Answering Paragraphs 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38,  
6 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56 of the Plaintiffs' Third  
7 Amended Complaint, these Answering Defendants deny each and every allegation contained  
8 therein.

9 **FIRST CAUSE OF ACTION**

10 **(Negligence – Defendant HWP)**

11 **(Alter Ego Liability Only – Defendants West Coast Water Parks, LLC; Double OTT Water  
12 Holding, LLC, and the Individual Defendants)**

13 6. These Answering Defendants repeat and re-allege its responses to each and every  
14 allegation contained in Paragraphs 1 through 56 of the Plaintiffs' Third Amended Complaint as  
15 though fully set forth herein.

16 7. Answering Paragraphs 58, 59, 60, 61, 62 and 63 of the Plaintiffs' Third Amended  
17 Complaint, these Answering Defendants deny each and every allegation contained therein.

18 **SECOND CAUSE OF ACTION**

19 **(Negligence – Individual Defendants)**

20 8. These Answering Defendants repeat and re-allege its responses to each and every  
21 allegation contained in Paragraphs 1 through 63 of the Plaintiff's Second Amended Complaint as  
22 though fully set forth herein.

23 9. Answering Paragraphs 65, 66, 67, 68, 69, 70, and 71 of the Plaintiffs' Third  
24 Amended Complaint, these Answering Defendants deny each and every allegation contained  
25 therein.

26 **THIRD CAUSE OF ACTION**

27 **(Reverse Veil Piercing Under The Alter Ego Doctrine-  
28 Orluff Opheikens and R&O Construction Company)**

10. These Answering Defendants repeat and re-allege its responses to each and every  
allegation contained in Paragraphs 1 through 71 of the Plaintiff's Second Amended Complaint as  
though fully set forth herein.

1           9.       Answering Paragraphs 73, 74, 75, 76, 77, 78, 79, 80, and 81 of the Plaintiffs'  
2 Third Amended Complaint, these Answering Defendants deny each and every allegation  
3 contained therein.

4                                   **AFFIRMATIVE DEFENSES**

5                                   **FIRST AFFIRMATIVE DEFENSE**

6           These Answering Defendants are informed and believe, and thereon allege, that Plaintiffs'  
7 Third Amended Complaint, and each and every cause of action contained therein, fails to state  
8 facts sufficient to constitute a cause of action against these Answering Defendants.

9                                   **SECOND AFFIRMATIVE DEFENSE**

10          At the times and places alleged in Plaintiff's Third Amended Complaint, and for a period  
11 of time prior thereto, the Plaintiffs did not exercise ordinary care, caution or prudence for the  
12 protection of their, and each others's, own safety and the injuries and damages complained of by  
13 the Plaintiffs in their Third Amended Complaint, if any, were directly and proximately caused or  
14 contributed to by the fault, failure to act, carelessness and negligence of the Plaintiffs.

15                                   **THIRD AFFIRMATIVE DEFENSE**

16          At all times and places alleged in Plaintiffs' Third Amended Complaint on file herein, the  
17 negligence, misconduct, and fault of the Plaintiffs exceeds that of these Answering Defendants, if  
18 any, and Plaintiffs are thereby barred from any recovery against these Answering Defendants.

19                                   **FOURTH AFFIRMATIVE DEFENSE**

20          These Answering Defendants are informed and believe, and thereon allege, that Plaintiffs,  
21 by their conduct, and/or by the conduct of other entities and/or individuals, whether or not parties  
22 herein, is estopped from asserting any claim(s) for damages or seeking any other relief against  
23 these Answering Defendants.

24                                   **FIFTH AFFIRMATIVE DEFENSE**

25          These Answering Defendants are informed and believe, and thereon allege, that damages  
26 suffered by Plaintiffs, if any, were the direct and proximate result of the negligence of parties,  
27 persons, corporations and/or entities other than these Answering Defendants, and that the liability  
28 of these Answering Defendants, if any, is limited in direct proportion to the percentage of fault

1 actually attributable to these Answering Defendants.

2 **SIXTH AFFIRMATIVE DEFENSE**

3 These Answering Defendants are informed and believe, and thereon allege, that at all  
4 times mentioned herein, Plaintiffs were negligent, careless, reckless, and unlawfully conducted  
5 themselves so as to directly and proximately contribute to the happening of the incident and the  
6 occurrence of Plaintiffs claimed damages, all of which said negligence either bars completely or  
7 partially the damages sought herein.

8 **SEVENTH AFFIRMATIVE DEFENSE**

9 These Answering Defendants are informed and believe, and thereon allege, that the  
10 injuries and damages of which Plaintiffs complain in their Third Amended Complaint were  
11 proximately caused by or contributed to be the acts of other defendants, persons and/or entities  
12 and that said acts were intervening and superseding causes of the injuries and damages, if any, of  
13 which Plaintiffs complain, thus barring Plaintiffs from any recovery against these Answering  
14 Defendants.

15 **EIGHTH AFFIRMATIVE DEFENSE**

16 These Answering Defendants are informed and believe, and thereon allege, that Plaintiffs  
17 expressly, voluntarily and knowingly assumed all risks about which they complain in their Third  
18 Amended Complaint, and therefore Plaintiffs are barred either totally or to the extent of said  
19 assumption from any damages against these Answering Defendants.

20 **NINTH AFFIRMATIVE DEFENSE**

21 At all times herein the Plaintiffs alleged damages were caused by third parties over which  
22 these Answering Defendants had no control and had no duty to control.

23 **TENTH AFFIRMATIVE DEFENSE**

24 At all times these Answering Defendants acted diligently, within the standard of care, and  
25 with due care in the performance of any duty owed to Plaintiffs, if any.

26 **ELEVENTH AFFIRMATIVE DEFENSE**

27 The accident alleged in Plaintiffs' Third Amended Complaint, and resulting damages, if  
28 any, were caused or contributed to by Plaintiffs' own negligence which was greater than any

1 negligence attributed to these Answering Defendant, which is expressly denied by these  
2 Answering Defendants.

3 **TWELFTH AFFIRMATIVE DEFENSE**

4 Assuming *arguendo* that liability is found, these Answering Defendants would not be  
5 jointly liable and would be only severally liable (these Answering Defendants denies any  
6 negligence) for that portion of Plaintiffs' claims that represent the percentage of negligence  
7 attributable to them.

8 **THIRTEENTH AFFIRMATIVE DEFENSE**

9 This is no evidence of oppression, fraud or malice to support an award of punitive  
10 damages against these Answering Defendants.

11 **FOURTEENTH AFFIRMATIVE DEFENSE**

12 These Answering Defendants did not act with a wanton, willful or otherwise conscious  
13 disregard of Plaintiffs or their rights and, therefore, there can be no factual or legal basis for  
14 punitive damages.

15 **FIFTEENTH AFFIRMATIVE DEFENSE**

16 That an award of punitive damages would be unconstitutional in that it would deny these  
17 Answering Defendants their rights as guaranteed in the Due Process and Equal Protection Clauses  
18 of both United States and Nevada Constitutions.

19 **SIXTEENTH AFFIRMATIVE DEFENSE**

20 That if punitive damages are recoverable in this case, which these Answering Defendants  
21 specifically deny, such an award cannot be disproportionate to their alleged misconduct.

22 **SEVENTEENTH AFFIRMATIVE DEFENSE**

23 That these Answering Defendants are not subject to suit for punitive damages upon the  
24 facts and conclusions as stated in Plaintiffs Complaint by reason of provisions of NRS 42.001 et  
25 seq.

26 **EIGHTEENTH AFFIRMATIVE DEFENSE**

27 That if punitive damages are recoverable in this case, which these Answering Defendants  
28 specifically deny, such are criminal punishment in nature, and must be proven by at least a clear

1 and convincing evidence.

2 **NINETEENTH AFFIRMATIVE DEFENSE**

3 That Plaintiffs have failed to mitigate their damages.

4 **TWENTIETH AFFIRMATIVE DEFENSE**

5 That these Plaintiffs lack the legal capacity to sue.

6 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

7 Plaintiffs' claims regarding alter ego fail to state a claim upon which relief can be granted  
8 against these Answering Defendants.

9 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

10 Plaintiffs' claims regarding alter ego fail to satisfy the elements of NRS 78.747 and must  
11 therefore be dismissed against these Answering Defendants.

12 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

13 These Answering Defendants cannot be held liable for the acts of any other shareholder or  
14 member of the Management Committee and any liability as to these Answering Defendants is  
15 several only.

16 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

17 Plaintiffs' claims regarding Reverse Corporate Piercing fail to state a claim upon which  
18 relief can be granted against these Answering Defendants because, *inter alia*, it is not a legally  
19 cognizable cause of action in Nevada.

20 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

21 Plaintiffs' claims regarding Reverse Corporate Piercing are not ripe for adjudication and  
22 this court lacks subject matter jurisdiction over them.

23 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

24 Plaintiffs' claims regarding Reverse Corporate Piercing are an improper means of  
25 imposing a pre-judgment writ of attachment which violate these Answering Defendants  
26 constitutional rights to due process.

27 ///

28 ///

## TWENTY-SEVENTH AFFIRMATIVE DEFENSE

These Answering Defendants had neither actual nor constructive knowledge of the alleged predicate acts which Plaintiffs claim occurred, nor did these Answering Defendants have any legal duty to hold or seek out such knowledge.

## TWENTY-EIGHTH AFFIRMATIVE DEFENSE

That as pursuant to Nevada Rule of Civil Procedure 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as insufficient facts were not available after reasonable inquiry upon the filing of Plaintiffs' Third Amended Complaint, and therefore, these Answering Defendants reserve the right to amend their Answer to the Third Amended Complaint to allege additional affirmative defenses if subsequent investigation warrants.

**WHEREFORE**, as to the Plaintiffs' Third Amended Complaint in this case, these Answering Defendants pray as follows:

1. That Plaintiffs take nothing by reason of their Third Amended Complaint on file herein;
2. That these Answering Defendants are granted judgment against Plaintiffs, thereby dismissing the Plaintiffs' Third Amended Complaint on its merits;
3. That these Answering Defendants are granted judgment against Plaintiffs for their reasonable attorneys' fees and costs of suit; and
4. For such other and further relief as this Court deems just and proper.

///

///

///



1                                    **DEFENDANTS/CROSSCLAIMANTS' CROSSCLAIM AGAINST**  
2                                    **WILLIAM PATRICK RAY, JR.**

3            COME NOW Defendants/Crossclaimants DOUBLE OTT WATER HOLDINGS, LLC;  
4            TOM WELCH; ORLUFF OPHEIKENS; SLADE OPHEIKENS; and CHET OPHEIKENS  
5            (hereinafter these "Defendants/Crossclaimants") by and through their attorney of record, JOHN  
6            E. GORMLEY, ESQ. of the law firm OLSON, CANNON, GORMLEY, ANGULO &  
7            STOBERSKI and for their Crossclaim against WILLIAM PATRICK RAY, JR., hereby  
8            complain, allege and state as follows:

9            1.        Defendants/Crossclaimants are a collection of legal entities and individuals who  
10           are organized under the laws, and are residents, of a foreign jurisdiction, with the exception of  
11           Chet Opheikens who is a resident of Clark County, Nevada, and they have been named as  
12           Defendants herein.

13           2.        Crossdefendant WILLIAM PATRICK RAY, JR., upon information and belief, is  
14           and was at all times relevant herein a resident of Clark County, Nevada.

15           3.        On or about July 30, 2018, Plaintiffs filed their Third Amended Complaint,  
16           naming Defendants/Crossclaimants as direct defendants in this matter. That Third Amended  
17           Complaint alleges, inter alia, a variety of claims, including tort-based causes of action against  
18           Defendants/Crossclaimants.

19           4.        Defendants/Crossclaimants have denied such allegations and alleged in their  
20           Answer pertinent Affirmative Defenses.

21                                    **FIRST CAUSE OF ACTION**

22                                    **Contribution (against Crossdefendant WILLIAM PATRICK RAY, JR.)**

23           5.        Defendants/Crossclaimants repeat and reallege each and every allegation  
24           contained in Paragraphs 1 through 4, inclusive, as though fully set forth herein.

25           6.        Defendants/Crossclaimants allege that in the event they are found to be liable to  
26           Plaintiffs or to any party for damages, or payment is made to Plaintiffs or to any other party as a  
27           result of the incidents or occurrences described in the Third Amended Complaint, then  
28           Defendants'/Crossclaimants' liability or payment is based on the acts and/or omissions, including,  
without limitation, the conduct, negligence and/or fault of Crossdefendant WILLIAM PATRICK

1 RAY, JR., and therefore Defendants/Crossclaimants are entitled to Contribution from  
2 Crossdefendant WILLIAM PATRICK RAY, JR. for his proportionate share of all such loss or  
3 damage pursuant to NRS 17.225.

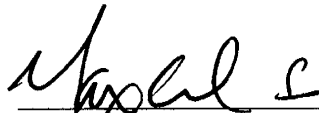
4 7. Defendants/Crossclaimants have been forced to retain an attorney to bring this  
5 Crossclaim, and therefore Defendants/Crossclaimants are entitled to recover reasonable attorney's  
6 fees and costs for the necessity of instituting this action.

7 WHEREFORE, Defendants/Crossclaimants pray for relief as follows:

- 8 1. For Contribution from Crossdefendant WILLIAM PATRICK RAY, JR.;
- 9 2. For an award of reasonable attorney's fees and costs; and
- 10 3. For all other such relief as the Court deems just and proper.

11 DATED this 16<sup>th</sup> day of August, 2018

12  
13 OLSON, CANNON, GORMLEY,  
14 ANGULO & STOBERSKI

15 

16 John E. Gormley, Esq.  
17 Nevada Bar No. 001611  
18 OLSON, CANNON, GORMLEY  
19 ANGULO & STOBERSKI  
20 9950 West Cheyenne Avenue  
21 Las Vegas, Nevada 89129  
22 Telephone: 702-384-4012  
23 Facsimile: 702-383-0701  
24 Attorney for Defendants/Crossclaimants  
25 *DOUBLE OTT WATER HOLDINGS, LLC;*  
26 *TOM WELCH; ORLUFF OPHEIKENS;*  
27 *SLADE OPHEIKENS; and CHET*  
28 *OPHEIKENS*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16<sup>th</sup> day of August, 2018, I served a true and correct copy of the foregoing document (and any attachments) entitled: ***DEFENDANTS' ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT AND CROSSCLAIM AGAINST WILLIAM PATRICK RAY, JR.***, 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 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:

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

Rebecca L. Mastrangelo, Esq.  
ROGERS, MASTRANGELO, CARVALHO  
& MITCHELL  
700 S. Third Street  
Las Vegas, NV 89101  
Attorney for Defendants,  
*SCOTT HUIISH, CRAIG HUIISH and  
WEST COAST WATER PARKS, LLC*

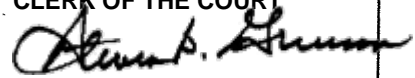
Paul F. Eisinger, Esq.  
Douglas J. Duesman, Esq.  
THORNDAL ARMSTRONG DELK  
BALKENBUSH & EISINGER  
1100 East Bridger Avenue  
Las Vegas, NV 89101-5315  
Attorneys for Defendant/Third-Party Plaintiff,  
*HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK*

Marsha L. Stephenson, Esq.  
STEPHENSON & DICKINSON  
2820 W. Charleston Blvd, Suite 200  
Las Vegas, NV 89102  
Attorney for Third-Party Defendant,  
*WILLIAM PATRICK RAY, JR.*

Steven T. Jaffe, Esq.  
Kevin S. Smith, Esq.  
HALL JAFFE & CLAYTON, LLP  
7425 Peak Drive  
Las Vegas, NV 89128  
Attorneys for Defendant,  
*SHANE HUIISH*

By: 

An employee of OLSON, CANNON, GORMLEY,  
ANGULO & STOBERSKI



ANS  
REBECCA L. MASTRANGELO, ESQ.  
Nevada Bar No. 5417  
ROGERS, MASTRANGELO, CARVALHO & MITCHELL  
700 S. Third Street  
Las Vegas, Nevada 89101  
Phone (702) 383-3400  
Fax (702) 384-1460  
rmastrangelo@rmcmmlaw.com  
Attorneys for Defendants  
SCOTT HUIH and CRAIG HUIH  
and WEST COAST WATER  
PARKS, LLC

DISTRICT COURT  
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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 )  
OPEIKENS, 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 )  
and ROE Limited Liability Company I through X, )  
inclusive, )

Defendants.

DEFENDANT CRAIG HUIH'S  
ANSWER TO THIRD AMENDED  
COMPLAINT

AND ALL RELATED CLAIMS.

Defendant, CRAIG HUIH, by and through his attorneys, ROGERS, MASTRANGELO,  
CARVALHO & MITCHELL, in response to Plaintiffs' Third Amended Complaint on file herein,  
admits, denies and alleges as follows:

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Answering Paragraphs 1, 2, 3, 4 and 5 of Plaintiffs' Third Amended Complaint on file herein, Defendant admits the allegations contained therein.

Answering Paragraphs 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18 and 19 of Plaintiffs' Third Amended Complaint on file herein, Defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and on that basis denies each and every allegation.

Answering Paragraphs 12 and 20 of Plaintiffs' Third Amended Complaint on file herein,  
Defendant denies the allegations contained therein.

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Answering Paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 54 and 55 of Plaintiffs' Third Amended Complaint on file herein, Defendant states that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and on that basis denies each and every allegation.

Answering Paragraphs 37, 40, 47, 53 and 56 of Plaintiffs' Third Amended Complaint on file herein, Defendant denies the allegations contained therein.

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Answering Paragraph 57 of Plaintiffs' Third Amended Complaint on file herein,  
Defendant repeats and realleges his answers to the allegations contained in Paragraphs 1 through

1 56 of the Third Amended Complaint and incorporates the same herein by this reference.

2 II

3 Answering Paragraph 58 of Plaintiffs' Third Amended Complaint on file herein,  
4 Defendant states that the allegations contained therein constitute conclusions of law and thus  
5 require no answer; however, to the extent that they contain allegations of fact, states that he is  
6 without knowledge or information sufficient to form a belief as to the truth or falsity of the  
7 allegations contained therein and on that basis denies each and every allegation.

8 III

9 Answering Paragraphs 59, 60, 61, 62 and 63 of Plaintiffs' Third Amended Complaint on  
10 file herein, Defendant denies the allegations contained therein.

11 **SECOND CAUSE OF ACTION**

12 I

13 Answering Paragraph 64 of Plaintiffs' Third Amended Complaint on file herein,  
14 Defendant repeats and realleges his answers to the allegations contained in Paragraphs 1 through  
15 63 of the Third Amended Complaint and incorporates the same herein by this reference.

16 II

17 Answering Paragraphs 65, 66, 67, 68, 69, 70 and 71 of Plaintiffs' Third Amended  
18 Complaint on file herein, Defendant denies the allegations contained therein.

19 **THIRD CAUSE OF ACTION**

20 I

21 Answering Paragraph 72 of Plaintiffs' Third Amended Complaint on file herein,  
22 Defendant repeats and realleges his answers to the allegations contained in Paragraphs 1 through  
23 71 of the Third Amended Complaint and incorporates the same herein by this reference.

24 II

25 Answering Paragraphs 73, 74, 75, 76, 77, 78, 79, 80 and 81 of Plaintiffs' Third Amended  
26 Complaint on file herein, Defendant states that he is without knowledge or information sufficient  
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1 to form a belief as to the truth of the allegations contained therein and on that basis denies each  
2 and every allegation.

3 **JURY DEMAND**

4 I

5 Answering Paragraph 82 of Plaintiffs' Third Amended Complaint on file herein,  
6 Defendant states that he is without knowledge or information sufficient to form a belief as to the  
7 truth of the allegations contained therein and on that basis denies each and every allegation.

8 **AFFIRMATIVE DEFENSES**

9 **FIRST AFFIRMATIVE DEFENSE**

10 The Plaintiffs' Third Amended Complaint on file herein fails to state a claim against this  
11 answering Defendant upon which relief can be granted.

12 **SECOND AFFIRMATIVE DEFENSE**

13 The incident alleged in the Plaintiffs' Third Amended Complaint and the resulting  
14 damage, if any, to Plaintiffs was proximately caused or contributed to by the Plaintiffs' own  
15 negligence, and such negligence was greater than the negligence, if any, of this answering  
16 Defendant.

17 **THIRD AFFIRMATIVE DEFENSE**

18 This answering Defendant alleges that the incident or incidents referred to in Plaintiffs'  
19 Third Amended Complaint, and all injuries and damages, if any, resulting therefrom, were  
20 caused by the acts or omissions of a third party over whom this answering Defendant had no  
21 control.

22 **FOURTH AFFIRMATIVE DEFENSE**

23 This answering Defendant alleges that Plaintiffs failed to mitigate their damages.

24 **FIFTH AFFIRMATIVE DEFENSE**

25 Recovery of punitive or exemplary damages is barred as NRS 42.005, under which  
26 punitive and exemplary damages are recoverable under Nevada law, is unconstitutionally vague  
27

1 under the due process clause of the Fifth Amendment to the United States Constitution and  
2 Section 8 of Article I of the Nevada Constitution, and as applied, authorizes an award of punitive  
3 or exemplary damages in violation of Defendant's right of equal protection of the law under the  
4 United States Constitution, and authorizes an award of punitive damages which would constitute  
5 an excessive fine in violation of Section 6 of Article I of the Nevada Constitution.

6 **SIXTH AFFIRMATIVE DEFENSE**

7 This answering Defendant alleges that the Plaintiffs fail to name a party necessary for full  
8 and adequate relief essential in this action.

9 **SEVENTH AFFIRMATIVE DEFENSE**

10 This answering Defendant alleges that the injuries or damage sustained by the Plaintiffs  
11 are a direct and proximate result of the superceding and/or intervening or other acts of a person  
12 or persons over whom this Defendant exercised no control and with whom this Defendant has no  
13 legal relationship.

14 **EIGHTH AFFIRMATIVE DEFENSE**

15 This answering Defendant alleges that he had neither a management nor an ownership  
16 interest in any limited liability company or other entity named herein.

17 **NINTH AFFIRMATIVE DEFENSE**

18 Pursuant to NRCP Rule 11, as amended, all possible affirmative defenses may not have  
19 been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the  
20 filing of Defendant's Answer, and therefore, Defendant reserves the right to amend this Answer  
21 to allege additional affirmative defenses if subsequent investigation warrants.

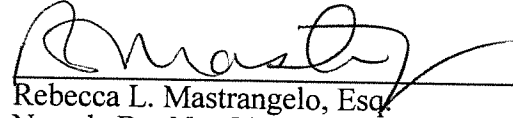
22 WHEREFORE, Defendant CRAIG HUIZH prays as follows:

- 23 1. That Plaintiffs take nothing by reason of their Third Amended Complaint on file  
24 herein;  
25 2. That Defendant be dismissed with costs and attorney's fees incurred herein; and  
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1           3.       For such other and further relief as the Court may deem just in the premises.  
2       DATED this 21<sup>st</sup> day of August, 2018.

3                               ROGERS, MASTRANGELO, CARVALHO &  
4                               MITCHELL

5                               

6                               Rebecca L. Mastrangelo, Esq.  
7                               Nevada Bar No. 5417  
8                               700 S. Third Street  
9                               Las Vegas, Nevada 89101  
10                              Attorney for Defendants  
11                              CRAIG HUIH and SCOTT HUIH  
12                              WEST COAST WATER PARKS, LLC

**CERTIFICATE OF SERVICE**

Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a), and Rule 9 of the N.E.F.C.R. I hereby certify that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 20 day of August, 2018, a true and correct copy of the foregoing DEFENDANT CRAIG HUISH'S ANSWER TO THIRD AMENDED COMPLAINT was served via electronic means with the Eighth Judicial District Court, addressed as follows, upon the following counsel of record:

Donald Campbell, Esq.  
Samuel Mirkovich, Esq.  
Philip Erwin, Esq.  
CAMPBELL & WILLIAMS  
700 S. Seventh Street  
Las Vegas, Nevada 89101  
Attorneys for Plaintiffs

Paul Eisinger, Esq.  
Douglas Duesman, Esq.  
THORNDAL ARMSTRONG DELK  
BALKENBUSH & EISINGER  
1100 E. Bridger Avenue  
Las Vegas, Nevada 89101  
Attorneys for Defendant  
Henderson Water Park

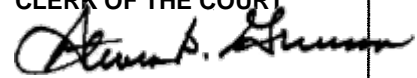
Marsha Stephenson, Esq.  
STEPHENSON & DICKINSON  
2820 W. Charleston Boulevard, Suite 17  
Las Vegas, Nevada 89102  
Attorney for Third-Party Defendant  
William Patrick Ray, Jr.

Steven Jaffe, Esq.  
Kevin Smith, Esq.  
HALL JAFFE & CLAYTON, LLP  
7425 Peak Drive  
Las Vegas, Nevada 89128  
Attorneys for Defendant Shane Huish

John Gormley, Esq.  
OLSON, CANNON, GORMLEY,  
ANGULO & STOBERSKI  
9950 W. Cheyenne Avenue  
Las Vegas, Nevada 89129  
Attorneys for Defendants Double Ott Water  
Holdings, Tom Welch, Orluff Opheikens,  
Slade Opheikens and Chet Opheikens



An employee of ROGERS, MASTRANGELO,  
CARVALHO & MITCHELL



ANS  
REBECCA L. MASTRANGELO, ESQ.  
Nevada Bar No. 5417  
ROGERS, MASTRANGELO, CARVALHO & MITCHELL  
700 S. Third Street  
Las Vegas, Nevada 89101  
Phone (702) 383-3400  
Fax (702) 384-1460  
rmastrangelo@rmcmlaw.com  
Attorneys for Defendants  
SCOTT HUIH and CRAIG HUIH  
and WEST COAST WATER  
PARKS, LLC

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 )  
OPEIKENS, 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 )  
and ROE Limited Liability Company I through X, )  
inclusive, )

Defendants. )

AND ALL RELATED CLAIMS. )

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

DEFENDANTS WEST COAST  
WATER PARKS, LLC'S AND  
SCOTT HUIH'S ANSWER TO  
THIRD AMENDED COMPLAINT

Defendants, WEST COAST WATER PARKS, LLC, and SCOTT HUIH, by and  
through their attorneys, ROGERS, MASTRANGELO, CARVALHO & MITCHELL, in response  
to Plaintiffs' Third Amended Complaint on file herein, admit, deny and allege as follows:

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Answering Paragraphs 1, 2, 3, 4 and 5 of Plaintiffs' Third Amended Complaint on file herein, Defendants admit the allegations contained therein.

Answering Paragraphs 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 18 and 19 of Plaintiffs' Third Amended Complaint on file herein, Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and on that basis deny each and every allegation.

Answering Paragraphs 12 and 20 of Plaintiffs' Third Amended Complaint on file herein,  
Defendants deny the allegations contained therein.

Answering Paragraph 17 of Plaintiffs' Third Amended Complaint on file herein, Defendants deny the allegations contained therein save and except Defendants admit that Cowabunga Bay Water Park is a water park located at 900 Galleria Drive, Henderson, Nevada 89011.

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Answering Paragraphs 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 41, 42, 43, 44, 45, 49, 50, 51, 54 and 55 of Plaintiffs' Third Amended Complaint on file herein, Defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein and on that basis deny each and every allegation.

Answering Paragraphs 37, 39, 40, 46, 47, 48, 52, 53 and 56 of Plaintiffs' Third Amended Complaint on file herein, Defendants deny the allegations contained therein.

1 **FIRST CAUSE OF ACTION**

2 I

3 Answering Paragraph 57 of Plaintiffs' Third Amended Complaint on file herein,  
4 Defendants repeat and reallege their answers to the allegations contained in Paragraphs 1 through  
5 56 of the Third Amended Complaint and incorporate the same herein by this reference.

6 II

7 Answering Paragraph 58 of Plaintiffs' Third Amended Complaint on file herein,  
8 Defendants state that the allegations contained therein constitute conclusions of law and thus  
9 require no answer; however, to the extent that they contain allegations of fact, state that they are  
10 without knowledge or information sufficient to form a belief as to the truth or falsity of the  
11 allegations contained therein and on that basis deny each and every allegation.

12 III

13 Answering Paragraphs 59, 60, 61, 62 and 63 of Plaintiffs' Third Amended Complaint on  
14 file herein, Defendants deny the allegations contained therein.

15 **SECOND CAUSE OF ACTION**

16 I

17 Answering Paragraph 64 of Plaintiffs' Third Amended Complaint on file herein,  
18 Defendants repeat and reallege their answers to the allegations contained in Paragraphs 1 through  
19 63 of the Third Amended Complaint and incorporate the same herein by this reference.

20 II

21 Answering Paragraphs 65, 66, 67, 68, 69, 70 and 71 of Plaintiffs' Third Amended  
22 Complaint on file herein, Defendants deny the allegations contained therein.

23 **THIRD CAUSE OF ACTION**

24 I

25 Answering Paragraph 72 of Plaintiffs' Third Amended Complaint on file herein,  
26 Defendants repeat and reallege their answers to the allegations contained in Paragraphs 1 through  
27

1 71 of the Third Amended Complaint and incorporate the same herein by this reference.

2 II

3 Answering Paragraphs 73, 74, 75, 76, 77, 78, 79, 80 and 81 of Plaintiffs' Third Amended  
4 Complaint on file herein, Defendants state that they are without knowledge or information  
5 sufficient to form a belief as to the truth of the allegations contained therein and on that basis  
6 deny each and every allegation.

7 **JURY DEMAND**

8 I

9 Answering Paragraph 82 of Plaintiffs' Third Amended Complaint on file herein,  
10 Defendants state that they are without knowledge or information sufficient to form a belief as to  
11 the truth of the allegations contained therein and on that basis deny each and every allegation.

12 **AFFIRMATIVE DEFENSES**

13 **FIRST AFFIRMATIVE DEFENSE**

14 The Plaintiffs' Third Amended Complaint on file herein fails to state a claim against  
15 these answering Defendants upon which relief can be granted.

16 **SECOND AFFIRMATIVE DEFENSE**

17 The incident alleged in the Plaintiffs' Third Amended Complaint and the resulting  
18 damage, if any, to Plaintiffs was proximately caused or contributed to by the Plaintiffs' own  
19 negligence, and such negligence was greater than the negligence, if any, of these answering  
20 Defendants.

21 **THIRD AFFIRMATIVE DEFENSE**

22 These answering Defendants allege that the incident or incidents referred to in Plaintiffs'  
23 Third Amended Complaint, and all injuries and damages, if any, resulting therefrom, were  
24 caused by the acts or omissions of a third party over whom these answering Defendants had no  
25 control.

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**FOURTH AFFIRMATIVE DEFENSE**

These answering Defendants allege that Plaintiffs failed to mitigate their damages.

**FIFTH AFFIRMATIVE DEFENSE**

Recovery of punitive or exemplary damages is barred as NRS 42.005, under which punitive and exemplary damages are recoverable under Nevada law, is unconstitutionally vague under the due process clause of the Fifth Amendment to the United States Constitution and Section 8 of Article I of the Nevada Constitution, and as applied, authorizes an award of punitive or exemplary damages in violation of Defendants’ right of equal protection of the law under the United States Constitution, and authorizes an award of punitive damages which would constitute an excessive fine in violation of Section 6 of Article I of the Nevada Constitution.

**SIXTH AFFIRMATIVE DEFENSE**

These answering Defendants allege that the Plaintiffs fail to name a party necessary for full and adequate relief essential in this action.

**SEVENTH AFFIRMATIVE DEFENSE**

These answering Defendants allege that the injuries or damage sustained by the Plaintiffs are a direct and proximate result of the superceding and/or intervening or other acts of a person or persons over whom these Defendants exercised no control and with whom these Defendants have no legal relationship.

**EIGHTH AFFIRMATIVE DEFENSE**

These answering Defendants allege that they had neither a management nor an ownership interest in any limited liability company or other entity named herein.

**NINTH AFFIRMATIVE DEFENSE**

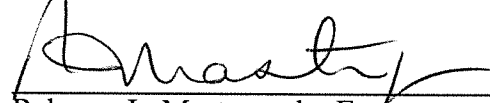
Pursuant to NRCP Rule 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of Defendants’ Answer, and therefore, Defendants reserve the right to amend this Answer to allege additional affirmative defenses if subsequent investigation warrants.

1 WHEREFORE, Defendants, WEST COAST WATER PARKS, LLC, and SCOTT  
2 HUIH pray as follows:

- 3 1. That Plaintiffs take nothing by reason of their Third Amended Complaint on file  
4 herein;  
5 2. That Defendants be dismissed with costs and attorney's fees incurred herein; and  
6 3. For such other and further relief as the Court may deem just in the premises.

7 DATED this 2<sup>nd</sup> day of August, 2018.

8 ROGERS, MASTRANGELO, CARVALHO &  
9 MITCHELL

10 

11 Rebecca L. Mastrangelo, Esq.  
12 Nevada Bar No. 5417  
13 700 S. Third Street  
14 Las Vegas, Nevada 89101  
15 Attorney for Defendants  
16 CRAIG HUIH and SCOTT HUIH  
17 WEST COAST WATER PARKS, LLC  
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**CERTIFICATE OF SERVICE**

Pursuant to N.R.C.P. 5(a), E.D.C.R. 7.26(a), and Rule 9 of the N.E.F.C.R. I hereby certify that I am an employee of Rogers, Mastrangelo, Carvalho & Mitchell, and on the 22 day of August, 2018, a true and correct copy of the foregoing DEFENDANTS WEST COAST WATER PARKS, LLC'S AND SCOTT HUISH'S ANSWER TO THIRD AMENDED COMPLAINT was served via electronic means with the Eighth Judicial District Court, addressed as follows, upon the following counsel of record:

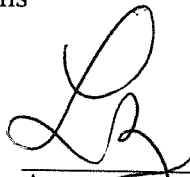
Donald Campbell, Esq.  
Samuel Mirkovich, Esq.  
Philip Erwin, Esq.  
CAMPBELL & WILLIAMS  
700 S. Seventh Street  
Las Vegas, Nevada 89101  
Attorneys for Plaintiffs

Paul Eisinger, Esq.  
Douglas Duesman, Esq.  
THORNDAL ARMSTRONG DELK  
BALKENBUSH & EISINGER  
1100 E. Bridger Avenue  
Las Vegas, Nevada 89101  
Attorneys for Defendant  
Henderson Water Park

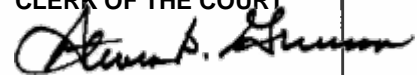
Marsha Stephenson, Esq.  
STEPHENSON & DICKINSON  
2820 W. Charleston Boulevard, Suite 17  
Las Vegas, Nevada 89102  
Attorney for Third-Party Defendant  
William Patrick Ray, Jr.

Steven Jaffe, Esq.  
Kevin Smith, Esq.  
HALL JAFFE & CLAYTON, LLP  
7425 Peak Drive  
Las Vegas, Nevada 89128  
Attorneys for Defendant Shane Huish

John Gormley, Esq.  
OLSON, CANNON, GORMLEY,  
ANGULO & STOBERSKI  
9950 W. Cheyenne Avenue  
Las Vegas, Nevada 89129  
Attorneys for Defendants Double Ott Water  
Holdings, Tom Welch, Orluff Opheikens,  
Slade Opheikens and Chet Opheikens



An employee of ROGERS, MASTRANGELO,  
CARVALHO & MITCHELL



1 ANSC  
2 THORNDAL ARMSTRONG DELK  
3 BALKENBUSH & EISINGER  
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17 Attorneys for Defendant/Third-Party Plaintiff,  
18 HENDERSON WATER PARK, LLC dba  
19 COWABUNGA BAY WATER PARK

11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

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

15 Plaintiffs,

16 vs.

17 HENDERSON WATER PARK, LLC dba  
18 COWABUNGA BAY WATER PARK, a  
19 Nevada limited liability company; WEST  
20 COAST WATER PARKS, LLC, a Nevada  
21 limited liability company; DOUBLE OTT  
22 WATER HOLDINGS, LLC, a Utah limited  
23 liability company; ORLUFF OPEIKENS, an  
24 individual; SLADE OPEIKENS, an individual;  
25 CHET OPEIKENS, an individual; SHANE  
26 HUIH, an individual; SCOTT HUIH, an  
27 individual; CRAIG HUIH, an individual; TOM  
28 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,

26 Defendants.

27 AND ALL RELATED CLAIMS  
28

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

**DEFENDANT HENDERSON WATER  
PARK, LLC'S ANSWER TO  
PLAINTIFFS' THIRD AMENDED  
COMPLAINT AND THIRD-PARTY  
COMPLAINT**

1        **DEFENDANT HENDERSON WATER PARK, LLC'S ANSWER TO PLAINTIFFS'**  
2        **THIRD AMENDED COMPLAINT**

3        Defendant, HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER  
4        PARK (hereinafter "Cowabunga Bay"), by and through its counsel of record, Paul F. Eisinger,  
5        Esq. and Douglas J. Duesman, Esq., of the law firm of THORNDAL ARMSTRONG DELK  
6        BALKENBUSH & EISINGER, does herein Answer the Third Amended Complaint filed  
7        against it by Plaintiffs, as follows:

8                                **IDENTIFICATION OF THE PARTIES**

9                1.        Cowabunga Bay admits the allegations contained in Paragraph 1 of Plaintiffs'  
10        Third Amended Complaint.

11                2.        Cowabunga Bay admits the allegations contained in Paragraph 2 of Plaintiffs'  
12        Third Amended Complaint.

13                3.        Cowabunga Bay admits the allegations contained in Paragraph 3 of Plaintiffs'  
14        Third Amended Complaint.

15                4.        Cowabunga Bay admits the allegations contained in Paragraph 4 of Plaintiffs'  
16        Third Amended Complaint.

17                5.        Cowabunga Bay is without knowledge or information sufficient to form a belief  
18        as to the truth of the allegations contained in Paragraph 5 of Plaintiffs' Third Amended  
19        Complaint and therefore denies the same.

20                6.        Cowabunga Bay is without knowledge or information sufficient to form a belief  
21        as to the truth of the allegations contained in Paragraph 6 of Plaintiffs' Third Amended  
22        Complaint and therefore denies the same.

23                7.        Cowabunga Bay is without knowledge or information sufficient to form a belief  
24        as to the truth of the allegations contained in Paragraph 7 of Plaintiffs' Third Amended  
25        Complaint and therefore denies the same.

26                8.        Cowabunga Bay is without knowledge or information sufficient to form a belief  
27        as to the truth of the allegations contained in Paragraph 8 of Plaintiffs' Third Amended  
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1 Complaint and therefore denies the same.

2 9. Cowabunga Bay is without knowledge or information sufficient to form a belief  
3 as to the truth of the allegations contained in Paragraph 9 of Plaintiffs' Third Amended  
4 Complaint and therefore denies the same.

5 10. Cowabunga Bay is without knowledge or information sufficient to form a belief  
6 as to the truth of the allegations contained in Paragraph 10 of Plaintiffs' Third Amended  
7 Complaint and therefore denies the same.

8 11. Cowabunga Bay is without knowledge or information sufficient to form a belief  
9 as to the truth of the allegations contained in Paragraph 11 of Plaintiffs' Third Amended  
10 Complaint and therefore denies the same.

11 12. Cowabunga Bay is without knowledge or information sufficient to form a belief  
12 as to the truth of the allegations contained in Paragraph 12 of Plaintiffs' Third Amended  
13 Complaint and therefore denies the same.

14 13. Cowabunga Bay is without knowledge or information sufficient to form a belief  
15 as to the truth of the allegations contained in Paragraph 13 of Plaintiffs' Third Amended  
16 Complaint and therefore denies the same.

17 14. Cowabunga Bay is without knowledge or information sufficient to form a belief  
18 as to the truth of the allegations contained in Paragraph 14 of Plaintiffs' Third Amended  
19 Complaint and therefore denies the same.

20 15. Cowabunga Bay is without knowledge or information sufficient to form a belief  
21 as to the truth of the allegations contained in Paragraph 15 of Plaintiffs' Third Amended  
22 Complaint and therefore denies the same.

23 16. Cowabunga Bay is without knowledge or information sufficient to form a belief  
24 as to the truth of the allegations contained in Paragraph 16 of Plaintiffs' Third Amended  
25 Complaint and therefore denies the same.

26 17. Cowabunga Bay admits it is a water park located at 900 Galleria Drive,  
27 Henderson, Nevada 89011, but denies the remainder of the allegations contained in Paragraph  
28

1 17 of Plaintiffs' Third Amended Complaint.

2 18. Cowabunga Bay is without knowledge or information sufficient to form a belief  
3 as to the truth of the allegations contained in Paragraph 18 of Plaintiffs' Third Amended  
4 Complaint and therefore denies the same.

5 19. Cowabunga Bay is without knowledge or information sufficient to form a belief  
6 as to the truth of the allegations contained in Paragraph 19 of Plaintiffs' Third Amended  
7 Complaint and therefore denies the same.

8 20. Cowabunga Bay denies the allegations contained in Paragraph 20 of Plaintiffs'  
9 Third Amended Complaint.

10 **GENERAL ALLEGATIONS**

11 21. Cowabunga Bay is without knowledge or information sufficient to form a belief  
12 as to the truth of the allegations contained in Paragraph 21 of Plaintiffs' Third Amended  
13 Complaint and therefore denies the same.

14 22. Cowabunga Bay is without knowledge or information sufficient to form a belief  
15 as to the truth of the allegations contained in Paragraph 22 of Plaintiffs' Third Amended  
16 Complaint and therefore denies the same.

17 23. Cowabunga Bay is without knowledge or information sufficient to form a belief  
18 as to the truth of the allegations contained in Paragraph 23 of Plaintiffs' Third Amended  
19 Complaint and therefore denies the same.

20 24. Cowabunga Bay is without knowledge or information sufficient to form a belief  
21 as to the truth of the allegations contained in Paragraph 24 of Plaintiffs' Third Amended  
22 Complaint and therefore denies the same.

23 25. Cowabunga Bay is without knowledge or information sufficient to form a belief  
24 as to the truth of the allegations contained in Paragraph 25 of Plaintiffs' Third Amended  
25 Complaint and therefore denies the same.

26 26. Cowabunga Bay is without knowledge or information sufficient to form a belief  
27 as to the truth of the allegations contained in Paragraph 26 of Plaintiffs' Third Amended  
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1 Complaint and therefore denies the same.

2 27. Cowabunga Bay is without knowledge or information sufficient to form a belief  
3 as to the truth of the allegations contained in Paragraph 27 of Plaintiffs' Third Amended  
4 Complaint and therefore denies the same.

5 28. Cowabunga Bay is without knowledge or information sufficient to form a belief  
6 as to the truth of the allegations contained in Paragraph 28 of Plaintiffs' Third Amended  
7 Complaint and therefore denies the same.

8 29. Cowabunga Bay is without knowledge or information sufficient to form a belief  
9 as to the truth of the allegations contained in Paragraph 29 of Plaintiffs' Third Amended  
10 Complaint and therefore denies the same.

11 30. Cowabunga Bay is without knowledge or information sufficient to form a belief  
12 as to the truth of the allegations contained in Paragraph 30 of Plaintiffs' Third Amended  
13 Complaint and therefore denies the same.

14 31. Cowabunga Bay is without knowledge or information sufficient to form a belief  
15 as to the truth of the allegations contained in Paragraph 31 of Plaintiffs' Third Amended  
16 Complaint and therefore denies the same.

17 32. Cowabunga Bay is without knowledge or information sufficient to form a belief  
18 as to the truth of the allegations contained in Paragraph 32 of Plaintiffs' Third Amended  
19 Complaint and therefore denies the same.

20 33. Cowabunga Bay is without knowledge or information sufficient to form a belief  
21 as to the truth of the allegations contained in Paragraph 33 of Plaintiffs' Third Amended  
22 Complaint and therefore denies the same.

23 34. Cowabunga Bay is without knowledge or information sufficient to form a belief  
24 as to the truth of the allegations contained in Paragraph 34 of Plaintiffs' Third Amended  
25 Complaint and therefore denies the same.

26 35. Cowabunga Bay is without knowledge or information sufficient to form a belief  
27 as to the truth of the allegations contained in Paragraph 35 of Plaintiffs' Third Amended  
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1 Complaint and therefore denies the same.

2 36. Cowabunga Bay is without knowledge or information sufficient to form a belief  
3 as to the truth of the allegations contained in Paragraph 36 of Plaintiffs' Third Amended  
4 Complaint and therefore denies the same.

5 37. Cowabunga Bay denies the allegations contained in Paragraph 37 of Plaintiffs'  
6 Third Amended Complaint.

7 38. Cowabunga Bay is without knowledge or information sufficient to form a belief  
8 as to the truth of the allegations contained in Paragraph 38 of Plaintiffs' Third Amended  
9 Complaint and therefore denies the same.

10 39. Cowabunga Bay is without knowledge or information sufficient to form a belief  
11 as to the truth of the allegations contained in Paragraph 39 of Plaintiffs' Third Amended  
12 Complaint and therefore denies the same.

13 40. Cowabunga Bay is without knowledge or information sufficient to form a belief  
14 as to the truth of the allegations contained in Paragraph 40 of Plaintiffs' Third Amended  
15 Complaint and therefore denies the same.

16 41. Cowabunga Bay is without knowledge or information sufficient to form a belief  
17 as to the truth of the allegations contained in Paragraph 41 of Plaintiffs' Third Amended  
18 Complaint and therefore denies the same.

19 42. Paragraph 42 of Plaintiffs' Third Amended Complaint contains a statement of  
20 law Cowabunga Bay does not believe requires a response. To the extent a response is required,  
21 Cowabunga Bay is without knowledge or information sufficient to form a belief as to the truth  
22 of the allegations contained in Paragraph 42 of Plaintiffs' Third Amended Complaint and  
23 therefore denies the same.

24 43. Paragraph 43 of Plaintiffs' Third Amended Complaint contains a statement of  
25 law Cowabunga Bay does not believe requires a response. To the extent a response is required,  
26 Cowabunga Bay is without knowledge or information sufficient to form a belief as to the truth  
27 of the allegations contained in Paragraph 43 of Plaintiffs' Third Amended Complaint and  
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1 therefore denies the same.

2 44. Cowabunga Bay is without knowledge or information sufficient to form a belief  
3 as to the truth of the allegations contained in Paragraph 44 of Plaintiffs' Third Amended  
4 Complaint and therefore denies the same.

5 45. Cowabunga Bay is without knowledge or information sufficient to form a belief  
6 as to the truth of the allegations contained in Paragraph 45 of Plaintiffs' Third Amended  
7 Complaint and therefore denies the same.

8 46. Cowabunga Bay denies the allegations contained in Paragraph 46 of Plaintiffs'  
9 Third Amended Complaint.

10 47. Cowabunga Bay denies the allegations contained in Paragraph 47 of Plaintiffs'  
11 Third Amended Complaint.

12 48. Cowabunga Bay denies the allegations contained in Paragraph 48 of Plaintiffs'  
13 Third Amended Complaint.

14 49. Cowabunga Bay is without knowledge or information sufficient to form a belief  
15 as to the truth of the allegations contained in Paragraph 49 of Plaintiffs' Third Amended  
16 Complaint and therefore denies the same.

17 50. Cowabunga Bay is without knowledge or information sufficient to form a belief  
18 as to the truth of the allegations contained in Paragraph 50 of Plaintiffs' Third Amended  
19 Complaint and therefore denies the same.

20 51. Cowabunga Bay denies the allegations contained in Paragraph 51 of Plaintiffs'  
21 Third Amended Complaint.

22 52. Cowabunga Bay denies the allegations contained in Paragraph 52 of Plaintiffs'  
23 Third Amended Complaint.

24 53. Cowabunga Bay denies the allegations contained in Paragraph 53 of Plaintiffs'  
25 Third Amended Complaint.

26 54. Cowabunga Bay is without knowledge or information sufficient to form a belief  
27 as to the truth of the allegations contained in Paragraph 54 of Plaintiffs' Third Amended  
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1 Complaint and therefore denies the same.

2 55. Cowabunga Bay is without knowledge or information sufficient to form a belief  
3 as to the truth of the allegations contained in Paragraph 55 of Plaintiffs' Third Amended  
4 Complaint and therefore denies the same.

5 56. Cowabunga Bay denies the allegations contained in Paragraph 56 of Plaintiffs'  
6 Third Amended Complaint.

7 **FIRST CAUSE OF ACTION**

8 57. Answering Paragraph 57 of Plaintiffs' Third Amended Complaint, Cowabunga  
9 Bay repeats and realleges each and every response to paragraphs 1 through 56 of Plaintiffs'  
10 Third Amended Complaint as if set forth therein.

11 58. Paragraph 58 of Plaintiffs' Third Amended Complaint contains several  
12 statements of law Cowabunga Bay does not believe requires a response. To the extent a  
13 response is required, Cowabunga Bay is without knowledge or information sufficient to form a  
14 belief as to the truth of the allegations contained in Paragraph 58 of Plaintiffs' Third Amended  
15 Complaint and therefore denies the same.

16 59. Cowabunga Bay denies the allegations contained in Paragraph 59 of Plaintiffs'  
17 Third Amended Complaint.

18 60. Cowabunga Bay denies the allegations contained in Paragraph 60 of Plaintiffs'  
19 Third Amended Complaint.

20 61. Cowabunga Bay denies the allegations contained in Paragraph 61 of Plaintiffs'  
21 Third Amended Complaint.

22 62. Cowabunga Bay denies the allegations contained in Paragraph 62 of Plaintiffs'  
23 Third Amended Complaint.

24 63. Cowabunga Bay denies the allegations contained in Paragraph 63 of Plaintiffs'  
25 Third Amended Complaint.

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71. Cowabunga Bay denies the allegations contained in Paragraph 71 of Plaintiffs' Third Amended Complaint.

74. Cowabunga Bay is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 74 of Plaintiffs' Third Amended

1 Complaint and therefore denies the same.

2 75. Cowabunga Bay is without knowledge or information sufficient to form a belief  
3 as to the truth of the allegations contained in Paragraph 75 of Plaintiffs' Third Amended  
4 Complaint and therefore denies the same.

5 76. Cowabunga Bay is without knowledge or information sufficient to form a belief  
6 as to the truth of the allegations contained in Paragraph 76 of Plaintiffs' Third Amended  
7 Complaint and therefore denies the same.

8 77. Cowabunga Bay is without knowledge or information sufficient to form a belief  
9 as to the truth of the allegations contained in Paragraph 77 of Plaintiffs' Third Amended  
10 Complaint and therefore denies the same.

11 78. Cowabunga Bay is without knowledge or information sufficient to form a belief  
12 as to the truth of the allegations contained in Paragraph 78 of Plaintiffs' Third Amended  
13 Complaint and therefore denies the same.

14 79. Cowabunga Bay is without knowledge or information sufficient to form a belief  
15 as to the truth of the allegations contained in Paragraph 79 of Plaintiffs' Third Amended  
16 Complaint and therefore denies the same.

17 80. Cowabunga Bay is without knowledge or information sufficient to form a belief  
18 as to the truth of the allegations contained in Paragraph 80 of Plaintiffs' Third Amended  
19 Complaint and therefore denies the same.

20 81. Cowabunga Bay is without knowledge or information sufficient to form a belief  
21 as to the truth of the allegations contained in Paragraph 81 of Plaintiffs' Third Amended  
22 Complaint and therefore denies the same.

23 **JURY DEMAND**

24 82. No allegations are pled against Cowabunga Bay, or any other party, in Paragraph  
25 82 of Plaintiffs' Third Amended Complaint and no response is required.

26 ...

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1 **AFFIRMATIVE DEFENSES**

2 **FIRST AFFIRMATIVE DEFENSE**

3 Plaintiffs' Third Amended Complaint fails to state a claim upon which relief can be  
4 granted against Cowabunga Bay.

5 **SECOND AFFIRMATIVE DEFENSE**

6 The liability of the Defendants herein, if any, is several.

7 **THIRD AFFIRMATIVE DEFENSE**

8 That any harm or injury attributable to Plaintiffs as alleged in Third Amended  
9 Complaint was directly and proximately caused by forces of nature over which Cowabunga Bay  
10 had no control.

11 **FOURTH AFFIRMATIVE DEFENSE**

12 The occurrence referred to in the Third Amended Complaint, and all damages, if any,  
13 arising therefrom, were caused by the acts or omissions of a third person or persons over whom  
14 Cowabunga Bay had no control.

15 **FIFTH AFFIRMATIVE DEFENSE**

16 Cowabunga Bay alleges that any and all injuries and damages sustained by Plaintiffs  
17 were proximately caused solely by the acts or omissions, negligent or otherwise, of William  
18 Ray

19 **SIXTH AFFIRMATIVE DEFENSE**

20 Plaintiffs have failed to mitigate their damages.

21 **SEVENTH AFFIRMATIVE DEFENSE**

22 Plaintiffs' Amended Complaint is barred by the applicable Doctrine of Laches.

23 **EIGHTH AFFIRMATIVE DEFENSE**

24 Plaintiffs' Amended Complaint is barred by the applicable statute of limitations.

25 **NINTH AFFIRMATIVE DEFENSE**

26 Under the laws of this jurisdiction and/or any applicable laws of any other jurisdiction,  
27 punitive damages are not recoverable.  
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**TENTH AFFIRMATIVE DEFENSE**

Punitive damages are not recoverable against Cowabunga bay as no facts exist to support the allegation that it was guilty of malice, oppression or fraud.

**ELEVENTH AFFIRMATIVE DEFENSE**

Cowabunga Bay alleges that Plaintiffs have failed to name a party necessary for full and adequate relief essential in this action.

**TWELFTH AFFIRMATIVE DEFENSE**

Cowabunga Bay alleges that any alleged conduct on its part was not the cause, nor proximate cause of any damages allegedly sustained by Plaintiffs.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Cowabunga Bay alleges that the damages, if any, to Plaintiffs were, as alleged in the Amended Complaint, proximately caused by an independent and intervening cause and not by any alleged negligence on the part of Cowabunga Bay.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs are estopped from asserting any cause of action whatsoever against Cowabunga Bay.

**FIFTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs, by their acts and conduct have waived and abandoned any and all claims as alleged herein against Cowabunga Bay.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Defendant states that the Plaintiffs' alleged injuries and damages, if any, were caused in whole or in part by the negligence of the Plaintiffs.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

The damages or injuries, if any, alleged by Plaintiffs in the Third Amended Complaint, came as a result of a superseding cause and/or intervening acts of others which bars this suit.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

This answering Defendant did not act with a wanton, willful or otherwise conscious disregard of Plaintiffs and, therefore, there can be no factual or legal basis for punitive damages.

1 **NINETEENTH AFFIRMATIVE DEFENSE**

2 Pursuant to NRCP § 11, all possible affirmative defenses may not have been alleged  
3 herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of  
4 Cowabunga Bay's Answer to Plaintiffs' Third Amended Complaint, and therefore, Cowabunga  
5 Bay reserves the right to amend its Answer to the Third Amended Complaint to allege  
6 additional affirmative defenses if subsequent investigation so warrants.

7 WHEREFORE, HENDERSON WATER PARK, LLC dba COWABUNGA BAY  
8 WATER PARK prays for dismissal of the Third Amended Complaint against it, for judgment on  
9 its behalf, for costs, interest or any other relief the Court deems just under the circumstances.

10 **THIRD-PARTY COMPLAINT**

11 **AGAINST WILLIAM PATRICK RAY, JR.**

12 Defendant/Third-Party Plaintiff, HENDERSON WATER PARK, LLC dba  
13 COWABUNGA BAY WATER PARK (hereinafter "Cowabunga Bay"), by and through its  
14 counsel of record, Paul F. Eisinger, Esq. and Douglas J. Duesman, Esq., of the law firm of  
15 THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER, does herein allege as  
16 follows:

17 **I.**

18 Third-Party Plaintiff, HENDERSON WATER PARK, LLC dba COWABUNGA BAY  
19 WATER PARK is, and at all times mentioned herein, was a Nevada limited liability company.

20 **II.**

21 Third-Party Defendant, WILLIAM PATRICK RAY, JR. is, and was at all times  
22 mentioned herein, a resident of the State of Nevada.

23 **III.**

24 At all times mentioned herein, the events giving rise to this action occurred in Clark  
25 County, Nevada.

26 **IV.**

27 The names and capacities of Third-Party Defendants named herein as DOES I through  
28 X, inclusive, whether individual, corporate, associate or otherwise, are presently unknown to

1 Third-Party Plaintiff who, therefore, sues said Third-Party Defendants by such fictitious names.  
2 Third-Party Plaintiff is informed and believes and therein alleges that each of the Third-Party  
3 Defendants so designated is responsible in some manner for the events and happenings referred  
4 to herein and Third-Party Plaintiff will ask leave of the Court to amend this Third-Party  
5 Complaint to insert the names and capacities of DOES I through X, inclusive, when the same  
6 have been ascertained and to join such Third-Party Defendants in this action.

7  
8 **V.**

9 On or about July 28, 2015, Plaintiffs, PETER and CHRISTIAN GARDNER, on behalf  
10 of minor child, LELAND GARDNER, filed a Complaint bearing Case No. A-15-722259-C,  
11 against Defendant/Third-Party Plaintiff, Cowabunga Bay. Thereafter on November 8, 2016 and  
12 December 18, 2017, said Plaintiffs filed a First Amended Complaint and Second Amended  
13 Complaint against Defendant/Third-Party Plaintiff, Cowabunga Bay. In a Third Amended  
14 Complaint filed on July 30, 2018, the Plaintiffs allege that Cowabunga Bay negligently operated  
15 the wave pool causing the subject incident and Plaintiffs' claimed injuries and damages.  
16 Defendant/Third-Party Plaintiff, Cowabunga Bay denies that it was negligent and also denies  
17 any liability for said incident.

18 **VI.**

19 Said incident, which is the subject matter of Plaintiffs' Third Amended Complaint, was  
20 proximately caused by the negligence or fault of Third-Party Defendants, WILLIAM PATRICK  
21 RAY, JR., and/or DOES I through X.

22 **FIRST CAUSE OF ACTION**

23 **(Contribution)**

24 **VII.**

25 Third-Party Plaintiff, Cowabunga Bay incorporates by reference paragraphs I through  
26 VI above as if fully set forth herein.

27 **VIII.**

28 In the event the trier of fact determines that Third-Party Plaintiff, Cowabunga Bay, is  
liable to Plaintiffs or, in the event of any Judgment rendered to Plaintiffs and against Third-

1 Party Plaintiff, Cowabunga Bay, said Third-Party Plaintiff is entitled to contribution from  
2 Third-Party Defendants, WILLIAM PATRICK RAY, JR., and/or DOES I through X.

3 **SECOND CAUSE OF ACTION**

4 **(Equitable and/or Implied Indemnity)**

5 **IX.**

6 Third-Party Plaintiff, Cowabunga Bay incorporates by reference paragraphs I through  
7 VIII above as if fully set forth herein.

8 **X.**

9 At the time of the incident referred to in Plaintiffs' Third Amended Complaint, Third-  
10 Party Defendant, WILLIAM PATRICK RAY, JR., was negligent in the supervision of Leland  
11 Gardner which negligence was the cause of the incident. As such, the sole and proximate cause  
12 of the incident referred to in Plaintiffs' Third Amended Complaint was the negligence,  
13 misconduct, or other fault of Third-Party Defendant, WILLIAM PATRICK RAY, JR.

14 **XI.**

15 Due to said acts and/or omissions the Third-Party Defendants, WILLIAM PATRICK  
16 RAY, JR., and/or DOES I through X should bear the entire responsibility for this incident and  
17 fully and totally indemnify Third-Party Plaintiff, Cowabunga Bay for any and all damages, or  
18 monies otherwise paid to Plaintiffs, arising from the incident described in Plaintiffs' Third  
19 Amended Complaint.

20 **XII.**

21 Third-Party Plaintiff alleges that if it is found to be liable to Plaintiffs in the above-  
22 captioned action for damages, or if payment is made by Third-Party Plaintiff to Plaintiffs, as a  
23 result of the allegations set forth in Plaintiffs' Third Amended Complaint, then the Third-Party  
24 Plaintiff's liability or payment is based upon an obligation imposed by law, and not based upon  
25 the alleged acts and/or omissions of the Third-Party Plaintiff, but is based instead upon the acts  
26 and/or omissions of Third-Party Defendants, WILLIAM PATRICK RAY, JR., and/or DOES I  
27 through X. Third-Party Plaintiff asserts that it is entitled to be fully indemnified by Third-Party  
28 Defendants, for any liability Third-Party Plaintiff may incur toward, have paid, or may be  
required to pay to Plaintiffs.



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WHEREFORE, Third-Party Plaintiff, Cowabunga Bay, prays for judgment against the Third-Party Defendants as follows:

- DATED this 24<sup>th</sup> day of August, 2018.

PAUL F. EISINGER, ESQ.  
Nevada Bar No. 1617  
DOUGLAS J. DUESMAN, ESQ.  
Nevada Bar No. 10341  
1100 East Bridger Avenue  
Las Vegas, NV 89101-5315  
Mail To:  
P.O. Box 2070  
Las Vegas, NV 89125-2070  
Attorneys for Defendant,  
HENDERSON WATER PARK, LLC dba  
COWABUNGA BAY WATER PARK

**CERTIFICATE OF SERVICE**

Pursuant to N.R.C.P. 5(b)(D), I hereby certify that on the 24<sup>th</sup> day of August, 2018, service of the foregoing **DEFENDANT HENDERSON WATER PARK, LLC'S ANSWER TO PLAINTIFFS' THIRD AMENDED COMPLAINT** to 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  
CAMPBELL & WILLIAMS  
700 South Seventh Street  
Las Vegas, NV 89101  
Phone: (702) 382-5222  
Fax: (702) 382-0540


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

Marsha L. Stephenson, Esq.  
STEPHENSON & DICKINSON  
2820 West Charleston Blvd, Suite 19  
Las Vegas, NV 89102  
Phone : (702) 474-7229  
Fax : (702) 474-7237  
Attorneys for Third-Party Defendant,  
WILLIAM PATRICK RAY, JR.

Rebecca L. Mastrangelo, Esq.  
ROGERS MASTRANGELO CARVALHO  
& MITCHELL  
700 S. Third Street  
Las Vegas, NV 89101  
Phone : (702) 383-3400  
Fax : (702) 384-1460  
Attorneys for Defendants,  
SCOTT HUIISH, CRAIG HUIISH and WEST  
COAST WATER PARKS, LLC

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Phone : (702) 384-4012  
Fax : (702) 383-0701  
Attorneys for Defendants,  
ORLUFF OPHEIKENS, SLADE  
OPHEIKENS, CHET OPHEIKENS, and  
DOUBLE OTT WATER HOLDINGS, LLC

Steven T. Jaffe, Esq.  
Kevin S. Smith, Esq.  
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Las Vegas, NV 89128  
Phone : (702) 316-4111  
Fax : (702) 316-4114  
Attorneys for Defendant,  
SHANE HUIISH

  
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