Case No. 77261

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

v.

R & O CONSTRUCTION, INC.

Respondent.

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

JOINT APPENDIX, VOL. III OF III

Donald J. Campbell, Esq. (#1216)
J. Colby Williams, Esq. (#5549)
Philip R. Erwin, Esq. (#11563)
Samuel R. Mirkovich, Esq. (#11662)
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222

Counsel for Appellants

INDEX

Page

MDSM

Karen Porter
Nevada Bar No. 13099
Brett Godfrey (Pending *Pro Hac Vice*)
Jeffrey Vail (Pending *Pro Hac Vice*)
GODFREY JOHNSON
9557 South Kingston Court
Englewood, Colorado 80112
Telephone: 303-228-0700
Facsimile: 303-228-0701

John E. Gormley
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorneys for Defendant,
R&O Construction, Inc.

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 HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an individual; R&O CONSTRUCTION COMPANY, a Utah corporation; DOES I through X, inclusive; ROE

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

MOTION TO DISMISS

CORPORATIONS I through X, inclusive, and ROE LIMITED LIABILITY COMPANY I through X, inclusive,

Defendants.

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

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

COMES NOW, Defendant R & O Construction, Inc. ("R&O") by and through its undersigned counsel, and hereby files its Motion to Dismiss Plaintiffs' Sole Claim Against R&O ("Motion"), and in support thereof states as follows:

I. INTRODUCTION

Simply put, there is no basis in law or equity to hold R&O liable for the damages Plaintiff Leland Gardner suffered at the Cowabunga Bay waterpark. In 2012, Splash Management, LLC ("Splash") joined with West Coast Water Parks, LLC ("West Coast") to begin construction of a waterpark called Cowabunga Bay in Henderson, Nevada. Third Amended Complaint ("TAC") ¶ 22. Together, they hired Defendant R & O Construction, Inc. as their general contractor on the project. *Id*. ¶ 25. Shortly thereafter—but not before R&O and its subcontractors had spent millions of dollars in support of the nascent construction project—the financing behind Cowabunga Bay fell through. *Id.* ¶ 26. As a result, neither R&O's nor its subcontractors' bills were paid. *Id*. Rather than stand by while this economic calamity unfolded, R&O approved a plan to attempt to rescue the Cowabunga Bay project and get its subcontractors paid. R&O loaned millions of dollars to a

single-purpose entity Double Ott Water Holdings, LLC ("Double Ott") set up expressly to affect this rescue and float the project. In turn, Double Ott received an equity stake in Cowabunga Bay that would enable it, hopefully, to repay this loan. At no point did R&O have any ownership in Cowabunga Bay or role in the management of Cowabunga Bay—indeed, there is no allegation in this case that R&O itself is responsible for the tragedy that befell young Leland Gardner.

However, because R&O is perceived by Plaintiffs as having "deep pockets"—Plaintiffs' counsel has repeatedly inquired about whether the Third Amended Complaint will trigger R&O's insurance policies—Plaintiffs are now attempting to hold R&O liable through a 'reverse veil piercing' cause of action for what normally would be viewed as a commendable business decision: loaning money to ensure various subcontractors are paid for work already done. In contrast, the crux of Plaintiffs' argument is that R&O's efforts to *save the project* somehow would work an *injustice* unless R&O is held liable for Plaintiffs' damages.

II. ARGUMENT

A. Reverse-Piercing Is Not A Valid Pre-Judgment Cause Of Action In Nevada

Initially, Plaintiffs' single cause of action for 'reverse veil piercing' against R&O can be disposed of immediately because it is not a valid pre-judgment claim for relief in Nevada. Nevada law allowing reverse veil piercing requires that a plaintiff first be a judgment creditor before a reverse veil piercing theory of recovery can even be advanced in the appropriate form. *See LFC Marketing Group, Inc. v. Loomis*, 8 P.3d 841 (Nev. 2000) (allowing for a judgment creditor to utilize reverse veil piercing as a *remedy* to enforce a post-judgment writ of attachment). Here, Plaintiffs have only recently added their claim for reverse veil piercing, arguing that R&O should be held liable for the *alleged* conduct of Orluff Opheikens, without first obtaining a judgment against him.

No Nevada appellate court has ever permitted a reverse veil piercing claim pre-judgment,

though admittedly no Nevada appellate court has ever had the opportunity to expressly reject such a claim either. However, as argued in more detail in **Section C.2**, *infra*, a fundamental requirement of any claim based on an *alter ego* theory (including reverse veil piercing) is that it be necessary to prevent "a manifest injustice." N.R.S. § 78.747(2)(c). Here, the only claim to injustice of any degree made by Plaintiffs is the *implication* that *if* they get a judgment against Orluff Opheikens, *and if* that judgment against him cannot be fully collected, *then* it would be unjust not to provide that some other party with 'deep pockets' pay that judgment. Fundamentally, a claim for relief cannot be predicated on the theoretical fulfillment of conditions that could not be met, if at all, until after trial. Indeed, a fundamental requirement of any equitable claim—such as reverse veil piercing—is that there is no adequate remedy at law. *See, e.g. In re Hamilton*, 186 B.R. 991, 1000 (Bk. D. Colo. 1995) (Reverse piercing is an "equitable remed[y], which is dubious . . . equitable remedies which must be sparingly invoked and, as is true of all equitable remedies, *only when there is no adequate remedy at law*.") (emphasis added). This underscores why a claim for reverse veil piercing must always be a post-judgment remedy, not a pre-judgment cause of action: it is fundamentally impossible to determine if there any injustice due to a lack of an adequate remedy at law (*viz.,* an uncollectable judgment) until the post-judgment phase of a case. Accordingly, because Plaintiffs' reverse veil piercing cause of action against R&O does not state a valid claim for relief, it must be dismissed.

B. As A Matter Of Law, Alter Ego Determination Is Appropriate For Early Resolution By The Court

Additionally, it is important to determine when allegations of *alter ego*—a predicate determination for any reverse veil piercing theory—should be resolved, and by whom. Plaintiffs have previously argued that this is a fact question that must be left to the jury. *See* Motion for Leave to File Third Amended Complaint at 7. That is simply incorrect. The question of whether one party is the *alter ego* of another party is one of law in Nevada, not a question of fact. The

statutory language could not be more clear: "[t]he question of whether a stockholder, director, or officer acts as the *alter ego* of a corporation must be determined by the court as a matter of law." N.R.S. § 78.747(3). This principle has been affirmed as recently as this year by the United States District Court for the District of Nevada, which reiterated that *alter ego* issues "must be determined by the court as a matter of law." *Bustos v. Dennis,* Case No. 17-cv-00822-KDJ-VCF, 2018 WL 1400972 at *2 (D. Nev., Mar. 20, 2018) (citing N.R.S. § 78.747). Indeed, *every case* in which Nevada law has been considered on this question has come to this same conclusion. *C.f., Webb v. Shull*, 270 P.3d 1266, 1271 (Nev. 2012); *Lorenz v. Beltio, Ltd.*, 963 P.2d 488, 492 (Nev. 1998).

Accordingly, the *alter ego* allegation against R&O is particularly appropriate for disposition by this Court on a Rule 12(b)(5) motion based on failures in the Plaintiffs' allegations alone to meet Nevada's statutory *alter ego* requirements. It certainly should not serve as the excuse to drag R&O through extensive discovery, let alone trial.

C. Plaintiffs Have Not Adequately Pleaded Their Reverse Piercing Theory

Reverse veil piercing is a species of *alter ego* allegation, and accordingly the effort to hold R&O liable for Orluff Opheikens' *alleged* negligence must meet Nevada's statutory requirements for proof that R&O is the *alter ego* of Orluff. *See Loomis*, 8 P.3d at 846 ("reverse piercing . . . appl[ies] the *alter ego* doctrine in reverse"). By statute, in order to state a claim for *alter ego* liability in Nevada, a plaintiff must allege all of the following:

> (a) The corporation is influenced and governed by the stockholder, director or officer;
>
> (b) There is such unity of interest ***and ownership*** that the corporation and the stockholder, director or officer are inseparable from each other; ***and***
>
> (c) Adherence to the corporate fiction of a separate entity would ***sanction fraud*** or ***promote a manifest injustice***.

N.R.S. § 78.747(2) (emphasis added). Here, Plaintiffs' Third Amended Complaint ("TAC") fails to plead factual allegations sufficient to establish that Defendant Orluff Opheikens even could be,

let alone is in fact, the *alter ego* of R&O. First, Plaintiffs fail to allege that Orfluf actually owns any shares of R&O that could permit any degree of "unity of . . . ownership" as required by N.R.S. § 78.747(2)(b). Second, Plaintiffs fail to make any coherent allegation that it would "promote manifest injustice" if R&O is not found to be the *alter ego* of Orluff, as required by N.R.S. § 78.747(2)(c).

1. Plaintiffs have not pleaded facts establishing the required unity of interest and ownership between Orluff and R&O.

a. The history and interpretation of the Nevada statute.

N.R.S. § 78.747 requires a plaintiff to establish that there is "such unity of interest *and ownership*" that one party is inseparable from the other. *Id*. at § 747(2)(b) (emphasis added). The history leading up to the enactment of this statutory language is particularly compelling here. The Nevada Supreme Court, on September 19, 2000 in *Loomis*, and interpreting the *then-applicable common law standard* for *alter ego* liability as a flexible balancing test comprised of numerous elements, stated that "[a]lthough ownership of corporate shares is a strong factor favoring unity of ownership and interest, the absence of corporate ownership is not automatically a controlling event." *Id*., 8 P.3d at 847. In response, less than one year later, on June 15, 2001, the Nevada Legislature enacted N.R.S. § 78.747 which codified specific, fixed requirements that ***must*** be shown to establish *alter ego* liability.

The statutory language enacted by the Nevada Legislature does not create the kind of balancing test that is open to flexible interpretation, such as the Nevada Supreme Court had just endorsed in *Loomis*. *Id*., 8 P.3d at 846. Rather, the statute's test is explicit and conjunctive—a finding of *alter ego* liability requires the existence of "unity of interest **and** ownership." N.R.S. § 78.747(2)(b) (emphasis added). The fundamentals of statutory construction as endorsed by the Nevada Supreme Court tell us that the word "and creates a conjunctive list," *Humphries v. New York-New York Hotel & Casino*, 403 P.3d 358, 362 (Nev. 2017) (citations omitted), and that it is

presumed to be used in a statute conjunctively "unless there is *clear* legislative intent to the contrary." *See Dezzani v. Kern & Assoc., Ltd.*, 412 P.3d 56, 60 (Nev. 2018) (citations omitted) (emphasis in original).

Here, the legislative intent behind S.B. 577, the bill that enacted N.R.S. § 78.747, shows no evidence that the phrase "interest and ownership" should not create a conjunctive *requirement* for *both*. *Id.*, at § 78.747(2)(b). Rather, the legislature demonstrated a clear intent to "limit common law and statutory liability" under the *alter ego* doctrine. NV. Assem. Comm. Min. 6/1/2001 (Ways and Means), *attached hereto* at **Exhibit A** at *2. Indeed, the intent of the legislature was to strike a bargain—to raise corporate filing fees to fund education, and in exchange "guarantee that Nevada was the 'domicile of choice' for corporations around the country" and "that Nevada's corporate laws were the best, most inviting for business." NV. Assem. Comm. Min. 6/1/2001 (Judiciary), *attached hereto* at **Exhibit B** at *9. Critically, the legislature repeatedly questioned and summarized the negative effects of Nevada's common law *alter ego* jurisprudence, focusing on both the *Polaris Indus. Corp. v. Kaplan*, 747 P.2d 884 (Nev. 1987), case, and the problem of "no *fixed* criteria to use the *alter ego* doctrine to pierce the corporate veil" demonstrated in both *Polaris* and the then most recent *alter ego* case, *Loomis*, 8 P.3d at 846. *See* **Exhibit B** (emphasis added) at * 13. It was this need to create a clear, "fixed" criteria for the courts to use in making *alter ego* determinations that was "'the carrot' of the liability law . . . [to] 'the stick' of increased fees." *Id.* Accordingly, to the extent the plain language of the statute is not sufficiently clear on its face, the legislative history certainly shows intent that a court *must* find *both* unity of "interest *and ownership*" to make a finding of *alter ego*. N.R.S. § 78.747(2)(b) (emphasis added). As argued below, Plaintiffs' Third Amended Complaint contains no coherent allegation that Orluff Opheikens owns a single share of R&O. Therefore, R&O cannot be Orluff's *alter ego* because the Third Amended Complaint fails as a matter of law to allege the required unity of ownership.

b. Application of the statute here.

Without any ownership by Orluff of shares in R&O, it cannot be his *alter ego* as a matter of law. *See* N.R.S. § 78.747, and **Section (B)(1)(a)**, *supra*. On this point, Plaintiffs make only a single, internally contradictory allegation concerning ownership: that "Orluff, *through his family trust,* owns approximately eighty-five percent (85%) of the outstanding shares in R&O." TAC ¶ 14 (emphasis added). As a matter of law, either Orluff *or* The Opheikens Family Trust can own these shares, but not both. *See* Bogert's THE LAW OF TRUSTS AND TRUSTEES, § 148 ("trust creation has as one of its elements a *change* of possession" of the trust *res* from grantor to trustee) (emphasis added); § 28 (defining property interest in trust *res* post-creation as "both trustee and beneficiary own the same thing," with no interest in grantor); *and* § 42 ("After a settlor has completed the creation of a trust . . . [he] has no rights, liabilities, or powers with regard to the trust administration . . . [and] has no power to revoke or modify [an irrevocable trust]."). Indeed, the fundamental purpose of placing any property in a trust is to legally and effectively separate it from the property of the grantor. *See id.* § 148. The Court has no obligation to accept as true Plaintiffs' allegations concerning the question of ownership, not only because their sole allegation on this point contradicts itself, but because the concept of ownership is a legal conclusion which courts are not bound to accept. *Allen v. U.S.*, 964 F. Supp. 2d 1239, 1251 (D. Nev. 2013).

Here, Plaintiffs also appear to have left their allegations concerning The Opheikens Family Trust intentionally vague, as though that would buy them 'wiggle room' in the face of a clear and strictly construed *alter ego* statute. They make no allegations, for example, as to the identity of the grantor, the trustee, or the beneficiaries, just the inadvertent implication that by calling it a "family trust," TAC ¶ 14, it presumably acts to *separate* ownership of R&O from Orluff.

These muddled allegations may be clarified by The Opheikens Family Trust Document ("Trust"), which is incorporated by Plaintiffs by reference into the Complaint at T.A.C. ¶ 13, when

they set forth the internally contradictory allegation that "Orluff, through his family trust, owns approximately eight-five percent (85%) of the outstanding shares of R&O." Because this trust document is "incorporated by reference" within the TAC due to allegations that can only be understood by reference to the document itself, and because these conclusions are "integral to the [*alter ego*] claim," it can be considered by this Court under Rule 12(b)(5) without triggering conversion to a motion under Rule 56. *Baxter v. Dignity Health*, 357 P.3d 927, 930 (Nev. 2015). A review of the relevant portion of the Trust document, *attached hereto* at **Exhibit C**, shows the three key facts concerning ownership of R&O: (1) the Trust is irrevocable and was established by Orluff as grantor long before the accident in question; (2) Orluff is not a trustee of the Trust; and (3) Orluff is not a beneficiary of the Trust. Based on this document referenced and incorporated by Plaintiffs in their Third Amended Complaint, the Trust—and not Orluff—owns the shares in R&O. *Id.*

Regardless of whether the Court focuses on the internally contradictory ownership allegation in TAC ¶ 13, or whether it looks to the plainly contradictory terms in the referenced Trust document, **Exhibit C**, the clear conclusion is that the Third Amended Complaint fails to coherently and effectively allege that Orluff has *any ownership at all* in R&O. Accordingly, as a matter of law, without any allegation of ownership, there can be no "unity of interest *and ownership*" between Orluff and R&O as required by N.R.S. § 78.747(2)(b). *Id.* (emphasis added); *See also Cuomo v. Deluca & Assoc., P.C.,* Case No. 66484 (Nev. Jan 15, 2016), 2016 WL 207658 (where a single required element of a claim is missing, the claim must be dismissed under N.R.C.P. 12(b)(5)). Therefore, Plaintiffs have failed to state valid *alter ego* allegation against R&O, and their Third Claim for Relief must be dismissed.

2. Plaintiffs make no coherent allegation that, absent an alter ego finding, the result would "sanction fraud or promote a manifest injustice."

Another required element of any *alter ego* allegation is a showing that, absent a finding of

alter ego, the court would "sanction fraud or promote a manifest injustice." N.R.S. § 78.747(2)(c). Plaintiffs make no allegation at any point in the Third Amended Complaint that either Orluff or R&O are in any way involved in a "fraud."[1] *See generally*, TAC. Therefore, Plaintiffs instead must allege that maintaining R&O's corporate separateness from Orluff would "promote a manifest injustice." N.R.S. § 78.747(2)(c).

Plaintiffs, however, nowhere allege that reverse veil-piercing in this case would avoid *manifest* injustice. Rather, they make only the conclusory and facially-insufficient allegation that "adherence to the corporate fiction of R&O [would] . . . promote injustice." TAC ¶ 79. First, Plaintiffs are pleading a conclusion of law, and this Court is in no way required to accept it as true. *Allen*, 964 F. Supp. 2d at 1251. However, even if this Court were to accept that conclusory allegation as true, it does not meet the statutory requirement for "manifest injustice." N.R.S. § 78.747(3). This omission is not akin to a scrivener's error: the Nevada Legislature specifically added the word "manifest" to the prior Nevada Supreme Court's expression of the common law requirement that a proponent of an *alter ego* claim must allege it would "promote injustice." *Loomis*, 8 P.3d at 847 (quoting *Polaris*, 747 P.2d at 886). They did so to "ensure that Nevada's corporate laws were the best, the most inviting for business." **Exhibit B** at *9. Here, both the plain language of N.R.S. § 78.747 and the clear underlying intent of the legislature require more than simply 'injustice'—they require "manifest injustice.' Plaintiffs have failed to allege this in the TAC, and for that reason alone, their claim against R&O should be dismissed.

The importance of the 'manifest injustice' requirement goes far beyond the absence of a single word, however. The 'manifest injustice' requirement underscores that any pleading of the legal conclusion of injustice must be supported by a detailed and coherent set of factual allegations

[1] While the word "fraudulent" occurs twice in a conclusory listing ("grossly negligent, reckless, willful, intentional, oppressive, fraudulent, malicious, and done in reckless disregard," TAC ¶¶ 62, 70), there is no actual discussion of fraud, nor any allegations that could possibly meet the heightened pleading requirements of N.R.C.P. 9.

such that it is manifest – "clear and obvious." OXFORD ENGLISH DICTIONARY, 3d.[2] Despite calling it a "scheme," TAC ¶ 36, and stating without factual adornment the legal conclusion that Orluff was "a straw man owner," *id*., it is unclear how Plaintiffs can argue that protecting the corporate separateness of R&O would be in any way unjust, let alone how it would create *manifest* injustice. Here, Plaintiffs admit that "R&O did not make a profit from the construction of Cowabunga Bay and even waived its lucrative general contractor fee." *Id*. As Plaintiffs explain, the "loan," TAC ¶ 29, from R&O to its Chairman Orluff Opheikens was then contributed to Double Ott. Double Ott used those funds to obtain an equity stake in the water park and ensure the project could be completed. TAC ¶ 28, 34.

Here, as throughout the Third Amended Complaint, Plaintiffs generally refer to Double Ott as "Orluff," presumably relying on yet another layer of cursory, unstated, and wholly insufficient *alter ego* allegations. *Id*. ¶ 16. They do so to disguise the highly-attenuated chain of *alter ego* findings—Cowabunga Bay to Double Ott to Orluff to The Opheikens Family Trust to R&O—all of which this Court must accept (even though they are not pleaded) before it can even begin to consider whether there would be manifest injustice should it not hold R&O—*the construction company*—liable for an accident that occurred at a water park *long after construction had been completed, and wholly unrelated to the quality of the construction*. Plaintiffs are conspicuously vague, and never explain how this attenuated "scheme" they have painstakingly cobbled together could possibly result in an injustice. Indeed, Plaintiffs' own allegations of the motivation explain that the goal was not to defraud a young boy and his family, but rather *the hope* that Double Ott's "ownership stake in the Cowabunga Bay project . . . would eventually generate sufficient funds to [repay the loan and thereby] make R&O whole," "so R&O could recover its construction costs and

[2] Black's Law Dictionary (10th ed. 2014) defines manifest injustice only as it operates as a standard for appellate review: "A direct, obvious, and observable error in a trial court, such as a defendant such as a defendant's guilty plea that is involuntary or is based on a plea agreement that the prosecution has rescinded."

pay its subcontractors." *Id*. ¶¶ 29, 81. Plaintiffs, however, make ***no*** allegation of how this "scheme," TAC ¶ 36, would ever work an injustice, let alone the required "manifest injustice." N.R.S. § 78.747(2)(c).

Presumably, the only 'injustice' Plaintiffs are referring to is their concern that *if* Plaintiffs prevail at trial against Orluff Opheikens, and *if* they are not able to collect whatever judgment is apportioned to him, *then* they would like to have R&O's deep pockets available to pay them.[3] If such a concern were sufficient to state a reverse piercing *alter ego* claim against a corporation in Nevada, then the corporate form would be rendered meaningless here. Indeed, this overreaching by Plaintiffs only serves to underscore that reverse piercing is not a pre-judgment claim for relief, but must be considered, if at all, as a post-judgment collection remedy, as argued in **Section A**, *supra*.

"The corporate cloak is not lightly thrown aside," and here, as a matter of law, Plaintiffs have failed to allege facts that, even when taken in the light most favorable to them, could possibly show promotion of a manifest injustice by affirming the corporate separateness of R&O. *Baer v. Amos J. Walker, Inc.*, 452 P.2d 916, 916 (Nev. 1969). Accordingly, Plaintiffs' Third Cause of Action against R&O should be dismissed.

D. This Court Should Adopt The Iqbal-Twombly Pleading Standard, Under Which Plaintiffs' Reverse Piercing Theory Is Woefully Inadequately Pleaded

In the event that this Court determines that under the legacy "no set of facts" standard the claim against R&O cannot yet be dismissed, *see, e.g., Dezzani v. Kern & Asssoc., Ltd*., 412 P.3d 56, 64 (Nev. 2018) (Pickering, J., dissenting), this Court should adopt the *Iqbal-Twombly* "plausibility" standard to prevent such an internally contradictory and transparently deficient claim from being allowed purely to create leverage, and to drag R&O through the expense and burden of

[3] Indeed, even if one were to assume liability, the TAC makes no allegation of what amount of damages would be necessary to make Plaintiffs whole, or what assets Orluff Opheikens may have to pay any judgment, making even the most tentative dacceptance of the potential for 'injustice' under this theory of impossible.

discovery. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

"Nevada hasn't adopted the *Twombly/Iqbal* doctrine, ***at least not yet***." *MG & S Enterprise, LLC v. Travelers Casualty Ins. Co. of Am*., Case No. 69622 (Nev. App., Sept. 29, 2017), 2017 WL 4480776 at *7 (emphasis added). Indeed, just as there was a gradual but steady tide of state courts adopting the prior notice-pleading standard after *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), state courts are gradually adopting the *Iqbal-Twombly* standard, and it is likely only a matter of time before Nevada does so. *See Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 424-25 (2018) (noting Colorado, the District of Columbia, Massachusetts, Nebraska, South Dakota, and Wisconsin have now adopted the *Iqbal-Twombly* standard). While the adoption of the *Iqbal-Twombly* standard at the state court level may seem slow, the same was the case with state court adoption of modified summary judgment standards promulgated by the Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In the 32 years since that 1986 opinion, 39 state courts have now adopted the *Celotex* standard—approximately the same pace as the ongoing adoption of *Iqbal/Twombly*. *Procedural Retrenchment and the States* at 429-432. The same is likely to happen in Nevada with respect to *Iqbal-Twombly*, particularly with this state's recognition that the Nevada Rules are modeled after the Federal Rules, and Nevada's general desire to reduce wasteful discovery costs—the same policy concern that underscored *Iqbal-Twombly*.

1. Adopting Iqbal-Twombly in Nevada state courts will reduce wasteful discovery costs spent on implausible claims by increasing early judicial management.

In deciding *Iqbal*, Justice Kennedy explained that requiring parties to plead ***plausible*** claims precludes "unlock[ing] the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79. Before the U.S. Supreme Court adopted the plausibility standard in *Twombly*, the mere threat of discovery expense in federal civil litigation could push "defendants to settle even anemic cases." *Twombly*, 550 U.S. at 559.

The requirement to plead plausible claims thus serves two vital purposes: "to ensure that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an appropriate defense," and "to avoid ginning up the costly machinery associated with our civil discovery regime on the basis of 'a largely groundless claim.'" *Pace v. Swerdlow*, 519 F.3d 1067, 1076 (10th Cir. 2008) (citing *Twombly*, 550 U.S. at 1964, 1966). Where the presumptive motive of impleading R&O is to reach its insurance policies, this jurisprudential argument becomes even more clear-cut.

Nevada and federal courts share the goal of using pretrial rules to ensure "the just, speedy, and inexpensive determination of every action." *Compare* N.R.C.P. 1, *with* Fed. R. Civ. P. 1. Likewise, both Nevada and federal rules require the identical "short and plain statement of the claim showing that the pleader is entitled to relief." *Compare* N.R.C.P. 8 *with* Fed. R. Civ. P. 8. Case law interpreting a federal rule, where they are very similar to the analogous Nevada rule, present "strong persuasive authority" for Nevada state courts. *Vanguard Piping v. Eighth Jud. Dist. Ct.*, 309 P.3d 1017, 1020 (Nev. 2013). Accordingly, this Court should adopt the *Iqbal-Twombly* 'plausibility' standard as the pleading requirement contained in N.R.C.P. 8—"showing that the pleader is entitled to relief" must require more than stating conclusions." *Id.*

2. The deficiencies in the instant claim is a showcase for the merits of Iqbal-Twombly: a corporation should not be dragged to the conclusion of litigation in light of these highly-implausible claims of injustice.

Here, even if this Court determines that the TAC satisfies a purely theoretical 'possibility of future injustice standard,' let alone that this theoretical future injury could state a claim under Nevada law, there is certainly no *plausible* claim sufficient to demand that R&O be dragged into this case. Plaintiffs make no "show[ing]", even if every *factual* allegation in the TAC is accepted as true, that there is a plausible concern of actual, present, and *manifest* injustice. *See Iqbal*, 556 U.S. at 576. Rather, Plaintiffs present the Court with nothing but the wholly speculative concern that without R&O's deep pockets, there might not be enough money to pay a theoretical future

judgment against another party. This highlights a fundamental flaw in the legacy "no set of facts" pleading standard—if that bar is not high enough to stop this claim of 'injustice,' what claim could it stop? *Cohen v. Mirage Resorts, Inc.,* 62 P.3d 720, 734 (2003). Under Plaintiffs' proposal, injustice would, by definition, exist *everywhere*, as every complaint for money damages carries with it from the outset at least the theoretical possibility that a judgment could go unpaid. Nevada's statutory requirement of "manifest injustice" must require more than that, or it would become an impermissible nullity. N.R.S. § 78.747(2)(c).

Adoption of the *Iqbal-Twombly* pleading standard here would avoid such an impermissible nullification of the legislatively mandated requirement for "manifest injustice." N.R.S. § 78.747(2)(c). If this Court cannot dispose of this claim as an invalid claim for pre-judgment relief, as argued in **Section A**, *supra*, then it must, at a minimum, impose a plausibility standard for pleading the required manifest injustice—a standard that Plaintiffs have not met here. At *most*, the TAC has "alleged—but it has not show[n]" that declining to find R&O to be the *alter ego* of Orluff Opheikens would promote a manifest injustice. *Iqbal*, 556 U.S. at 576. If that were sufficient to state a 'claim' for *alter ego*, the floodgates would open and the corporate form would cease to provide any meaningful protection in Nevada. That is the exact opposite of the expressed intent of the Legislature. *See, e.g.,* **Exhibit B** at *9 (legislative intent of alter ego statute is for Nevada's corporate laws to be the "most inviting for business" in the nation). Accordingly, this Court should adopt the plausibility requirement from *Iqbal-Twombly* and dismiss Plaintiffs' claim against R&O for, among other things, failing to state plausible allegations of manifest injustice.

III. CONCLUSION

For all of the above stated reasons and authorities, Defendant R & O Construction, Inc. respectfully requests this Court GRANT its Motion and DISMISS the claim against it.

Dated: August 31, 2018

/s/ Karen Porter

Karen Porter
Nevada Bar No. 13099
Brett Godfrey (Pending *Pro Hac Vice*)
Jeffrey Vail (Pending *Pro Hac Vice*)
GODFREY JOHNSON
9557 South Kingston Court
Englewood, Colorado 80112
Telephone: (303) 228-0700
Facsimile: (303) 228-0701

John E. Gormley, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorneys for Defendant,
R & O Construction, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31 day of August, 2018, I served a true and correct copy of the foregoing document (and any attachments) entitled: ***Motion to Dismiss,*** 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 GARNDER 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 HUISH, CRAIG HUISH 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 HUISH

By: */s/ Megan Rettig*
An employee of GODFREY JOHNSON

Exhibit A

Nevada Assembly Committee Minutes, June 1, 2001

Nevada Assembly Committee Minutes, 6/1/2001

Nevada Assembly Committee on Ways and Means
Seventy-First Session, 2001

The Committee on Ways and Meanswas called to order at 7:43 a.m. on Friday, June 1, 2001. Chairman Morse Arberry Jr. presided in Room 3137 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Mr. Morse Arberry Jr., Chairman
Ms. Chris Giunchigliani, Vice Chairwoman
Mr. Bob Beers
Mrs. Barbara Cegavske
Mrs. Vonne Chowning
Mrs. Marcia de Braga
Mr. Joseph Dini, Jr.
Mr. David Goldwater
Mr. Lynn Hettrick
Ms. Sheila Leslie
Mr. John Marvel
Mr. David Parks
Ms. Sandra Tiffany

COMMITTEE MEMBERS ABSENT:

Mr. Richard D. Perkins (Excused)

STAFF MEMBERS PRESENT:

Mark Stevens, Fiscal Analyst
Steve Abba, Principal Deputy Fiscal Analyst
Rick Combs, Program Analyst
Georgia Rohrs, Program Analyst
Andrea Carothers, Committee Secretary
Connie Davis, Committee Secretary

The Chair opened the hearing on A.B. 287.

Assembly Bill 287: Makes appropriation to Washoe County School District for support of preschool program for non-English speaking children offered by The Children's Cabinet at Incline Village, Inc. (BDR S-1183)

Greg Brower, Assemblyman, District 37, testified in favor of A.B. 287. Mr. Brower explained that the bill requested an appropriation for an educational program, affiliated with the Children's Cabinet at Incline Village. The Children's Cabinet was a children's organization with two chapters, one in Reno and one in Incline Village, and was dedicated to improving the life of the children and families in the areas where the centers were located. Mr. Brower stated that programs administered by the Children's Cabinet included a health clinic, mentoring and tutoring services, mental health services, and the Family-to-Family connection. The program that was being requested to be funded by A.B. 287 was known as the El Conte Program. It provided non-English speaking four and five year olds an opportunity to learn English before entering the public school system. There was a large number of non-English speaking or English as a second language families in the Lake

Tahoe area, most of which were Latino. The primary goal of the El Conte Program was to prepare the children for success in school by teaching English and the skills children were expected to have once in kindergarten. The program had been able to survive through grant funding, fund-raising, and private donations. Mr. Brower noted that he had participated in fund-raising efforts, and although the fund-raising was successful it was not enough to keep the program running. The program had received donations from the United Way and other charitable efforts, and Mr. Brower reiterated that the monies received were not enough to keep the program running, and he was requesting the state's help.

Mr. Brower introduced Sara Ohmann, former Executive Director, Children's Cabinet at Incline Village. Ms. Ohmann stated that she had brought a poster painted by the children to support the request (Exhibit C). Ms. Ohmann provided a folder with brochures outlining the programs offered, a budget, a brief narrative, and a letter of recommendation from four kindergarten teachers at Incline Elementary School (Exhibit D). The El Conte Pre-school Program was initiated in 1995 in response to the growing Hispanic population within the community and the language barriers it presented. The Children's Cabinet formed a strong foundation for the El Conte Pre-school Program and a partnership with the Incline Elementary School, encouraging parents to enroll their children. At most 28 children would enter the El Conte Pre-school Program with limited English speaking skills. Ms. Ohmann stated that by attending school three days a week, the goal was to have each student fluent in English and have learned appropriate classroom behavior upon graduation. The program also concentrated on family participation in and outside of the classroom. Parents were not charged tuition for the program, but were asked to donate time in class, assist in the maintenance of the building, and perform two fund-raisers each year. The parents raised nearly $5,000 for the school. Ms. Ohmann stated that there was a high transition rate from the El Conte Pre-school Program to Incline Elementary School. She noted that the program helped to dissipate the division in the classroom of those students who could and who could not speak English. Ms. Ohmann explained that the program could be funded as a pilot program, and could be duplicated throughout the state.

Ms. Shelia Leslie asked Harry Haaser, Principal, Incline Elementary School, if any research had been done to determine the differences between Latino children who had been through the El Conte Program and those that had not. Mr. Haaser explained that the school had been attempting to follow the students that had participated in the program, and noted the Hispanic population in the kindergarten class was approaching 50 percent of the student population. Due to the program the teachers were focusing less on language and more on teaching children the curriculum. Mr. Haaser stated that there was no testing done statewide to validate the improvement as a result of the program, but the kindergarten teachers had seen tremendous growth in the children who had gone through the program as opposed to students who entered without English skills. Mr. Haaser stated that the other portion of the program that was important was the level of parent interaction that was encouraged. The parent interaction was easy to transfer to the elementary school.

Ms. Chris Giunchigliani asked what the age population was in the El Conte Program. Ms. Ohmann stated that the age population was four to five. Ms. Giunchigliani asked if any of the children were disabled in any way. Mr. Haaser explained that screening was completed and nothing had been able to be identified. Ms. Giunchigliani asked if there were transition services that the Washoe County School District provided to the Incline program. Mr. Haaser stated that there were no English as a Second Language (ESL) services provided to kindergarten, so school services were not provided for the kindergarten. Ms. Giunchigliani stated that the services were now mandatory. Mr. Haaser explained that it was his understanding the ESL services were not provided for kindergarten students. Ms. Giunchigliani reiterated that it was mandatory to provide ESL services to kindergarten classes.

Mrs. Barbara Cegavske stated that the grant revenue was $6,814 and asked if the grants were local grants. Ms. Ohmann stated that the amount was a projection for the current fiscal year and the program was fortunate to have it funded through a private grant. The funding history of the program had been on a year-to-year basis. Mrs. Cegavske asked how many years the Children's Cabinet had been in the elementary school. Ms. Ohmann stated the Children's Cabinet was ten years old, and the El Conte Program opened in 1995. Mrs. Cegavske suggested that Ms. Ohmann talk to Assemblywoman Chowning.

Mr. Brower thanked the committee for hearing the testimony on the bill.

The Chair closed the hearing on A.B. 287 and opened the hearing on S.B. 432.

Senate Bill 432: Makes appropriation to Department of Museums, Library and Arts for purchase of computer software and equipment. (BDR S-1363)

Scott Sisco, Interim Director, Department of Cultural Affairs, stated that he had provided a handout concerning S.B. 432 (Exhibit E). The bill was a one-shot included in The Executive Budget. S.B. 432 included $137,518 for computer replacements and upgrades throughout the department. The original request was $153,309 and had been decreased by $15,791 to the amount previously mentioned. Within the handout was a list of the computers going to each agency within the department.

The Chair closed the hearing on S.B. 432 and opened the hearing on S.B. 457.

Senate Bill 457: Makes appropriation to Department of Museums, Library and Arts for conservation laboratory and extends reversion date for prior appropriation made to Department. (BDR S-1423)

Mr. Sisco stated that S.B. 457 included a $40,000 appropriation, found in The Executive Budget, to complete the conservation lab. The conservation lab had originally been built as part of the Nevada State Library and Archives Building in 1991 with an anticipated cost of $75,000 for furnishings and equipment. The department was able to receive grants in the amount of $35,000 and the $40,000 appropriation would finish the conservation lab. The previous handout listed the equipment for the laboratory, of which the first $40,000 was included in the bill. The conservation lab would provide the ability to take care of the items in the State Library and Archives, in particular, older documents in need of restoration found in the archives. In addition, the bill was amended in the Senate Committee on Finance. The department had been given an appropriation for the Boulder City Railroad Museum in the previous biennium, and the work to prepare the passenger facilities was not completed and would not be completed by the close of the fiscal year. The amended bill requested an extension on the reversion date for the funds to December 31.

The Chairman closed the hearing on S.B. 457 and opened the hearing on S.B. 437 and S.B. 438.

Senate Bill 437: Makes appropriation to National Judicial College to assist in securing public and private grants and other funding for support during 2001-2003 biennium. (BDR S-1371)

Senate Bill 438: Makes appropriation to Louis W. McHardy National College of Juvenile and Family Justice to assist in securing public and private grants and other funding for support during 2001-2003 biennium. (BDR S-1373)

Chairman Arberry recognized Don Hataway, Deputy Director, Budget Division. Mr. Hataway explained that S.B. 437 and S.B. 438 continued the financial support that the state had provided to the two institutions for the previous 12 years. In S.B. 437 the support had previously been in the form of endowments to the organization on which interest could be earned, or in direct appropriations. In 1999 the appropriation was for $600,000, which equated to the interest that the organization earned in the previous two years. The original bill in The Executive Budget was to continue the $600,000 funding level, but it had been amended to $450,000, which reflected the interest that would be earned on the same amount of money. The same concept was continued at the current interest cost. Mr. Hataway indicated that the same concept was found in S.B. 438.

The Chair closed the hearing on S.B. 437 and S.B. 438 and opened the hearing on S.B. 450.

Senate Bill 450: Makes appropriation to State Department of Agriculture for vehicles and new equipment. (BDR S-1399)

Ed Hoganson, Administrator, State Sealer of Weights and Measures, explained that the division was charged with determining fuel specifications for the state, and the testing of motor fuels for that use. The division was primarily charged with inspecting and testing all commercial use scales throughout the state. The request in the bill was for the petroleum testing section. There were several pieces of equipment that were 30 or 40 years old and did not meet the current standards for testing meters recognized by the National Institute of Standards and Technology Handbooks. The division was concerned with the condition of

the equipment, and with safety issues when handling volatile fuels. The division had two petroleum testing vehicles, one in Elko and one in Las Vegas, that needed to be replaced. Mr. Hoganson stated that with the growth of petroleum meters in Las Vegas, one additional unit needed to be added. In the areas of the larger meters, the division required a 100-gallon prover for handling fuel deliveries at airports and home deliveries. The larger petroleum prover was basically for use at airports and needed to be equipped with safety inner locks so that the dispensers at commercial airports could be tested. The final item in the request was a prover for testing liquid propane.

Chairman Arberry inquired about the time line for receiving the new equipment if the request was approved. Mr. Hoganson answered that from conversations with the suppliers, he believed a majority of the equipment would be in place within six months.

Mr. John Marvel asked how often the metering devices were found to be out of sync. Mr. Hoganson answered that the amount varied depending on the type of meter that was being discussed. The meters were mechanical and had electrical inner locks with displays, so some of the violations were minor. Most of the adjustments that were made were completed on-site by a registered service agent, and a representative of the dispensing organization. Mr. Hoganson opined that 10 to 20 percent of the meters needed to be corrected.

Chairman Arberry closed the hearing on S.B. 450 and opened the hearing on S.B. 455.

Senate Bill 455: Makes appropriation to Department of Human Resources for new and replacement equipment, and hardware and software at Lakes Crossing Center. (BDR S-1419)

Mike Torvinen, Administrative Services Officer, Division of Mental Health and Developmental Services, explained that S.B. 455 was included in The Executive Budget and was for new and replacement equipment, and hardware and software at the Lake's Crossing Center in Sparks. A majority of the requested appropriation would be spent on security equipment, such as electronic doors, cameras and security glass. The appropriation included a request to establish a network at the facility.

The Chair closed the hearing on S.B. 455 and opened the hearing on S.B. 456.

Senate Bill 456: Makes appropriation to Division of Child and Family Services of Department of Human Resources for new and replacement equipment at Southern Nevada Child and Adolescent Services Juvenile Treatment Facility. (BDR S-1420)

Bruce Alder, Deputy Administrator, Division of Child and Family Services, explained that S.B. 456 was a one-shot appropriation for the Southern Nevada Child and Adolescent Services. The original request was for $178,458 and had been reduced to $148,150. The money would be used to purchase new and replacement furnishings and equipment for the on-campus treatment homes, Desert Willow Treatment Center, and other areas in early childhood services.

The Chair closed the hearing on S.B 456 and opened the hearing on S.B. 477.

Senate Bill 477: Makes appropriation to Department of Employment, Training and Rehabilitation for Independent Living State Client Services Program. (BDR S-1413)

Mr. Hataway stated that the $500,000 appropriation was included in The Executive Budget at $500,000 to provide assistance for assisted living devices to help disabled people to maintain an independent living environment. The amendment changed the appropriation from the Department of Human Resources to the Department of Employment Training and Rehabilitation. Mr. Hataway explained that in the budget there had been a proposal to create an Office of Disability Services, within the Department of Human Resources, which had not been approved. The appropriation in S.B. 477 had been moved accordingly.

The Chair recognized Robert Desruisseaux, Northern Nevada Center for Independent Living, who spoke in favor of the bill. Mr. Desruisseaux noted that the program provided for home modifications and technology for people with disabilities that did not qualify for services through other programs. The program had a large waiting list and had not received an increase in funding over the previous two sessions. People on the waiting list had a year and a half to a two-year wait for services. The Independent Living program provided the tools that an individual needed to become independent, and gain a place in the community.

Last year the home modification program had raised $50,000 and in the current year that had increased to $60,000. In the previous year through the home modification program 50 people were serviced. Mr. Desruisseaux presented the committee with stories of children who had utilized the services (Exhibit F), and a handout of letters from people on the waiting list (Exhibit G). Mr. Desruisseaux noted that the impact of the program on an individual and their family was immediate. He urged the committee's support of the bill.

Jon Sasser, Lobbyist, Washoe Legal Services, testified in support of the bill.

The Chair closed the hearing on S.B. 477 and opened the hearing on S.B. 491.

Senate Bill 491: Makes appropriation to Opportunity Village Foundation for revitalization of thrift stores that are operated by Opportunity Village Foundation. (BDR S-1354)

Mr. Hataway explained that the $250,000 proposal in the bill was included in The Executive Budget. The amendment to the bill added a reporting requirement and clarified what the funds would be used for, the revitalization of thrift stores that were operated by Opportunity Village Foundation.

Ed Guthrie, Executive Director, Opportunity Village Foundation, explained that Opportunity Village had been established in 1954 as the Clark County Association for Retarded Children by a group of concerned parents and family members. Mr. Guthrie noted that the organization was the largest provider of vocational training and employment services for people with metal retardation and related disabilities in the state of Nevada. Over the past five years Opportunity Village had paid over $1 million per year in wages to people that others might consider unemployable because of serious disabilities. The organization also provided day habilitation services to people with some of the more serious disabilities. Mr. Guthrie thanked the committee for their consideration.

The money requested would be used to revitalize the thrift stores in order to continue to provide services and generate surpluses that would be used to subsidize other services. The Opportunity Village had been the thrift store for Las Vegas for the previous 40 years. Over two-thirds of the employees in the thrift stores and processing division were people with severe disabilities. Mr. Guthrie stated that in FY2002 fund-raising and contract income would generate over $9.5 million of an $11.5 million budget. Less than 20 percent of the money Opportunity Village used to provide services was provided by the state of Nevada. Mr. Guthrie noted that for years the thrift stores were able to generate $250,000 per year that went to subsidize the Community Training Center Program, but times had changed and the thrift stores were facing competition from national chains. Over the past decade market shares and sales had decreased to the point if there was not a change the stores would be closed. Opportunity Village would use the appropriation to open new stores, and to hire a management consultant firm to improve the efficiency and effectiveness of the operation. Mr. Guthrie opined that hundred of thousands of dollars of surplus would be generated over the next decade, and the organization intended to invest the surplus in community services for people with severe disabilities. He promised that the one-time investment would contribute at least $2.5 million over the next decade toward services for people with severe disabilities. Mr. Guthrie urged the committee to support the bill.

Mrs. Cegavske thanked Mr. Guthrie for the services that were being provided.

Ms. Leslie stated that she was sure that the organization completed wonderful work, and noted that she had spent time with the sister agency in northern Nevada. Ms. Leslie asked what rationale Mr. Guthrie could provide for funding a nonprofit organization in southern Nevada without funding the similar organization in northern Nevada in a tight budget year. Mr. Guthrie indicated there were different conditions in northern Nevada than there were in southern Nevada. The Opportunity Village was feeling a major impact due to the national chains of thrift stores. The national chains had not been as much of a major influence in the Reno area as they had been in the Las Vegas area. The money requested would rebuild the competitive capability to survive in the market area. Ms. Leslie stated that there had been a large impact in the Reno area from the national chains, and the southern organizations had access to a larger number of resources than northern programs did. Ms. Leslie stated that she found the request slightly offensive.

Ms. Giunchigliani asked if Mr. Guthrie would not support splitting the appropriation in order to assist other areas that needed the support. Mr. Guthrie stated that he had not said he

would not support other areas that were in need, but the Opportunity Village needed the assistance to work with the thrift stores. Ms. Giunchigliani explained that she understood that concept and appreciated the competition factor. She asked how the money would be used to make the organization competitive. Mr. Guthrie reiterated that the organization would be hiring a management-consulting firm that had a background in thrift stores, to improve operations. Ms. Giunchigliani asked what percentage of the appropriation would go toward the management-consulting firm, to which Mr. Guthrie answered approximately half. The other half of the appropriation would be used to open new stores for Opportunity Village. The organization was hoping to open three to four new stores within the next two years. Ms. Giunchigliani asked if that was the appropriate path to take if the organization was just beginning exploratory conversations with consultants. Mr. Guthrie explained that there had been preliminary conversations with the consultants, and a certain base was needed to improve the operation. Ms. Giunchigliani asked if Opportunity Village had looked at moving in a different direction from thrift stores. Mr. Guthrie explained that the organization did complete items in other areas, and had just begun a $3.1 million food service contract with Nellis Air Force Base. The organization generated $1.5 million in fund-raising income. Ms. Giunchigliani stated that she did not mean this as a criticism, but she was fearful when an appropriation was given to one group, when there was a great need across the state, the disabled community would be split. Mr. Guthrie stated that he believed this was equated to funding a building at the University of Nevada at Las Vegas, and not fund one at the University of Nevada at Reno in the current biennium. Ms. Giunchigliani stated that she was not on the subcommittee that considered those matters. Mr. Guthrie explained that he believed the legislature had a history of completing that type of funding in the education realm. Ms. Giunchigliani asked if Mr. Guthrie could provide a budget or plan on how the expenditures would be completed.

The Chair closed the hearing on S.B. 491 and opened the hearing on S.B. 494.

Senate Bill 494: Creates Nevada protection account in state general fund. (BDR 31-1430)

Mr. Hataway explained that the request was included in The Executive Budget. The bill created the Nevada Protection Account in the state General Fund, gave authorization to receive gifts, donations, and other sources of money, allowed interest accrued to be given to the account, and the funds in the account would not revert to the General Fund at the end of the fiscal year. The second item in the bill was a $4 million appropriation to the newly created fund. The amended bill reduced the original recommendation from $5 million to $4 million in order to balance the current fiscal year budget. The state had a budget account for ongoing studies of reports issued by the federal government in regard to the potential placement of a permanent nuclear waste repository at Yucca Mountain. The fund would provide the ability for the state to challenge a final decision of the federal government to place the repository, and to step into any venue where it was appropriate to complete that task, including the regulatory situation in Washington D.C., the judicial system to challenge the regulatory bodies decisions, and the advertising and political arena.

Mr. Joe Dini noted he had read in a newspaper that Yucca Mountain was “dead” and asked if that affected the appropriation. Mr. Hataway explained nothing had been said about instructing the agency to dispense with construction activities on the site, and a final decision had not been made. He opined that when the decision was made it would be to the detriment of the state and the funds were needed to take whatever actions were necessary.

Mr. Marvel asked how the money would be used. Mr. Hataway stated that the bill established the corpus to use and a plan could not be developed until the direction that needed to be taken was discovered. Mr. Marvel asked if there would be reporting to the Interim Finance Committee (IFC). Mr. Hataway stated that that could be an element. Mr. Marvel stated that he would like to have that included as a Letter of Intent.

The Chair closed the hearing on S.B. 494.

Senate Bill 138: Exempts Colorado River commission from State Budget Act. (BDR 31-344)

Mark Stevens, Fiscal Analyst, explained that the bill would exempt the Colorado River Commission from the State Budget Act.

Ms. Giunchigliani explained that there needed to be further conversations with the Governor about this bill.

Chairman Arberry held the bill.

Senate Bill 143: Makes appropriations to certain judicial districts for continuation or establishment of programs of treatment for abuse of alcohol or controlled substances. (BDR S-178)

Mr. Stevens stated that S.B. 143 would fund the drug courts in Clark and Washoe Counties.

Mr. Hataway explained that the bill was a continuation of the support that had been provided in the previous session. It replaced two of the Budget Division bills.

Chairman Arberry stated that it was nearing the end of session and action needed to be taken on some of the bills. He held S.B 143.

Senate Bill 277: Requires posting of sign in certain food establishments in which alcoholic beverages are sold that warns of dangers of drinking such beverages during pregnancy. (BDR 40-24)

Mr. Stevens commented that S.B. 277 required the posting of signs in food establishments in which alcoholic beverages were sold that warned about the dangers of drinking during pregnancy. There was an amendment to the bill that changed the size of the lettering on the sign, so the sign would be 8.5 inches by 11 inches.

Mr. Dini stated that the purpose of the bill was fine, but as a businessman it was unreasonable. If the sign was posted in the bathroom and ripped off the wall by a customer the owner would be fined. The responsibility in the bill was placed on a person who had no chance to win.

The bill was held.

Chairman Arberry recessed the meeting at 8:45 a.m. and called the meeting back to order at 9:24 a.m. He opened the hearing on S.B. 421.

Senate Bill 421: Makes various changes to provisions governing common- interest communities. (BDR 10-446)

Renny Ashleman, Lobbyist, Southern Nevada Home Builders Association, commented that the Assembly Committee on Judiciary had agreed to a number of amendments for S.B. 421 that were primarily technical in nature. The amendments had been removed because the Legislative Counsel Bureau was unable to complete them in time to move the bill to the Assembly Committee on Ways and Means. The committees with jurisdiction over the bill were aware of the amendments that would be heard in the committee. What had been completed by the Assembly Committee on Judiciary was the deletion of Sections 36, 37, and 64 of the first reprint of S.B. 421, and the adoption of the amendments presented to the committee (Exhibit H, Exhibit I, Exhibit J). Mr. Ashleman asked the committee to duplicate the actions of the Assembly Committee on Judiciary. The bill created a commission that cost approximately $400,000 per annum to run, and there was $800,000 in the reserve.

Chairman Arberry asked who had provided the amendments. Scott Craigie, Lobbyist, American Resort Development Association, explained that Exhibit H had come from the working group, and were amendments that dealt with conflicts with existing law. The amendments spelled out that the developers had the responsibility for paying common area expenses before the common areas were turned over to the homeowner association. The amendments described were to Section 39.

Mr. Ashleman stated that the bill created a commission with the purpose of dealing with conflicts between the people who were members of the homeowners' association, and the managers and boards of the associations. It also had the purpose of gathering data for the purpose of refining and giving information for potential future legislation. The money for the commission was present in the reserves of the division and the income from the fees in effect for the support of similar actives were substantial and could cover the matter.

Joan Buchanan, Administrator, Real Estate Commission, Department of Business and Industry, stated that the session had begun with one fiscal note on the bill, and the division now felt that the third revision of the fiscal note that was before the committee would

support the projects and assist the homeowners' associations throughout the state. Ms. Buchanan explained the division had a hefty reserve, and it kept increasing. The reserve was averaging $50,000 per month. Ms. Buchanan noted there were people still missing, and once additional staff was employed there would be additional money. Currently there was more than adequate money in the reserve to complete the request. Ms. Buchanan noted that currently the division was spending $181,000 with four employees in the Ombudsman's Office, and the bill provided for a new arm of investigations of Common Interest Community Managers, task forces, and reporting back to the legislature. Additionally there was a data position so that tracking could be updated and statistics could be improved. If the committee was interested in in-depth information on the data position Ms. Buchanan could provide that. The division was confident that the reserve money could carry the program forward, and was excited about continuing being part of the solution. Ms. Buchanan explained that an additional deputy administrator was being requested because the Real Estate Division had received a number of additional duties.

Mr. Dini asked if the bill would assist in solving the problems that were being experienced in Lovelock. Ms. Buchanan answered in the affirmative and explained that the legislation required that all managers be licensed. There were also regulatory enforcement powers so that the division could address concerns with the managers. Additionally, there was a provision of notices to boards, and there would be meetings with the Ombudsman mediating and working with the parties. If nothing was solved then the problem would go to the commission. Mr. Dini confirmed that the commission could enforce the laws.

Ms. Buchanan explained that the division believed the program would work.

Mrs. Vonne Chowning stated that all the help that could be given was needed. She asked if the legislation continued the exemption of small units. Ms. Buchanan explained that the very small units were exempted. Mr. Craigie informed the committee that in the previous session the small unit exemption had been removed, and was not being put back into place. Ms. Buchanan explained that the time-share industry was being removed from the bill by S.B. 261, which would make various changes to provisions governing time-shares and common-interest communities.

Chairman Arberry asked for reiteration of the amendments. Mr. Craigie stated that three sections of the bill had been amended out, Sections 34, 36, and 64, and there was a list of technical amendments. The amendments were not transported to the committee as was previously mentioned, and a vote to amend the bill would be needed. The Assembly Committee on Judiciary had acted on the bill behind the Bar to remove the amendments so that it could be referred to the committee because of the legislation deadlines. Mr. Arberry confirmed that all the amendments had been provided to the committee.

Mr. Ashleman reiterated that the motion was needed to delete Sections 34, 36, and 64, and pass the three handouts of amendments that had been provided to the committee.

The Chair closed the hearing on S.B. 421.

Senate Bill 431: Makes appropriation to Department of Museums, Library and Arts for grants for library collections and equipment requirements. (BDR S-1362)

Mr. Stevens explained that S.B. 431 provided for grants to the Department of Museums, Library and Arts for library collections and equipment requirements.

MR. MARVEL MOVED TO DO PASS S.B. 431.
MRS. CHOWNING SECONDED THE MOTION.
THE MOTION PASSED UNANIMOUSLY. (Mr. Perkins was absent.)

The Chair recessed the meeting at 9:38 a.m. and reconvened the meeting at 9:41 a.m.

Senate Bill 432: Makes appropriation to Department of Museums, Library and Arts for purchase of computer software and equipment. (BDR S-1363)

MR. DINI MOVED TO DO PASS S.B. 432.
MS. LESLIE SECONDED THE MOTION.
THE MOTION PASSED UNANIMOUSLY. (Mr. Perkins was absent.)

The Chair indicated that the committee would make a motion on the following bills en masse: S.B. 435, S.B. 436, S.B. 437, S.B. 438, S.B. 439, S.B. 440, S.B. 441, S.B. 448, S.B. 450, S.B. 455, S.B. 456, S.B. 457, and S.B. 461.

Senate Bill 435: Makes appropriation to Division of Mental Health and Developmental Services of Department of Human Resources for new and replacement equipment, maintenance, and new and replacement computer hardware and software. (BDR S-1367)

Senate Bill 436: Makes appropriation to Department of Human Resources for new and replacement equipment, operating expenses and new and replacement computer hardware and software for Rural Regional Center of Division of Mental Health and Developmental Services. (BDR S-1369)

Senate Bill 437: Makes appropriation to National Judicial College to assist in securing public and private grants and other funding for support during 2001-2003 biennium. (BDR S-1371)

Senate Bill 438: Makes appropriation to Louis W. McHardy National College of Juvenile and Family Justice to assist in securing public and private grants and other funding for support during 2001-2003 biennium. (BDR S-1373)

Senate Bill 439: Makes appropriation to Division of Mental Health and Developmental Services of Department of Human Resources for new and replacement equipment and computer hardware and software at Desert Regional Center. (BDR S-1374)

Senate Bill 440: Makes appropriation to Division of Mental Health and Developmental Services of Department of Human Resources for new and replacement equipment and computer hardware and software at Sierra Regional Center. (BDR S-1375)

Senate Bill 441: Makes appropriation to Department of Human Resources for new and replacement equipment and computer hardware and software at Rural Clinics. (BDR S-1377)

Senate Bill 448: Makes appropriation to State Department of Conservation and Natural Resources for improvement projects at state parks and revises particular purposes and extends periods for expenditure of certain money previously appropriated for park improvement projects. (BDR S-1392)

Senate Bill 450: Makes appropriation to State Department of Agriculture for vehicles and new equipment. (BDR S-1399)

Senate Bill 455: Makes appropriation to Department of Human Resources for new and replacement equipment, and hardware and software at Lakes Crossing Center. (BDR S-1419)

Senate Bill 456: Makes appropriation to Division of Child and Family Services of Department of Human Resources for new and replacement equipment at Southern Nevada Child and Adolescent Services Juvenile Treatment Facility. (BDR S-1420)

Senate Bill 457: Makes appropriation to Department of Museums, Library and Arts for conservation laboratory and extends reversion date for prior appropriation made to Department. (BDR S-1423)

Senate Bill 461: Makes appropriation to University and Community College System of Nevada for new and replacement equipment and associated software in computing center. (BDR S-1428)

MR. DINI MOVED TO DO PASS S.B. 435, S.B. 436, S.B. 437, S.B. 438, S.B. 439, S.B. 440, S.B. 441, S.B. 448, S.B. 450, S.B. 455, S.B. 456, S.B. 457, AND S.B. 461.

MR. MARVEL SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY. (Mr. Perkins was absent.)

Senate Bill 143: Makes appropriations to certain judicial districts for continuation or establishment of programs of treatment for abuse of alcohol or controlled substances. (BDR S-178)

Mr. Stevens explained that S.B. 143 was for drug courts in Clark and Washoe Counties. There was approximately $10,000 more than what was built into The Executive Budget in the bill.

Mr. Dini explained that A.B. 73, which would make an appropriation to the Administrative Office of the Courts for establishment of programs of treatment for abuse of alcohol or

controlled substances in certain judicial districts, was for the rural drug courts and provided $150,000 each year and covered Carson, Churchill, Douglas, Lyon and Storey Counties. The judges had asked Mr. Dini to introduce the bill. There was controversy occurring in District 9 dealing with the Equal Protection Clause, because the drug court programs were currently only available in certain counties. Mr. Dini suggested to have A.B. 73 amended into S.B. 143.

MR. DINI MOVED TO AMEND AND DO PASS S.B. 143, INCLUDING A $300,000 APPROPRIATION TO THE RURAL AREA DRUG COURT PROGRAM.

MR. MARVEL SECONDED THE MOTION.

Ms. Sandra Tiffany assumed that the motion was for the $300,000 in A.B. 73 to be included in the bill on top of the $1.1 million appropriation in S.B. 143. Ms. Tiffany asked if the $300,000 was on the priority list for spending because the funding was not in the budget. Chairman Arberry explained that there was no priority listing. Ms. Tiffany stated that she would like to see competitive requests for proposals (RFP) as well as a utilization review to ensure for accountability.

Ms. Leslie stated that a majority of the money involved in the bill was in the budget.

Mr. Hataway explained that S.B. 429, which would make an appropriation to the Administrator of the Courts of the Second Judicial District for continuation of its programs of treatment for abuse of alcohol or drugs, and S.B. 430, which would make an appropriation to the Administrator of the Courts of the Eighth Judicial District for continuation of its programs of treatment for abuse of alcohol or drugs, had been indefinitely postponed by the Senate in favor of S.B. 143.

Ms. Leslie noted that although A.B. 73 was not included in The Executive Budget, she did support the inclusion. Ms. Leslie explained that rather than amending the bill she had had conversations with the judges and she was willing to have a Letter of Intent included to indicate the need for competitive RFPs.

Ms. Tiffany explained that she did not believe there had been enough time spent on the bill. The rural courts were receiving a $300,000 appropriation and Washoe County would be receiving a $350,000 appropriation. Ms. Tiffany believed that there was not an appropriate balance in the funding in comparison to population of the area. She said that an exorbitant amount of money was being given to the rural areas in comparison to Clark and Washoe Counties.

Mr. Dini explained that there needed to be a comparison of judicial load. The Ninth Judicial District, which was Churchill and Lyon Counties, compared to the judicial load in Clark County. Mr. Dini emphasized that in the rural areas one judge had to oversee three judicial districts.

Ms. Tiffany explained that she had not heard testimony that justified what Mr. Dini had just said.

Gene Porter, Chief Judge, Eighth Judicial District, testified that Mr. Dini was correct. The Ninth Judicial District was the second busiest district court in Nevada, approximately 200 cases less than the Eighth Judicial District. Ms. Tiffany asked if that was in reference to the drug court. Judge Porter explained that the drug court program was a wonderful program, and the other option was prison.

Mr. Bob Beers stated Clark County would receive 51 percent of the drug court money with 69 percent of the population in the proposed amended bill. If this problem could not be solved he would have to vote against the bill.

Mr. Dini said the judges had asked for the amounts that were being requested in the bill. The amounts were not random, and the judges must know how much was required to run the drug courts in a particular area.

Mrs. Chowning confirmed that the motion included $300,000 for the other counties, and asked if the RFP language was included. Ms. Giunchigliani stated that in discussions with the courts, the RFP would be workable, and it was up to the committee to decide how to include that language. Chairman Arberry indicated it would be included through a Letter of Intent.

Mrs. Cegavske disclosed that she was employed by West Care and would have to abstain

from voting on the bill.

THE MOTION PASSED, INCLUDING THE LETTER OF INTENT. (Mr. Beers voted no. Mrs. Cegavske abstained from the vote. Mr. Perkins was absent.)

Assembly Bill 175: Requires department of transportation to establish along certain highways system of communication for members of general public to report emergencies and receive information concerning conditions for driving on those highways. (BDR 35-820)

MRS. CHOWNING MOVED TO AMEND AND DO PASS A.B. 175 TO ESTABLISH APPROXIMATELY 40 COMMUNICATION SYSTEMS ON INTERSTATE 15 FROM THE CALIFORNIA STATE LINE TO LAKE MEAD DRIVE, WITH AN APPROPRIATION OF $500,000 FOR THE HIGHWAY FUND.

MS. GIUNCHIGLIANI SECONDED THE BILL.

THE MOTION PASSED UNANIMOUSLY. (Mr. Beers and Mr. Perkins were absent for the vote.)

Assembly Bill 615: Requires submission to voters of proposal to issue general obligation bonds to protect, preserve and obtain benefits of property and natural resources of state. (BDR S-1463)

Mr. Stevens explained that A.B. 615 was a bond issue not to exceed $200 million. There were substantial amendments to the bill that had been proposed during the bill's hearing. It would break the bond amounts into areas listed within the bill.

Ms. Giunchigliani stated this was a policy decision for the committee because it was outside of the cap. Her suggestion for the bill was to give the authority, and allow the neediest projects to move forward, and then allow for the issuance of grants with appearances before the IFC for authority. Ms. Giunchigliani said that she did not desire to have the IFC approve every grant, but with the suggestion there would be a phase-in over a six-year period. She noted it was a huge issue, but would have a long-term effect. The suggestion did not change the amendments that had been previously given to the committee. Ms. Giunchigliani asked to have the amendment looked at by the committee to ensure its acceptance.

MS. GIUNCHIGLIANI MOVED TO AMEND AND DO PASS A.B. 615.

MR. GOLDWATER SECONDED THE MOTION.

Mr. Lynn Hettrick was concerned that there were smaller counties that were at the cap, and even if they voted against the proposal the smaller counties would have to pay the additional tax requirement. He also noted that because the smaller counties were at the cap they would not be able to receive the match money, and would still have to pay the tax. He asked to have small counties not go over the cap and not receive the funds, or to allow the option into paying the tax and receiving the money.

Ms. Giunchigliani stated that Mr. Hettrick's points were valid. She stated that it appeared that if the smaller counties were allowed not to be a part of the agreement it would not stop the Department of Conservation and Wildlife from completing its tasks of the statewide issues. Ms. Giunchigliani said that her recommendation allowed for the larger projects to commence and then the other staggered areas could then begin.

Mr. John Marvel agreed with Mr. Hettrick and stated that if it was possible to stay within the 15 cents then all the counties could continue to meet the level, but if it was increased over 15 cents then there were areas that were currently at the $3.64 level.

Mr. David Goldwater explained that the proposal was over and above the $3.64 cap. The committee had considered the issue several times for a number of different causes. He believed that the rural counties needed to address the issue. The $3.64 cap was in response to Proposition 13 in California from the early 1980s. Mr. Goldwater said that when taxes were examined one area that would need to be looked at was what to do about the ad valorem tax in the rural counties or what revenues would be used to fund the rural counties. Mr. Goldwater said that this was the first time he had considered going outside the cap, because he believed that the tax structure of the state was going to be seriously looked at.

Mr. Marvel said that he believed that the $3.64 cap could not be overridden by going to a vote of the people.

Mr. Dini agreed with Mr. Goldwater's comments about exceeding the cap. He stated that there was precedence for the idea. He said that if the committee looked at the A.B. 198 bond money that had been used for water systems, it could be noted that the bond was paid for by a statewide tax and a large percentage went to rural and small communities. Mr. Dini said that he believed the smaller communities would need to pay the tax in order to meet the constitutional requirements of the state. Mr. Dini commented that there was bond conveyance built into the bill, and if counties were exempted there might be a negative impact. He noted that Esmeralda County was a small county, but if it was a statewide project all people needed to be involved.

Mr. Marvel said that Elko County contained the city of Wells and the city of Carlin, both of which were currently at the $3.64 cap.

Ms. Giunchigliani said that when amendments were being worked out, the attempt was to stagger the projects for the purposes that had been previously mentioned, then in statewide issues there would be money to fund the projects. The division would also be allowed to appear before the IFC to request the next portion of issuance based on the other groups' readiness.

Pamela Wilcox, Administrator and State Land Registrar, Division of State Lands, stated that Ms. Giunchigliani was correct, and noted that the IFC would have control over the bond process as the projects moved forward. The taxpayers would only have to pay back the bonds that were issued. Ms. Wilcox noted that a majority of the bonds were going to projects that had statewide significance. There had been a real effort in the writing of the bill, and even monies that were going to local governments were going for conservation purposes. She opined that people in rural counties and urban counties enjoyed the state parks. The bill was built to be a bill that would benefit the state of Nevada at the present time and in the future by protecting the resources.

Ms. Giunchigliani stated that the way the amendment provided for the staggering showed a need for further discussions. If the rural areas did not wish to participate in projects and did not desire the movement of the bonds, then the bonds would not be issued. Ms. Giunchigliani reiterated that her motion was to amend and do pass A.B. 615.

Mr. Hettrick asked what the required tax rate would be if all the bonds were issued. Ms. Wilcox stated that the tax would be approximately 2 cents above the $3.64 level.

THE MOTION PASSED. (Mrs. Cegavske voted no. Mr. Beers and Mr. Perkins were absent for the vote.)

Ms. Giunchigliani stated that she appreciated the hesitancy because this was an important matter. She suggested having the committee examine the bill to ensure a high comfort level once the amendments had been added.

BUDGET CLOSINGS

DISTRIBUTIVE SCHOOL ACCOUNT - BUDGET PAGE K12-11

Mr. Goldwater noted that the Assembly Committee on Ways and Means and Senate Committee on Finance Joint Subcommittee on K-12/Human Resources had worked hard, along with the Senate and Assembly leadership, to close the Distributive School Account. He read from the Closing Report of June 1, 2001, as follows:

Local School District Salaries: The Subcommittee recommends a 2% COLA in FY 2003 for local school district employees, to be paid from Business Transaction Fees and Rental Car Fee Rebate Reversion.

School District Utility Costs: The Subcommittee recommends correcting the calculation of utility costs in The Executive Budget to include inflation adjustments for the increases in square footage, increasing the funding available for school districts by $2,123,049 over the 2001-03 biennium.

Per Pupil Guaranteed Support: Increases for COLA and utilities would be reflected in the guaranteed per pupil basic support, increasing it to $3,897 for FY 2002 and $3,991 for FY 2003, raising the per pupil support by $1 in FY 2002 and by $95 in FY 2003

Special Education: The Subcommittee recommends continuing funding of special education enrollment growth based on the same rate of growth as the general student population. Increases in federal special education funding will support increased enrollment and smaller caseloads and class sizes.

Class-Size Reduction: The Subcommittee recommends closing the Class-Size Reduction

program at the level recommended by the Governor. The Subcommittee recommends adding language to the appropriations bill to continue the Elko Class-Size Reduction demonstration project for the next biennium.

Adult High School Diploma Program: The Subcommittee recommends adoption of the funding formula changes to the Adult High School Diploma Program, recommended by the Department of Education, to be effective FY 2003, with a sunset clause of June 30, 2003. The Subcommittee recommends issuing a Letter of Intent directing the Department of Education to maintain the current level of programs both in prison programming and in school district programming, and to provide a written report to the 2003 Legislature.

School Improvement Programs:

PROGRAM	Reductions	FY2002 Recommended	Reductions	FY2003 Recommended
Remediation Grants	($1,325,629)	**$6,750,000**	($1,621,199)	**$6,750,000**
Prof. Development Categorical Grants	($521,725)	**$4,695,530**	($611,197)	**$5,500,775**
Nevada Early Literacy Intervention Program	($500,000)	**$4,500,000**	($500,000)	**$4,500,000**
School-to-Careers	($500,000)	**$500,000**	0	**0**
Early Childhood Education Grants	($1,000,000)	**$3,500,000**	($1,000,000)	**$3,500,000**

The Subcommittee recommends the budget reductions set forth in the table above. The Subcommittee recommends combining funding for the Professional Development categorical grants with the Nevada Early Literacy Intervention Program, with all funding directed through the Regional Professional Development Programs. The Regional Professional Development Programs are to ensure that $4.5 million per year, at a minimum, is dedicated to training for K-3 teachers in reading programs and intervention models that reflect instructional goals grounded in six fundamental elements as recommended by the Governor.

Funding Issues:

LSST: The Subcommittee approved offsetting the LSST revenue shortfall of $2,875,887 for FY 2001 with estate tax collections, as a one-time expense.

Interest Income: The Subcommittee recommends that the amount recommended for interest income from The Permanent School Fund be increased by $1.25 million per year to $4,994,428 per year.

Property Tax: The Subcommittee recommends reducing the 25¢ portion of the projected increase in assessed valuation from 7.3 percent to 6.44 percent to reflect the current projection by the Department of Taxation. The Subcommittee does not recommend reducing the 50¢ portion of the assessed valuation projected increase from 7.3 percent to 6.44 percent.

Estate Taxes: The Subcommittee recommends offsetting the FY 2001 $2,875,887 shortfall in sales tax collections with estate tax, as a one-time expense.

Business Transaction Fees, S.B. 577,are expected to generate $29.0 million in the next biennium. The Rental Car Fee Rebate Reversion, A.B. 460, is expected to generate $23.5 million in revenues.

In addition to COLA for school district employees and providing for increased utility costs, the Business Transaction Fees and the Rental Car Fee Rebate Reversion, along with $57.5 million in The Executive Budget and $10 million from A.B. 450 are expected to fund the following, not included in the DSA:

- A 3% Teacher Retention Bonus to be paid in FY 2001
- Teacher Recruitment Bonuses for FY 2001 and FY 2002
- An Energy Assistance Fund in the amount of $17 million for state agencies such as the University and Community College System and prisons, and $6.5 million for K-12

● Assistance with Health Insurance Premiums in the amount of $13 million
● $5 million for other Vital Education Programs Subsidy out of concern that school districts may be cutting essential or desirable programs
● Addition of one position to the Legislative Audit Division staff; an experienced auditor will conduct a preliminary survey of areas that might be appropriate for audit in the Clark and Washoe County School Districts.

Fund balances will be tested May 1, 2002 to determine if fund balances have exceeded projections by the Economic Forum sufficient to fund a 1% or 2% COLA for school district employees. If there are insufficient revenues to fund a 2% COLA in May, 2002, but it appears from revenue projections in October, 2002, that revenues will be sufficient to fund a 2% increase, a 2% COLA will be given to school district employees at that time.

Regardless of whether sufficient funding exists to fund a 2% COLA in May or October, 2002, the base for the FY 2004 budget will reflect a 4% increase over FY 2002 for school district salaries.

Mr. Goldwater said the statement that he had just read from was recommended by the subcommittee unanimously, and he thanked Georgia Rohrs, Program Analyst, for her work.

Ms. Giunchigliani disclosed that she was a public school teacher, but would be voting on the budget. Ms. Giunchigliani stated that although many teachers were appreciative, the job was not complete and over the interim funding still needed to be dealt with. She went on to say that she was under the impression that staff had found extra dollars that could have been used for special education, and asked why the committee had not acted on that.

Mr. Stevens explained that there was some discussion on increasing the special education unit value based on the 2 percent salary increase that was provided generally to K-12 employees. That had been discussed but was not acted on by the subcommittee. The cost was in the neighborhood of $1.5 million.

Mrs. Chowning asked for a reiteration of what was recommended concerning class-size reduction. Mr. Goldwater explained that the subcommittee had accepted the Governor's recommended funding level and added language to allow Elko to continue the pilot program. Mrs. Chowning indicated that the recommendation did not include the addition of grade six to the class-size reduction program. Mr. Goldwater said that the Elko program would be adding grade six, but the other schools would not be. The Elko program had the flexibility to complete the class-size reduction program pending approval of legislation relating to that issue.

Mrs. Chowning stated that there was a presumed $29 million present in S.B. 577, whichwould limit common law and statutory liability of corporate stockholders, directors, and officers, and increased fees for filing certain documents with the Secretary of State, and asked how it would be spent. Mr. Goldwater explained that the numbers were tentative because they were not Economic Forum numbers. There was a reasonable expectation, and the subcommittee had used as fiscally conservative revenue projections as possible. Mr. Goldwater had encouraged discussion on different education funding plans, and as the different plans were examined the projection was viewed conservatively because the worst thing would be to have the actual not meet the projections.

Mrs. Chowning commented that the committee needed to be mindful that what was being proposed was contingent on additional legislation, S.B. 577 and A.B. 460, which dealt with car rental tax. Mrs. Chowning asked if A.B. 460 was going to be a $23.5 million “hit to that industry.” Mr. Goldwater explained that he believed there had been a compromise worked out allowing the industry to recover the registration fee. He noted that the budget was contingent on the legislation passing. Mrs. Chowning clarified that the recommendation was taking into consideration A.B. 460 as amended.

Ms. Giunchigliani asked why if there was an additional $1.5 million for special education, the money was not being utilized. She noted that it was not anticipated, and she did not desire stopping the passage of the recommendation, but asked if the conversation could be continued. Ms. Giunchigliani stated that it was illogical to not place the found money into the budget when special education was already underfunded. She emphasized that she would continue to pursue the idea of the additional money for special education.

MR. DINI MOVED TO CLOSE THE BUDGET AS RECOMMENDED BY THE SUBCOMMITTEE.

MS. LESLIE SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY. (Mr. Beers, Mr. Hettrick, and Mr. Perkins were absent for the vote.)

CAPITAL IMPROVEMENT PROJECTS

The Chair recognized Rick Combs, Program Analyst. Mr. Combs presented the recommendations of the Assembly Committee on Ways and Means and Senate Committee on Finance Joint Subcommittee on Higher Education/Capital Improvement Projects. The total program recommended by the subcommittee was $293,689,091. The funds that made up that total amount were:

- $14,000,472 in General Funds in comparison to the Governor's original recommendation of $18 million and revised recommendation of $16 million,
- $196,490,014 in General Obligation Bonds in comparison to the Governor's recommendation of $200,203,753,
- $2,202,333 in re-allocations from previous CIPs in comparison to $3,000,000 recommended by the Governor and approximately $2.3 million found by the Public Works Board,
- $1,598,090 in Highway Funds,
- $33,949,306 in university donations,
- $7,110,310 in federal funds,
- $4,000,000 in the Department of Employee Training and Rehabilitation funds,
- $29,338,566 in bonds not paid from ad valorem tax,
- and $5,000,000 from the Special Higher Education Capital Construction Fund.

Mr. Combs stated that he would present the main projects that had been adjusted from what was recommended by the Governor. Project number 01-C3 was recommended by the Governor to purchase an EICON building in Carson City and an EICON building in Las Vegas. The Governor had later indicated that the Las Vegas building was not as desirable, and the subcommittee voted to approve the purchase and renovation of the EICON building in Carson City. This reduced the funding from the Governor's recommendation of $16,240,000 to $5,542,245.

Project number 01-C4 was the State Motor Pool on the University of Nevada at Las Vegas (UNLV) campus. The Motor Pool was in the process of being evicted by the Airport Authority from the current location and would need a new facility within the next three years. The project would fund the facility on the UNLV campus. There had been some discussion during the subcommittee about finding a better location for the Motor Pool. It had been proposed to be located in the southwest corner of the campus in the parking lot for the Thomas-Mack Center. The subcommittee voted to approve the funding for the project and asked to have a proposal submitted to the IFC if the site for the project changed, as well as have all other available sites considered.

Project 01-C13 included $500,000 recommended by the Governor to convert the Belrose warehouse into the Southern Nevada Records Center. Problems discussed during the subcommittee included that there were no furnishings or shelving included in the project cost estimate, and the department indicated that the facility would not meet the need for an extended period of time, and a record center would eventually need to be built in southern Nevada. The Public Works Board recommended reallocating advance planning funds that had been approved in the previous session to assist in paying for the project. The subcommittee voted to eliminate the project and allow the department to keep the advance planning funds for a future record center.

Project number 01-C21L as recommended by the Governor was to build a new Health Sciences/Biotech Building on the West Charleston Campus of Community College of Southern Nevada (CCSN). It would have been funded through $20 million of state funds and $5 million of donations from the university. Through the process the community college indicated that their ability to raise funds was being reduced from $5 million to $1 million. Based on that and other considerations the subcommittee recommended, rather than approving the construction, to approve advance planning through the plan-checking phase of the project. The amount funded was reduced from $25 million to $1,461,661.

In regard to project number 01-C25, Mr. Combs noted that there had been an error in information provided to the subcommittee dealing with the amount of state funding for the project. The president at the Nevada State College had indicated that due to the change in location for the facility the amount could be reduced by $2.6 million, and that amount was

voted by the subcommittee to be removed from the General Obligation Bond funding for the project. The original $16 million less the $2.6 million was $13.4 million. The previous information provided to the subcommittee reflected an amount of $14.4 million.

Project number 01-C29L was added by the subcommittee. It was $19 million in state funds, and $1 million in other funds for a telecommunications building at the CCSN, Cheyenne Campus. The funding was made available due to the reduction of funds for the building on the West Charleston Campus.

Project number 01-C30L recommended a transitional bridge building at the UNLV. The funding was $5 million in state funds, and it would provide a connection between the current engineering building and White Hall. The bridge building would be used as transitional space while the science and engineering complex was being advanced planned, and would also be used as transitional space for the dental school.

Project O1-C31L, approved by the subcommittee, provided $1 million in state funds for the planning and site preparation of the Dental School.

Project 01-C32L provided funding in the amount of $1 million for the Medical School, Dental Residency Program, at the University of Nevada at Reno (UNR). That money would be used to expand some of the office and lab space.

Project number 01-M5 was improvements to the Clear Creek facility. Mr. Combs pointed out that there were some expenses that the board had recommended to include in the project. The subcommittee voted to approve the increase. The new total for the project was $1,629,447 and included paving and Americans with Disabilities Act (ADA) improvements that were not included in the original project cost estimate.

Projects 01-M7 and 01-M8 were printing projects. There would be a provision included in the CIP bill that would require the Printing Division to pay back the bond interest and redemption fund for the projects. The same held true for projects 01-M25 through 01-M28 for the Department of Information Technology.

Project number 01-M43 was recommended by the Governor at $300,768 to repair gates at the Southern Desert Correctional Center. It was determined through the subcommittee's review that the motors in the gates did not need to be replaced, and there was sufficient funding in a 1999 project to finish the project. The funds were not needed and had been eliminated.

Project 01-M46L had been requested by the Executive Branch at a previous subcommittee hearing to assist in mold remediation and prevention at the Southern Nevada Child and Adolescent Services campus. A majority of the buildings on the campus had mold detected and some of the buildings had to be evacuated. This had been mentioned at the last IFC meeting. To solve the problem an additional $1,590,446 was being requested, and the subcommittee voted to approve the amount recommended by staff and the Public Works Board. The funding would be from General Obligation Bond proceeds.

Project number 01-S8 was the energy retrofit projects. The projects would be paid for through the cost savings that agencies would receive on utility bills. The subcommittee did recommend increasing the current cap that was in the statute from $5 million to $15 million so that more of the energy retrofit projects could be performed.

Mr. Combs clarified terminology that would be included in the CIP bill. Project 01-E1, which was the project for the Department of Employment Training and Rehabilitation, included bond funds that were not technically General Obligation Bonds but would be termed that in the bill. It was a five-year bond that could not be considered a revenue bond because a portion of the funding that was being used to repay the bond was rent savings that would not occur once the building was completed. The bond would be a General Obligation Bond and would go against the 2 percent debt limit for the five-year time line, but it would not go against the 15-cent ad valorem tax rate because there would be additional funds. Also in project 01-E1 there would be a section in the bill that would allow for $4 million in other funds from the Department of Employment Training and Rehabilitation to fund the project. A majority of the additional funding was federal money, and there was some property the department was planning to sell and the proceeds would be used to pay for the project.

Project 01-C27 was a Division of Wildlife project to rehabilitate the state fish hatcheries.

This would also be called a General Obligation Bond, but would be paid through revenues that were generated by the increase in the Trout Stamp that had been approved. That increase in the Trout Stamp from $5 to $10 would help to pay for the bond, but it would still be termed as a General Obligation Bond to allow for a better interest rate. The bond would not go against the 2 percent debt limit or the 15 percent ad valorem tax rate.

Mr. Combs stated that project 01-C24, UNR's new library, would have $22 million in additional revenue bonds to assist in funding the project. The funds would be covered through an increase in student fees. The increase for the biennium was approved in the operating budget.

Other items approved by the subcommittee included an issue related to the Highway Patrol building for Las Vegas that had been approved during the previous session. In the CIP bill during the previous session, there was $2 million allotted for site acquisition, but that money could only be used for site acquisition. There had been a cost overrun on the project, and the Highway Patrol requested to use some of that funding for the cost overruns. Rather than actually provide the funding, the subcommittee, based on the limited notice, voted to amend the 1999 CIP bill to allow the Highway Patrol to appear before the IFC and request to use the funding in that manner. That provision would be included in the CIP bill.

MR. MARVEL MOVED TO CLOSE THE BUDGET AS RECOMMENDED BY THE SUBCOMMITTEE.

MR. DINI SECONDED THE MOTION.

Mrs. Cegavske stated that she would be voting against the budget because of project 01-C25 and her concern about the usage of the estate tax in the University budgets. She noted that with the hole that was being created with the DSA she believed there were monies that should not have been allocated where they were, and the funding could have helped to offset needed items. The textbook bills had not been completed. Mrs. Cegavske reiterated that she would be voting against the budget.

Mrs. Chowning asked for clarification about project 01-C13, as well as clarification regarding the differences between the Governor's recommendation for project 01-C7, Veteran's Cemetery expansion, and the idea that there was additional funding needed that was not provided for in project 01-C8, Veteran's Home finalization.

Mr. Combs explained that in project 01-C13, the 1999 legislature had approved funding to advance plan the design of a new records storage center in southern Nevada. The Governor's recommendation was to remodel a warehouse and transfer the 1999 funding into the remodeling program. When the subcommittee heard that the $500,000 project would only suit the storage needs for a short period, the subcommittee elected to eliminate the $500,000 project, but allow the continuation of the use of the 1999 funding for the advance planning of a records storage center. Mrs. Chowning confirmed that the planning for the new records storage center would continue. Mr. Combs stated that no construction funds had been approved at the current time, but the planning would continue. Mrs. Chowning confirmed that the 1999 funding had not been spent, but would carry over and continue to be used for planning. Mr. Combs commented that the amount that would carry over was $201,874.

Mr. Combs explained that project 01-C7 was the Veteran's Cemetery expansion. There had been $300,000 in state funding included in The Executive Budget. The subcommittee voted rather than to approve the $300,000 as General Obligation Bonds, to include a provision in the CIP bill that would allow the Veteran's Affairs to obtain a loan from the General Fund for the $300,000. The $300,000 was “seed money” that would be repaid by the federal government once the design was completed. Rather than have the $300,000 in bond funding the subcommittee voted to allow a $300,000 loan from the General Fund that would be repaid when the funding from the federal government was made available.

Mr. Combs continued to say that project 01-C8 was a project that people were having a difficult time “getting their arms around,” because there was already an open project to construct the facility that had been approved by the 1997 legislature. The staff had not received a revised project cost estimate asking for additional funding for the project. The subcommittee had never received a list of furnishings and equipment that were being funding in the requested appropriation. Staff recommendation to the subcommittee was that although specifics had not been provided it was obvious that additional funding would be

needed to complete the home in the manner in which the legislature had envisioned. Mrs. Chowning stated the $1 million in the budget versus the possible $3 million that had been suggested was sufficient. Mr. Combs said that he was unaware of a $3 million funding level, so he was unsure that the subcommittee had been presented with any information regarding additional needed funding.

THE MOTION PASSED. (Mrs. Cegavske voted no. Mr. Beers, Mr. Hettrick, and Mr. Perkins were absent for the vote.)

Ms. Giunchigliani noted that she had voted against the budget during the subcommittee hearing, but because she did not wish to stop the budget from progressing she had voted for the budget during this motion. This did not preclude her from voting against the budget on the Assembly floor.

Chairman Arberry recessed the meeting to the call of the Chair. The meeting reconvened on June 2 at 8:12 a.m. and adjourned at 8:12 a.m.

RESPECTFULLY SUBMITTED:
Andrea Carothers
Committee Secretary

APPROVED BY:

_____

Assemblyman Morse Arberry Jr., Chairman

DATE: _____

NV Assem. Comm. Min., 6/1/2001

End of Document

Exhibit B

Nevada Assembly Committee Minutes, May 30, 2001

Nevada Assembly Committee Minutes, 5/30/2001
Legislative History *(Approx. 21 pages)*

Nevada Assembly Committee on Judiciary
Seventy-First Session, 2001

The Committee on Judiciarywas called to order at 7:55 a.m. on Wednesday, May 30, 2001. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada. Portions of the meeting were simultaneously videoconferenced in Room 4401 of the Grant Sawyer Office Building, Las Vegas. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:
Mr. Bernie Anderson, Chairman
Mr. Mark Manendo, Vice Chairman
Mrs. Sharron Angle
Mr. Greg Brower
Ms. Barbara Buckley
Mr. John Carpenter
Mr. Jerry Claborn
Mr. Tom Collins
Mr. Don Gustavson
Mrs. Ellen Koivisto
Ms. Kathy McClain
Mr. Dennis Nolan
Mr. John Oceguera
Ms. Genie Ohrenschall

GUEST LEGISLATORS PRESENT:
Senator Maurice Washington, Washoe Senate District 2
Senator Valerie Wiener, Clark Senate District 3
Senator Mark James, Clark Senate District 8
Speaker Richard Perkins, Assembly District 23
Assemblyman David Goldwater, Assembly District 10

STAFF MEMBERS PRESENT:
Nicolas Anthony, Committee Policy Analyst
Risa B. Lang, Committee Counsel
Deborah Rengler, Committee Secretary

OTHERS PRESENT:
Dean Heller, Secretary of State
Renee Lacey, Chief Deputy Secretary of State
Judge Scott Jordan, Second Judicial District Court, Family Division
Leonard Pugh, Director, Washoe County Department of Juvenile Services
Madelyn Shipman, Assistant District Attorney, Civil Division, Washoe County District Attorney; Legislative Representative, Nevada District Attorney's Association
John Morrow, Chief Deputy, Washoe County Public Defender
Dorothy Nash Holmes, Special Assistant to the Director, Department of Prisons
Glen Whorton, Chief, Classification & Planning, Department of Prisons
Steve Barr, Nevada Corrections Association
Clay Thomas, Deputy Chief, Division of Parole and Probation, Department of Motor Vehicles and Public Safety (DMV&PS)

Kirby Burgess, Director, Clark County Family and Youth Services
Willie Smith, Deputy Administrator for Youth Corrections, Division of Child and Family Services
Jan Gilbert, Progressive Leadership Alliance of Nevada (PLAN)
Bobbie Gang, Lobbyist, Nevada Women's Lobby
Dr. Jane Foraker-Thompson, Religious Alliance in Nevada (RAIN) and Episcopal Diocese of Nevada
Gary Crews, Legislative Auditor, Legislative Counsel Bureau, Audit Division
Rocky Cooper, Legislative Auditor, Legislative Counsel Bureau, Audit Division
Dr. Ted D'Amico, Medical Director, Department of Prisons
Rex Reed, PhD., Medical Administrator, Department of Prisons
Michael Bonner, representing self
James Bilbray, representing self
Kenneth Lange, Executive Director, Nevada State Education Association
Derek Rowley, Corporate Services Center
John Olive, President, Nevada Association of Listed Resident Agents (NALRA)
Rose McKinney-James, Clark County School District
Bob Crowell, Nevada Trial Lawyers Association (NTLA)
Bill Bradley, Nevada Trial Lawyers Association (NTLA)
Pat Cashill, Nevada Trial Lawyers Association (NTLA)
Danny Thompson, Executive Secretary-Treasurer, Nevada State American Federation of Labor-Congress of Industrial Organization (AFL-CIO)
Dave Howard, Reno-Sparks Chamber of Commerce
Kami Dempsey, Director, Government Affairs, Las Vegas Chamber of Commerce
Sam McMullen, Las Vegas Chamber of Commerce and the Retail Association of Nevada
Mary Lau, Executive Director, Retail Association of Nevada
Ray Bacon, Nevada Manufacturers Association

Chairman Anderson made opening remarks and noted a quorum was present.

Chairman Anderson opened the hearing on S.B. 137.

Senate Bill 137: Increases number of district judges in second and eighth judicial districts. (BDR 1-521)

Judge Scott Jordan, Second Judicial District Court, Family Division, spoke in favor of S.B. 137. Judge Jordan submitted statistics (Exhibit C) from the court indicating a dramatic increase in the number of family court cases; the numbers alone justified the need for a new judge.

Chairman Anderson said there were currently 11 judges in the Second Judicial District Court and S.B. 137 would increase that number to 12. Of that 12; four were Family Court judges. Chairman Anderson read information from the Administrative Office of the Court's Annual Report, quoting statistics in Nevada for the Eighth Judicial District Court in comparison to the Second Judicial District Court.

Assemblyman Carpenter asked what had caused the substantial increase in juvenile filings. Judge Jordan said the growth in population of the county was the main contributor to that increase.

Leonard Pugh, Director, Washoe County Department of Juvenile Services, said since 1990 Washoe County had experienced approximately a 181 percent increase in person-related crimes and a 280 percent increase in other crimes. There were more juveniles under drug testing clauses, house arrest, and search clauses. Because juveniles were being held accountable for those offenses, it had resulted in higher levels of supervision and an increase in court time. Chairman Anderson said the increase was a result of previous legislation that allowed intervention at earlier stages. Mr. Pugh said that while the number of petitions being filed was increasing, since 1995 the commitment rate to state institutions had decreased significantly. Chairman Anderson said it was better to have more judges that cost less than the long-term cost of incarceration and the creation of lifetime criminals; it would actually result in a cost-savings.

Madelyn Shipman, Assistant District Attorney, Civil Division, Washoe County District Attorney, and Legislative Representative for the Nevada District Attorney's Association, spoke in support of S.B. 137. She said that while the cost of the judge was a state responsibility, Washoe County was ready to assume the cost of the support staff and space

requirements. Chairman Anderson said there was also an “overcrowded” court facility question to be dealt with in Washoe County, namely, would court space be shared. Ms. Shipman said county management was aware of the current status and would have space available by January 2003. Judge Jordan said a committee was already impaneled made up of court representatives, general services, and county representatives to resolve the problem.

John Morrow, Chief Deputy, Washoe County Public Defender, spoke in favor of S.B. 137. He supervised the Family Court Division of the Public Defender's Office in Washoe County. The overcrowding problem in Family Court was having an impact on dealing with the families. Having another judge would help the families and “do good things” for them as far as getting cases in and out of the system quickly.

Chairman Anderson entertained a motion of do pass for S.B. 137.

ASSEMBLYWOMAN ANGLE MOVED TO DO PASS S.B. 137.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Chairman Anderson noted S.B. 137 was already referred to the Assembly Committee on Ways and Means.

MOTION PASSED WITH MRS. KOIVISTO, MR. NOLAN AND MS. BUCKLEY ABSENT FROM THE VOTE.

Chairman Anderson opened the hearing on S.B. 193.

Senate Bill 193: Makes various changes concerning department of prisons. (BDR 16-311)

Dorothy Nash Holmes, Special Assistant to the Director, Department of Prisons, said a joint introduction of S.B. 193 was made on March 12, 2001. Ms. Holmes said there were four highlights:

1. Changed the name of Department of Prisons to Department of Corrections. Nevada was the last “state in the union” that used the “Department of Prisons,” which had disqualified Nevada from some federal funds.
2. Created an offender management division using funds from an existing vacant and highly paid psychiatrist position. The offender management division would manage and coordinate all programming. There would be no fiscal impact; it would actually result in an $11,000 savings over the biennium.
3. Established a facilities orientation training in the prisons, teaching the officers how to do their basic job.
4. Implemented structured living, using a disciplined progressive opportunities approach, and unit management, a widely accepted management tool in corrections.

Chairman Anderson said S.B. 193 would go to the Assembly Committee on Ways and Means.

Glen Whorton, Chief, Classification & Planning, Department of Prisons, and Steve Barr, Nevada Corrections Association, were available for questions.

Chairman Anderson asked for questions from the committee members and further testimony. There being none, he closed the hearing on S.B. 193 and entertained a do pass motion.

ASSEMBLYWOMAN ANGLE MOVED TO DO PASS S.B. 193.

ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.

MOTION PASSED WITH MRS. KOIVISTO, MR. NOLAN, AND MS. BUCKLEY ABSENT FROM THE VOTE.

Chairman Anderson said he would present S.B. 137 on the Assembly floor.

Chairman Anderson asked Assemblyman Collins to present S.B. 193 on the Assembly floor.

Chairman Anderson opened the hearing on S.B. 194 and acknowledged Senator Maurice Washington, Washoe County Senatorial District 2.

Senate Bill 194: Makes changes pertaining to interstate compacts for supervision of offenders. (BDR 16-107)

Senator Washington said S.B. 194 was a bill for the Division of Parole and Probation (P&P) that had been worked on for the past 18 months. It provided for the ratification of the old interstate compact, under which Nevada was currently operating, for the supervision and movement of adult offenders from one jurisdiction to another. The current interstate compact had not been ratified in 50 years. The compact set up an interstate commission for adult supervision; it organized, operated, and set up rules of authority; and set up select members from the state council which might be non-voting members to include governors, legislators, state judges, attorneys general, and/or victims of crime. The ratification of that interstate compact must be completed by 35 states; 21 states had already ratified the new interstate compact. The interstate compact was necessary to enable Nevada to transfer offenders to or accept offenders from other states; it would give Nevada a voice on the commission. The Division of Parole and Probation (P&P) needed S.B. 194; the appropriation would be referred to the Assembly Committee on Ways and Means.

Chairman Anderson asked what was the policy question being addressed and how did it compare or change what was currently being done. Would Nevada surrender authority by complying with that compact?

Senator Washington said Nevada would not surrender any authority. Nevada could actually negate the compact by passing legislation that would exempt Nevada from the interstate compact. Nevada would maintain its jurisdictional authority as the state of Nevada. The interstate compact allowed Nevada an advantage in negotiating disputes and ratifying resolutions and preempted the federal government from taking over the supervision of adult offenders, including their movement from one state to another.

Chairman Anderson asked what the advantage would be to have a state senator and assemblyman sit on the commission. Would it become more political than administrative in nature? Senator Washington said the advantage to sitting on the commission would be to review the public policy and bring back to the legislative body new rules or issues that might be of concern. It would give Nevada a voice and a vote. Chairman Anderson said it was his understanding that the Chairman of the Senate Committee on Judiciary preferred that a common commission look at all such judicial questions, rather than working piecemeal.

Senator Washington said the interstate compact was already in existence, and Nevada was abiding by that interstate compact. S.B. 194 ratified that compact with new provisions to deal with the “new sophistication of mobilization and movement” of adult offenders. It allowed P&P to know the whereabouts of adult offenders and from what state they came. If they re-offended, it would give Nevada the jurisdiction, the power, and the authority to send the re-offenders back to their state of origin. It would be wise and prudent to have a legislator serve on the state council.

Chairman Anderson said Article 14 of the compact detailed the binding effect of the compact on other laws; “the compact had the force and effect of statutory law and take precedence over conflicting state law.” Chairman Anderson was concerned that the compact could “override the actions of state law.” Was there “prolonged discussion” in the Senate over that issue?

Senator Washington said there was a “long dialogue and concern” about the ratification of the compact and if it would supercede state authority. To assure that was not the case, the bill was amended to say the Nevada Constitution would supercede any rules or regulations promulgated by the commission. Senator Washington had served twice with the Council of State Governments (CSG) concerning the issue. Provisions were adjusted in the compact to make sure that states still had the ultimate authority regarding the operation, implementation, and the use of the compact. Nevada was currently a part of the compact. Regardless of whether or not Nevada decided to ratify the compact, after the 35th state adopted the compact, Nevada would be bound by it anyway.

Assemblywoman Ohrenschall asked what was the point of having non-voting members on the commission. She asked Senator Washington to clarify why Nevada would be bound by the compact after the other 35 states ratified it.

Chairman Anderson clarified that Nevada was currently participating with the interstate compact, even though Nevada had not formally adopted the statutory conditions. Senator Washington said Nevada was part of the old compact. Chairman Anderson said if S.B. 194 moved forward, Nevada would continue doing what it had been doing. Senator Washington

agreed.

Clay Thomas, Deputy Chief, Division of Parole and Probation (P&P), Department of Motor Vehicles and Public Safety (DMV&PS), said the state of Nevada was in compliance with the current interstate compact that had existed since 1937. S.B. 194 would ratify the contract that would hold all states to a "level playing field." It would ensure there was consistency with the interstate compact and addressing of public safety issues for individuals who traveled into or from Nevada. Nevada currently had a 2-to-1 ratio of offenders leaving Nevada compared to those entering Nevada. There were 2,303 supervised offenders outside of Nevada compared to 1,085 individuals who transferred into Nevada from other states.

Assemblywoman Ohrenschall asked for clarification regarding whether Nevada could drop out of the interstate compact. Mr. Thomas said there was always the potential to drop out, but Nevada would then have no voice of authority and could become a dumping ground for offenders, without any recourse for the state.

Chairman Anderson clarified that because Nevada was part of the compact, Nevada did not retain the supervision expense for those offenders transferred to other states, and Nevada could charge those offenders coming into Nevada for their supervision. Before any individuals were transferred in or out of Nevada, paperwork was exchanged detailing supervision requirements and any special conditions ordered by the states.

Chairman Anderson asked how a state could send an individual into Nevada without Nevada authorities knowing it. Mr. Thomas said there was an obligation to register, but under the existing compact, there were no sanctions against a state that failed to comply with the compact. With the ratification of the new compact, a state that willfully ignored the compact would be held accountable. Mr. Thomas recounted the Nevada request and transfer process and paperwork.

Chairman Anderson asked if there were any questions from committee members. There being none, he entertained a motion to do pass S.B. 194.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 194.

ASSEMBLYWOMAN ANGLE SECONDED THE MOTION.

MOTION PASSED WITH MRS. KOIVISTO, MR. NOLAN, AND MS. BUCKLEY ABSENT FROM THE VOTE.

Chairman Anderson asked Assemblywoman Ohrenschall to present the bill on the Assembly floor.

Chairman Anderson opened the hearing on S.B. 232.

Senate Bill 232: Provides for collection of information on economic background of each child referred to system of juvenile justice and requires each juvenile probation department to determine whether children of racial or ethnic minorities and children from economically disadvantaged homes are receiving disparate treatment in system of juvenile justice. (BDR 5-573)

Senator Valerie Wiener, Clark County Senatorial District 3, presented S.B. 232, one of four bills requested by the A.C.R. 13 Interim Study Committee on Juvenile Justice, which she had the privilege to Chair during the last interim. S.B. 232 proposed to expand the existing information collected by the juvenile courts and juvenile probation to include data on the juvenile's economic background. To eliminate a large fiscal note, local juvenile probation departments would analyze the information collected to determine whether children of racial or ethnic minorities and children from economically disadvantaged homes were receiving disparate treatment in the juvenile justice system. Based on the information, departments would develop appropriate recommendations to address any such disparate treatment. The results of their analysis and recommendations would be submitted to the Division of Child and Family Services (DCFS). Once the DCFS had received the counties' reports, those reports would be compiled into a single publication.

Senator Wiener submitted letters from Ms. Willie Smith, Deputy Administrator, Youth Correctional Services, Division of Child and Family Services (Exhibit D), and from Kirby Burgess, Director, Department of Family and Youth Services (Exhibit E), both supporting S.B. 232.

Senator Wiener said the issue was very important to both the A.C.R. 57 (1997-1998) and A.C.R. 13 (1999-2000) Interim Committees on Juvenile Justice. It was agreed that the legislature should take steps to address that concern, especially as it impacted the juvenile justice system, young people, families, and communities.

Chairman Anderson said the bill applied to counties with over 400,000 in population or counties with under 100,000 in population. As such, what happened to Washoe County? Mr. Pugh replied that Washoe County had a probation department within its juvenile services; Washoe County considered themselves a local juvenile probation department because it was one of their divisions.

Mr. Burgess said Clark County Family and Youth Services had a probation division within their agency and they were ready to participate in the process. It should be noted that the information was not being collected to place blame; rather, it was an effort to keep youth out of the system. A recent report by a national consultant said that Clark County was doing a better job of keeping ethnic minority youth out of the juvenile justice system. That data would help determine what was being done and why it was done.

Chairman Anderson asked how current information was being gathered and analyzed. Mr. Burgess said Clark County had a computer system called “Family Tracks” that collected data on every child that entered the juvenile justice system. With a “tweak” to the system, the data required for S.B. 232 could be analyzed. Chairman Anderson asked how it was anticipated that the courts would get involved in the purpose of the legislation. Mr. Burgess said they currently tracked a youth upon entry into the juvenile justice system, at the detention facility, during the filing of the petition by the juvenile division of the District Attorney's Office in Clark County, as well as at all court hearings and dispositions. Chairman Anderson clarified that Mr. Burgess had taken that upon himself; the courts were not doing it for him. Mr. Burgess said his department had a good partnership with the court system, and every court action was captured for analysis.

Mr. Pugh said in Washoe County every court order was entered into the juvenile system and included when a petition was filed, what actions were taken on that petition, and what the ultimate court action was. All of that data could be retrieved. Washoe County did not currently collect the economic background on juveniles, and it might be difficult to get the parents to disclose that information. Washoe County did track minorities in the referrals to the department. Statistics included juveniles booked in the detention centers, detained at the detention centers, and committed to the state training centers. Mr. Pugh felt the legislation was important and said Washoe County had volunteered existing resources and was adding resources to implement the provisions of S.B. 232.

Assemblyman Carpenter asked what information would be considered when collecting data on economic background. Mr. Pugh said he understood an amendment to the original bill listed the economic data to be collected. It was important to make sure that those families that could not provide certain levels of supervision or lived in lower socioeconomic areas where the crime rates were higher were not treated any differently than those who had stable, higher income homes. Mr. Burgess said income guidelines could be used as a factor. Assemblyman Carpenter said he felt “things were being taken too far” that might interfere with doing programs for the children. Income should not matter as it related to the programs. If the children had the same problems and the same needs, the side issues were not needed.

Chairman Anderson said economic diversity of the juvenile population, relative to their access to the system, had been discussed, and there had been a number of pieces of legislation that dealt with juvenile rights. Senator Wiener said that juveniles and their access to the system had been a consideration. She believed that while gathering data, if it were discovered that there was a substantial disproportionate number of children in the system from very low socioeconomic backgrounds, some of the preventative programs could be geared toward those neighborhoods and populations. The law already required that information, except economic background, be provided to the state.

Willie Smith, Deputy Administrator for Youth Corrections, Division of Child and Family Services, said she wanted to address Assemblyman Carpenter's question. Currently, except for economic background information, all the data that was needed to make determinations was available along with the information as to what services the youth were receiving when they came through the system. She believed the data collection would

make sure that all children got the services they needed. Ms. Smith said the state employee who was responsible for working on the data was paid by federal dollars, and that individual would continue to assist with the responsibility for that data.

Assemblyman Carpenter said he wanted to make sure that what was “viewed as an evil” was not cured by allowing the children to fall through the cracks. He emphasized that “all” children needed to be taken care of. Mr. Pugh agreed with Assemblyman Carpenter, and there was no intention to exclude anyone from receiving any service. Mr. Pugh believed prevention programs, available to anyone within the community and focused at keeping children out of the system, would benefit everyone in the community.

Assemblywoman Ohrenschall asked for clarification as to whether more information was being gathered about the juveniles than had been gathered before. Senator Wiener said the state already substantial data on each juvenile collected by the local authorities, and the economic background information would be in addition to that data. For purposes of analysis, there would be three substantial components: ethnic, racial, and economic background. Assemblywoman Ohrenschall asked if that information would be used for any other purpose or only for the study. Senator Wiener said it really was not just a study; rather, it was a way of doing business. It would include collecting data, doing an analysis, developing recommendations, and passing the information to the state where a statewide report would be compiled. Assemblywoman Ohrenschall asked if there was any chance that the information could be used to prove a “family was too poor.” Senator Wiener said that was not the intent of S.B. 232; it was to gather data to keep children out of the system. Mr. Pugh said he dealt with the delinquency court, which did not deal with custody issues.

Chairman Anderson made comments regarding the lack of statistical information from the courts on a regular basis. Having that information would backup the intention to keep children out of the prison system. Chairman Anderson did not propose to put the prison system out of business; he just would like it to have a smaller population. Ms. Smith said the intent was to obtain information in order to make better decisions.

Jan Gilbert, Progressive Leadership Alliance of Nevada (PLAN), said she supported S.B. 232. She felt it would be a tool for planning, prevention, and services, and it would benefit all the communities.

Bobbie Gang, Lobbyist, Nevada Women's Lobby, said she supported S.B. 232.

Dr. Jane Foraker-Thompson, Religious Alliance in Nevada (RAIN) and Episcopal Diocese of Nevada, said she supported S.B. 232.

Chairman Anderson closed the hearing on S.B. 232 and entertained a motion to do pass S.B. 232.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Assemblyman Gustavson said he did not believe the economic background information needed to be collected, and he indicated he would vote against S.B. 232.

Chairman Anderson asked that the motion be withdrawn.

ASSEMBLYWOMAN OHRENSCHALL WITHDREW THE MOTION TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER WITHDREW THE SECOND.

Chairman Anderson opened the hearing on S.B. 241.

Senate Bill 241: Revises provisions relating to determination of whether certain offenders constitute menace to health, safety or morals of others. (BDR 16-435)

Gary Crews, Legislative Auditor, Legislative Counsel Bureau, Audit Division, said in the first week of the current legislative session, he presented an audit report on the Department of Prisons Sex Offender Certification Panel. An executive summary of that report was submitted to the committee (Exhibit F). Problems had been identified and reported to the Assembly Committee on Judiciary. Recommendations were made regarding revision of statutes to address who should be responsible for the program, who would be responsible to appoint members to the certification panel, and what the qualifications of those members should be. A Bill Draft Request (BDR) was submitted with Department of Prison language, but the Audit Division's concerns were addressed.

Rocky Cooper, Legislative Auditor, Legislative Counsel Bureau, Audit Division, said he was available for questions.

Assemblyman Carpenter asked for clarification on Section 1, specifically, how the observation would be carried out. What was involved in certifying that a prisoner had been under observation? Mr. Crews said the Department of Prisons should answer that question.

Chairman Anderson asked if a subsequent audit was planned for that department as part of the regular scheduled audits. Mr. Crews said every two years there was a risk assessment of all state government agencies, identifying each department's goals for the next two years. It would be based on a number of factors. Mr. Crews believed he would return to do another audit.

Chairman Anderson acknowledged Rex Reed, PhD., Medical Administrator, Department of Prisons. Dr. Ted D'Amico, Medical Director, Department of Prisons, joined Dr. Reed at the witness table. Chairman Anderson said there was concern in the change of behavior of the Department of Prisons in their implementation of the new provisions for supervision of sex offenders. Dr. D'Amico said a sex offender program had already been started in Lovelock. The program identified 400 individuals, who were offered the program and were currently participating in the program. The program at Lovelock was scheduled to last approximately one year. A maintenance program had been established in southern Nevada with 200 individuals. The total number of sex offenders in the system at the time was 1,500.

Assemblyman Nolan said a bill had been passed out of the committee requiring treatment for sex offenders. Because the bill had a fiscal note, it was in the Assembly Committee on Ways and Means. That bill made the treatment mandatory, and Assemblyman Nolan asked why the mandatory provision was taken out of S.B. 241. Dr. D'Amico replied someone told him it had been taken out, but that was hearsay. Dr. D'Amico felt it was an important factor for the bill; however, whether it was in or out, the program would still be run, and it was expected to be very effective.

Chairman Anderson said the fiscal note was $13,754 for S.B. 241. That was not a part of the discussion, since Judiciary was a policy committee not a money committee, and S.B. 241 would go to the Assembly Committee on Ways and Means. Assemblyman Nolan was not concerned with the fiscal note. He was concerned with the process where inmates may not be identified as sex offenders, not participate in treatment programs, and be released without any treatment.

Dr. Reed said the fiscal note for S.B. 241 was for the Department of Prisons. The Division of Mental Health also had a fiscal note. Dr. Reed had spoken with the Legislative Counsel Bureau that should have submitted an impact statement.

Chairman Anderson said the fiscal note was not the concern. S.B. 241 was proposing a cleaner process, which would hold the prison system more clearly responsible for “ascertaining the condition of sex offenders.” Dr. D'Amico said the new emphasis was toward care and programs, and some very reliable outside federal funding sources were being developed. Dr. D'Amico felt it was important that the Department of Prisons accepted ownership of the program in order to create procedures and protocols. Chairman Anderson noted there was another fiscal note to cover expenses for the State Motor Pool.

Chairman Anderson closed the hearing on S.B. 241 and entertained a motion to do pass S.B. 241.

ASSEMBLYMAN NOLAN MOVED TO DO PASS S.B. 241.

ASSEMBLYMAN GUSTAVSON SECONDED THE MOTION.

Assemblyman Carpenter said it was very important that all that could be done was done. It was important to make the best possible decision using highly qualified people to conduct the evaluations. Assemblyman Carpenter felt the language in S.B. 241 made it a good piece of legislation. Chairman Anderson agreed that with the audit recommendations and the new direction of the Department of Prisons, S.B. 241 was a strong step forward that would include better follow-through on the issue.

MOTION PASSED WITH MS. BUCKLEY, MR. COLLINS, AND MS. McCLAIN ABSENT FROM THE VOTE.

Chairman Anderson asked Mr. Nolan to present the bill on the Assembly floor.

Chairman Anderson entertained a motion to do pass S.B. 232.

ASSEMBLYWOMAN OHRENSCHALL MOVED TO DO PASS S.B. 232.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Assemblyman Gustavson repeated his opposition to the bill saying he did not believe there was a need to collect more information. Assemblyman Carpenter said that collecting information, handled in the correct manner, would be a positive step.

A ROLL CALL VOTE WAS CALLED AND THE MOTION PASSED 10-2 WITH MS. ANGLE AND MR. GUSTAVSON VOTING NO, AND MS. BUCKLEY AND MR. COLLINS ABSENT FROM THE VOTE.

Chairman Anderson recessed the meeting at 9:39 a.m.

Chairman Anderson reconvened the meeting at 10:04 a.m., opened the hearing on S.B. 577 and acknowledged Senator Mark James, Clark County Senatorial District 8.

Senate Bill 577: Revises statutory liability of corporate stockholders, directors and officers and increases fees for filing certain documents with secretary of state. (BDR 7-1547)

Senator James said legislation had been processed each session updating and upgrading to ensure that Nevada's corporate laws were the best, the most inviting for business, the fairest, and the most equitable in the country. Senator James gave a brief description of what had happened over the last couple of years in corporate law. It had been a rare occasion when the fees were increased for Secretary of States transactions, the last raise in fees being in 1989. The fee increases in S.B. 577 were modest increases. The intent was to guarantee that Nevada was the “domicile of choice” for corporations around the country. Work was accomplished with the S.C.R. 19 Interim Committee of the Seventieth Session, with recommendations resulting in a number of bills that had been processed through the Senate Committee on Judiciary. Senator James believed S.B. 577 would generate approximately $30 million in the biennium for the General Fund budget. Senator James reported it was the Governor's desire to utilize these funds to assist in providing raises to the teachers in Nevada.

Senator James said S.B. 577 would accomplish many purposes. He highlighted a number of provisions of the bill and additional key data:

1. Schedule of fees
2. Liabilities of those who serve as directors of corporations as seen in the doctrine of alter ego or piercing the corporate veil
3. 172,000 corporations in Nevada
4. 35,000 bankruptcies last year in Nevada
5. Adherence to the corporate fiction
6. Required corporate formalities

Chairman Anderson interrupted Senator James and indicated that Risa Lang, Committee Counsel, had prepared an *Explanation of Senate Bill No. 577* (Exhibit G). Nick Anthony, Committee Policy Analyst, had prepared a summary on the *Polaris v. Kaplan* Nevada Supreme Court Case (Exhibit H).

Senator James made closing remarks, noting that a Senate amendment deleted the wording, “clear and convincing evidence” leaving the evidence standard at “preponderance of evidence” to show liability under the statute.

Senator James submitted the following exhibits without testimony:

Exhibit I - Video from Senate Judiciary Hearing May 22, 2001

Exhibit J - Letter from S. Craig Tompkins, a director of a number of public companies, in support of S.B. 577

Assemblywoman Buckley said she supported the provisions of the bill that increased the fees. As far as the liability provisions, she had lots of questions. In Section 1, where it said a court determined the issues, was it the intent to eliminate the right to a jury trial? Senator James said that was not the intent. Assemblywoman Buckley asked if it was the intent to take the decision away from a jury and place it in the hands of a judge. Senator James said S.B. 577 did not do that. Assemblywoman Buckley reported there had been some legal opinions to the contrary.

Assemblywoman Buckley called attention to provisions applying to the alter ego doctrine and added, “Why would we want to change a good law that said justice was to be the determining factor?” Senator James said many creditors would also require a personal guarantee in addition to a corporate guarantee. Fraud was not allowed; otherwise there was a predictable rule. That was justice. Assemblywoman Buckley believed “justice” was in the first version that came out of the Judiciary Committee.

Assemblyman Brower agreed with Assemblywoman Buckley's comments, but he was concerned about any lawsuit that might be prohibited as a result of S.B. 577. Senator James countered S.B. 577 prohibited no type of lawsuit.

Assemblyman Oceguera asked why the corporate veil was not predictable. Senator James said the Nevada Supreme Court case in 1987 set the standard, and hundreds of cases had been decided applying that standard.

Assemblywoman Ohrenschall noted the *Polaris* decision proved that corporate fiction was utilized to “sanction fraud or promote injustice.” Did that mean there would be immunity unless fraud could be proven? Senator James said S.B. 577 did not provide immunity. The lower courts required proving fraud, while the higher courts only required proof of injustice. Assemblywoman Ohrenschall felt S.B. 577 would “raise the bar” from not needing to demonstrate fraud to absolutely proving fraud. Senator James agreed. Assemblywoman Ohrenschall asked if S.B. 577 eliminated gross negligence or wanton and woeful disregard, standards that came close but were not fraud. Senator James said the liability was to a third party, and they would need to show fraud.

Chairman Anderson noted he had received a conflict notice affecting S.B. 51 that made various changes pertaining to business associations and increased fees for document corrections.

Dean Heller, Secretary of State, said he wanted to read the conflict notice and return an explanation of the conflicts. He did not see it as a major conflict or that it should hold up the bill, but he was willing to work with the committee to resolve any conflicts. Chairman Anderson wanted assurance that the dollars were generated as intended; the Legal Division would compare S.B. 51 and S.B. 577. Mr. Heller said there were new articles in S.B. 51 that were not included in S.B. 577. Ms. Lang said there were three substantive conflicts that would need to be resolved; otherwise S.B. 51 and S.B. 577 would be made consistent.

Michael Bonner, an attorney in Las Vegas, was asked by Senator James to speak on the advantages of corporations choosing Nevada as their domicile. That involved comparing the Nevada statutes to the Delaware statutes. S.B. 577 clarified issues and strengthened protections as detailed in *Nevada Revised Statutes* (NRS) 78.307. Mr. Bonner suggested that the language “promote injustice” should be deleted.

James Bilbray, former Senator, Chairman of the Senate Committee on Taxation and practicing attorney, had represented clients and sat on public boards where suing directors was used by many people as a method to recover what was perceived as wrong doings. If Nevada wanted more businesses to come into the state, benefits must be offered; protections for the directors was such a benefit.

Assemblyman Carpenter asked if Delaware had in their law what Nevada wanted to put into their statutes. Mr. Bonner said Delaware had a similar version of liability protection; however, Nevada provisions were better.

Assemblywoman Ohrenschall disclosed she was a director of a number of Nevada corporations, and she had assisted in creating many incorporations. Despite that, she would participate and vote.

Kenneth Lange, Executive Director, Nevada State Education Association, spoke in support of S.B. 577.

Chairman Anderson recessed the meeting at 10:56 a.m. to go to the Assembly floor session. The meeting would reconvene at 4:00 p.m. to continue testimony on S.B. 577.

Chairman Anderson reconvened the meeting at 4:15 p.m., made opening remarks, and noted a quorum was present. Chairman Anderson continued the hearing on S.B. 577.

Derek Rowley, President, Corporate Services Center, spoke in favor of S.B. 577.

Mr. Rowley voiced concern over rumored changes that could strip the indemnification provisions from the bill, making it a special interest amendment in favor of one or two groups.

Chairman Anderson declared such allegations were not allowed, and he asked who had made such accusations. Special interest legislation was not done. Chairman Anderson took personal affront at Mr. Rowley's remarks and voiced concern about his further testimony.

Mr. Rowley continued his testimony. He said the indemnification provisions were vital to making the package work. Mr. Rowley said Nevada was not for sale with the bill, the bill did not prevent criminal prosecution of corporate officers or directors, the bill did not prevent personal liability of corporate officers or directors where fraud existed, and the bill did not prevent individuals from holding corporations responsible for damages incurred. What the bill would do was codify the existing Nevada legal decisions and add a new level of predictability to Nevada's corporate statutes.

Mr. Rowley said there was a liability crisis in the country today. The indemnification provisions of S.B. 577 should be kept whether the fees were increased or not. Mr. Rowley believed there were misconceptions that the corporate filings were stable and the revenues from these filings were predictable. The truth was that corporate filings were a barometer of the economy. While an 8 percent annual growth in corporations was estimated by the Secretary of State's office, Nevada experienced a negative growth through the first quarter of 2001. It was not understood how price-sensitive the incorporation industry was today. There was a great deal of competition for new incorporation, and the ease of the Internet made it simple for price comparison from state to state, service for service. Mr. Rowley said he supported S.B. 577 as written, but he could not support S.B. 577 if the indemnification provisions were removed.

Chairman Anderson said S.B. 577 provided an opportunity to take case law and put it into the relevant statute. He asked if that would be objectionable. Mr. Rowley said it would not necessarily be objectionable. In the effort to promote or market Nevada for business purposes, his company was pleased with the current provisions. The impact of the increased fees was unknown; however, to justify those fees, he believed an additional benefit was needed to keep Nevada at the forefront of the incorporation industry.

Assemblywoman Buckley asked if Wyoming had recently raised their fees. Mr. Rowley said Wyoming raised their renewal fees, creating a $40 increase over the original incorporation fees. Assemblywoman Buckley verified that S.B. 577 did not increase the renewal fees. Mr. Rowley agreed. Since the increase in revenue was based on an increase in new corporate filings, it would be necessary to “sell” Nevada on a continuing, on-going basis in order to generate the revenues.

Chairman Anderson asked Mr. Rowley if he was familiar with the *Polaris v. Kaplan* case. Mr. Rowley said he had only read a summary of the case.

Assemblyman Carpenter asked what kind of corporation would be concerned over a $50 difference in fees. Mr. Rowley said the typical “mom and pop” operation or “people with a good idea” made up a vast majority of the Nevada corporations. They were very conscientious about costs, running their business on a shoestring; they were people with a dream.

Assemblyman Brower said there seemed to be a disconnect between “the stick” of increased fees and “the carrot” of the liability law. Mr. Rowley said the language in Section 1 stabilized the expectation of companies regarding indemnification, and it did not change anything the courts were not already enforcing. Section 3, subsection 7, was very important. Assemblyman Brower then asked what the pitch or “the hook” would be when marketing Nevada. Mr. Rowley said he would pitch low fees and costs, the Nevada tax structure, liability protection, and indemnification provisions. The liability protection was a big deal for individuals.

Chairman Anderson said it was clear there was concern about retaining Section 3, subsection 7, as a crucial provision of the bill, and no other additions were needed for the bill. Mr. Rowley had no other concerns about the bill as long as the indemnification provisions were retained in the law.

Assemblyman Carpenter asked if Mr. Rowley had been talking about income tax laws. Mr. Rowley said he was talking about the lack of a state corporate income tax. Assemblyman Carpenter asked if Wyoming had a state corporate income tax. Mr. Rowley replied Wyoming did not. Assemblyman Carpenter asked if Delaware had a state corporate income tax. Mr. Rowley said Delaware had a state corporate income tax of 8.7 percent.

Assemblyman Collins asked what it would cost Nevada if people went to Wyoming to incorporate. Mr. Rowley said the way the bill was currently written, it was not significant if Nevada lost a large number of corporations to Wyoming. An individual who took a corporation to “domesticate” in Wyoming could do so for approximately $200, and Wyoming had provisions in their law that allowed that corporation to carry its corporate history with it as if it had always existed in Wyoming.

Chairman Anderson asked Mr. Rowley if his company would recommend more corporations in Wyoming over Nevada if the fees increased. Mr. Rowley said his sale staff did not make that decision; they provided the information, and the decision was left up to the customer. Chairman Anderson asked if the “mom and pop” corporations understood the indemnification provisions that Mr. Rowley was trying to protect. Mr. Rowley said they might not have a full understanding of those provisions, which was even more reason to have those provisions in place.

John Olive, President, Nevada Association of Listed Resident Agents (NALRA), represented 35 resident agent companies that collectively represented 50,000 to 55,000 corporations organized within the state of Nevada. Mr. Olive spoke in support of S.B. 577. The value of codifying case law would allow prospective incorporators to assess the likelihood of success in defending themselves in a case in which they might be drawn in as defendants. Mr. Olive said that the indemnification extension would essentially substitute for the lack of heritage of corporate jurisprudence until the business court had sufficient case law to provide a similar depth of jurisprudence as seen in Delaware.

Chairman Anderson asked how the bill would impact the resident agent industry. Mr. Olive said a study was done at the Advanced Research Institute at University of Nevada, Las Vegas to project the impact of the proposed $500 franchise fee. It was determined that the franchise fee would have precipitated an estimated 80 percent exodus of corporations from the state of Nevada. The study would need to be revised with the increase of fees to reflect their impact; it was estimated there would be some reduction in the number of corporations being formed. Chairman Anderson queried, that by offering the limited liability as provided in S.B. 577, how many additional companies would be attracted to Nevada. Mr. Olive quoted growth projections of 12 to 15 percent.

Assemblyman Brower stated Section 2, page 2, would eliminate a current statutory provision that allowed a corporation to include in its Articles of Incorporation certain liability limiting provisions. Mr. Olive agreed. Assemblyman Brower said Section 3, subsection 7, page 3, addressed the same issue, only making it automatic. Mr. Olive agreed. Assemblyman Brower said the bill would then achieve the same result as current law; it would not be a substantive change in the law. The real issue addressed by the bill would then be the alter ego doctrine in Section 1. Mr. Olive said Section 3, subsection 7, might seem redundant with Section 2, but it was the same spirit as Section 1 that codified current case law; Mr. Olive agreed with Assemblyman Brower's assessment of the bill.

Rose McKinney-James, Clark County School District, offered “unqualified” support for S.B. 577. Ms. McKinney-James believed the funding from the bill would be used for salaries for teachers and to fund those programs and services that had been curtailed.

Bob Crowell, Nevada Trial Lawyers Association (NTLA), supported the fee and funding mechanism set forth in S.B. 577, but was concerned about the corporate immunity. S.B. 577 changed the corporate immunity statutes in Nevada in three ways:

1. Codified the alter ego doctrine or piercing the corporate veil, by changing the case law with respect to proof required to pierce the corporate veil.
2. Extended the officers' and directors' immunity currently in Nevada law to other individuals.
3. Shortened the statute of limitations for bringing actions against officers and directors from three years to two years.

Bill Bradley, Nevada Trial Lawyers Association (NTLA), posed a scenario involving Chairman Anderson and Assemblyman Carpenter for purposes of explaining the

ramifications of forming and operating a corporation in Nevada, and, unfortunately, of experiencing fraud in their dealings with another corporation.

Pat Cashill, Nevada Trial Lawyers Association (NTLA), said Nevada had 44 years of corporate case law going back to 1957. The key to the judicial history in Nevada on that issue was the court took the position that there was no fixed criteria to use the alter ego doctrine to pierce the corporate veil. The *Polaris* decision talked about a number of factors that "would sanction fraud or promote injustice" and could lead to piercing the corporate veil:

1. Under-capitalization
2. Co-mingling of funds
3. Unauthorized diversion of funds
4. Treatment of corporate assets as individual's own
5. Failure to observe corporate formalities

Mr. Cashill went on to suggest language retentions and deletions in S.B. 577. He was "gravely" concerned and believed it would be bad social policy to enact the bill as written.

Chairman Anderson asked how the "Bubba and the Cowboy" corporation would be affected if S.B. 577 was enacted. Mr. Bradley agreed the corporation would be left "holding the stick." The importance of the *Polaris* decision (Exhibit K) was seen where the Supreme Court elected to follow the "promote injustice" standard. Trying to prove fraud was an extremely tough burden; fraud was a state of mind, and it was tough to prove a state of mind. Mr. Bradley believed it was important to amend S.B. 577 to include the language "or promote injustice."

Assemblyman Brower asked why a criteria "less than fraud" would be allowed to be used as the standard to pierce the corporate veil. Mr. Crowell said it was difficult to articulate what constituted fraud or the various circumstances that might lead to or give rise to an injustice sufficient to pierce the corporate veil. He believed the Supreme Court answered that question on page 3, Section [2][3] of Exhibit K where it stated, "It is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in an injustice." The *Polaris* decision continued on the top of page 4 of Exhibit K, "There is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case." Mr. Bradley said there were circumstances where it "may not be fraud," but you knew it was wrong. Assemblyman Brower said, "If it walks, talks, and swims like fraud you should be able to prove fraud."

Assemblyman Collins reminded the committee to look at the bigger issue of S.B. 577. Was the issue to deal with the *Polaris* decision or find money for the teachers? Mr. Bradley was in support of funding teacher salaries; however, it was not necessary to significantly change a strong 50-year judicial doctrine in order to accommodate that fee increase. That was why NTLA was offering an amendment.

Assemblyman Manendo asked if S.B. 577 had been in place a couple of years ago, how would that have affected the "Harley Harmon incident" in southern Nevada? Mr. Cashill said the current language in Section 3, subsection 7, page 3, provided immunity to officers or directors for any action committed as an officer or director. He did not believe it was the intent to extend immunity "that far." Mr. Cashill suggested some "limiting" language should be inserted that would limit the immunity to corporate activities in a legitimate sense. Mr. Bradley said Section 3, subsection 7, stated, "unless otherwise provided in NRS..." and that included mortgage and securities issues; there was some protection because it referred to existing provisions in the NRS. Without an amendment, Section 3, subsection 7, would eliminate third party damages, and that was not the intent. Mr. Cashill said there was an inconsistency between existing law in Section 2 that limited the liability and Section 3, subsection 7 that seemed to extend unlimited immunity.

Assemblywoman Buckley asked, when viewing the issue of fraud versus injustice, what definition of fraud would be used if the language of S.B. 577 was approved. Would it be the common law definition of fraud or the definition in NRS 42.001? Mr. Cashill said in the case *Lubey v. Barba* the common law definition was used as a standard. He did not know whether the statute or the common law definition would apply in any case. Assemblywoman Buckley said perpetrators of fraud could "get away with it" by saying there was "no intentional misrepresentation" to deprive a creditor. Mr. Cashill agreed.

Assemblyman Brower disagreed, saying he believed, in a case of "looting the corporation,"

fraud could be proven. Assemblyman Brower said Section 3, subsection 7, did not give unlimited immunity because it said, “unless it was proven there was fraud, intention misconduct or known violation of the law.” Mr. Crowell disagreed with Assemblyman Brower and submitted an amendment (Exhibit M) that clarified a director could not be shielded from liability for acts outside the corporation, which left intact the rights of a third party.

Chairman Anderson asked for an explanation of the Loomis letter (Exhibit L). Mr. Cashill recalled the circumstances of the case and subsequent judgment against Lange Financial Corporation. The Loomis family had great difficulty collecting the judgment amount, but was able to use the alter ego doctrine to reach through numerous corporate shells to reach the assets of the corporation in order the satisfy the judgment.

Mr. Crowell made closing statements regarding the proposed amendment (Exhibit M) from the NTLA. It included five sections:

1. Rewrote Section 1 using language drawn directly from the *Polaris* decision.
2. Amended language in Section 3, subsection 7, to clarify that the immunity from liability extended to an officer or director only “to the corporation or its stockholders” and to include the word “or” when listing the two actions that might cause liability.
3. Changed the effective date language to include “shall apply to claims that arise after October 1, 2001” in Section 59, subsection 2(b).
4. Changed Section 8 to restore the statute of limitations to three years.
5. Deleted Section 55 since legislative intent should not be a part of the bill.

Chairman Anderson asked if the proposed amendment (Exhibit M) had been shared with Senator James. Mr. Cashill said they “talked.”

Assemblyman Oceguera asked for clarification from Mr. Bradley concerning comments made relating to Section 2, and to Section 3, subsection 7. Mr. Bradley reiterated the changes as outlined in the NTLA proposed amendment (Exhibit M).

Assemblyman Carpenter said on page 3, line 21, the NTLA proposed to delete “unless it is proven that,” and asked why would the NTLA want that taken out. Mr. Bradley said that was a typo; it was their intent to retain that language.

Chairman Anderson clarified the language of the proposed amendment and asked the NTLA to submit a clean copy with any additional changes.

Danny Thompson, Executive Secretary-Treasurer, Nevada State American Federation of Labor-Congress of Industrial Organization (AFL-CIO), said Clark County had a critical need for 1,200 new teachers in 2001-2002, but they had only been able to recruit 500. Mr. Thompson shared statistics regarding high school dropouts, prison inmates, low teacher salaries, portable classrooms, and lack of books. The problem could not wait; it needed to be solved in the current session. The problem was not going away!

Dave Howard, Reno-Sparks Chamber of Commerce, spoke in support of S.B. 577 with some reservations; he felt the bill did not do enough. Although it was believed that the bill was written to attract new corporations to Nevada, no one had discussed attrition if the economy “goes down the dumps;” there was no guarantee that the economy would continue to encourage growth. And even though Mr. Crowell said the bill would not be retroactive, Mr. Howard felt the provisions of the bill would also apply to those who were already incorporated.

Kami Dempsey, Director, Government Affairs, Las Vegas Chamber of Commerce, spoke in support of S.B. 577 as written. She said it was a first step to finding a solution to help teachers obtain a salary increase without negatively impacting the economy and disproportionately hurting small businesses. The Las Vegas Chamber of Commerce and the business community recently completed a position paper outlining their intention to work during the interim to find a tax package that would fulfill the state's financial needs over the next ten years.

Sam McMullen, Las Vegas Chamber of Commerce and the Retail Association of Nevada, said S.B. 577 contained a very serious issue. Mr. McMullen spoke in support of the bill, but he did not believe it needed an amendment. He reiterated his commitment to work during the interim on a package to be presented to the legislature at the Seventy-Second Session. Mr. McMullen said the bill had been looked at from both sides, as defendants and as plaintiffs, and he believed it to be a fair statement of the law, one that needed to be secured

and passed in its current form. He said the real issue was sanctioning fraud; promoting justice was vague and too broad.

Chairman Anderson asked if Mr. McMullen had heard the testimony of the Secretary of State regarding the conflicts between S.B. 51 and S.B. 577. Mr. McMullen said he did not have a problem with conflict amendments; he did have a problem with changing the bill as written. Chairman Anderson stated there were time factors in the bill that may have led to a misunderstanding of the real intent of the bill. Mr. McMullen said he had no problems with the effective date of the law relating to claims. Chairman Anderson asked if Mr. McMullen participated in the drafting of the bill. Mr. McMullen said he had not.

Assemblyman Collins reiterated his question related to the “real issue” under discussion. Was it a test or was it a precedent with strings? Mr. Collins asked, “Are we doing the right thing?” Mr. McMullen said the real question should be, “How do we guarantee that we actually get out of this bill what we said we were going to get out of it?” In order to increase fees, new provisions were necessary to drive revenue, to secure it, and to expand it in the future.

Assemblywoman Buckley verified the fees that would increase and those that would remain the same. It was good to be a business-friendly state; it was good for the economy. She questioned why an $80 increase required the kind of immunity provisions that could hurt other Nevada businesses? Mr. McMullen did not believe those immunity provisions would hurt any existing Nevada businesses; they were good for Nevada business. In his judgment, he did not think the trade was $80 for those provisions; rather, it was a resolution of budget issues, a marketing tool, and a clarification of current law.

Assemblyman Brower said he did not see the linkage between the fee increase and the change in policy. Regardless of whether the fees were increased, the proposed change in the law was a good policy change for Nevada. Mr. McMullen confirmed that would be good for Nevada. What people wanted most of all was to know what the rules of law were. It would be good for new corporations and would be clarification for existing corporations.

Chairman Anderson asked if Delaware or any other state had similar provisions. Why not take case law and put that into statutory provision? Mr. McMullen said Delaware did have more case law to rely on, but that might not be the question. It was easy for Delaware to attract corporations, especially on the east coast. Nevada needed to create a better attraction for corporations.

Chairman Anderson said the advantage of case law was that once it was on the books, it was there. Like common law, you could continue to make reference to it as it continued to evolve. Case law became a much more reliable predictor of behavior in a litigant society. Mr. McMullen disagreed. The issue was whether or not the stream of revenue was secured. Out-of-state corporations did not want case law to be a determining factor, as they could be the next case. Those corporations wanted to know that the rules were secure. Chairman Anderson said the question was then whether public policy should be put at-risk to fund education. Mr. McMullen did not think there was any risk; it was a clear statement of the policy.

Mary Lau, Executive Director, Retail Association of Nevada, said the issue of increased fees had been brought forward previously without result, and now that issue was being revisited.

Chairman Anderson asked for further testimony. There being none, he announced the committee would be recessed until 9:30 a.m. tomorrow morning. The testimony phase was at an end. The committee was waiting for additional information from the Legal Division regarding the fiscal impact and those sections in conflict.

Assemblywoman Koivisto asked, if it was such good policy, why had it never come up before. The question was discussed among committee members. Chairman Anderson queried about an interim committee study done by Senator James. Assemblyman Brower was not aware of any Bill Draft Request (BDR) recommendation nor did he recall it being a discussion topic at any of the meetings. Assemblyman Manendo said the interim study committee broke into several panels, and the issue was not raised on his panel.

Ray Bacon, Nevada Manufacturers Association, said during the Business Law Committee, chaired by Mr. Taylor, discussed adding certainty to the law in two separate subcommittees.

Mr. Bacon did not recall that specific issue being discussed.

Mr. McMullen said those types of issues were discussed, but until raising fees became a viable option, the counterbalance of those provisions was not necessary.

Chairman Anderson recessed the meeting at 6:46 p.m. until 9:30 a.m. the next morning.

Chairman Anderson reconvened the meeting at 10:00 a.m., the following day, made opening remarks, and noted a quorum was present. Discussion of S.B. 577 resumed.

Chairman Anderson drew attention to a letter from the Secretary of State's office (Exhibit N) that was submitted in response to the request made by the committee. The letter brought clarity to the provisions of S.B. 577 as to when the various sections would apply and why there were different dates for implementation.

Chairman Anderson announced a short recess to handle trouble with the Internet connection; the meeting reconvened in three minutes.

Renee Lacey, Chief Deputy, Secretary of State, said currently initial lists were currently not required for LLCs, LPs, and entities other than corporations; they only filed annual lists. S.B. 51 would require them to submit initial lists, resulting in the need for additional staff in order to maintain the 10-day money-back guarantee.

Chairman Anderson cautioned that conflicts might exist between S.B. 51 and S.B. 577 that would require amendments to make them consistent. As such, the dollar amounts currently in S.B. 577 might not be in the final draft. Mr. Lacey said that issue had been discussed with the Legal Division that would be preparing the amendment. Ms. Lang said S.B. 51 had already been enrolled, but would be amended to be consistent with S.B. 577.

Assemblywoman Buckley said the appropriation in Section 58 seemed excessive. Ms. Lacey said new positions had been discussed with the Fiscal Division, and most would come out of the Special Services Funds. The request to use those Special Services Funds for technology or positions in the office had to go through the Interim Finance Committee. The appropriation in Section 58 came from the portion that went into the Special Services Fund and not from the portion of the increased fees that would go to the General Fund to assist the teachers. Anything over $2 million that remained in the Special Services Fund at the end of the fiscal year went to the General Fund. The appropriation also included estimated funding for leased space. The additional staff, besides reviewing forms and preparing for the new services and the additional review required by the new services, would also staff a counter service that would provide a 2-hour and 24-hour expedited document service.

Assemblywoman Buckley asked why that funding had not been included in the separate bill where the new services were proposed and the new staff was requested. Ms. Lacey said requiring the new lists for LLCs and LPs was a new service not previously proposed. The Secretary of State's budget had been closed; 20 new positions were requested, and the Assembly Committee on Ways and Means approved 12. The Committee on Ways and Means asked the Secretary of State's Office to obtain funding for the remaining staff through S.B. 577 since the additional staff would be needed for the proposed services in the bill.

Assemblyman Manendo asked why the proposed amendment by the NTLA was approved by the Senate Judiciary Committee and then was taken out. Chairman Anderson verified that the proposed amendments presented to the committee were the same amendments that had been presented in the Senate. Mr. Crowell said the amendment presented in the Senate had been slightly different; it had been passed and then reconsidered the next day. He did not know why. Chairman Anderson requested that the amendment be redrafted, with a clean copy provided to the committee. Mr. Crowell submitted a new copy of the proposed amendment (Exhibit O) for the committee's consideration.

Chairman Anderson recessed the meeting at 10:26 a.m. to be reconvened upon the call of the Chair. There being no further business on that day, the meeting was adjourned at 2:30 p.m.

RESPECTFULLY SUBMITTED:
Deborah Rengler
Committee Secretary

APPROVED BY:

_____

Assemblyman Bernie Anderson, Chairman

DATE: _____

NV Assem. Comm. Min., 5/30/2001

End of Document

Exhibit C

TRUST AGREEMENT

("*The Opheikens Family Trust*")

THIS TRUST AGREEMENT is made and entered into the 26th day of December, 2012, by and between ORLUFF OPHEIKENS, a resident of Ogden, Weber County, State of Utah (hereinafter sometimes referred to as the "GRANTOR"), and J. SLADE OPHEIKENS, a resident of Ogden, Weber County, State of Utah (hereinafter sometimes referred to as the "TRUSTEE").

WITNESSETH:

WHEREAS, the GRANTOR is the owner of one hundred seventy (170) shares of voting common stock (hereinafter the "Shares") of R & O CONSTRUCTION COMPANY, a Utah corporation (hereinafter the "Company"); and

WHEREAS, the GRANTOR desires that the Company remain closely held within the GRANTOR'S family for the maximum period permitted by applicable law; and

WHEREAS, to keep the Company closely held within the GRANTOR'S family, the GRANTOR desires by this trust instrument to establish an irrevocable trust upon the conditions and for the uses and purposes hereinafter set forth, to own and control the Shares and for the ultimate distribution of the Shares, or the proceeds from the sale thereof, in the trust created hereunder;

NOW, THEREFORE, in consideration of the premises and the agreements and undertakings of the parties hereto, the GRANTOR hereby gives, grants, transfers, sets over and delivers the Shares to the TRUSTEE to have and to hold the same, in trust, and to manage the same, and any additions that may from time to time be made to the trust created hereunder, subject to the terms, conditions, powers and agreements hereinafter set forth.

FIRST: NAME AND BENEFICIARIES OF TRUST. The trust created hereunder shall be identified as "THE OPHEIKENS FAMILY TRUST" and for purposes of convenience shall hereinafter be referred to as the "trust." The trust shall be for the use and benefit of the issue of the GRANTOR and the issue of the GRANTOR'S wife, JUDY OPHEIKENS. The names of the children of the GRANTOR, all of whom are now living, are KARLIE O. RAIRIGH, J. SLADE OPHEIKENS, and CHET O. OPHEIKENS. The names of the children of the GRANTOR'S said wife, both of whom are now living, are ROWDY IRICK and CODY IRICK. For purposes of this trust instrument, ROWDY IRICK and CODY IRICK and their respective issue shall be deemed issue of the GRANTOR.

SECOND: TRUST IRREVOCABLE. This trust shall be irrevocable and shall not be altered, amended, revoked or terminated except as may be expressly provided in this trust instrument.

THIRD: ADDITIONAL CONTRIBUTIONS. The GRANTOR, and any other person or persons, may at any time devise, bequeath, grant, convey, give or transfer additional real, personal or mixed properties, including policies of life insurance, to the TRUSTEE for the benefit of the trust by inter vivos act or by Will, subject to the same terms and conditions as the original provisions of this trust instrument; provided, however, the TRUSTEE may refuse to accept such transfers if the TRUSTEE deems acceptance not to be in the best interest of the trust. Provided, further, the TRUSTEE shall hold all transfers to the trust by someone other than the GRANTOR, if made during the GRANTOR'S lifetime, in a segregated fund, as a separate and independent trust from the trust created by assets transferred by the GRANTOR to the trust. Such separate and independent trust shall be held for the benefit of the same beneficiaries and on the same terms and conditions as the trust created and funded by transfers by the GRANTOR, but the assets of such separate and independent trust shall not be commingled or otherwise mixed with those asset contributed by or attributable to contributions by the GRANTOR. Such separate and independent trust shall not be deemed owned by the GRANTOR for federal income tax purposes, notwithstanding any other provisions of this trust instrument.

FOURTH: TERM. The term of this trust shall commence on the date hereof and shall continue until the expiration of the Perpetuities Period or the earlier distribution of all of the assets of the trust as provided in paragraph SIXTH, below.

FIFTH: ADMINISTRATION OF TRUST PRIOR TO TRIGGERING EVENT. Until the first to occur of (1) the sale or other disposition of all or substantially all of the Shares, (2) the sale or other disposition of all or substantially all of the assets of the Company, or (3) the dissolution and winding up of the Company and its business (the first such event hereinafter being referred to as the "Triggering Event"), the TRUSTEE shall not divide the trust principal, but shall distribute to the GRANTOR'S issue, per stirpes, such portion of the net income, if any, and principal of the trust, other than the Shares, as the TRUSTEE, in the TRUSTEE'S sole discretion may from time to time determine. Any undistributed income shall be added to the principal of the trust.

SIXTH: ADMINISTRATION OF TRUST FOLLOWING TRIGGERING EVENT. Upon the Triggering Event, the principal and undistributed income of the trust shall be held, administered, paid over and distributed as follows:

A. Division and Retention in Trust. The trust estate shall be divided into equal shares for the benefit of the then-living issue of the GRANTOR, per stirpes, and retained in trust as hereinafter provided in this paragraph SIXTH.

JOIN
JOHN E. GORMLEY, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorney for Defendants
TOM WELCH; ORLUFF OPHEIKENS; SLADE OPHEIKENS; and CHET OPHEIKENS

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, a Nevada limited liability company; ORLUFF OPHEIKENS, an individual; SLADE OPHEIKENS, an individual; CHET OPHEIKENS, an individual; SHANE HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, 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.

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

Third-Party Plaintiff,

vs.

WILLIAM PATRICK RAY, JR.; and

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

DEFENDANTS ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, AND TOM WELCH'S COMPREHENSIVE JOINDER TO R&O CONSTRUCTION, INC.'S MOTION TO DISMISS

Date of Hearing: October 10, 2018

Time of Hearing: 9:00 A.M.

DOES 1 through X, inclusive,

Third-Party Defendants.

COME NOW Defendants ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, and TOM WELCH ("the Opheikens Defendants") by and through their attorney of record, JOHN E. GORMLEY, ESQ., of the law firm OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, hereby file this Comprehensive Joinder to R&O Construction, Inc.'s Motion to Dismiss.

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

Dated September 16, 2018.

OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI

JOHN E. GORMLEY, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorney for Defendants
TOM WELCH; ORLUFF OPHEIKENS; SLADE OPHEIKENS; and CHET OPHEIKENS

POINTS AND AUTHORITIES

I.

INTRODUCTION

The Opheikens Defendants join the arguments raised in R&O Construction, Inc.'s Motion to Dismiss.[1] As set forth below, there are additional reasons why this Court should grant R&O's Motion to Dismiss. First, this Court has already recognized and stated that there is no prejudgment cause of action for reverse piercing the corporate veil in Nevada. On that basis alone, this Court can and should grant R&O's Motion to Dismiss.

However, even if this Court were to create a new cause of action solely for the purposes of this case, Plaintiffs' Third Cause of Action must still be dismissed because Plaintiffs cannot meet -- and noticeably have not plead -- the requisite entitlement to assert such a cause of action at this stage. Specifically, Plaintiffs have failed to allege that they are a judgment creditor, that Orluff Opheikens is a judgment debtor, that they have a clear and established legal standing in which to raise a reverse pierce theory at this time, and that they have been unable to collect upon that judgment. Nevada law allowing reverse veil piercing requires that a plaintiff be, among other things, a judgment creditor before a reverse veil piercing theory of recovery can even be advanced in the appropriate form. *See LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000) (allowing for a judgment creditor to utilize a reverse veil piercing theory of recovery to enforce a post-judgment writ of attachment). Plaintiffs are not a judgment creditor, there is no judgment debtor, Plaintiffs have no established right to enforce any judgment, they have not been unable to collect upon their fictional judgment, and they have failed to plead these necessary elements for a reverse pierce claim.

[1] R&O's Motion is styled as a Motion to Dismiss, however it focuses solely upon the Third Cause of Action, the only claim raised by the Plaintiffs against R&O in their Third Amended Complaint. The Opheikens Defendants' Joinder seeks dismissal of the Third Cause of Action, not the entire Third Amended Complaint.

Finally, the version of reverse piercing which Nevada law does countenance (postjudgment, against an entity with a sole shareholder) is not applicable in this case by Plaintiffs' own averments. Namely, Plaintiffs openly concede that R&O has multiple shareholders, and therefore Plaintiffs openly concede that it would be a manifest injustice to allow a reverse pierce to be asserted as a cause of action – or even a theory of relief -- in this case. Plaintiffs are misled in treating reverse piercing and alter ego as one in the same, but Nevada law is fairly clear. In the limited context in which it allows reverse piercing, Nevada jurisprudence does not permit reverse piercing under the "facts" the Plaintiffs have chosen to plead in this case. Indeed, the overwhelming trend of sister jurisdiction cases involving reverse pierce situations, just like Nevada, fall squarely against Plaintiffs. The predominant legal, logical, and equitable views regarding reverse pierce conclusively reject what the Plaintiffs are seeking to do in this case with their Third Cause of Action. Under any rooted analysis, this Court should grant R&O's Motion to Dismiss at this time.

II.

STANDARD

NRCP 12 provides, in pertinent part:

> (b) How presented: Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (5) failure to state a claim upon which relief can be granted.

Nevada Rules of Civil Procedure, Rule 12. A complaint will not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief." *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985). Failure to assert a necessary element of a cause of action subjects that cause of action to dismissal pursuant to NRCP 12(b) (5). *See Tahoe Village Homeowners*

Ass'n v. Douglas County, 106 Nev. 660, 799 P.2d 556 (1990) (where complaint alleged negligent inspection of property by the county, but did not allege that the county had knowledge of the alleged defects, the complaint failed to state a cause of action for negligence); *Hale v. Burkhardt*, 104 Nev. 632, 764 P.2d 866 (1988) (where plaintiffs failed to state the necessary elements of the predicate crime of obtaining services by means of false pretense, the plaintiff failed to state a claim upon which relief could be granted and the action was properly dismissed pursuant to NRCP 12(b)(5)); *Bemis v. Estate of Bemis*, 114 Nev. 1021, 967 P.2d 437 (1998) (a court can dismiss a complaint for failure to state a claim upon which relief can be granted if, for instance, the action is barred by the statute of limitations); *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 221 P.3d 1276 (2009) (to survive dismissal, factual allegations must be legally sufficient to constitute the elements of the claim asserted).

The question of whether alter ego exists in Nevada is a purely legal one. *See* NRS 78.747(3) ("The question of whether a stockholder, director, or officer acts as the alter ego of a corporation must be determined by the court as a matter of law."); *Material Supply Int'l, Inc. v. Sunmatch Industrial Co., Ltd.*, 62 F.2d 13, 19-20 (D.D.C. 1999) ("Whether one corporation is the alter ego of another is a question of law."); *FG Hemisphere Associates, LLC v. Unocal Corporation*, 560 Fed.Appx. 672 (9th Cir. 2014) (the availability of the alter ego doctrine to determine the location of intangible property under the Federal Sovereign Immunities Act is a question of law).

III.

ARGUMENT

A. The Third Cause Of Action Must Be Dismissed Because It Is Not A Recognized Cause Of Action In Nevada

Plaintiffs' Third Cause of Action -- "Reverse Veil Piercing Under The Alter Ego Doctrine" -- is not a legally recognized cause of action in Nevada.[2] "A request to pierce the corporate veil is only a means of imposing liability for an underlying cause of action and is not a cause of action in and of itself." *Local 159 v. Nor-Cal Plumbing, Inc.,* 185 F.3d 978, 985 (9th Cir.1999) (*citing Peacock v. Thomas,* 516 U.S. 349, 354, 116 S. Ct. 862 (1996)). This is independent of whether the alter ego claim is traditional or "reverse".[3] As the United States District Court for the District of Nevada has repeatedly stated, ***"alter-ego is a theory of liability aimed at penetrating a corporation's limited liability protection, it is not an independent cause of action."*** *Fernandez v. Penske Truck Leasing Co., L.P.,* 2012 U.S. Dist. LEXIS 69596, *4, n. 2 (D. Nev. 2012) *(emphasis added) (citing Taddeo v. Taddeo,* 2011 U.S. Dist. LEXIS 103649, *28 (D. Nev. 2011)); *see also Adams v. Silar Advisors, LP,* 2013 U.S. Dist. LEXIS 60118, *21 (D. Nev. 2013) (alter ego is a legal theory and measure of relief not amounting to an independent cause of action); *Waterfall Homeowners Ass 'n v. Viega, Inc.,* 283 F.R.D. 571, 579 (D. Nev. 2012) ("claims for alter ego are not independent causes of action"); *Henderson v. Buchanan (In re Western World Funding, Inc.)*, 52 B.R. 743, 782 (Bankr. D. Nev. 1985). "Put another way, a claim against a defendant based on the alter ego theory is a derivative of the substantive cause of

---

[2] This is not an instance of inartful pleading on Plaintiffs' part. Rather, it is a strategic attempt to add a deep pocket into the case without any legitimate basis for doing so.

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

action against the corporate defendant." *Smith v. Simmons,* 638 F. Supp.2d 1180, 1190, n. 14 (E.D. Cal. 2009) (alter ego "is 'not itself a claim for substantive relief).[4]

Thus, "the veil-piercing doctrine does not come into play...unless and until [the Plaintiffs] establish their right to a money judgment against [the corporate defendants] under the alter ego doctrine...." *Local 159,* 185 F.3d at 985 (9th Cir. 1999). Simply put, absent an underlying cognizable cause of action and an established right to a money judgment, the reverse pierce remedy is not available as a cause of action or a theory of relief.

The United States District Court of Nevada has recently rejected reverse pierce alter ego as a cause of action. The Court in *Transfirst Grp., Inc. v. Magliarditi*, a case involving an established judgment creditor attempting a reverse pierce, applied *LFC* and made the point clear:

> While it often will be the case that alter ego is a remedy for another claim, the Supreme Court of Nevada has referred to alter ego as a "claim" in the context of a judgment creditor asserting alter ego in aid of execution of a judgment. In *Callie v. Bowling*, the Supreme Court of Nevada overruled a prior case that suggested that a judgment creditor could amend a judgment to make another entity liable as the alter ego of the judgment debtor. 160 P.3d 878, 880 (Nev. 2007) (*en banc*). The court "clarif[ied] that a motion to amend a judgment is not the proper vehicle by which to allege an alter ego claim." *Id.* Instead, a "party who wishes to assert an alter ego claim must do so in an independent action against the alleged alter ego with the requisite notice, service of process, and other

---

[4] Of those which have considered the issue, the majority of state courts have found an alter ego claim does not constitute an independent action. Courts in Arkansas, California, Colorado, Florida, New York, Tennessee, Texas, and Utah have noted alter ego is not an independent claim, but rather a theory of liability, procedure, or equity to enforce another substantive claim. *See Forever Green Athletic Fields, Inc. v. Lasiter Constr., Inc.*, 384 S.W.3d 540, 553 (Ark. Ct. App. 2011); *Leek v. Cooper*, 125 Cal. Rptr. 3d 56, 71 (Cal. Ct. App. 2011); *Swinerton Builders v. Nassi*, 272 P.3d 1174, 1177-78 (Colo. Ct. App. 2012); *Turner Murphy Co. v. Specialty Constructors, Inc.*, 659 So.2d 1242, 1245 (Fla. Dist. Ct. App. 1995); *Morris v. N.Y. State Dep't of Taxation & Fin*, 623 N.E.2d 1157, 1160 (N.Y. 1993); *Boles v. Nat'l Dev. Co*, 175 S.W.3d 226, 251 (Tenn. Ct. App. 2005); *Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d 692, 693 n.1 (Tex. 1990); *Jones & Trevor Mktg., Inc. v. Lowry*, 284 P.3d 630, 634 n.1 (Utah 2012). Similarly, federal courts applying Illinois, Connecticut, Pennsylvania, and Virginia state law have noted that an alter ego claim is not an independent cause of action. *See Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc.*, 356 F.3d 731, 735-36 (7th Cir. 2004); *Everspeed Enters. Ltd. v. Skaarup Shipping Int'l*, 754 F. Supp. 2d 395, 404 (D. Conn. 2010); *Siematic Mobelwerke GmbH & Co. KG v. Siematic Corp.*, 643 F. Supp. 2d 675, 694 (E.D. Pa. 2009); *C.F. Trust, Inc. v. First Flight Ltd. P'ship*, 111 F. Supp. 2d 734, 742 (E.D. Va. 2000).

> attributes of due process." *Id.* at 881. *Callie* thus refers to alter ego as a "claim" and invites **judgment creditors** to file a separate action to assert it when they are attempting to collect the **judgment debtor's** assets that are in another party's hands whom the creditor contends is an alter ego.
>
> This is consistent with *Mona v. Eighth Judicial District Court of the State of Nevada in and for The County of Clark*, 380 P.3d 836, 841 (Nev. 2016) (en banc). There, the Supreme Court of Nevada similarly concluded that a **judgment creditor** who domesticates a judgment cannot attach a third party's assets as an alter ego through Nevada's procedures for judgment debtor exams and related sanctions. Instead, the court referred to Nevada's procedures governing execution on a judgment. *Id.* (citing Nevada Revised Statutes ("NRS") §§ 21.010–.260). Under those procedures, a judgment creditor must bring a separate action if a third party claims an adverse interest in the property. *Id.* at 841–42 (stating that "NRS 21.330 permits a judgment creditor to institute [a separate] action against the third parties with adverse claims to the property of a judgment debtor") (quotation omitted).

Transfirst Grp., Inc. v. Magliarditi, 2017 WL 2294288, at *2–3 (D. Nev. May 25, 2017), *on reconsideration in part*, 2017 WL 3723652 (D. Nev. Aug. 29, 2017) (internal footnote omitted) (emphasis added).[5]

Here, the Plaintiffs' Third Cause of Action asserts an independent cause of action entitled"Reverse Veil Piercing Under The Alter Ego Doctrine," yet that cause of action is not premised upon any tort or breach of contract described therein. By the very terms chosen by the Plaintiffs, it is an untethered participle which should be dismissed because it simply is not a cause of action.

B. Plaintiffs' Third Cause Of Action Must Be Dismissed Because The Facts They Allege Demonstrate That Reverse Pierce Is Not Available To The Plaintiffs, And The Facts They Have Not Alleged Do Not Assert The Necessary Elements To Allow Them To Reverse Pierce At All

Plaintiffs' proffered Third Cause of Action asks this Court to create a new cause of action called "Reverse Veil Piercing Under The Alter Ego Doctrine". Plaintiffs' request is born from their incomplete understanding of reverse pierce and the Nevada Supreme Court's decision in *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000). In so doing, they ask

[5] *See also Ward v. Desert Eagle, LLC*, 2010 WL 455089 (D. Nev. February 2, 2010) (ultimately rejecting a judgment creditor's an attempt to reverse pierce).

this Court to change Nevada law as to when reverse pierce may be allowed. They do so in two ways. First, Plaintiffs propose that this Court ignore the inequities associated with reverse piercing where there are a multitude of affected shareholders, as well as pre-existing creditors, to allow them to cut the line and not go through the judgment collection process – or even a trial of the underlying case, for that matter. Courts across the country, following the modern trend, have recognized that an inequitable result is achieved when reverse pierce is permitted under the circumstances found in this case. Nevada case law, in fact, has already signaled that Nevada falls in line with this reasonable, equitable approach; our law does not countenance Plaintiffs' version of reverse pierce within the context of the facts known and plead in their Third Amended Complaint.

Second, Plaintiffs propose that this Court ignore the requirements that someone seeking to reverse pierce be an established judgment creditor, that the individual subject of the reverse pierce be an established judgment debtor, and that the established judgment has been demonstrated to be uncollectible. Given reverse pierce's underlying principles, these are unquestionably necessary elements for a reverse pierce. Without them, a claim seeking to reverse pierce fails as a matter of law.

For these reasons, this Court should reject Plaintiffs' Third Cause of Action on the basis that it fails to state a claim upon which relief can be granted. The Court should thereby dismiss the Plaintiffs' Third Cause of Action.

1. Reverse Pierce Is Not Allowed Where There Are Multiple Shareholders And Creditors Who May Be Impacted

Reverse pierce's modern trend demonstrates that it cannot be employed where there are multiple shareholders or innocent creditors impacted by such a postjudgment remedy. Nevada law is in league with this modern trend, and has taken care to repeatedly emphasize that "[t]he corporate cloak is not lightly thrown aside" and that the alter ego doctrine (traditional and reverse

piercing) is an exception to the general rule recognizing corporate independence. *LFC,* 116 Nev. at 903-904, *citing Baer v. Amos J. Walker, Inc.,* 85 Nev. 219, 220, 452 P.2d 916, 916 (1969).

Indeed, reverse pierce is an extreme remedy, as well as a "radical and problematic change in standard alter ego law." *Postal Instant Press, Inc. v. Kaswa Corp.*, 162 Cal.App.4th 1510, 1521 (2008) (holding that California law does not allow reverse piercing in the corporation setting). Some courts even refuse to utilize it, particulary in the context of a corporation, because of its abuse.[6] For example, the *Postal Instant Press, Inc.* Court provided a detailed, rational analysis of the many pitfalls associated with the sort of haphazard imposition of reverse pierce sought by the Plaintiffs in this case. The Court noted, "on the application of the doctrine of outside reverse piercing, we conclude they reflect inherent and insurmountable flaws in the doctrine itself. These concerns arise precisely because standard alter ego and outside reverse piercing are actually different theories, justified by different reasons, and address different issues. To ameliorate the flaws in outside reverse piercing, courts recognizing the doctrine have imposed qualifications and requirements which, in their totality, essentially eliminate the outside reverse piercing doctrine as a practical matter. Indeed, if all the requirements of outside reverse piercing are met, its application would be unnecessary to protect the judgment creditor. Judgment collection procedures offer judgment creditors adequate protection in situations where outside reverse piercing would not harm innocent shareholders and creditors, legal remedies are inadequate, and the traditional requirements of proving alter ego are met. By levying on the debtor's shares, the

[6] The Georgia Supreme Court has rejected reverse piercing entirely, noting that it "would constitute a radical change to the concept of piercing the corporate veil in this state and, thus, should be created by the General Assembly and not by this Court." *Acree v. McMahan*, 276 Ga. 880, 882, 585 S.E.2d 873 (2003); *Rector v. Calvert*, 2018 WL 2460361 (Ky. Ct. App. 2018) (refusing to adopt reverse pierce in Kentucky); *Lawrence Leasing, Inc. v. Northwoods Pallets, LLC*, 2016 WL 1081126 (Minn. Ct. App. March 21, 2016) (holding that district court abused its discretion in allowing reverse pierce because Minnesota has not adopted outsider reverse piercing). "Reverse alter ego is an equitable doctrine; it stretches the imagination, not to mention the equities, to conceive of how someone wholly outside the corporation may be used to pierce the corporate veil from within." *Estate of Daily v. Title Guaranty Escrow Svc.,* 178 B.R. 837, 845(III) (D.Hawai'i 1995).

judgment creditor could place itself in the same position as the shareholder." *Id.* at 1524 (emphasis added).[7]

Moreover, even where there is a judgment in place, a court considering reverse veil piercing must weigh the impact of such action upon innocent investors, innocent limited partners or innocent general partners, as well as other innocent shareholders. *C.F. Trust, Inc. v. First Flight Limited Partnership*, 266 Va. 3, 12-13 (2003). It must also consider the impact of such an act upon innocent secured and unsecured creditors. *Id.* at 13. The court must also consider the availability of other remedies the creditor may pursue. *Id.*[8]

Although some courts have adopted reverse veil piercing with little distinction as a logical corollary of traditional veil piercing, because the two share similar equitable goals, others wisely have recognized important differences between them and have either limited, or disallowed entirely, reverse veil piercing. *See Commissioner of Environmental Protection v. State Five Industrial Park*, 304 Conn. 128, 140 (2012), *citing* Gregory S. Crespi, *The Reverse Piercing Doctrine: Applying Appropriate Standards*, 16 J.Corp.L. 33, 37 (1990) ("reverse pierce claims implicate different policies and require a different analytical framework from the more routine corporate creditor veil-piercing attempts"). Multiple specific concerns have been identified. "First, reverse piercing bypasses normal judgment-collection procedures, whereby judgment creditors [of an individual judgment debtor] attach the judgment debtor's shares in the corporation and not the corporation's assets." *Id.*, *quoting Postal Instant Press, Inc. v. Kaswa*

---

[7] The Court further held, "[e]ven if we were to accept outside reverse piercing, we would reverse because PIP failed to meet the requirements for its application. At the time of the litigation, Rangoonwala was not the sole shareholder of Kaswa. PIP failed to show that innocent creditors would be adequately protected. Amendment of a judgment to add an alter ego is an equitable procedure (*Carr v. Barnabey's Hotel Corp.* (1994) 23 Cal.App.4th 14, 21, 28 Cal.Rptr.2d 127), and before applying outside reverse piercing, "the availability of alternative, adequate remedies must be considered by the trial court" (*In re Phillips*, *supra*, 139 P.3d at p. 647). PIP failed to establish its legal remedies were inadequate, and the record does not show whether the trial court considered the adequacy of PIP's legal remedies. *Id.* at 1524 (*emphasis added*).

[8] "And, a litigant who seeks reverse veil piercing must prove the necessary standards by clear and convincing evidence." *Id.*

Corp., 162 Cal.App.4th at 1520. When corporate assets are attached directly for the benefit of the creditors of an individual, it prejudices rightful creditors of the corporation, who relied on the entity's separate corporate existence when extending it credit and "underst[ood] their loans to be secured—expressly or otherwise—by corporate assets." *Id.*, *quoting Floyd v. I.R.S.,* 151 F.3d 1295, 1299 (10th Cir.1998).[9]

Second, if a "corporation has other non-culpable shareholders, they [too] obviously will be prejudiced if the corporation's assets can be attached directly. In contrast, in ordinary piercing cases, only the assets of the particular shareholder [or other insider] who is determined to be the corporation's alter ego are subject to the attachment." *Id., quoting Postal Instant Press, Inc., supra.* Thus, "[a] key factor in any outsider reverse piercing controversy is the presence of corporate shareholders other than the insider against whom the outsider is asserting the primary claim. If other shareholders do exist, allowance of a reverse pierce would prejudice those shareholders by allowing the outsider to attach assets in which they have an interest." *Id.* at 141, *quoting* G.S. Crespi, *supra*, 16 J. Corp. L. at 65.

Finally, because corporate veil piercing is an equitable remedy, it should be granted only in the absence of adequate remedies at law. *Id.* at 141, *citing Naples v. Keystone Building & Development Corp.*, 295 Conn. 214, 233 (2010); *see also Floyd v. Internal Revenue Service,*

---

[9] "It is of no consequence that State Five's line of credit is not secured by corporate assets; a lender in this context extends credit in reasonable reliance on the existence of both a viable borrower in possession of assets and the additional security provided by a secondary obliger. *See Floyd v. Internal Revenue Service, supra*, 151 F.3d at 1299 (corporate creditors rely on entity's separate existence when extending it credit and "understand their loans to be secured—expressly or otherwise—by corporate assets" [emphasis added]); *In re Phillips*, 139 P.3d 639, 646 (Colo.2006) ("secured *and unsecured* creditors of the corporation have a cognizable legal interest in corporate assets, upon which they relied in lending money and selling goods and services to the corporation" [emphasis added]). Permitting direct attachment of corporate assets to satisfy an individual insider's debt undermines corporate viability, reasonably relied upon by creditors, with no forewarning. *Id.* at 144-145; *and see Standage v. Standage,* 147 Ariz. 473, 476–77, 711 P.2d 612 (Ariz. App. 1985) (before applying reverse veil piercing, trial court made specific provision for corporate liabilities, including not only tax deficiencies, maintenance costs and potential expenses connected with rental property owned by corporation, but also for unknown liabilities that could arise).

supra, 151 F.3d at 1300; 1 W. Fletcher, Cyclopedia of the Law of Private Corporations (1999) § 41.25, p. 604; annot., 2 A.L.R.6th, supra, § 3, at p. 195. In the case of a traditional veil pierce, "[w]hen a judgment debtor is a corporation, the judgment creditor cannot reach the assets of the individual shareholders due to limitations on liability imposed by corporate law"; *Postal Instant Press, Inc., supra*, 162 Cal.App.4th at 1522; thereby justifying the invocation of equity. Conversely, when the judgment debtor is a shareholder or other insider, many legal remedies potentially are available to reach corporate assets that rightfully should be available for collection, including the attachment of the debtor's shares in the corporation, if he or she is a shareholder, garnishment of his or her pay from the corporation, if he or she is an employee, challenging of his or her transfers of assets to the corporation as fraudulent conveyances or illegal conversion, or attribution of individual conduct to the corporation under theories of agency or respondeat superior. *Id.* at 141-142; *quoting Postal Instant Press* at 1520; *Floyd v. Internal Revenue Service, supra*, at 1300. If pursued, these remedies may "[obviate] the need for the more drastic remedy of corporate disregard." *Floyd v. Internal Revenue Service, supra*, at 1300; *see, e.g., Owens & Sons, Inc. v. Guastella East, Inc.*, 354 So.2d 571, 572 (La.App.1977) (finding reverse pierce "an unnecessary and therefore unavailable remedy" where judgment creditor could execute on debtors' shares). When the preceding concerns are implicated, courts have declined to impose reverse veil piercing. *Id.* at 142.[10]

In this respect, the Colorado Supreme Court has remarked that "some jurisdictions refuse to allow outside reverse piercing of the corporate form because, when inartfully performed, outside reverse piercing has the potential to prejudice innocent shareholders and creditors, and to bypass normal judgment procedures." *In re Phillips*, 139 P.3d 639, 645 (Colo. 2006), *citing*

[10] *Compare Sky Cable, LLC v. DIRECTV, Inc.*, 886 F.3d 375, 387 (4th Cir. 2018) (holding that "reverse piercing is particularly appropriate when an LLC has a single member, because this circumstance alleviates any concern regarding the effect of veil piercing on other members who may have an interest in the assets of an LLC.").

Cascade Energy & Metals Corp., 896 F.2d 1557, 1577 (10th Cir. 1990). When innocent shareholders or creditors would be prejudiced by outside reverse piercing, an equitable result is not achieved. Innocent shareholders possess legitimate expectations that corporate assets will be insulated from the claims of a controlling insider's creditors. Similarly, secured and unsecured creditors of the corporation have a cognizable legal interest in corporate assets, upon which they relied in lending money and selling goods and services to the corporation. Accordingly, equity requires that innocent shareholders and creditors be adequately protected before outside reverse piercing is appropriate under Colorado law. *Id.* at 646.

This same approach, namely confirming that there are no other shareholders or pre-existing creditors who might be impacted by a reverse pierce, was undertaken in *LFC*. There, the Court noted that "there are other equities to be considered in the reverse piercing situation – namely, whether the rights of innocent shareholders or creditors are harmed by the pierce." *LFC*, 116 Nev. at 905, 8 P.3d at 847, *citing Floyd v. I.R.S.*, 151 F.3d 1295, 1300 (10th Cir. 1998). In *LFC,* the lower court made a specific finding that LFC had a sole shareholder, Robert Lange, who would not be harmed by the reverse pierce, and used it as a foundation for allowing the reverse pierce in that case. *LFC*, 116 Nev. at 905-906, 8 P.3d at 847. That is, the *LFC* Court acknowledged, took into consideration, and ruled in favor of allowing the reverse pierce under the limited circumstances presented there precisely because no one else would be affected.

Such is not the case here. By Plaintiffs' own version of the facts, Orluff Opheikens is not the sole shareholder of R&O. Per Plaintiffs' factual statements within their Third Amended Complaint: "Orluff, through his family trust, owns approximately eighty-five percent (85%) of the outstanding shares in R&O and the remaining shares are owned by other executives and board members of R&O; and "[w]hile R&O has minority shareholders that own approximately fifteen percent (15%) of the corporation's outstanding stock, each minority shareholder is an executive with R&O". *See Third Amended Complaint*, para. 14 and 81. Quite clearly, other shareholders

would be unfairly impacted by a reverse pierce (whether timely or, as here, undeniably premature).

This is buttressed by the affidavit of Jeffrey Slade Opheikens, which make it even clearer that Nevada law would not allow the type of reverse pierce the Plaintiffs' advocate. *See* Exhibit A, *Affidavit of Jeffrey Slade Opheikens* In particular, his Affidavit provides confirming information that multiple R&O shareholders who are not named defendants in this litigation will also be harmed by a reverse pierce through absolutely no fault of their own.[11] It also provides an indication of the number of R&O's secured and unsecured creditors that will be impermissibly and unfairly harmed if the Third Cause of Action is not dismissed. In this respect, Plaintiffs' pleas for equity are hypocritical, actually do far more harm than good, and are themselves purely inequitable.

In sum, not only does Nevada law not permit reverse pierce as a cause of action, it also does not permit reverse pierce under the facts of this case because it would be inequitable and create a manifest injustice. Thus, the Third Cause of Action fails to state a claim under Nevada law upon which relief can be granted and it must be dismissed.

2. Necessary Elements Of A Reverse Pierce Include Being a Judgment Creditor, Targeting A Judgment Debtor, And Having An Uncollectible Judgment In Place; Without These, A Reverse Pierce Claim Fails To State A Claim Upon Which Relief Can Be Granted

Plaintiffs, it appears, seek to treat reverse pierce just like traditional alter ego. This approach suggests a gross misunderstanding of reverse pierce and the rationale behind allowing it in very limited circumstances. Contrary to Plaintiffs' belief, a reverse pierce claim cannot be plead like a traditional alter ego claim because it necessarily has different elements which much be alleged and established before it can even be considered by the court. Indeed, Plaintiffs' conflation of reverse pierce with traditional alter ego has not been adopted in Nevada; it has been

[11] There is nothing manifest unjust in deciding to loan money to complete a construction project.

squarely rejected across the country. This court should follow suit.

The Court is aware that the seminal Nevada Supreme Court case involving the concept of reverse pierce is *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000). A careful review of *LFC* reveals that Plaintiffs' action for reverse piercing has not been adequately plead because there is no mention of: (1) any plaintiff being a judgment creditor; (2) any defendant being a judgment debtor: (3) any judgment having been entered, and; (4) that said judgment has been shown to be uncollectible from the individual target Defendant (Orluff Opheikens).

In the *LFC* case, Plaintiff Loomis was an established judgment creditor of William Lange (the individual target) who had held himself out as the President, CEO, and primary owner of the LFC Marketing Group, Inc., the corporate target. Namely, Loomis had previously obtained a judgment of $25,000 against Lange and for three years had been unsuccessful collecting against it. Loomis then obtained a writ of attachment against monies owed to the corporation in a post-judgment proceeding at which time LFC appeared in the case to defend its interests. After conducting a hearing under the then-existing NRS 31.070(5), the district court determined that LFC was Lange's alter ego and thereby granted the motion for writ of attachment in the post-judgment proceeding. In upholding the writ of attachment, the *LFC* Court noted that:

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

LFC, 116 Nev. at 903, 8 P.3d at 846.

In reaching its conclusion, the *LFC* Court relied upon a litany of cases which all shared one important fact in common: Each involved the collection of an established pre-existing debt in a proceeding in which the complaining party was attempting to collect the established pre-existing debt from the alter ego corporation. For instance, the *LFC* Court cited to *Cargale Inc. v.*

Hedge, 375 N.W.2d 477 (Minn. 1985), a case where the court held that the family farm corporation was the alter ego of its owner--occupants, and therefore, the owners were entitled to reverse pierce the corporate entity to assert homestead exemption against the judgment creditor of one owner. *LFC* also relied upon *Taylor v. Newton*, 117 Cal.App.2d, 257 P.2d 68 (1953), wherein the plaintiff was attempting to collect against a judgment debtor. The *Taylor* Court declared that the corporation was the debtor's alter ego and therefore both of them were jointly and severally liable for the judgment debt; a judgment was present before the attempt to show the alter ego status of the corporation was allowed.[12]

The *LFC* Court also cited to *Towe Antique Ford Foundation v. I.R.S.*, 999 F.2d 1387 (9th Cir. 1993), for the proposition that most courts considering the reverse piercing issue allow such piercing. *LFC*, 116 Nev. at 903, 8 P.3d at 846. *Towe Antique*, however, involved an established tax liability, and the *Towe Antique* Court remarked that "[o]rdinarily, courts are called upon to apply the alter ego doctrine in cases where a party seeks to hold an individual liable for a business entity's debts. *Towe Antique*, 999 F. 2d at 1390 (*emphasis added*), *citing Drilcon, Inc. v. Roil Energy Corp., Inc.*, 230 Mont. 166, 749 P.2d 1058 (1988).[13]

In the present case there is no allegation that an established, pre-existing judgment exists. No allegation that Plaintiffs are established judgment creditors. No allegation that any defendant

---

[12] *LFC* cited to a similar case, *State v. Easton*, 169 Misc.2d 282, 287, 647 N.Y.S.2d 904, 908-910 (App.Div. 1995), a case which involved the same situation as *Taylor*, namely an established judgment with a judgment creditor and judgment debtor.

[13] The *LFC* Court also cited to several bankruptcy, collection, and tax cases where reverse pierce was permitted. For example, *Select Creations, Inc. v. Paliafito Am., Inc.*, 852 F.Supp. 740, 773-74 (E.D.Wis. 1994), was cited for the proposition that reverse pierce "is particularly appropriate...when the controlling party useds the controlled entity to hide assets or secretly to conduct business to avoid the pre-existing liability of the controlling party." *McCall Stock Farms, Inc. v. United States*, 14 F.3d 1562 (Fed.Cir. 1993), was a collection matter brought under the Debt Collection Act involving a defaulted loan. *Zahra Spiritual Trust v. United States*, 910 F.2d. 243-345 (5th Cir. 1990), was a tax collection case. As described below, the *LFC* Court's recognition of *Floyd v. I.R.S.*, 151 F.3d 1295 (10th Cir. 1998), a case which warns that the practice of freely allowing reverse pierce may unfairly prejudice innocent shareholders and harm a corporation's ability to raise credit, was considered inapplicable under the specific facts presented before the Court. A different result should be reached in this case, however.

is an established judgment debtor. No allegation that Plaintiffs have an uncollectible judgment.[14] Indeed, there is no allegation that any party with any legal connection to R&O has been established as being liable for anything that happened to Leland. No one, especially not Orluff Opheikens, owes the Plaintiffs anything at the present time, and therefore no reverse pierce can even be plead at this time.

The *LFC* decision shows that this is indeed the law. The *LFC* Court noted that "[c]onceptually, we conclude that reverse piercing is not inconsistent with traditional piercing in its goal of preventing abuse of the corporate form. Indeed "it is particularly appropriate to apply the alter ego doctrine in 'reverse' when the controlling party uses the controlled entity to hide assets or secretly to conduct business to avoid the **pre-existing** liability of the controlling party." *Id.* at 903, 8 P.3d at 846, *citing Select Creations, Inc. v. Paliafito Am., Inc.*, 852 F.Supp. 740, 774 (E.D.Wis. 1994) (emphasis added).

To that end, if the Plaintiffs do not prove Orluff Opheikens is liable to them at all, then no debt will ever be owed by him or by the hypothetical "reverse pierce" alter ego, R&O. This necessarily means that reverse pierce claims cannot exist without there first being a judgment in place, with a judgment creditor seeking to enforce it against a specific judgment debtor – not a hypothetical one. And, should the Plaintiffs manage to obtain a judgment against Orluff Opheikens, then it will be time for the Plaintiffs to try to prove (through clear and convincing evidence) that R&O is his alter ego <u>if</u> they are incapable to collecting upon the judgment against him. Stated another way, the Plaintiffs' misunderstanding of the applicability of reverse pierce puts the cart much too far before the horse. Consequently, the Third Cause of Action must be

---

[14] This is particularly significant because the *LFC* Court ruled that because the Loomises had been unable to collect upon their judgment for over three years, failing to allow a reverse pierce would "sanction a fraud or promote injustice." *LFC*, 116 Nev. at 905, 8 P.3d at 847. The Court held, "[i]ndeed, the evidence supports the district court's conclusion that the carefully designed business arrangements between the LFC entities, William, and the NLRC contributed to the Loomises' inability to collect their judgment." *Id.*

dismissed at this time because the Plaintiffs have not even pleaded it sufficiently.

C. This Case Presents An Ideal Opportunity To Apply The *Iqbal-Twombly* Standard, Especially Because The Advisory Committee To The Nevada Supreme Court Has Indicated The Time Has Come For Nevada To Join The Rest Of The Country And Apply The Plausibility Standard

As this Court is aware, the Nevada Supreme Court appointed a committee to consider whether the Nevada Rules of Civil Procedure should be updated. On August 17, 2018, the Petition supporting the proposed updates, including how NRCP 12 should be construed by the lower courts, was filed. *See* ADKT 0522 (Doc. 18-31981). Therein, the Advisory Committee Note for Rule 12 made the following comment:

> Rule 12(b)(5) tracks FRCP 12(b)(6). As noted in the Advisory Committee Note to Rule 8, by adopting the text of the federal rule the Committee does not intend any change to existing Nevada case law regarding pleading standards, and leaves to judicial development whether Nevada should adopt the plausibility analysis in *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009), and *Bell Atlantic Co. v. Twombly*, 550 U.S. 544, 565-66 (2007).

This comment is significant for two reasons. First, it correctly notes that the Advisory Committee did not have the authority to bring Nevada jurisprudence immediately in line with the well-established, modern, and favored *Iqbal-Twombly* plausibility standard. Second, however, it also identified that judicial development, through rulings made at the district court level that are intended to bring Nevada's standards in line with the federal ones, are both invited and expected.

In this regard, as pointed out in R&O's Motion to Dismiss, the runaway implication of Plaintiffs' reverse pierce claim against R&O – how it makes every case involving a corporation into one involving "manifest injustice" -- creates an obvious path for Nevada's courts to begin to implement the plausibility standard. This Court should utilize the *Iqbal-Twombly* standard in considering, and rejecting, Plaintiffs' Third Cause of Action.[15]

[15] To be clear, even under the legacy "no set of facts" standard, R&O's Motion to Dismiss can and should be granted.

V.

CONCLUSION

WHEREFORE, the Opheikens Defendants respectfully request that this Court enter an Order granting R&O's Motion to Dismiss in its entirety.

Dated September 11, 2018.

OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI

JOHN E. GORMLEY, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorney for Defendants
TOM WELCH; ORLUFF OPHEIKENS; SLADE OPHEIKENS; and CHET OPHEIKENS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of September 2018, I served a true and correct copy of the foregoing document (and any attachments) entitled: DEFENDANTS ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, AND TOM WELCH'S COMPREHENSIVE JOINDER TO R&O CONSTRUCTION, INC.'S MOTION TO DISMISS 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 HUISH, CRAIG HUISH 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 HUISH

By: _____
An employee of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

EXHIBIT A

AFFIDAVIT OF JEFFREY SLADE OPHEIKENS

STATE OF UTAH)
) ss:
COUNTY OF WEBER)

Jeffrey Slade Opheikens, being first sworn, deposes and states as follows:

1. I am the President of R&O Construction, Inc. ("R&O), a proposed defendant in the matter styled *Gardner v. Henderson Water Park, LLC et al.* (Case No. A-15-722259-C). I am a resident of the State of Utah, I am over the age of 18, and I have personal knowledge of the facts related to herein and am competent to so testify.

2. I have been President of R&O for over five years. Prior to being President, I was the Chief Operating Officer of R&O. I own shares of stock in R&O, and have been a shareholder since before November 2012. I am a named Defendant in this matter.

3. There are a number of R&O shareholders who are not named Defendants in this case. They include:

The Opheikens Family Trust
Frank McDonough
Charlie Auger
Rick Zampedri
Tim Gladwell
Rowdy Irick

4. During the period of August 16, 2013 to April 1, 2015, R&O made several loans to Double Ott Water Holdings, LLC, which totaled approximately $9.2Million. All of the shareholders of R&O listed above in paragraph 3 were shareholders from August 16, 2013 to the present. However, there was one additional shareholder on August 16, 2013, Dale Campbell. Mr. Campbell died in December 2014, and R&O subsequently acquired his R&O stock from his estate.

5. In loaning the approximately $9.2Million to Double Ott Water Holdings, LLC, R&O understood that Double Ott would invest the money in Henderson Water Park, LLC, to assist in paying for the completion of the Cowabunga Bay Water Park. R&O never intended to assume any exposure or liability relating to the business and activities of Double Ott and/or Henderson Water Park, other than with respect potential loss of the principal amount of the loan in the event Double Ott Water Holdings, LLC defaulted on the loan.

5. At all times R&O's shareholders Frank McDonough, Charlie Auger, Rick Zampedri, and Tim Gladwell have had no involvement in the management or operation of Henderson Water Park. Nor do these shareholders have any ownership in Double Ott and will not receive any financial benefit from Henderson Water Park in the event it were to make a profit after satisfying the $9.2Millon loan.

6. R&O regularly has over 500 creditors per month, both secured and unsecured, which are mostly in the form of subcontractors.

7. I hereby attest that the foregoing information is true and accurate to the best of my knowledge.

JEFFREY SLADE OPHEIKENS

SUBSCRIBED AND SWORN to before me
this 10th day of September, 2018.

NOTARY PUBLIC in
and for said County and State

TAMMY BURNETT
NOTARY PUBLIC • STATE of UTAH
COMMISSION NO. 698073
COMM. EXP. 12/14/2021

OPPS

CAMPBELL & WILLIAMS
DONALD J. CAMPBELL, ESQ. (1216)
djc@cwlawlv.com
SAMUEL R. MIRKOVICH, ESQ. (11662)
srm@cwlawlv.com
PHILIP R. ERWIN, ESQ. (11563)
pre@cwlawlv.com
700 South Seventh Street
Las Vegas, Nevada 89101
Telephone: (702) 382-5222
Facsimile: (702) 382-0540

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 HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an individual; R&O CONSTRUCTION COMPANY, INC. 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

PLAINTIFFS' OPPOSITION TO DEFENDANT R&O CONSTRUCTION COMPANY'S MOTION TO DISMISS AND THE OPHEIKENS DEFENDANTS' JOINDER THERETO

Hearing Date: October 10, 2018
Hearing Time: 9:00 a.m.

531

Plaintiffs, by and through their undersigned counsel, hereby submit the following Opposition to Defendant R&O Construction Company's Motion to Dismiss and the Opheikens Defendants' Joinder Thereto. This Opposition 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

The Motion to Dismiss filed by Defendant R&O Construction Company ("R&O") and the procedurally flawed "Joinder" filed by the Opheikens Defendants (referred to collectively with R&O as "Defendants") are an unabashed invitation for this Court to commit reversible error.[1] In their respective filings, Defendants repeatedly misstate Nevada law or flatly ask the Court to ignore binding precedent. Defendants likewise discard the procedural rules governing motions to dismiss under Rule 12(b)(5) and present misleading factual arguments based on evidence that are better suited to a motion for summary judgment. Incredibly, Defendants even go so far as to ask this Court to create new law by adopting the *Iqbal-Twombly* pleading standard employed by federal courts.

In short, it is clear that Defendants are so desperate to obtain an early dismissal of Plaintiffs' reverse veil-piercing claim that they are willing to do or say anything even if it causes the Court to

[1] Orluff Ophiekens ("Orluff"), Slade Opheikens ("Slade"), Chet Opheikens ("Chet") and Tom Welch (collectively referred to as the "Opheikens Defendants") filed their Answer to Plaintiffs' Third Amended Complaint ("TAC") on August 16, 2018. Hornbook law dictates that the Opheikens Defendants could not thereafter seek dismissal of Plaintiffs' reverse veil-piercing claim under NRCP 12(b)(5). *See, e.g.*, *Poole v. Life Ins. Co. of N. Am.*, 984 F.Supp.2d 1179, 1184-85 (M.D. Ala. 2013) (finding that defendant "forsook the right to assert the defense [of failure to state a claim upon which relief can be granted] in a motion to dismiss" where it filed an untimely joinder in another party's motion to dismiss after answering the complaint). The Court must, therefore, construe the Opheikens Defendants' untimely "Joinder" as a motion for judgment on the pleadings under NRCP 12(c). *See Drake v. Nelsen*, 2016 WL 2870675, at *2 (Nev. Ct. App. May 6, 2016) (construing untimely motion to dismiss as motion for judgment on the pleadings under NRCP 12(c)).

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

err. And make no mistake, Defendants have every reason to be concerned about what will happen if Plaintiffs' reverse veil-piercing claim is permitted to proceed to discovery and trial. Defendants are fully aware that each and every allegation underpinning Plaintiffs' reverse veil-piercing theory is already supported by documentary evidence and witness testimony. For that reason, Plaintiffs' reverse veil-piercing claim against Orluff and R&O is a meritorious legal theory under Nevada law; not some negotiating tactic or leverage point designed to extort a settlement.

On the latter point, Plaintiffs must address Defendants' tired narrative that Plaintiffs are somehow acting in bad faith by seeking to name R&O as a defendant with "deep-pockets." To be clear, the undersigned counsel has an ethical obligation to obtain the best possible result on behalf of Plaintiffs and, accordingly, will not apologize for vigorously representing Plaintiffs' interests by pleading any and all viable claims in this litigation. Moreover, Defendants would be well-served to remember that Plaintiffs are forced to pursue these claims because Defendants underinsured Cowabunga Bay to such a woeful extent that Leland's medical expenses dwarf the funds currently available for recovery.

The Court should not lose sight of the fact that the true victim in this case is the incapacitated eight-year-old boy who suffered devastating injuries as a result of the conscious decision by Henderson Water Park, LLC ("HWP") and the Individual Defendants to intentionally understaff the water park in violation of Nevada law so they could meet their onerous financial obligations. HWP and, in particular, the Individual Defendants (for the benefit of R&O) chose to elevate their own monetary interests over the safety of Leland and the general public, and their ongoing attempt to portray themselves as the targets of a shakedown is nothing short of appalling. With that in mind, Plaintiffs will now turn to the meritless legal arguments in R&O's Motion to Dismiss and the Opheikens Defendants' untimely Joinder thereto.

. . . . .

. . . . .

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

II. ARGUMENT

A. Legal Standard.

1. Motions to dimiss and for judgment on the pleadings under NRCP 12.

R&O's Motion to Dismiss is brought under NRCP 12(b)(5). Notwithstanding Defendants' request that this Court become the first tribunal in Nevada to adopt the *Iqbal-Twombly* pleading standard—which will be addressed in greater detail below—dismissal is permissible under NRCP 12(b)(5) "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Torres v. Nev. Direct Ins. Co.*, 131 Nev. Adv. Op. 54, 353 P.3d 1203, 1210 (2015) (quoting *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008)). In the context of a motion to dismiss, "all alleged facts in the complaint [are] presumed true and all inferences [are] drawn in favor of the complainant." *Id.* When a complaint is deficient, the proper remedy is leave to amend; not dismissal. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003).

Under NRCP 12(c), the Court may grant a motion for judgment on the pleadings—or, in this case, the Opheikens Defendants' so-called "Joinder"—when "the material facts of the case are not in dispute and the movant is entitled to judgment as a matter of law." *Sadler v. Pacificare of Nevada*, 130 Nev. 990, 340 P.3d 1264, 1266 (2014). "As with a dismissal for failure to state a claim, in reviewing a [motion for] judgment on the pleadings, [the Court] will accept the factual allegations in the complaint as true and draw all inferences in favor of the nonmoving party." *Id.*; *see also Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238 (1987) (A "motion for judgment on the pleadings has utility only when all material allegations of fact are admitted in the pleadings and only questions of law remain.").[2]

[2] R&O and the Opheikens Defendants improperly attached evidence outside of the pleadings as exhibits to their respective filings. Plaintiffs will address the effect of such evidence on the applicable legal standard below should the Court decide to consider it.

NRCP 8(a) provides that a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599, 584 P.2d 159, 160 (1978) ("Nevada is a notice-pleading jurisdiction and liberally construes the pleadings to place into issue matter which is fairly noticed to the adverse party[.]"). As a result, the rule of law in Nevada remains that "the pleading of conclusions, either of law or fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the claim." *Crucil v. Carson City*, 95 Nev. 583, 585, 600 P.2d 216, 217 (1979); *see also Hall v. SSF, Inc.*, 112 Nev. 1384, 1391, 930 P.2d 94,98 (1996) ("[A] complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought.").

2. The resolution of alter ego claims as a matter of law under NRCP 12.

Plaintiffs do not dispute the plain language of NRS 78.747(3) that "[t]he question of whether a stockholder, director or officer acts as the alter ego of a corporation must be determined by the court as a matter of law." That said, Plaintiffs strongly disagree that this statutory provision completely negates the role of the jury in resolving disputed factual issues. For example, the legislative history cited by R&O confirms that the Nevada Legislature did not intend to completely remove the jury from the adjudication of alter ego claims when it enacted NRS 78.747. *See* Mot., Ex. B at 9-10 ("As far as the liability provisions, [Assemblywoman Buckley] had lots of questions. ***In Section 1, where it said a court determined the issues, was it the intent to eliminate the right to a jury trial? Senator James said that was not the intent. Assemblywoman Buckley asked if it was the intent to take the decision away from the jury and place it in the hands of a judge. Senator James said S.B. 577 did not do that.***") (emphasis added).

As such, Plaintiffs submit that—as in any other case—the jury should resolve any factual disputes and, once those disputes are resolved, the Court should weigh the equities and determine as a matter of law whether the imposition of alter ego liability is warranted. But that is a debate for

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

trial and, irrespective of the ultimate fact-finder, Defendants' suggestion that "the alter ego allegation against R&O is particularly appropriate for disposition by this Court on a Rule 12(b)(5) motion" could not be farther from the truth in light of the highly fact-specific nature of the inquiry. *See, e.g.*, *LFC Mktg. Grp. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841, 847 (2000) ("We have emphasized [ ] that there is no litmus test for determining when the corporate fiction should be disregarded; the result depends on the circumstances of each case."); *Runvee, Inc. v. United States*, 2013 WL 1249602, at *16 (D. Nev. Mar. 26, 2013) ("Whether Plaintiff is the alter ego of Runvee Holdings is essentially a fact question."). Regardless, Plaintiffs easily carry their burden of alleging a cognizable claim for reverse veil-piercing under the alter ego docrine.

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

1. Defendants conflate the nature of Plaintiffs' alter ego claims in an effort to obfuscate the Court's analysis.

Plaintiffs will begin by addressing the Opheikens Defendants' argument that reverse veil-piercing under the alter ego doctrine is not an independent cause of action and, therefore, must be dismissed. To be clear, Plaintiffs are not taking this argument first due to the strength of the Opheikens Defendants' position. Rather, the Opheikens Defendants' argument about the labelling of Plaintiffs' reverse veil-piercing claim provides the best platform to clarify the record in light of Defendants' confused and misleading portrayal of Plaintiffs' alter ego theories. Put simply, the Court should not be swayed by Defendants' efforts to make Plaintiffs' alter ego claims appear far more complicated than they truly are.

R&O asserts that the Court must accept "a highly attenuated chain of alter ego findings—[HWP] to Double Ott to Orluff to The Opheikens Family Trust to R&O" to find that reverse veil-piercing is warranted in this case. *See* Mot. at 11. In opposing Plaintiffs' Motion for Leave to Amend, the Opheikens Defendants similarly argued that "the nexus between [HWP] and R&O is even more remote: [Henderson Water Park, LLC] – Double Ott – Orluff – family trust – R&O." *See* Opp. to Mot.

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

for Leave to Amend at 5 (on file). In making these erroneous representations to the Court, Defendants ignore that Plaintiffs have alleged two separate and distinct theories under the alter ego doctrine.

As this Court is aware, Plaintiffs originally sought to plead an alter ego claim against Henderson Water Park, LLC and its member-LLCs as a vehicle to obtain liability against the Individual Defendants. To succeed on this theory against the Opheikens family, Plaintiffs would need to establish the following chain of alter ego findings: Henderson Water Park, LLC – Double Ott Water Holdings LLC – the Opheikens family.[3] The Court denied Plaintiffs' request for leave to assert this alter ego theory on grounds that the alter ego doctrine does not apply to LLCs and subsequently dismissed the member-LLCs from the case. The Nevada Supreme Court granted Plaintiffs' Petition for Writ of Mandamus and the member-LLCs were re-named as alter-ego defendants only. *See Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court*, 405 P.3d 651 (Nev. 2017).

By virtue of that same writ of mandamus, Plaintiffs were likewise permitted to plead direct claims for negligence against the Individual Defendants, including Orluff. It is in this capacity that Plaintiffs are seeking to impose alter ego liability through a reverse veil-piercing theory and hold R&O liable for Orluff's negligent conduct as a Manager of Cowabunga Bay. As a result, Plaintiffs must only establish that Orluff is the alter ego of R&O to prevail on their reverse veil-piercing theory or, in Defendants' parlance, establish the following chain of alter ego findings: Orluff – R&O.[4] Indeed, R&O acknowledged as much in its Motion when it stated "[r]everse veil-piercing is a species of alter ego allegation, and accordingly ***the effort to hold R&O liable for Orluff Opheikens' alleged negligence must meet Nevada's statutory requirements for proof that R&O is the alter ego of***

[3] Similarly, to succeed on this theory against the Huish family, Plaintiffs would need to establish the following chain of alter ego findings: HWP – West Coast Water Parks LLC – the Huish family.

[4] Defendants' contention that Plaintiffs must somehow pierce the veil of the Opheikens Family Trust to obtain liability against R&O is wrong. As demonstrated below, ownership is not determinative of reverse veil-piercing under the alter ego doctrine in Nevada or any other jurisdiction. *See infra* at Section II.D.1.

Orluff." *See* Mot. at 5 (emphasis added). As such, the "highly attenuated chain of alter ego findings" described by Defendants is misdirection designed to confuse the Court's analysis.

2. The Opheikens Defendants' request for dismissal due to the labelling of Plaintiffs' reverse veil-piercing claim is baseless.

The Opheikens Defendants assert that Plaintiffs' reverse veil-piercing claim is "an untethered participle which should be dismissed because it simply is not a cause of action." *See* Joinder at 8. Setting aside that a "participle" is a grammatical term with no meaning in the law, Plaintiffs agree that 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* TAC 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, 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.[5] Again, R&O even recognized that fact when it acknowledged that Plaintiffs are seeking to hold R&O liable for Orluff's negligence. *See* Mot. at 5.

The Opheikens Defendants seemingly take issue with the fact that Plaintiffs pleaded their claim for reverse veil-piercing against R&O and Orluff as a separate cause of action.[6] While reverse veil-piercing under the alter ego doctrine may not be an independent cause of action, there is no dispute

[5] To that end, Plaintiffs agree 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.

[6] The Nevada Supreme Court and Court of Appeals frequently use the term "claim" when referring 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"); *Transfirst Grp., Inc. v. Magliarditi*, 2017 WL 2294288, at **2-3 (D. Nev. Aug. 2017) ("[T[he Nevada Supreme Court has referred to alter ego as a 'claim[.]'").

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

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. Int'l Refinery*, 402 B.R. 728, 751 (Bankr. W.D. La. 2008) ("As far as the applicable pleading standard, Plaintiffs' alter ego allegations are governed by the notice pleading standard of Rule 8(a)[.]") (applying alter ego doctrine under Nevada law).[7]

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

[7] "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, 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).

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

This Court should reach the same result. Plaintiffs pleaded reverse veil-piercing under the alter ego doctrine as required by NRCP 8, and predicated this derivative theory of liability on their pre-existing negligence claim against Orluff. That Plaintiffs identified reverse veil-piercing as a separate cause of action in their proposed TAC is inconsequential as the Nevada Supreme Court "has consistently analyzed a claim according to its substance, rather than its label." *Otak Nevada, L.L.C. v. Eighth Judicial Dist. Court*, 129 Nev. 799, 809, 312 P.3d 491, 498-99 (2013) (citing *Rolf Jenson Assocs. v. Eighth Judicial Dist Court*, 128 Nev. 441, 282 P.3d 743 (2012) and *Alsenz v. Clark Cnty. School Dist.*, 109 Nev. 1062, 1066, 864 P.2d 285, 288 (1993)).

C. Plaintiffs Are Clearly Entitled To Pursue A Claim For Reverse Veil-Piercing Against R&O Prior To The Entry Of Judgment Against Orluff.

As they did in response to Plaintiffs' Motion for Leave to Amend, Defendants attempt to manufacture a new element for reverse veil-piercing claims by arguing that the existence of an uncollectible judgment is a prerequisite under Nevada law. R&O takes a cautious approach in arguing that reverse veil-piercing is only available in post-judgment proceedings and, in a rare moment of candor, concedes that while "[n]o Nevada appellate court has ever permitted a reverse veil-piercing claim pre-judgment, no Nevada appellate court has ever had the opportunity to expressly reject such a claim either." *See* Mot. at 3-4. Unlike R&O, the Opheikens Defendants swing for the fences by arguing that the Nevada Supreme Court's opinion in *Loomis* created ***four*** new elements for reverse veil-piercing claims that are not present in traditional alter ego claims: (1) the plaintiff must be a judgment creditor, (2) the defendant must be a judgment debtor, (3) the judgment must be entered, and (4) the judgment must be uncollectible from the non-corporate defendant. *See* Joinder at 16.

This language is nowhere to be found in *Loomis* as the Nevada Supreme Court 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 demonstrate (i) influence and control, (ii) unity of ownership and interest, and (iii) that adherence to the corporate fiction would sanction a fraud or promote injustice).

It is undisputed by the parties that reverse veil-piercing is simply an offshoot of traditional veil-piercing under the alter ego doctrine. Indeed, the Nevada Supreme Court in *Loomis* adopted reverse veil-piercing as a viable claim for relief because the 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. The Opheikens Defendants find support for their position in the *Loomis* court's statement that "the 'reverse' piercing situation involves a ***creditor*** reaching assets of a corporation to satisfy the debt of a corporate insider based on a showing that the corporate entity is the alter ego of the individual." *Id.* (emphasis added). The Nevada Supreme Court, however, similarly described "the classic alter ego situation" as "a ***creditor*** reaching the personal assets of a controlling individual to satisfy a corporation's debt[.]" *Id.* (emphasis added).

The Nevada Supreme Court's use of the word "creditor" in *Loomis* when referring to traditional veil-piercing claims is particularly noteworthy because parties are regularly permitted to pursue such claims prior to the entry of judgment. To that end, the Court need not look any further than the history of this case as the Nevada Supreme Court already issued a writ of mandamus compelling the Court to allow Plaintiffs to bring alter ego claims against Henderson Water Park LLC, its member-LLCs and the Individual Defendants. *Gardner*, 405 P.3d at 655-57 and n. 1.[8] If Plaintiffs are permitted to pursue

[8] This fact alone refutes R&O's specious argument that "a claim for relief cannot be predicated on a theoretical fulfillment of conditions that could not be met, if at all, until after trial." *See* Mot. at 4. By R&O's flawed logic, Plaintiffs' traditional alter ego claim is also "predicated on a theoretical fulfillment of conditions that could not be met, if at all, until after trial"—*i.e.* the inability to collect on a potential judgment—yet the Nevada Supreme Court issued a writ of mandamus granting Plaintiffs the right to pursue such relief in this action.

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

traditional veil-piercing claims against the LLCs and Individual Defendants in this action prior to the entry of judgment, then it necessarily follows that Plaintiffs are entitled to bring a reverse veil-piercing claim against R&O and Orluff at the same time.

The weight of authority is in accord. "A movant may seek to pierce the veil as part of the initial complaint or after a judgment has been obtained and the movant discovers that the corporate shield may be vulnerable. This difference only affects the procedure of obtaining the relief and not the nature of the remedy." *In re Howland*, 516 B.R. 163, 169 n. 3 (Bankr. E.D. Ky. 2014), *aff'd*, 579 B.R. 411 (E.D. Ky. 2016), *aff'd*, 674 Fed. Appx. 482 (6th Cir. 2017).[9] For that reason, courts routinely allow plaintiffs to pursue reverse veil-piercing claims in the original complaint rather than after the entry of judgment. *See, e.g.*, *Allstate Ins. Co. v. TMR Medicabill Inc.*, 2000 WL 34011895, at *16 (E.D.N.Y. July 13, 2000) (entering pre-judgment writ of attachment against non-party corporations based on reverse veil-piercing theory premised on RICO and fraud claims asserted in original complaint); *McCleskey v. David Boat Works, Inc.*, 225 F.3d 654, at **3-4 (4th Cir. 2000) (reversing entry of summary judgment on reverse veil-piercing claim premised on tort and contract claims asserted in the original complaint); *Smith v. Carolina Med. Ctr.*, 274 F.Supp.3d 300, 327-28 (E.D. Pa. 2017) (denying motion to dismiss reverse veil-piercing claim premised on tort claims asserted in the original complaint); *Wilson v. Davis*, 305 S.W.3d 57, 68-72 (Tex. Ct. App. 2009) (reversing grant of summary judgment on reverse veil-piercing claim premised on negligence claims asserted in the original complaint); *cf. M.J. v. Wisan*, 371 P.3d 21, 36 (Utah 2016) (adopting reverse veil-piercing as a viable theory in connection with tort claims brought in original complaint but concluding that such relief was not necessary under the factual circumstances).

[9] Plaintiffs do not dispute that *In re Howland* addressed reverse veil-piercing claims arising in the post-judgment context. That said, the court unequivocally stated that a plaintiff is permitted to pursue a reverse veil-piercing theory prior to the entry of judgment as part of the original complaint. This is a far clearer judicial edict on this issue than anything Defendants have cited to the Court despite having multiple bites at the apple.

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

Noticeably absent from the Opheikens Defendants' papers is any attempt to distinguish the foregoing authority even though Plaintiffs previously cited it when seeking leave to file the TAC. The Opheikens Defendants' silence is particularly conspicuous in light of their counsel's strident commentary to this Court during the July 25, 2018 hearing on Plaintiffs' Motion for Leave to Amend. More specifically, the Opheikens Defendants' counsel made the following representations to the Court regarding Plaintiffs' supporting legal authority:

> Counsel: ***They did not cite for you a single case where a reverse pierce theory of recovery has ever been permitted in the absence of a judgment debtor, judgment creditor, tax case, or confessed judgment, not one.***
>
> *Smith v. Carolina Medical Center*, that's pursuant to a plea agreement. *McCleskey v. David Boat Works*, judgment creditor/debtor. *Allstate v. TMR Medicabill* [sic], post-plea allocution. So its pursuant to an agreement that we owe money.

See Hr'g Tr. at 7:19-8:3 (emphasis added).

In anticipation that the Opheikens Defendants will repeat these same misleading arguments in reply, Plaintiffs will address them here. At the outset, Plaintiffs would simply point out that counsel failed to mention the *Wilson* case, which is understandable since it directly contradicts the false assertion that Plaintiffs did not cite a single pre-judgment case involving a claim for reverse veil-piercing. In *Wilson*, the Texas Court of Appeals reversed the trial court's entry of summary judgment on the plaintiffs' reverse veil-piercing claim that was premised on tort claims for negligence and wrongful death brought in the initial complaint that were also dismissed. 305 S.W.3d at 68-72. Suffice it to say, the *Wilson* plaintiffs could not be judgment creditors when the Texas Court of Appeals reversed the trial court's entry of summary judgment on their tort claims at the same time as their reverse veil-piercing claims.

The Opheikens Defendants' counsel's representation that the plaintiffs' reverse veil-piercing claims in *Allstate* were founded on a "post-plea allocution" is another falsehood. While the court referenced the defendants' plea allocutions, it only did so because its "findings with respect to disputed

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 South Seventh Street, Las Vegas, Nevada 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

facts [were] based on admissions by defendants [ ] in their plea allocutions [ ] in a related criminal prosecution." 2000 WL 34011895, at *2. And it should go without saying that the plaintiffs did not have an existing judgment against the defendants when the *Allstate* court entered a ***pre-judgment*** writ of attachment based on the plaintiffs' claim "that this relief [was] necessary to prevent defendants from continuing to liquidate, transfer or otherwise dispose of their assets and real property with the intent of frustrating ***the enforcement of any judgment that plaintiffs might obtain***." *Id.* at *12 (emphasis added).

Turning to *McCleskey*, the Opheikens Defendants' counsel correctly stated that a judgment creditor/debtor relationship existed when the Fourth Circuit Court of Appeals reversed the district court's entry of summary judgment on the plaintiff's reverse veil-piercing claims. But the judgment creditor/debtor relationship only existed at that time because the plaintiff had proceeded to trial, obtained a verdict on his remaining breach of contract claim, and appealed the district court's entry of summary judgment on his reverse veil-piercing claim. The Fourth Circuit Court of Appeals stated that "the evidence in support of piercing the corporate veils was sufficient to withstand summary judgment, and we therefore vacate the district court's grant of summary judgment to the defendants on this claim." *McCleskey*, 225 F.3d 654, at *3. Put another way, the Fourth Circuit Court of Appeals ruled that the district court committed reversible error by refusing to allow the plaintiff to proceed with his reverse veil-piercing claim at the same time as his underlying tort and contract claims.

As to *Smith*, the term "plea agreement" does not even appear in the court's opinion. The only conceivable equivalent is that the primary defendant was convicted of Medicaid fraud approximately seventeen years before the *Smith* court rendered its decision, and the defendant's continued participation in Medicare and Medicaid over the next decade formed the basis of the Government's civil claims against him and his co-defendants. 274 F.Supp.3d at 306. This conviction certainly did not create a judgment creditor/debtor relationship considering the court's opinion from *Smith* addressed the sufficiency of the Government's substantive causes of action as

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

well as its reverse veil-piercing claims under FRCP 12(b)(6). Obviously, if the Government had a pre-existing judgment against the defendants arising out of a seventeen-year-old conviction, there would be no need to file a new lawsuit that wrapped up tort claims, False Claims Act claims, and reverse veil-piercing claims in one complaint.

As evidenced by the foregoing, the Opheikens Defendants will say anything to obtain an early dismissal of Plaintiffs' reverse veil-piercing claim against Orluff and R&O. Based on their counsel's outright mischaracterizations in open court, the Court should view the Opheikens Defendants' arguments with extreme skepticism. Here, it is contrary to Nevada law and simply illogical to claim that Plaintiffs lack standing to pursue a reverse veil-piercing claim until they proceed to trial against Orluff, obtain a judgment against him, and unsuccessfully attempt to collect on that judgment for some indeterminate amount of time.

D. Plaintiffs Are Entitled To Pursue A Reverse Veil-Piercing Claim Even If Orluff Has No Ownership Stake In The Company And, Regardless, There Is A Genuine Issue Of Material Fact Concerning Orluff's Ownership Interest In R&O.

R&O's primary argument in favor of dismissal is that Plaintiffs' TAC "contains no coherent allegation that Orluff Opheikens owns a single share of R&O. Therefore, R&O cannot be Orluff's alter ego because the [TAC] fails as a matter of law to allege the required unity of ownership." *See* Mot. at 7. In other words, R&O asserts that Nevada law dictates that an individual cannot be the subject of a reverse veil-piercing claim unless he or she personally owns shares in the corporate entity. R&O has the audacity to advance this position despite the fact that the *Loomis* court unequivocally rejected the same argument and held that "the absence of corporate ownership is not automatically a controlling event. Instead, the circumstances of each case and the interests of justice should control." *Loomis*, 116 Nev. at 904-05, 8 P.3d at 847. Once again, Defendants are asking this Court to deviate from settled Nevada law.

Here, Plaintiffs alleged that Orluff owns approximately eighty-five percent (85%) of the outstanding shares in R&O through his family trust, which was based on the deposition testimony of

Slade Opheikens. *See* TAC at ¶ 14 (on file). R&O submits that the existence of this family trust divests Orluff of any personal ownership in R&O, and even goes so far as to attach an incomplete version of the trust agreement as evidence of its terms. While Plaintiffs obviously dispute that a trust can insulate a party from alter ego liability, it is unnecessary to address R&O's attempt to manufacture a loophole at this stage as Orluff's ownership of R&O—personally or through his family trust—has no bearing the Court's analysis of the instant Motion.[10]

Even if Orluff did not personally own a single share of stock during the relevant timeframe—and evidence produced after the TAC was filed shows that not to be the case—Nevada law is clear that the absence of corporate ownership will not defeat a traditional or reverse veil-piercing claim under the alter ego doctrine. Moreover, to the extent the Court is inclined to consider the Opheikens Family Trust agreement, R&O's improper submission of this document converts the instant Motion to a motion for summary judgment under NRCP 56, and a genuine issue of material fact indisputably exists as to Orluff's ownership interest. Plaintiffs will address each point in turn.

1. Corporate ownership is not a prerequisite to a viable alter ego claim under Nevada law.

As stated previously, the *Loomis* court expressly ruled on this issue and rejected R&O's argument that the absence of corporate ownership negates any finding of "unity of interest and ownership." *Loomis*, 116 Nev. at 904-05, 8 P.3d at 847. R&O acknowledges this binding Nevada precedent, but advances the novel argument that the Nevada Legislature enacted NRS 78.747 "in response" to the *Loomis* decision in order to codify the requirement of corporate ownership. *See* Mot. at 6. R&O then engages in a meaningless analysis of the legislative history behind NRS 78.747 in an effort to convince this Court to depart from well-settled Nevada law. This is pure sophistry.

[10] Accepting R&O's argument would eviscerate the alter ego doctrine as it exists in Nevada. If an individual could defeat the application of the alter ego doctrine by merely placing his or her corporate ownership interest in a trust, then it would render NRS 78.747 and the longstanding body of Nevada jurisprudence applying the alter ego doctrine meaningless. That cannot be the law.

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

In point of fact, R&O fails to identify a single passage from the legislative history that supports its interpretation of NRS 78.747, *i.e.*, that ownership of corporate stock is now a prerequisite to alter ego liability. *See* Mot. at 5-9. Nor can it as such language is nowhere to be found in the legislative history. To be sure, R&O cannot seriously contend that the Nevada Legislature sought to alter the Nevada Supreme Court's jurisprudence on the alter ego doctrine when the "unity of interest and ownership" language is identical in *Loomis* and NRS 78.747. *Compare Loomis*, 116 Nev. at 904, 8 P.3d at 846-47 ("[T]here must be ***such unity of ownership and interest*** that one is inseparable from the other") *with* NRS 78.747(2)(b) ("There is ***such unity of interest and ownership*** that the corporation and the stockholder, director or officer are inseparable from each other.") (emphases added). R&O's argument relies on the codification of the "unity of interest and ownership element" in NRS 78.747, and that language was taken directly from Nevada's longstanding common law test applied in *Loomis*. Accordingly, the Court should reject R&O's preposterous claim that *Loomis* was superseded by statute such that an ownership interest is now a prerequisite to alter ego liability in the state of Nevada.

The Court need not take Plaintiffs' word for it as multiple other courts considering this issue have reached the same conclusion following the enactment of NRS 78.747. For example, the Honorable Lloyd D. George writing on behalf of the United States District Court for the District of Nevada rejected the same argument advanced by R&O based on the plain language of NRS 78.747 and the Nevada Supreme Court's holding in *Loomis* as follows:

> Tipton argues that he has no liability under Nevada's alter ego doctrine because he had no ownership interest in the entities at the time or after plaintiffs and SCGC entered into the contract upon which the judgment underlying the present action was based. However, Nevada's 2001 codification of the alter ego liability standard cannot be so interpreted. NRS 78.747 enumerates three classes of individuals who may act as the alter ego of a corporation: stockholders, directors and officers. That directors and officers need not be stockholders to be alter egos in compelled by a plain reading of the statute. Moreover, even before NRS 78.747 was enacted, the Nevada Supreme Court ruled that "although ownership of corporate shares is a strong factor favoring unity of ownership and interest, the absence of corporate ownership is not automatically a controlling event. Instead, the circumstances of each case and the interests of justice control." *LFC Marketing Group v. Loomis*, 116 Nev. 896, 905, 8 P.3d 841, 847 (2000).

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

Stanley v. Jecklin, 2007 WL 923836, at *1 (D. Nev. March 23, 2007); *see also Clapper v. Am. Realty Invs., Inc.*, 2018 WL 3868703, at *21-22 (N.D. Tex. Aug. 14, 2018) ("Phillips' lack of ownership and sole control of ARI and EQK does not change this result. The absence of corporate ownership is not dispositive of an alter ego claim.") (applying Nevada law and citing *Loomis*); *United States v. Cohen*, 2011 WL 4946590, at **11-12 (C.D. Ill. Oct. 18, 2011) (denying summary judgment on grounds that "a fact-finder could conclude there was a unity of interest and ownership" even though defendant did not own any stock in corporation) (applying Nevada law and citing *Loomis*).[11]

The Court should reject R&O's unfounded position as it is contradicted by the plain language of NRS 78.747 and binding precedent from the Nevada Supreme Court in *Loomis*. Assuming *arguendo* that Orluff did not own a single share of R&O during the relevant time period—a dubious proposition at best—Plaintiffs would still be entitled to pursue their reverse veil-piercing claim under Nevada law. That R&O would urge the Court to adopt a contrary rule in the face of such abundant authority speaks volumes about its desperation to prevent Plaintiffs from pursuing this meritorious claim.

2. Even if the nature and extent of Orluff's ownership stake in R&O was determinative of Plaintiffs' reverse veil-piercing claim—and it is not—a genuine issue of material fact exists to defeat summary judgment.

R&O attached the Opheikens Family Trust agreement to its Motion on grounds that "this document is 'incorporated by reference within the TAC due to allegations that can only be understood by reference to the document itself, and because these conclusions are 'integral to the [alter ego] claim,' it can be considered by this Court under Rule 12(b)(5) without triggering conversion to a motion under Rule 56. *See* Mot. at 9. This is utter nonsense. Notably, R&O cited, but did not address *Baxter v.*

[11] Nevada law is not unique in this regard. *See, e.g.*, *Buckley v. Abuzir*, 8 N.E. 3d 1166 (Ill. Ct. App. 2014) (collecting cases from dozens of jurisdictions including Nevada and concluding that "the weight of authority supports the conclusion that lack of shareholder status [ ] does not preclude veil piercing.").

Dignity Health, 357 P.3d 927, 930 (Nev. 2015), which sets forth the appropriate legal standard to determine whether a document outside of the pleadings may be considered on a motion to dismiss without conversion to a motion for summary judgment. A cursory review of this test demonstrates that R&O's reliance on the Opheikens Family Trust agreement requires conversion if the Court chooses to consider the document.

In *Baxter*, the Nevada Supreme Court stated that "in evaluating a motion to dismiss, courts primarily focus on the allegations in the complaint. But the court is not limited to the four corners of the complaint." *Id.* at 930. "A court may also consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *Id.* First, Plaintiffs' TAC did not refer to the trust agreement or rely on its terms; rather, Plaintiffs merely stated that Orluff owned a majority stake in R&O through his family trust. Second, the trust document is not central to Plaintiffs' reverse veil-piercing claim as R&O can be held liable for reverse veil-piercing even if Orluff does not own a single share of stock. *See supra* at Section II.D.1. Third, Plaintiffs absolutely question the authenticity of the trust document since it has never been produced in this litigation and is obviously incomplete.[12] R&O's attachment of the Opheikens Family Trust agreement is clearly barred by *Baxter* unless the instant Motion is converted to a motion for summary judgment under NRCP 56.

If the Court nonetheless considers the Opheikens Family Trust agreement, then it must also accept Plaintiffs' evidence on the issue of Orluff's ownership interest in R&O. In that regard, Plaintiffs

[12] R&O refers to Plaintiffs' allegations about the trust as "muddled" because they did not make allegations "as to the identity of the grantor, the trustee, or the beneficiaries." *See* Mot. at 8-9. While this information is entirely inconsequential to Plaintiffs' reverse veil-piercing claim, the allegations in the TAC are based on the limited discovery conducted to date on this issue, *i.e.*, the depositions of Orluff, Slade and Tom Welch. As such, it is patently absurd for R&O to claim that Plaintiffs "left their allegations concerning the Opheikens Family Trust intentionally vague" when Defendants (including R&O) are well aware that the trust has never been the subject of discovery in this action. *See* Mot. at 8. If anything, R&O's ridiculous assertions demonstrate why Plaintiffs are entitled to conduct discovery on their reverse veil-piercing claim.

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

submit e-mail correspondence between R&O's Chief Financial Officer, Charlie Auger, and the Bank of Utah wherein Mr. Auger represented that Orluff ***personally*** owned 21.28% of the outstanding shares in R&O in early 2014. *See* Exhibit "1," E-mail Correspondence dated February 24, 2014.[13] Importantly, Mr. Auger's e-mail postdates the creation of the Opheikens Family Trust by approximately fourteen (14) months as evidenced by the fact the trust also held 19.32% of the outstanding shares in R&O. This documentary evidence is clearly sufficient to generate a genuine issue of material fact especially when the communication falls squarely within the relevant time period of the allegations contained in the TAC. *See* TAC at ¶¶ 22-36, 47, 72-81 (detailing events between September 2012 and December 2014). As such, it appears that R&O's attachment of the Opheikens Family Trust agreement was not only procedurally improper, but also designed to mislead the Court as it is readily apparent that Orluff personally owned shares in R&O during the relevant timeframe.

E. Plaintiffs Adequately Pleaded That Adherence To The Corporate Form In This Case Would Promote Manifest Injustice.

R&O's next line of attack against Plaintiffs' reverse veil-piercing claim is to argue that they failed to use the magic word "manifest" when pleading the "manifest injustice" element. *See* Mot. at 9-12. But again, the Court should look past word choice to the substance of Plaintiffs' allegations. *See Otak Nevada,* 129 Nev. at 809, 312 P.3d at 498-99. Because R&O's hyper-technical argument elevates form over substance, Plaintiffs will focus on their allegations supporting this element as they are clearly sufficient to pass muster under Nevada's pleading standard.[14]

To that end, Plaintiffs must first address R&O's mischaracterization of Nevada's notice-pleading standard. Specifically, R&O (incorrectly) claims that Plaintiffs made "only the conclusory

---

[13] The Bank of Utah produced this document pursuant to a third-party subpoena after Plaintiffs moved for leave to file the TAC.

[14] Should His Honor deem it necessary for Plaintiffs to include the word "manifest" in their TAC, the Court should grant leave to amend so Plaintiffs can add that specific term to their allegations supporting this element. *See Cohen*, 119 Nev. at 22, 62 P.3d at 734.

and facially-insufficient allegation that 'adherence to the corporate fiction of R&O [would] . . . promote injustice." *See* Mot. at 10. According to R&O, the Court "is in no way required to accept [this allegation] as true" because it is a conclusion of law. *Id.* In support of this representation, R&O cites *Allen v. United States*, 964 F.Supp.2d 1239, 2151 (D. Nev. 2013), which is a federal case applying the *Iqbal-Twombly* pleading standard. That is not the law in Nevada. *See infra* at Section II.G.

In reality, Nevada law provides that "the pleading of conclusions, either of law or fact, is sufficient so long as the pleading gives fair notice of the nature and basis of the claim." *Crucil*, 95 Nev. at 585, 600 P.2d at 217. For that reason, the Nevada Supreme Court allowed Plaintiffs to proceed with their traditional alter ego claim in this case even though they pleaded mere conclusions of both fact and law. *See* TAC at ¶ 16. The Court's inquiry should end there as a conclusory allegation of injustice is sufficient to provide notice of Plaintiffs' reverse veil-piercing claim under Nevada's existing pleading standard.

Plaintiffs, however, did not limit their pleading of this element to a mere conclusion of law nor was it solely based on the fact that any potential judgment in this action will be uncollectible. Plaintiffs expressly pleaded the manifest injustice element as follows:

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

See TAC at ¶ 79.

R&O makes much of Orluff's "commendable business decision" to save R&O from "economic calamity" and assume a management role in Cowabunga Bay for the purpose of making R&O whole. *See* Mot. at 2-3. Notwithstanding that this "economic calamity" was the result of R&O's

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

own missteps, Orluff's plan to salvage the company's disastrous project at Cowabunga Bay allowed R&O to obtain the financial benefits of Orluff's and the other Individual Defendants' gross mismanagement of the water park that endangered public safety and resulted in Leland's devastating injuries while avoiding any liability. Indeed, Plaintiffs' corresponding allegation—which is supported by documentary evidence and testimony—speaks for itself:

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

See TAC at ¶ 47. Based on these allegations, there can be no doubt that adherence to the corporate form of R&O would promote manifest injustice.

F. The Mere Existence Of Other Shareholders Or Creditors Does Not Require The Dismissal Of Plaintiffs' Reverse Veil-Piercing Claim.

In the July 25, 2018 hearing, the Opheikens Defendants' counsel promised to "educate" Plaintiffs on the law governing reverse veil-piercing claims; he did not disappoint. *See* 07/25/2018 Hr'g Tr. at 13:10-12. There is just one problem with the Opheikens Defendants' rambling survey of reverse veil-piercing cases from around the country. *See* Joinder at 9-15. It focuses almost entirely on the law of states that, unlike Nevada, do not recognize reverse veil-piercing under the alter ego doctrine as a viable claim for relief. *See, e.g.*, *Postal Instant Press, Inc. v. Kaswa Corp.*, 77 Cal.Rptr.3d 96 (Cal. Ct. App. 2008) (rejecting reverse veil-piercing as a matter of California law); *Acree v. McMahan*, 585 S.E.2d 873 (Ga. 2003) (rejecting reverse veil-piercing as a matter of Georgia law); *Comm'r of Envtl.*

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

Prot. v. State Five Indus. Park, 37 A.3d 724 (Conn. 2012) (declining to adopt reverse veil-piercing as a viable theory under Connecticut law and determining it would not apply in any event); *Floyd v. I.R.S.*, 151 F.3d 1295 (10th Cir. 1995) (finding that Kansas law does not support the application of reverse veil-piercing).

While the Opheikens Defendants may wish that Nevada followed the same reasoning as California and these other jurisdictions, this State indisputably recognizes reverse veil-piercing as a valid claim for relief because it shares the same goal as traditional piercing of "preventing abuse of the corporate form." *Loomis*, 116 Nev. at 902-04, 8 P.3d at 845-46 (adopting reverse veil-piercing and noting that "most courts considering the issue have allowed such piercing."). Because the case law cited in the Opheikens Defendants' critique of reverse veil-piercing is inapposite on its face, Plaintiffs will not waste the Court's time by addressing it further.

The upshot of the Opheikens Defendants' argument appears to be that the Court may not impose reverse veil-piercing under the alter ego doctrine if R&O has other shareholders or pre-existing creditors who might be prejudiced. *See* Joinder at 14-15. At the outset, the potential effect on other shareholders and creditors is not an element of a reverse veil-piercing claim that must be pleaded in the complaint. NRS 78.747(2); *Loomis*, 116 Nev. at 904, 8 P.3d at 847 (setting forth elements of reverse veil-piercing claim under the alter ego doctrine). Rather, the Nevada Supreme Court stated that the presence of other shareholders and creditors is an "equit[y] to be considered in the reverse pierce situation." *Loomis*, 116 Nev. at 905, 8 P.3d at 847.

Irrespective of whether this equitable concern must be pleaded, the mere existence of other shareholders or creditors does not automatically preclude the application of reverse veil-piercing. *Id.* at 905, 8 P.3d at 847 (finding that the sole shareholder of corporation would not be harmed by the reverse pierce). To the contrary, the Court's analysis focuses on whether such shareholders or creditors will be prejudiced, which is obviously a factual determination that is premature on a motion to dismiss

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

under NRCP 12(b)(5). *Id.*[15] Then, if the other shareholders and creditors will suffer prejudice, the Court must determine whether such individuals and/or entities are "innocent." *Id.* Here, Plaintiffs expressly addressed this issue in their TAC and explained why the other shareholders of R&O cannot be deemed "innocent":

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

See TAC at ¶ 79.[16]

The Opheikens Defendants' supporting authority demonstrates that these allegations, when taken as true, are sufficient to prove that the other shareholders in R&O are not "innocent." For example, the court in *State Five* found that the "passive minority owners" were "innocent" because they had "no real involvement" in the business. 37 A.3d at 734-735. Similarly, in *Standage v.*

---

[15] The Opheikens Defendants prove Plaintiffs' point by improperly attaching evidence outside of the pleadings in form of a sworn affidavit from Slade that vaguely describes the shareholders and creditors of R&O. Under *Baxter*, the Court may not consider this evidence without converting the "Joinder" to a motion for summary judgment. *See supra* at Section II.D.2. If the Court is inclined to consider this extraneous evidence, Plaintiffs request leave to seek relief under NRCP 56(f) to conduct discovery on any potential prejudice to R&O's shareholders and creditors.

[16] The issue of R&O's innocent creditors illustrates why this equitable consideration is not an element of a reverse veil-piercing claim that must be pleaded. While Plaintiffs were able to address the impact on other shareholders based on prior discovery, Plaintiffs have no knowledge of R&O's creditors. Moreover, the potential impact on such creditors would necessarily be premised on R&O's financial situation, which has not been the subject of discovery. As a result, to the extent this equitable consideration even needs to be pleaded, Plaintiffs' general allegation that reverse veil-piercing will not harm the rights of innocent creditors is sufficient under NRCP 8. *Nutton v. Sunset Station*, 131 Nev. Op. 34, 357 P.3d 966, 974 (Ct. App. 2015) ("Nevada is a 'notice pleading' state, which means that the ultimate facts alleged within the pleadings need not be cited with particularity [ ], much less supported by citations to evidence and testimony within the pleading.").

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

Standage, the court determined that the other shareholder was not culpable because "[she] was not a party to the business decisions" that resulted in the reverse pierce. 711 P.2d 612, 615 (Ariz. Ct. App. 1985). These facts are diametrically opposed to what Plaintiffs have alleged here as the other shareholders are executives with R&O and members of the Board of Directors. *See* TAC at ¶ 79. In that regard, the minority shareholders voted for and benefitted from Orluff's decision to personally inject himself into the Cowabunga Bay project so R&O could recover its construction costs and pay its subcontractors. As a result, these shareholders cannot be considered "innocent." *See Sweeney, Cohn, Stahl & Vaccaro v. Kane*, 773 N.Y.S.2d 420, 425-26 (App. Div. 2004) (finding shareholder was not innocent where he participated and benefitted from the improper use of the corporate form).

To summarize, prejudice to innocent shareholders and creditors is not an element of a reverse veil-piercing claim that must be pleaded in a complaint. Rather, it is an equitable consideration that the Court must take into account before imposing alter ego liability against Orluff and R&O once Plaintiffs have met their burden under NRS 78.747 and *Loomis*. Nevertheless, even if this equitable consideration is a formal element of Plaintiffs' claim for relief, they have adequately pleaded it here under NRCP 8.

G. The Court Should Not Create New Law At Defendants' Request Although Plaintiffs' Reverse Veil Piercing Claim Survives Under *Iqbal-Twombly* Or Any Other Pleading Standard.

In a last-ditch effort to obtain dismissal, Defendants urge the Court to adopt the *Iqbal-Twombly* pleading standard employed by federal courts. Respectfully, this Court's duty is to apply Nevada law as it exists today; not as it may develop in the appellate courts at some undetermined point in the future. In that regard, Supreme Court Justice Kristina Pickering and Court of Appeals Judge Jerry Tao have each observed within the last year that Nevada has not adopted the *Iqbal-Twombly* pleading standard. *See Dezzani v. Kern & Assoc., Ltd.*, 134 Nev. Adv. Op. 9, 412 P.3d 56, 66 (2018) ("Nevada has not adopted the federal 'plausability' standard for assessing a complaint's sufficiency[.]") (Pickering, J., dissenting); *MG & S Enter., LLC v. Travelers Cas. Ins. Co. of Am.*, 2017 WL 4480776, at *7 (Nev. Ct.

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

App. Sept. 29, 2017) ("Nevada hasn't adopted the *Twombly/Iqbal* doctrine, at least not yet."). Given that Nevada's appellate courts passed on the opportunity to adopt *Iqbal-Twombly* at least twice within the last year, it stands to reason that this Court should not do so here.[17] That Defendants would even advance this argument is a telling admission that the Motion should be denied.

Here, Plaintiffs' TAC easily alleges sufficient facts to plead a reverse veil-piercing claim under any pleading standard, including *Iqbal-Twombly*. *See* TAC at ¶¶ 22-36, 47, 72-81. This is especially true in light of the fact that the generalized pleading of Plaintiffs' traditional veil-piercing claim was already approved by the Nevada Supreme Court. To that end, Defendants do not contend that Plaintiffs failed to plead the general elements of a reverse veil-piercing claim as set forth by the Nevada Supreme Court in *Loomis*. Defendants' only substantive critique of Plaintiffs' pleading is that they did not adequately allege "manifest injustice," *see* Mot. at 14-15; Joinder at 19, and Plaintiffs conclusively refuted that argument. *See supra* at Section II.E.

Defendants will be permitted to present their defense to the merits of Plaintiffs' reverse veil-piercing claim at the appropriate time. There is absolutely no basis to grant dismissal under NRCP 12(b)(5) or 12(c).

. . . . .

. . . . .

. . . . .

[17] Plaintiffs do not take a position on whether the Nevada Supreme Court should ultimately adopt the *Iqbal-Twombly* pleading standard. That said, numerous states have declined to adopt the heightened pleading standard employed by federal courts. *See, e.g.*, *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011) (declining to adopt *Iqbal-Twombly* pleading standard); *Cent. Mortg. Co. v. Morgan Stanley Capital Holdings LLC*, 27 A.3d 531 (Del. 2011) (same); *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861 (Wash. 2010) (same); *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344 (Ariz. 2008) (same); *Colby v. Umbrella, Inc.*, 955 A.2d 1082 (Vt. 2008) (same); *Walsh v. U.S. Bank, N.A.*, 851 N.E.2d 598 (Minn. 2014) (same); *Highmark W. Virginia*, 655 S.E.2d 509 (W. Va. 2007) (declining to adopt *Twombly*). The proposition that Nevada will inevitably adopt *Iqbal-Twombly*—even if the proposed amendments to the Nevada Rules of Civil Procedures are ultimately approved—is questionable at best.

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny Defendant R&O Construction Company's Motion to Dismiss and the Opheikens Defendants' Joinder Thereto in their entirety.

DATED this 20th day of September, 2018.

CAMPBELL AND WILLIAMS

By /s/ ***Donald J. Campbell***
Donald J. Campbell, Esq. (1216)
Samuel R. Mirkovich, Esq. (11662)
Philip R. Erwin, Esq. (11563)
700 South Seventh Street
Las Vegas, Nevada 89101

Attorneys for Plaintiffs

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CAMPBELL & WILLIAMS
ATTORNEYS AT LAW
700 SOUTH SEVENTH STREET, LAS VEGAS, NEVADA 89101
Phone: 702.382.5222 • Fax: 702.382.0540
www.campbellandwilliams.com

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 20th day of September, 2018 I caused the foregoing document entitled **Plaintiffs' Opposition to Defendant R&O Construction Company's Motion to Dismiss and the Opheikens Defendants' Joinder Thereto** 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/ ***John Y. Chong***
An Employee of Campbell & Williams

EXHIBIT 1

From:	Bart Tucker <btucker@bankofutah.com>
Sent time:	02/25/2014 01:33:41 PM
To:	Charlie Auger <charliea@randoco.com>
Cc:	Slade Opheikens <slade@randoco.com>
Subject:	RE: R&O Ownership

Thanks Charlie!

T. Bart Tucker| AVP/CRM Relationship Manager | **Bank of Utah**
2605 Washington Blvd. | Ogden, UT 84401
Direct line: 801.409.5215 | ***fax:*** 801.781.2727 | ***cell:*** 801.391.4547
--

From: Charlie Auger [mailto:charliea@randoco.com]
Sent: Tuesday, February 25, 2014 12:22 PM
To: Bart Tucker
Cc: Slade Opheikens
Subject: R&O Ownership

Bart,

Ownership of R&O is as follows:

Orluff Opheikens	21.28%
The Opheikens Family Trust	19.32%
Slade Opheikens	25.61%
Chet Opheikens	15.90%
Frank McDonough	13.64%
Dale Campbell	1.01%
Charles Auger	.94%
Rick Zampedri	.91%
Tim Gladwell	.91%
Rowdy Irick	.48%

Charlie Auger, CPA
R&O Construction
CFO
801-627-1403 Office
801-337-6380 Direct
801-399-1480 Fax

RIS

Karen Porter
Nevada Bar No. 13099
Brett Godfrey (Pending *Pro Hac Vice*)
Jeffrey Vail (Pending *Pro Hac Vice*)
GODFREY JOHNSON
9557 South Kingston Court
Englewood, Colorado 80112
Telephone: 303-228-0700
Facsimile: 303-228-0701

John E. Gormley
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorneys for Defendant,
R&O Construction, Inc.

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 HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an individual; R&O CONSTRUCTION COMPANY, a Utah corporation; DOES I through X, inclusive; ROE

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

DEFENDANT R&O'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Hearing Date: October 10, 2018

Hearing Time: 9:00 a.m.

CORPORATIONS I through X, inclusive, and ROE LIMITED LIABILITY COMPANY I through X, inclusive,

Defendants.

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

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

COMES NOW, Defendant R & O Construction, Inc. ("R&O") by and through its undersigned counsel, and hereby files its Reply ("Reply") in Support of Motion to Dismiss Plaintiffs' Sole Claim Against R&O ("Motion"), and in support thereof states as follows:

I. INTRODUCTION

Plaintiffs' Opposition to R&O's Motion ("Opposition") raises a variety of distractions and straw-man arguments while carefully sidestepping the two key arguments for dismissal presented by R&O: (1) Nevada law requires a pleading of unity of ownership between R&O and Orluff Opheikens for any *alter ego* claim to proceed, and (2) Nevada's entire system of *limited liability* demands more than conclusory allegations of injustice to permit the extraordinary remedy of piercing the corporate veil. Indeed, despite Plaintiffs' claims, it is not R&O's arguments but rather those of Plaintiffs that would usher in a dangerous sea-change in Nevada's legal landscape. If this Court were to accept Plaintiffs' proposed standard—that reverse piercing is available pre-judgment, regardless of whether there is any allegation of unity of ownership, and without anything more than a conclusory statement as to the issue of injustice—then any meaningful protections offered by a

'limited liability' entity structure in Nevada would evaporate. Despite the clear intent of the legislature and established vector of case law, Nevada's current traction toward diversifying its economy through its burgeoning position as the 'Delaware of the West' would entirely unravel.

II. ARGUMENT

A. Plaintiffs Do Not Address The Required Unity Of Ownership Between Orluff Opheikens and R&O

Plaintiffs spend much of their Opposition attempting to thread the needle between the pillars of *alter ego* law in Nevada. While admitting that they must show "unity of ownership and interest" between Orluff and R&O, Opposition at 11, they then claim that "[c]orporate ownership is not a prerequisite to a viable alter ego claim under Nevada law," *id*. at 16, entirely ignoring that the Nevada legislature intentionally developed its *alter ego* statute to supersede the very case law they cite.

Initially, Plaintiffs attempt to side-step R&O's entire argument about Nevada Revised Statute § 78.747 intentionally superseding and replacing the case law set forth by the Nevada Supreme Court in *LFC Mktg. Grp. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000). Plaintiffs ask this Court to revert back to the pre-statute, common law standard, essentially admitting the deficiency in their pleading when they argue that "Plaintiffs are entitled to pursue a reverse veil-piercing claim even if Orluff has no ownership stake in the company." Opposition at 15 (capitalization changed). In support of this claim, Plaintiffs cite to the *pre-statute holding* of the Nevada Supreme Court that "the absence of corporate ownership is not automatically a controlling event" in determining if a party is the *alter ego* of a corporation. *Loomis*, 116 Nev. At 904-05, 8 P.3d at 847. The Nevada Legislature, however, enacted N.R.S. § 78.747 in 2001, immediately after the 2000 holding in *Loomis*, for the express purpose of establishing "fixed criteria to use the *alter ego* doctrine to pierce the corporate veil." *See* **Exhibit B** to Motion at *13. The present statute, as enacted to address this exact ambiguity in *Loomis*, requires a showing of "unity of . . . ownership" between the two parties

claimed to be *alter egos*. N.R.S. § 78.747(2). This is not an optional element, nor is it but one of many factors to be weighed—it is a mandatory component of a conjunctive list of requirements set forth in the statute.[1] *Id.* Here, as set forth in detail in the Motion, Plaintiffs have plainly failed to make a coherent allegation that any unity of ownership exists between Orluff and R&O.

Additionally, and contrary to Plaintiffs' argument, there is no need to convert the instant Motion to a motion under Rule 56 or Rule 12(c), because there is nothing inappropriate about considering a document plainly referenced *by Plaintiffs* in the Third Amended Complaint ("TAC"). *See Baxter v. Dignity Health*, 357 P.3d 927, 930 (Nev. 2015) (consideration of an outside document appropriate where, as here, "the complaint 'relies heavily' on a document's terms and effect"). Plaintiffs raise this argument in an attempt to create an opening to introduce additional evidence that is not only misleading, but plainly beyond what may be considered on a motion to dismiss. Both their reference to an outdated and no-longer-accurate email[2] (**Exhibit 1** to the Opposition), and their efforts to interject attorney argument in place of well-pleaded fact (such as Plaintiffs' attorneys' statement that "Leland's medical expenses dwarf the funds currently available for recovery," Opposition at 3) are entirely unsupported by allegations in the TAC and may not be considered. *See, e.g., Baxter*, 357 P.3d at 930. However, to the extent this Court has any concerns about reference to the trust agreement, this Court is always free to simply disregard it. There is absolutely no requirement, as Plaintiffs contend, that if the Court considers the trust document—

[1] Despite criticizing the suggestion that *Twombly* should be adopted in Nevada state courts, Plaintiffs cite to a lone, unpublished opinion in the United States District Court for the District of Nevada for the implicit proposition that N.R.S. § 78.747 did not supersede *Loomis*. *See Stanley v. Jecklin*, 2007 WL 923836, at *1 (D. Nev. March 23, 2007). *Stanley* is not binding precedent, but to the extent it may be considered persuasive it was wrongly decided on this issue because neither party ever advocated to that court the common-sense proposition that N.R.S. § 78.747 came after, and therefore superseded, *Loomis*. *See Stanley, supra*.

[2] It is significant that Plaintiffs have taken extensive discovery in this case and had the email at **Exhibit 1** long before they amended the Complaint to plead that "Orluff, through his family trust, owns approximately eighty-five percent (85%) of the outstanding shares in R&O." TAC ¶ 14. That email contradicts their own pleading as it suggests a *combined* ownership between Orluff *and* the Opheikens Family Trust of under 41%—certainly not suggestive of "unity of . . . ownership." N.R.S. § 78.747(2). Regardless of the fact that it may not be considered on a motion to dismiss, Plaintiffs make no effort to explain this new 107% difference between the ownership alleged in the TAC and the number they now argue in their opposition.

the effect of which is clearly relied on by Plaintiffs in the Complaint—that "it must also accept Plaintiffs' evidence on the issue of Orluff's ownership interest in R&O." Opposition at 19; *see also id*. at 19-20.

What cannot be disregarded is the fundamental failure of the TAC to make any coherent allegation as to whether Orluff personally owns any part of R&O, and if so how much. As argued in the Motion, Plaintiffs' bare allegation that "Orluff, through his family trust, owns approximately eighty-five percent (85%) of the outstanding shares in R&O," TAC ¶ 14, is both factually contradictory and legally insufficient to make an *alter ego* finding that R&O *is* Orluff. An individual may *control* an asset or entity through a trust *if* they are the trustee (here, Orluff is not), but *ownership* fundamentally resides with the trust—a legally independent entity that is not a party to this case, and is not alleged to be the *alter ego* of either Orluff or R&O. The only potentially valid interpretation of Plaintiffs' allegation is that the Opheikens Family Trust, and not Orluff, owns this claimed "85%" stake in R&O. *See id*. Despite Plaintiffs' best efforts to distract from this core issue, as a matter of law the allegations in the TAC, even when assumed to be true, are insufficient to establish that there is "unity of . . . ownership" between Orluff and R&O. N.R.S. § 78.747(2). Accordingly, Plaintiffs' Third Claim for Relief must be dismissed.

B. Plaintiffs' Admission That Their Allegations Of Injustice Are Wholly Conclusory Underscores The Infirmity Of Their Claim.

Next, essentially admitting that their Complaint would be deficient under the Federal standard, Plaintiffs argue that "a conclusory allegation of injustice is sufficient . . . under Nevada's existing pleading standard." Opposition at 21. Plaintiffs then immediately backtrack by arguing that, regardless, they *have* expressly pleaded manifest injustice, but that argument is still nothing but empty conclusions—shadows and dust that serve only to highlight the dangers of permitting Plaintiffs' Third Claim for Relief to proceed.

In claiming that they have "expressly pleaded the manifest injustice elements," Plaintiffs

simply provide the Court with a new set of conclusory labels: "undercapitalization" and "lack of adequate insurance coverage." TAC ¶ 79. At no point, however, does the Complaint plead facts to show why this is the case—these are merely more conclusions. Indeed, presumably recognizing this infirmity, Plaintiffs use their Opposition to interject attorney argument that "Leland's medical expenses dwarf the funds currently available for recovery." Opposition at 3. Aside from being untrue, this unpleaded statement is wholly inappropriate for consideration on a motion to dismiss. *See, e.g., Baxter*, 357 P.3d at 930. The Complaint could—but does not—state what Leland's current medical expenses are, how many millions of dollars in insurance the waterpark has, how many millions of dollars have been invested in the waterpark, how many millions of dollars in equity exist in the waterpark, or any other factual basis that could *show* undercapitalization or underinsurance. Plaintiffs have taken discovery on all of these points, and the fact that they do not provide specifics in their Third Amended Complaint is telling.

N.R.C.P. 8(a) already requires more than merely stating conclusions like 'undercapitalized' and 'underinsured'—it requires a "*showing* that the pleader is entitled to relief." *Id.* Similarly, the United States Supreme Court's decision in *Twombly* did not rewrite the identical federal rule, F.R.C.P. 8(a), but rather clarified what is necessary to *show* entitlement to relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Here, R&O is only asking this Court to consider the prudential dangers of permitting the pleading of conclusions alone—without the pleading of any underlying facts *showing* them to be plausible—as sufficient to implead a corporation on a pre-judgment reverse veil-piercing theory.

Even if these conclusory statements about undercapitalization and underinsurance were sufficient, however, they remain only two legs of the stool. The fact that the quantum of damages that *may* be awarded, and the collectability of those damages, are neither pleaded nor appropriate for an offer of proof at this stage of litigation, underscores why reverse veil piercing must—in

general, but certainly under these circumstances—be a post-judgment remedy, not a pre-judgment claim for relief.

Plaintiffs claim their efforts to implead R&O are not merely a means of building settlement leverage against a deep-pocketed defendant. R&O disagrees. Fortunately, rather than devolve into a series of *ad hominem* jabs by the parties, this issue can be distilled to a simple litmus test: if this is truly not a ploy, but a genuine concern to prevent injustice, then this Court should dismiss the claim against R&O without prejudice as premature and reconsider the issue *if ultimately necessary and appropriate* in a post-judgment context. While the Nevada Supreme Court's opinion in *Loomis* has been superseded by statute as to the fixed elements of an *alter ego* claim, its fundamental holding that reverse veil-piercing may be appropriate in a post-judgment context remains intact. *See generally id*., 8 P.3d 841. Here, at this stage in litigation, we cannot know the following: (1) whether Plaintiffs will prevail on the merits and receive a judgment against Orluff Opheikens; (2) the amount of any such judgment that may be awarded; (3) whether any such judgment will be joint and several against one or more other defendants; and (4) whether any portion of a judgment will ultimately be uncollectable. Plaintiffs ask this Court to assume these are all foregone conclusions, but they are not. In a post-judgment context, however, *all of these answers will be known*. For that reason, if a reverse veil-piercing claim against R&O could be appropriate at all to *prevent*, rather than *create*, manifest injustice, it could only be so in a post-judgment context.

III. CONCLUSION

For all of the above stated reasons and authorities, Defendant R & O Construction, Inc. respectfully requests this Court GRANT its Motion and DISMISS the claim against it.

Dated: October 3, 2018

/s/ Karen Porter

Karen Porter
Nevada Bar No. 13099
Brett Godfrey (*Pro Hac Vice*)
Jeffrey Vail (*Pro Hac Vice*)
GODFREY JOHNSON
9557 South Kingston Court
Englewood, Colorado 80112
Telephone: 303-228-0700
Facsimile: 303-228-0701

John E. Gormley, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorneys for Defendant,
R & O Construction, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of October, 2018, I served a true and correct copy of the foregoing document (and any attachments) entitled: ***Reply in Support of Motion to Dismiss,*** 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 GARNDER 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 HUISH, CRAIG HUISH 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 HUISH

By: */s/ Megan Rettig*
An employee of GODFREY JOHNSON

RESP

JOHN E. GORMLEY, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorney for Defendants
TOM WELCH; ORLUFF OPHEIKENS; SLADE OPHEIKENS; and CHET OPHEIKENS

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, a Nevada limited liability company; ORLUFF OPHEIKENS, an individual; SLADE OPHEIKENS, an individual; CHET OPHEIKENS, an individual; SHANE HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, 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.

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

Third-Party Plaintiff,

vs.

WILLIAM PATRICK RAY, JR.; and

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

DEFENDANTS ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, AND TOM WELCH'S RESPONSE TO PLAINTIFFS' OPPOSITION TO COMPREHENSIVE JOINDER TO R&O CONSTRUCTION, INC.'S MOTION TO DISMISS

Date of Hearing: October 10, 2018

Time of Hearing: 9:00 A.M.

DOES 1 through X, inclusive,

Third-Party Defendants.

Defendants ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, and TOM WELCH ("the Opheikens Defendants") by and through their attorney of record, JOHN E. GORMLEY, ESQ., of the law firm OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, have submitted their Comprehensive Joinder to the Motion to Dismiss filed by R&O Construction, Inc. Plaintiffs have filed an Opposition to that Comprehensive Joinder, to which the Opheikens Defendants hereby respond.

Dated October 3, 2018.

OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI

JOHN E. GORMLEY, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorney for Defendants
TOM WELCH; ORLUFF OPHEIKENS; SLADE OPHEIKENS; and CHET OPHEIKENS

POINTS AND AUTHORITIES

I.

ARGUMENT

Plaintiffs' unfocused Opposition continues to ignore the differences between traditional alter ego and revere pierce, so much so that they continue to rely upon inapposite case law, a blinkered view of Nevada precedent and the Rules of Civil Procedure, and a heavy dose of hypocrisy – none of which is done in service to applying the law to the issue before this Court. Instead, Plaintiffs' predictable appeals to emotion -- along with a direct challenge to the Court -- add to the weakness of their Opposition and further demonstrate why R&O's Motion should be granted. As before, the Opheikens Defendants join that Motion and provide the following response to the Plaintiffs' selective Opposition.

1. The Joinder Is Timely And Appropriate Pursuant To EDCR 2.20(d)

The Court is aware that the Opheikens Defendants have submitted a Joinder, not a Motion to Dismiss pursuant to NRCP 12(b) (5). EDCR 2.20(d) provides that within 5 days of service of a Motion, a nonmoving party "may file written joinder thereto, together with a memorandum of points and authorities and any supporting affidavits." EDCR 2.20(d). Here, R&O served their Motion to Dismiss on August 31, 2018. Given the fact that R&O was afforded 3 additional calendar days pursuant to EDCR 8.06(a), coupled with NRCP 6(a), the Opheikens Defendants' Joinder was filed 2 days before the deadline for joinders – quite timely. As with the rest of Plaintiffs' Opposition, Plaintiffs' arguments about timeliness are not convincing in the least.[1]

---

[1] Plaintiffs' alternate suggestion that the Joinder is untimely because the Opheikens Defendants filed an Answer to the Third Amended Complaint is puzzling. Notwithstanding the fact that the Opheikens Defendants' Joinder is not a motion (though it could become a stand-alone motion if R&O were to withdraw their Motion to Dismiss, or if that Motion becomes moot, *see* EDCR 2.20(d)), a Rule 12(b)(5) argument can be raised at any time. *See Clark County School District v. Richardson Constr., Inc.*, 123 Nev. 382, 168 P.3d 87 (2007). This Court need not even reach this issue, however, because the Opheikens Defendants clearly complied with EDCR 2.20(d) and

2. Plaintiffs Rely Upon Hypocrisy, Emotion, And Threats Instead Of Law

In order to discourage the Court from applying Nevada law and dismissing their premature reverse pierce claim against R&O, Plaintiffs reach into their grab bag of distraction throughout their Opposition. Each attempt is unavailing and underscores the Plaintiffs' unsupported legal position.

First, Plaintiffs hypocritically claim that their counsel is only "vigorously representing Plaintiffs' interests by pleading any and all viable claims in this litigation." *See* Opposition, p. 3:10-12. Not remotely true. Plaintiffs never sued the man whom they specifically entrusted to keep Leland safe on May 27, 2015 – Third-Party Defendant William Ray. While Plaintiffs may choose to continue on with the self-deception, it is clear that the Emperor wears no clothes. And while Plaintiffs consider it to be a "tired narrative," the truth remains the truth: Plaintiffs' case is not about holding the truly responsible person accountable for what happened to Leland. As they have chosen to plead their case, the Third Amended Complaint is merely a mechanism to sue those whom they believe have deep pockets, to the exclusion of others.[2]

Second, Plaintiffs continue with their hypocrisy by claiming that the Defendants will say anything to gain a dismissal. Not remotely true. In fact, Plaintiffs' own hypocrisy shines through in their flip flop regarding whether alter ego determinations are a question of law or fact. The Court will recall that Plaintiffs made the unsubstantiated claim in their Motion for Leave to Amend that "it is well settled that the determination of whether the alter ego doctrine applies is a question of fact reserved for the jury." *See* Plaintiffs' Motion for Leave to Amend, p. 7:18-19. Now, Plaintiffs state (only after the Opheikens Defendants conclusively demonstrated the

---

there is no likelihood that R&O will abandon its Motion.

[2] The point is made even clearer by Plaintiffs' own statement that "Plaintiffs are forced to puruse these claims because Defendants underinsured Cowabunga Bay". *See* Opposition, p. 3:12-14. To be sure, this is not a case about justice; rather, it is about money.

meritless nature of Plaintiffs' statement) that they "do not dispute" that alter ego is – pursuant to NRS 78.747 – a matter of law. *See* Plaintiffs' Opposition, p. 5:12-16. It is unclear what position Plaintiffs will take tomorrow – though it will surely be whatever it takes to keep this Court from applying the law.

Continuing with Plaintiffs' campaign of distraction, they chide the Court into remembering the "true victim in this case", trotting out a hackneyed "profits over safety" trope rooted in fiction over fact, in order to tug at the Court's heart strings. No one would argue that what ultimately happened to Leland when Mr. Ray left him alone is heartbreaking. But Plaintiffs know full well there is zero truth to any claim that R&O (let alone the Opheikens Defendants) put profits over safety. And more to the point, their cookie cutter theme is inapplicable to the issue at hand: What exactly does Plaintiffs' closing argment of "profits over safety" have to do with whether reverse piercing is a cause of action that Plaintiffs can bring at this time? The answer is nothing.

Finally, Plaintiffs threaten the Court by suggesting that granting the R&O Motion to Dismiss is inviting reversible error. *See* Opposition, p. 2:10. Plaintiffs reinforce their strongarm tactics by making a direct reference to this Court's prior decision on alter ego (not reverse pierce) which resulted in *Gardner v. Eighth Judicial District Court*, 405 P.3d 651 (2017). *See* Opposition, p. 7. This is entirely improper and yet another means by which Plaintiffs hope this Court will not apply the law to their Third Amended Complaint. That *Gardner* decision has nothing to do with reverse pierce. As the Opheikens Defendants previously predicted to this Court, the Plaintiffs are hoping to stretch that *Gardner* decision in their efforts to cajole this Court going forward. *See* The Opheikens Defendants' Opposition to Motion for Leave to Amend, p. 9-10. Plaintiffs have proven predictable yet again.

3. The Actual *LFC* Holding, Along With The *LFC* Facts, Doom The Plaintiffs' Unsupported Conclusion That Reverse Pierce Is Available To Be Plead By Them At This Time

Before addressing the meritless nature of Plaintiffs' Opposition to the Opheikens Defendants' legal arguments, there must be some acknowledgement that Plaintiffs and the Opheikens Defendants, both, have been talking past each other. This is apparent, particularly with respect to the core issue of whether reverse pierce is ever an available theory of relief, especially in Nevada, absent a judgment. This is the fundamental question before this Court.

What has been lost in the shuffle is the actual decision rendered in *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000), along with the actual facts upon which that decision was premised. This Court should start its analysis with the *LFC* holding and the facts that brought the question of reverse pierce to the *LFC* Court's attention in the first place. This Court should then compare what *LFC* actually says to what the Plaintiffs (and the Opheikens Defendants) are saying now.

Succinctly stated, *LFC* actually holds the following:

> CONCLUSION
>
> We first conclude that the procedure of utilizing a writ of attachment in the **post-judgment context** is allowable under Nevada's statutes. Next, we conclude that there are **limited circumstances** where the alter ego doctrine may be applied "in reverse" in order to reach a corporation's assests **to satisfy a controlling individual's debt**. Finally, we conclude that there was substantial evidence to support the district court's ruling that LFC Marketing was the alter ego of William.
>
> Accordingly, the district court's order granting and issuing the Loomises' writ of attachment is affirmed.

LFC, 116 Nev. at 906, 8 P.3d at 847-48 (emphasis added).

Breaking the *LFC* holding down, it is undeniable that *LFC* was dealing with a post-judgment situation, completely unlike the facts before this Court. The first sentence

explicitly references that the reason the case was before the court was the application of a writ of attachment in the post-judgment context. Indeed, the *LFC* Court announced at the very beginning that the case involved "the Loomises' attempts to collect the judgment owed by William". *LFC*, 116 Nev. at 899, 8 P.3d at 843.

The context of the *LFC* decision – namely a post-judgment action -- must be significant, and it cannot be divorced from the *LFC* holding. Indeed, the primary procedural question was "Whether a writ of attachment may be used post-judgment to secure property to satisfy a judgment." *Id.* at 901, 8 P.3d at 844. As the *LFC* Court noted, writs of attachment were typically used as a pre-judgment remedy, not a post-judgment one, and Nevada had yet to adopt that mechanism for attaching assets "to satisfy [a] judgment debt." *Id.* at 899, 8 P.3d at 843.[3]

Applied to the present case, the Plaintiffs have not filed a writ of attachment. They are not attempting to collect on a judgment. They are not even alleging they have an established judgment upon which they are seeking to satisfy a debt. Nor have they alleged that a debt even exists. That is, Plaintiffs rightly concede that *LFC* presented quite a different set of facts than those alleged in their Third Amended Complaint. The most important being that there is no judgment against Orluff, Plaintiffs are not yet judgment creditors (and may never become them), and Orluff is not yet a judgment debtor (and may never become one).

Turning to the second sentence of the actual *LFC* holding, there should be little argument that *LFC* repeatedly tried to make clear that "in limited circumstances" a party may seek to reverse pierce. And by that, the *LFC* Court did not make reverse piercing an

[3] It makes perfect sense that the *LFC* Court would want to tackle this question first because the case came to them post-judgment by way of the Loomises' *ex parte* motion for writ of attachment. *Id.* at 899, 8 P.3d at 844, fn. 1.

open-ended proposition – particularly because that would run afoul of the longstanding Nevada principle that "the corporate cloak is not lightly thrown aside." *Id.* at 903, 8 P.3d at 846, *quoting Baer v. Amos J. Walker, Inc.*, 85 Nev. 219, 220, 452 P.2d 916 (1969). Instead, *LFC* reiterated that "the alter ego doctrine may be applied "in reverse" in order to reach a corporation's assets to satisfy a controlling individual's debt." *Id.* at 906, 8 P.3d at 847 (emphasis added). The words "to satisfy" and "debt" cannot be ignored – they are the heart of the *LFC* decision.

As before, the Court cannot divorce the context from the content of the *LFC* decision. *LFC* was a situation where there was an established debt – embodied by the judgment already entered against William, a *sine qua non* for allowing the corporate cloak to be cast aside – was what made reverse pierce an available remedy for the Loomises.[4] Without that debt, whether called a judgment or a "pre-existing liability", *Id.* at 903, 8. P.3d at 846, reverse piercing would not have been permitted. Otherwise, reverse piercing would envelope the undeniable principle that "the alter ego doctrine is an exception to the general rule recognizing corporate independence." *Id.* at 903-904, 8 P.3d at 846.

Applied to the present case, the Third Amended Complaint does not allege that there is an existing debt owed by Orluff to the Plaintiffs. It does not allege that there is a pre-existing liability, or a judgment, owed by Orluff to the Plaintiffs. It does not allege that Plaintiffs are seeking to satisfy any debt or judgment at all. Faced with these infirmities, Plaintiffs' arguments boil down to a position that reverse pierce is available in a pre-judgmen situation (though *LFC* says no such thing and was faced with no such

[4] Others noted within *LFC* include that the debt is uncollectible, that there are no other shareholders or creditors who may be harmed, and that a fraud would be sanctioned if reverse piercing was not permitted. It is important to note, though, that the "fraud" consideration does not outweigh and override all of the other considerations the Court must take into account.

circumstance) and argue that *LFC* is a fact-intensive decision to which a motion to dismiss is immune. Plaintiffs are only partially correct. *LFC* is fact-intensive with respect to how a corporation can be deemed the alter ego, in reverse, of an individual.[5] But the first and most important fact is that there is an existing liability in the form of a judgment (or a debt). That first fact is a critical "element" for any reverse pierce attempt.[6] It is absent from the Third Amended Complaint, and it is fatal to that Third Amended Complaint.

Finally, looking at the third sentence of the actual *LFC* holding, there is no dispute as to what the Court would need to consider in determining that "substantial evidence" exists to find alter ego in the reverse. These are the factors which the *LFC* Court advised may be indicative, but not conclusive, of the existence of an alter ego relationship. *Id.* at 904, 8 P.3d at 846-847. This is the fact-intensive analysis which Plaintiffs insist must mean that anyone can assert a reverse pierce claim at any time because "reverse piercing is not inconsistent with the traditional piercing in its goal of preventing abuse of the corporate form." *Id.* at 903, 8 P.3d at 846.

Noticeably, Plaintiffs' reading of *LFC* completely ignores the actual facts upon which *LFC* was decided. In so doing, they ignore the rest of the *LFC* holding. Yes, it is true there was substantial evidence that supported a finding of alter ego against William in *LFC*; but that factual analysis could never take place before a judgment (the "pre-existing liability" or "debt") had been entered against William. So while there are some

---

[5] This is the part where Plaintiffs rightly note that the "elements" to be applied when a reverse pierce situation may occur, are similar to those utilized in traditional alter ego cases. The Opheikens Defendants do not quarrel with that unremarkable proposition – nor have they ever.

[6] This is made all the more clear by the cases cited within *LFC* which served as the foundation for the *LFC* Court to hold that reverse pierce was an available remedy in limited circumstances. As noted below, Plaintiffs' Opposition completely ignores these cases – all cited in the Opheikens Defendants' Joinder – because they reveal the Plaintiffs' position to be baseless.

facts which Plaintiffs have alleged which remain to be determined (and can be taken as true by this Court at this stage), the most important fact has not been plead or even occurred yet. It is one which everyone must agree is purely hypothetical at this stage of the litigation. Again, if the goal is to turn *LFC* upside down and make reverse piercing the norm, rather than the exception, then this Court could agree with Plaintiffs and deny R&O's Motion. If not, this Court should take a "forest for the trees" approach and grant R&O's Motion to Dismiss.

4. The Cases Upon Which *LFC* Was Founded Are Ignored By Plaintiffs, And Plaintiffs Cite To No Nevada Case Where Pre-Judgment Reverse Pierce Has Ever Been Permitted

In Nevada, there has never been a reported case which allowed for a reverse pierce in a pre-judgment setting. *LFC* is the only case which even remarks upon applying alter ego "in reverse", and it is undisputed that *LFC* was a post-judgment case.

As identified in the Opheikens Defendants' Joinder, none of the cases relied upon by the *LFC* Court involved a pre-judgment attempt to apply alter ego "in reverse." Instead, the *LFC* Court surveyed existing cases from across the country – each of which involved the collection of an established debt in a proceeding in which the complaining party was attempting to collect from the alter ego corporate entity. The *LFC* Court cited numerous cases with approval -- in some instances even incorporating their rationale into the Nevada test for reverse pierce. *See id.* at 903, 8 P.3d at 846: *Cargale Inc. v. Hedge*, 375 N.W.2d 477 (Minn. 1985) (judgment creditor); *Taylor v. Newton*, 117 Cal.App.2d, 257 P.2d 68 (1953) (judgment creditor); *McCall Stock Farms v. U.S.*, 14 F.3d 1562 (Fed. Cir. 1993) (undisputed loan default with collection permitted pursuant to Federal statute); *State v. Easton*, 169 Misc.2d 282, 287, 647 N.Y.S.2d 904, 908-910 (App.Div. 1995) (judgment creditor); *Select Creations, Inc. v. Paliafito Am., Inc.*, 852 F.Supp. 740, 773-74 (E.D.Wis. 1994) (judgment creditor).

The *LFC* Court also cited to the following tax cases (tax law specifically allows the government to reverse pierce, *see U.S. v. Scherping,* 187 F.3d 796, 803-804 (8th Cir. 1999) ("reverse piercing is a well-established theory in the federal tax realm" that advanced the policies of avoiding fraud and collecting delinquent federal taxes); *and see Prompt Staffing, Inc. v. U.S.* , 2018 WL 3201825, *16 (C.D. Cal. May 8, 2018 ("Federal law allows the IRS to pierce the corporate veil to access [] levied funds")) for the proposition that reverse pierce is available in limited circumstances: *Towe Antique Ford Foundation v. I.R.S.*, 999 F.2d 1387 (9th Cir. 1993) (government enforcing tax liability); *Zahra Spiritual Trust v. U.S.*, 910 F.2d. 243-345 (5th Cir. 1990) (applying Texas law to allow reverse pierce to enforce a property judgment against a stockholder)[7]; *Floyd v. I.R.S.*, 151 F.3d 1295 (10th Cir. 1998) (identifying the many conceptual problems with reverse piercing, some of which were noted and addressed in *LFC*).

Returning to the context of *LFC*, it is no small coincidence that none of the cases cited by the *LFC* Court look anything like a pre-judgment case. Indeed, if *LFC* wanted to suggest that reverse piercing is available in a pre-judgment context, it would have cited to some case which actually held that reverse pierce is available in a pre-judgment context, or it would have said that it applies to pre-judgment situations. It is telling that no such case is mentioned in *LFC*, it is telling that no such case has ever been reported in Nevada, and it is telling that *LFC* does not state that reverse pierce applies to pre-judgment situations. Again, this cannot be coincidental, and the question must be asked: Why do Plaintiffs completely ignore the very foundations of the *LFC* decision in their Opposition? The answer is obvious: Plaintiffs realize they do not quite understand Nevada law on reverse pierce, and that they are advocating for something not recognized by our laws.

[7] The *Zahra* decision is particulary noteworthy because it found that Texas law would allow reverse pierce in the context of a pre-existing judgment. This is discussed in more detail below.

5. Plaintiffs Misunderstand Modern Reverse Pierce Jurisprudence, Along With The Cases They Cite In Their Opposition, In Service To Making Reverse Pierce The Rule Rather Than The Exception

Modern reverse pierce jurisprudence, which includes *LFC*, agrees that before reverse pierce can be contemplated there must be some form of a pre-existing liability, whether in the form of a judgment, a tax liability, or a debt. Each of the cases cited by the Opheikens Defendants firmly stand for that simple and bedrock proposition – whether they adopted reverse pierce or not, they all undertook a far deeper analysis (one consistent with *LFC*) than anything Plaintiffs offer this Court. This includes, but is not limited to, those jurisdictions which have decided to not allow for reverse pierce at all, such as California (but only in the context of corporations, as it does allow for reverse pierce against LLCs, *see Curci Investments, LLC v. Baldwin*, 14 Cal.App.5th 214 (Cal. Ct. App. 2017) (holding that reverse pierce can be used against a judgment debtor's LLC)).[8]

It also includes jurisdictions which do allow reverse pierce, such as Virginia, which permits reverse pierce under limited circumstances to satisfy a judgment. *C.F. Trust. v. First Flight Limited Partnership*, 266 Va. 3 (2003),[9] as well as Colorado, *In re Phillips*, 139 P.3d 639 (Colo. 2006) (answering a certified question as to whether Colorado allows for reverse pierce

---

[8] Plaintiffs focus upon *Postal Instant Press v. Kaswa Corp.*, 162 Cal.App.4th 1510 (Cal. Ct. App. 2008), cited by the Opheikens Defendants for different reasons than Plaintiffs suggest. *Postal Instant Press* holds that California does not allow reverse pierce in the context of a corporation. The point of the Opheikens Defendants' citation to *Postal Instant Press* seems lost on Plaintiffs. What is important about that case is the analysis which a court must undertake when considering reverse pierce at all – the very analysis which *LFC* cited to and considered, *e.g.* harm to other shareholders or creditors. Whether California law (or Georgia law, or Connecticut law) ultimately allows reverse pierce is immaterial. It is the analysis each respective Supreme Court has undertaken which matters – the very reason those cases are cited by the Opheikens Defendants. Indeed, it is no coincidence that each of those jurisdictions tied reverse pierce to a judgment debtor situation – like *LFC*. And just because *LFC* used a similar analysis but came to a different conclusion does not mean the analysis is wrong and the underlying concerns irrelevant to the reasons why reverse pierce might be available "in limited circumstances." Far from it.

[9] Plaintiffs do not mention *C.F. Trust* in their Opposition because it, like *LFC*, made quite clear that reverse pierce is not permitted absent a judgment.

against a debtor and holding that it does under limited circumstances)[10], and Delaware. *Sky Cable, LLC v. DIRECTV*, 886 F.3d 375 (4th Cir. 2018) (noting that Delaware law allows for reverse pierce against an LLC in the limited circumstance where the judgment debtor is a single member of that LLC).[11]

Once again, Plaintiffs opt not to see the forest for the trees and instead argue that there are other cases which suggest that reverse pierce can be used in a pre-judgment situation like the one presented in this case. But Plaintiffs' understanding of the very cases they cite is quite flawed, particularly when held up to the facts presented in this case.[12]

For instance, Plaintiffs rely upon *In re Howland*, 516 B.R. 163 (E.D. Ky. 2014). But *In re Howland* is a tax debtor case. Bankruptcy procedural and substantive law, as well as tax law, is far different than the common law of any state, a point heavily relied upon by the *In re Howland* Court: "Further, by virtue of § 544, the Trustee also stands in the shoes of the Debtors' judgment creditors. Thus, if state law allows the Debtors' judgment creditors to pierce the veil of the Debtors' limited liability company pursuant to an "outsider" reverse veil piercing theory, then the Trustee may utilize that theory as well. *See, generally*, 11 U.S.C. § 544." *Id.* at 166-167. And as noted above, federal tax law specifically allows for reverse pierce. Simply stated, the case at hand is neither a tax case, nor a bankruptcy case, and *In re Howland* does nothing to move the needle in Plaintiffs' favor.

---

[10] Plaintiffs also noticeably fail to mention the comprehensive analysis undertaken by the Colorado Supreme Court, which mimicked the one undertaken in *LFC*.

[11] Plaintiffs do not address *Sky Cable, LLC* either.

[12] Plaintiffs make a curious comment that the Opheikens Defendants did not reference in their Joinder any of the cases cited by Plaintiffs in their Reply to the Opposition to Plaintiffs' Motion for Leave to Amend. First, why would the Opheikens Defendants address wholly inapplicable cases cited in a different motion? Second, how could the Opheikens Defendants have foreseen Plaintiffs would actually rely upon those obviously inapplicable cases? Noticeably, Plaintiffs apparently realized that no less than five cases which they previously claimed stood for the proposition that reverse pierce could be used in a pre-judgment scenario do not say any such thing, so they omitted them in their current Opposition. Where did those cases go, and why did Plaintiffs cite them in their Reply but not now? Perhaps it is because they "will say anything to obtain" their desired result?

Plaintiffs next rely upon *Allstate v. TMR Medibill, Inc.*, 2000 WL 34011895 (E.D.N.Y. 2000), for the proposition that a pre-judgment writ of attachment can be used as a vehicle to reverse pierce. As noted above, however, Plaintiffs have not sought a pre-judgment writ of attachment here, and *Allstate* was a post plea allocution case where there was an actual admission of liability which triggered the ability to seek a reverse pierce. *Id.* at * 5-6. The *Allstate* facts are not remotely similar to the facts of this case, and are entirely unhelpful to this Court's analysis.

Plaintiffs then turn to an unpublished decision, *McLeskey v. Davis Boat Works*, 225 F.3d 654 (4th Cir. 2000), but that is quite clearly a judgment creditor/judgment debtor case which relied heavily upon *In re Blatstein*, 192 F.3d 88, 100 (3rd Cir. 1999) (holding that "reverse piercing" applies when the "assets of the corporate entity are used to satisfy the debts of a corporate insider so that the corporate entity and the individual will be considered one and the same") (emphasis added), to allow a reverse pierce to go forward in that matter. *Id.* at *1, fn. 1. Neither of those cases remotely aids the Plaintiffs' cause.

Plaintiffs move to *Smith v. Carolina Medical Center*, 274 F.Supp.3d 300 (E.D. Pa. 2017). But once again, that case was a *qui tam* case upon which reverse pierce was sought after a plea agreement.[13] Not only was *Smith* entirely dissimilar to the present case, it also relied substantially upon the same *In re Blatstein* case in noting that "[w]hile veil-piercing involves accessing a corporate owner or shareholder's assets to enforce a judgment against the corporation, "reverse" veil-piercing involves using corporate assets to satisfy a judgment against its owner. *Id.* at 327, *citing In re Blatstein*, 192 F.3d 88, 100 (3d Cir. 1999). Plaintiffs' logic in connecting *Smith* to the *Gardner* facts is dizzying, to say the least.

Finally, Plaintiffs rest upon *Wilson v. Davis*, 305 S.W.3d 57 (Tex.Civ.App. 2009), for the same discredited proposition that reverse pierce can be utilized in a pre-judgment setting. Once

---

[13] The *Smith* decision is not clear as to the procedural status of the case, which is why one might look to the underlying briefs to confirm that the case was the result of a plea agreement. *See* Exhibit A, 2016 WL 9998107, filed May 2, 2016 (E.D. Pa.).

again, Plaintiffs seem to have not read that case closely enough, as the *Wilson* Court made it quite clear that it refused to even reach the issue of whether reverse pierce could be allowed in a pre-judgment context because the underlying defendants (AWC, Inc.) "did not raise this argument until its summary-judgment reply brief." *Id.* at 70. The *Wilson* Court continued: "Therefore, we do not consider any arguments raised in [the movant's] reply brief..." *Id.*[14] Meaning, the *Wilson* decision is completely silent on whether Texas law would allow reverse pierce in a pre-judgment context because that argument was waived below. For Plaintiffs to claim that the Opheikens Defendants have misrepresented the law on reverse pierce now is quite odd, especially when Texas law is abundantly clear that reverse pierce is not allowed in the absence of an established debt (*e.g.* a judgment) or an injunction. *See Zahra Spiritual Trust v. U.S.*, 910 F.2d 240 (5th Cir. 1990) (cited in *LFC* and holding that reverse pierce could be used to enforce an existing property judgment); *NMRO Holdings, LLC v. Williams*, 2017 WL 4782793 (Tex.Civ.App. 2017) (reverse pierce allowed where plaintiff was seeking to collect upon a judgment); *Rocklon, LLC v. Paris*, 2016 WL 6110911 (Tex.Civ.App. 2016) (reverse pierce allowed where a temporary injunction prohibiting transfer of assets had been granted); *In re Moore*, 379 B.R. 284, 294-296 (N.D.Tex 2007) (strongly criticizing reverse pierce as "pervert[ing] Bankruptcy Code priorities and state law creditors rights provisions", but reluctantly following *Zahra* and allowing reverse pierce in bankruptcy proceedings where there was an established, admitted debt)[15]; *Boyo v. Boyo*, 196

---

[14] The *Wilson* Court had numerous other avenues to reverse summary judgment, which it did. But there can no doubt the Plaintiffs' claim that pre-judgment reverse pierce is recognized in Texas was certainly not one of them.

[15] *In re Moore* echoed many of the problems identified by numerous jurisdictions regarding the haphazard use of reverse pierce. *Id.* at 295-296, *citing Stoebner v. Lingenfelter*, 115 F.3d 576, 579-580 (8th Cir.1997) (indicating that Minnesota has only recognized the doctrine of reverse corporate piercing in very limited circumstances — namely, when no shareholder or creditor would be adversely affected); *Scholes v. Lehmann*, 56 F.3d 750, 758 (7th Cir.1995) (indicating without citations that "[r]everse piercing is ordinarily possible only in one-man corporations, since if there is more than one shareholder the seizing of corporation's assets to pay a shareholder's debts would be wrong to the other shareholders. Even in one-man corporations it is a rarity because a simple transfer of the indebted shareholder's stock to his creditors will usually give them all they could get from seizing the assets directly."); *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1575 (analyzing Utah law, suggesting that the reverse piercing doctrine

S.W.3d 409 (Tex.Civ.App. 2006) (reverse pierce allowed in a divorce case to reach established debts of controlling shareholder); *but see Cappuccitti v. Gulf Indus. Prods., Inc.*, 222 S.W.3d 468 (Tx. Ct. App. 2007) (employing reverse pierce analysis pre-judgment, but only for purpose of establishing personal jurisdiction).

At bottom, it is clear the best the Plaintiffs can muster is to ignore Nevada law, ignore the modern trend in reverse pierce, cite to an unpublished decisions (which do not even help them); cite to other non pre-judgment cases, and outright misrepresent the decision from a Texas court. If there was some actual, legitimate, recognized authority that permits reverse pierce to be employed in a pre-judgment scenario, Plaintiffs surely have not found it in Nevada or elsewhere. R&O's Motion should be granted on the basis that Nevada law (in league with the rationale employed by every other jurisdiction) does not recognize reverse pierce in a pre-judgment setting and that Plaintiffs have failed to allege a necessary factual predicate to seek a reverse pierce at this time.

---

was "little recognized" and presents many problems — namely it bypasses normal judgment collection procedures whereby a judgment creditor can simply attach the judgment debtor's shares in the corporation and not the corporation's assets; ultimately refusing to apply the doctrine in the absence of a clear statement from the Utah Supreme Court adopting it). It is worth noting that the Utah Supreme Court has since stated that reverse pierce is allowed in Utah as a "tool of last resort." *M.J. v. Wisan*, 371 P.3d 21, 36 (2016).

II.

CONCLUSION

WHEREFORE, the Opheikens Defendants respectfully request that this Court enter an Order granting R&O's Motion to Dismiss.

Dated October 3, 2018.

OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI

JOHN E. GORMLEY, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701
Attorney for Defendants
TOM WELCH; ORLUFF OPHEIKENS; SLADE OPHEIKENS; and CHET OPHEIKENS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of October, 2018, I served a true and correct copy of the foregoing document (and any attachments) entitled: DEFENDANTS ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, AND TOM WELCH'S RESPONSE TO OPPOSITION TO COMPREHENSIVE JOINDER TO R&O CONSTRUCTION, INC.'S MOTION TO DISMISS 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 HUISH, CRAIG HUISH 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 HUISH

By: _____
An employee of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

EXHIBIT A

2016 WL 9998107 (E.D.Pa.) (Trial Motion, Memorandum and Affidavit)
United States District Court, E.D. Pennsylvania.

UNITED STATES OF AMERICA ex rel. Karen Smith and State of North Carolina ex rel. Karen Smith, Plaintiffs,
v.
CAROLINA COMMUNITY MENTAL HEALTH CENTERS, INC., Northeast Community Mental Health Center, Inc., Lehigh Valley Community Mental Health Center, Inc., Melchor Martinez, Melissa Chlebowski, Jorge Acosta, Nancy Seier, Patricia Eroh, MM Consultants, LLC, and MCM Bethlehem Property, LLC, Defendants.

No. 5:11-CV-02756.
May 2, 2016.

Memorandum of Law in Support of Motion of Defendants Melchor Martinez and MM Consultants, LLC, for Judgment on the Pleadings Pursuant to Rules 9 and 12 of the Federal Rules of Civil Procedure

Aldan P. O'Connor, Rachel A. Mills, Pashman Stein, P.C., 21 Main Street, Suite 200, Hackensack, N.J. 07601, (201) 488-8200, for defendants Melchor Martinez and MM Consultants, LLC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

I. BACKGROUND

The Government's Complaint in Intervention alleges that, notwithstanding Defendant Melchor Martinez's ("Martinez") exclusion from participation in Medicare and Medicaid programs, Martinez continued to run, manage, and expand certain mental health care clinics in Philadelphia and the Lehigh Valley areas of Pennsylvania that he had previously owned and managed. (DE # 38, Compl., ¶¶ 6-7) But the Government fails to mention essential facts relating to Martinez's stipulation with the State of Pennsylvania, as part of his plea agreement, whereby Martinez and the State agreed that Martinez would transfer his ownership and management of the clinics to his wife, Melissa Chlebowski Martinez ("Chlebowski") and that she was expressly permitted to receive income as the director and owner of the clinics, Martinez was never prohibited from owning the properties in which the clinics were housed and acting as a landlord to the clinics during his exclusion.

Nevertheless, the Government speculated that Martinez's allegedly inappropriate involvement in the clinics, and the failure to disclose that involvement to health care administrators, renders all the Medicare and Medicaid reimbursement claims submitted during his exclusion false or fraudulent pursuant to the False Claims Act ("FCA"), 31 U.S.C. 3729 *et seq.*, warranting treble damages and civil penalties for each claim. (Compl. at ¶¶ 315-27) The Government further seeks recovery under the FCA for medication management visits because those visits were allegedly shorter in duration than what the Government mistakenly and without support claims is a fifteen-minute minimum purportedly established by the Medicaid program requirements. (*Id.* at ¶¶ 328-37) Additionally, the Government alleges FCA violations based on the provision of therapy services by individuals who were either unqualified to perform such services or who were unsupervised notwithstanding the program's requirement that they be supervised by a psychiatrist. (*Id.* at ¶¶ 338-357) Aside from the FCA claims, the Government seeks recovery under various common law theories, including mistake of fact, unjust enrichment, and common law fraud. (*Id.* at ¶¶ 358-373)

Defendants Martinez and MM Consultants, LLC (collectively the "Martinez Defendants") move for judgment on the pleadings under Rules 9(b) and 12(c) of the Federal Rules of Civil Procedure.[1] The Martinez Defendants further move for permission to join in the previously filed motions to dismiss field by codefendants in this case, Docket Entry Nos. 58 and 59.

II. LEGAL STANDARDS

A. False Claims Act Overview

"The primary purpose of the FCA 'is to indemnify the government—through its penalty provisions—against losses caused by a defendant's fraud.'" *U.S. ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 304 (2011) [hereinafter "*Wilkins*"] (quoting *Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001)). All of the Government's FCA claims in this case fall under 31 U.S.C. § 3729(a)(1)(A), (B), (C), & (G) of the FCA, which provides:
(1) In general.--Subject to paragraph (2), any person who--

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, ... plus 3 times the amount of damages which the Government sustains because of the act of that person.

To establish a *prima facie* FCA violation under section 3729(a)(1), the plaintiff "must prove that '(1) the defendant presented or caused to be presented to an agent of the United States a claim for payment; (2) the claim was false or fraudulent; and (3) the defendant knew the claim was false of fraudulent.'" *Wilkins*, 659 F.3d at 305 (quoting *U.S. ex. rel. Schmidt v. Zimmer, Inc.*, 386 F.3d 235, 242 (3d Cir. 2004)).

B. Motion for Judgment on the Pleadings

Because the Martinez Defendants have filed an answer, the instant motion is a motion for judgment on the pleadings pursuant to Rule 12(c), which is governed by the same standards a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Turbe v. Gov't of Virgin Is.*, 938 F.2d 427, 428 (3d Cir. 1991). In evaluating the motion for judgment on the pleadings, the

court "must accept the allegations in the complaint as true, and draw all factual inferences in favor of the plaintiff." *Id.* The court must determine "whether, under any reasonable reading of the ... complaint, [the plaintiff] may be entitled to relief," and, if not, the complaint must be dismissed. *Wilkins*, 659 F.3d at 302.

C. Pleading Requirements for Fraud Under Rule 9(b)

Claims under the FCA sound in fraud and are governed by the heightened pleading requirements for fraud under Rule 9(b). *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 155 (3d Cir. 2014). Rule 9(b) provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." The Rule "requires a plaintiff to plead (1) a specific false representation of material fact; (2) knowledge by the person who made it of its falsity; (3) ignorance of its falsity by the person to whom it was made; (4) the intention that it should be acted upon; and (5) that the plaintiff acted upon it to his damage." *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 285 (3d Cir. 1992). While there is no *per se* rule that group or collective pleading cannot satisfy Rule 9(b) if the plaintiff pleads sufficiently particularized allegations, generally, a plaintiff must separately plead the fraudulent acts of each defendant to satisfy Rule 9(b)'s particularity requirements. *See Swartz v. KPMG LLC*, 476 F.3d 756, 764-65 (9th Cir. 2007) ("Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant... and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." (internal quotation marks and citation omitted)); *Naporano Iron & Metal Co. v. Am. Crane Corp.*, 79 F. Supp. 2d 494, 511 (D.N.J. 1999) ("A plaintiff must plead fraud with particularity with respect to each defendant, thereby informing each defendant of the nature of its alleged participation in the fraud).

Additionally, as applied to FCA claims, the Third Circuit has held that Rule 9(b) requires the plaintiff "to allege particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that the claims were actually submitted." *Foglia*, 754 F.3d at 156.

III. LEGAL ARGUMENT

The Martinez Defendants incorporate by reference the arguments made in support of dismissal in the Memorandum of Law submitted on behalf of Defendants Melissa Chlebowski, MCM Bethlehem Consulting, and the clinics. (*See* DE # 59 ("Chlebowski Defendants' Brief")) The following arguments are made in further support of the Martinez Defendants' motion for judgment on the pleadings.

A. The Alleged Failure to Disclose Martinez's Purported Involvement in the Clinics Is Insufficient, As A Matter of Law, to Establish FCA Liability.

1. The Requirement of a False Claim

With respect to section 3729(a)(1)'s requirement that the underlying claim submitted to the government be false, courts have recognized two types of false claims: factually false claims and legally false claims. *Wilkins*, 659 F.3d at 305. A factually false claim is one in which "the claimant misrepresents what goods or services that it provided to the Government." *Id.* In contrast, "a claim is legally false when the claimant knowingly falsely certifies that it has complied with a statute or regulation the compliance with which is a condition for Government payment." *Id.* Legally false claims are based on the "false certification" theory of FCA liability. *Id.*

Courts have recognized two distinct types of legally false claims: express false certifications and implied false certifications. *Id.* "Under the 'express false certification' theory, an entity is liable under the FCA for falsely certifying that it is in compliance with regulations which are prerequisites to Government payment in connection with the claim for payment of federal funds." *Id.* The express certification theory involves the defendant's express representation, in connection with the submission of a claim for payment, that the defendant complied with a particular statute or regulation that is a condition of

payment. Courts uniformly recognize that the submission of a claim expressly certifying compliance with a condition of payment that is not actually satisfied is a basis on which to impose FCA liability.

In contrast, under the implied false certification theory, liability "attaches when a claimant seeks and makes a claim for payment from the Government without disclosing that it violated regulations that affected it eligibility for payment." *Id.* This "theory of liability is premised 'on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment.'" *Id.* (quoting *Mikes*, 274 F.3d at 699). Unlike the express certification theory, the implied certification theory does not involve any representation from the claimant that he complied with a particular condition. The Courts of Appeals are split on the viability of this theory for FCA liability, and the Third Circuit has joined the majority of the courts in "holding that a plaintiff may bring an FCA suit under an implied certification theory of liability." *Id.* at 306. However, the Third Circuit cautioned against broad expansion of the implied certification theory, "particularly when advanced on the basis of FCA allegations arising from the Government's payment of claims under federally funded health care programs." *Id.* at 307.

Even amongst jurisdictions that recognize the implied certification theory, courts are further divided on whether the statute or regulation must expressly identify itself as a precondition to payment. The Second Circuit has held that "implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states that the provider must comply in order to be paid." *Mikes*, 274 F.3d at 699. The District of Columbia Circuit has held that, under the implied certification theory, the plaintiff "must show that the contractor withheld information about its noncompliance with material contract requirements" and elaborated that "[t]he existence of express contractual language linking compliance to eligibility for payment may well constitute dispositive evidence of materiality, but it is not ... a necessary condition." *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010).[2]

In identifying those requirements that are preconditions of payment, courts have also distinguished conditions of payment from conditions of participation in federally funded programs. *Wilkins*, 659 F.3d at 309. On the one hand, "[c]onditions of payment are those which, if the government knew they were not being followed, might cause it to actually refuse payment." *Id.* (quoting *United States ex rel. Conner v. Salina Reg. Health Ctr., Inc.*, 543 F.3d 1211, 1220 (10th Cir. 2008)). On the other hand, "[c]onditions of participation ... are enforced through administrative mechanisms, and the ultimate sanction for violation of such conditions is removal from the government program." *Id.* (quoting *Conner*, 543 F.3d at 1220).

It is only conditions of payment that may serve as the basis for liability under the implied certification theory. "Since the Act is restitutionary and aimed at retrieving ill- begotten funds, it would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay." *Mikes*, 274 F.3d at 697. The Act "does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions." *Id.*

Courts have justifiably expressed hesitation about the application of the implied certification theory in the health care field, due to the myriad regulations governing federally funded health care programs, particularly given how unclear it is that any one provision out of the thousands of health care regulations is, in fact, a condition of payment. *See Wilkins*, 659 F.3d at 307. "The False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations—but rather only those regulations that are a precondition to payment—and to construe the impliedly false certification theory in an expansive fashion would improperly broaden the Act's reach." *Mikes*, 274 F.3d at 699. As the Third Circuit aptly recognized, "anyone examining the Medicare regulations would conclude that they are so complicated that the best intentioned plan participant could make errors in attempting to comply with them." *Wilkins*, 659 F.3d at 310.

The Government is not however, without a remedy. Indeed, the Government has established administrative mechanisms for noncompliance with violations that are not clearly conditions to payment, and addressing noncompliance with requirements that are not clearly conditions to payment through FCA actions "would short-circuit the very remedial process the Government has established to address non-compliance with those regulations." *Id.* For many regulatory and contractual violations, the Government has other, more appropriate, options at its disposal to correct or manage such violations other than withholding payment on individual reimbursement claims. *See Id.* Permitting FCA claims to proceed "based on the violation of regulations which may be corrected through an administrative process and which are not related directly to the Government's payment of a claim ... would [unwisely] shift the burden of enforcing the Medicare regulations to [the courts] even though the administration of the vast and complicated Medicare program is best left to the administrators." *Id.* For these reasons, to curb the potential for overly expansive FCA liability in the health care field, the Third Circuit has cautioned,

"under this theory, a plaintiff must show that if the Government had been aware of the defendant's violation of the Medicare laws and regulations that are the bases of a plaintiff's FCA claims, it would not have paid the defendant's claims." *Id.* at 307.

2. No False Claims Are Alleged

The Government's case against the Martinez Defendants hinges on the viability and scope of the implied certification theory. With respect to Counts I, II, and III of the Government's Complaint in Intervention, the Government asserts FCA liability premised on the failure of the defendants to disclose Martinez's alleged involvement in the clinics in violation of his exclusion from participation in the Medicaid and Medicare programs while simultaneously submitting claims for reimbursement for services provided, The Government does not allege that those services were not actually provided. The Government instead alleges that on Medicare and Medicaid enrollment and reimbursement applications, Chlebowski certified that no excluded person was managing the clinics and did not disclose Martinez's purported involvement. (Compl. at ¶¶ 224-29) Thus, according to the Complaint, the false certifications relating to Martinez purportedly occurred in connection with annual enrollment documents, not in connection with specific claims for payment. (*See* Chlebowski Defendants' Brief at 8) But, in order for the Government to succeed on its claims, the implied certification theory must be found viable, and the regulations relating to Martinez's involvement in the clinics must be conditions of payment. *See Wilkins*, 659 F.3d at 309; *Mikes*, 274 F.3d at 697.

The essential question in distinguishing conditions of payment from conditions of participation is whether compliance with the regulation or statute or contract provision in question is a condition of receipt of payment from the Government. *See Wilkins*, 659 F.3d at 309-10. Here, both the source of the purported certification (program enrollment documents) and the nature of the regulatory scheme belie any contention that strict compliance with the excluded provider provisions is a condition of payment. First, as discussed, the Complaint itself alleges Chlebowski's certifications that there was no involvement by any excluded providers in the clinics occurred on annual enrollment applications, unconnected to any claim for payment. (Compl. at ¶¶ 224-29) And, second, while the Office of the Inspector General ("OIG") is vested with discretion to exclude entities from participation if they are managed or controlled by an excluded individual, the OIG is by no means required to do so. *See* 42 U.S.C. § 1320a-7(b)(8); 42 C.F.R. § 1001,1001. (*See also* Chlebowski Defendants' Brief at 9) That exclusion is not automatic and is instead a matter of discretion demonstrates that the excluded person provisions are appropriately categorized as conditions of participation, not payment. *See Wilkins*, 659 F.3d at 309 (distinguishing between violations which are correctable and those which result in automatic termination of the provider contract).

The applicable statutes and regulations also provide that "no payment will be made by Medicare, Medicaid or any of the other Federal health care programs for any item or service furnished ... by an excluded individual or entity, or at the medical direction or on the prescription of a physician or other authorized individual who is excluded when the person furnishing such item or service knew or had reason to know of the exclusion." 42 C.F.R. § 1001.1901(b); *see also* 42 U.S.C. § 1395y(e)(1); 42 U.S.C. § 1336a(a)(39). Similarly, the Pennsylvania Department of Public Welfare "does not pay for services or items rendered, prescribed or ordered" by an excluded individual. 55 Pa. Code § 1101.77(c)(1). Admittedly, as discussed in the Chlebowski Defendants' Brief, these are clearly conditions of payment. However, nowhere does the Government allege that Martinez furnished, directed, rendered, prescribed, or ordered the provision of services. The Complaint alleges instead that he, *inter alia*, "held himself out as the owner of the clinics", was physically present at the clinics, managed facility issues at the clinics, brought therapists to work at the clinics, monitored billing submissions, made personnel and salary determinations, negotiated third-party contracts, participated in management meetings, established a master's degree program, and bought additional properties to house the clinics. (Compl. at ¶¶ 95-199) Even assuming the truth of these allegations, much of which the Martinez Defendants deny, these allegations, even if proven, would not establish that Martinez, an excluded individual, furnished, rendered, prescribed, ordered, or directed the provision of services. Therefore, the Complaint, when construed in favor of the Government, does not support the inference that the Martinez Defendants may be held liable for falsely certifying any conditions of payment.

Because the Medicaid and Medicare program requirements purportedly violated by the Martinez Defendants are not conditions of payment, there can be no FCA liability as a matter of law. And while the Court may wish to wait for the Supreme Court's decision in *Universal Health Services*, the Government's claim must fail regardless of the Court's disposition on the implied certification theory. Even under the most generous, expansive interpretation of the implied certification theory of liability, the Complaint has not alleged violations of conditions of payment with which defendants

purportedly certified compliance in submitting claims for payment under the Medicare and Medicaid programs.

B. The Government's Allegations Relating Pertaining to Fraudulent Billing in Connection with Medication Management Visits Are Insufficient As A Matter of Law to Impose Liability under the FCA.

Counts IV and V of the Complaint are premised on the defendants' submission to the Pennsylvania Medicaid Program of claims for medication management visits ("med checks"). According to the Government, those visits should have lasted a minimum of fifteen minutes, but allegedly patients were seen for less than fifteen minutes, and treatment documentation from the Pennsylvania clinics failed to include clock time in and clock time out for the visits. (See Compl. at ¶¶ 328-37) The Government does not allege that the clinics' employees did not actually perform the med checks.

The med check claims fail as a matter of law for several reasons. First, the Government has neglected to identify the legal source of the purported 15-minute rule or of the requirement that clock in and out time be documented anywhere in its 56-page, 373-paragraph Complaint. Failing to identify the origins of these professed conditions to payment clearly falls below the mandates of Rule 9(b), which requires that fraud be plead with particularity. Without legal support for these requirements, the defendants cannot adequately respond to allegations that they failed to meet these requirements or that they falsely and impliedly certified compliance with the requirements. *See Travelers Indem. Co. v. Cephalon, Inc.*, 620 Fed. Appx. 82, 85-86 (3d Cir. 2015) ("In order to satisfy Rule 9(b), plaintiffs must plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." (quoting *Lum v. Bank of Am.*, 361 F.3d 217, 223-24 (3d Cir, 2004))). Even if the Government identifies the legal source of these purported conditions to payment in response to this motion, such identification is external the pleadings and does not negate the appropriateness of the entry of judgment on the pleadings in favor of the Martinez Defendants on these claims.

Second, the Government has not established that, even if such conditions exist in the contracts, statutes, or regulations, such conditions are conditions *of payment* that could form the basis of FCA liability, assuming the viability of the implied certification theory. Conclusory allegations that the fifteen-minute rule is a condition of payment are insufficient, particularly given the Government's failure to identify the source of the requirement. (*See* Compl. at ¶ 240) Given the sheer volume of the regulatory requirements in the health care arena, such regulatory requirements may be conditions of participation. *Mikes*, 274 F.3d at 699 ("The False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations—but rather only those regulations that are a precondition to payment...."). For these reasons, the allegations pertaining to med checks are insufficient as a matter of law, and judgment on the pleadings should be entered in favor of the Martinez Defendants on these counts.

C. The Government's Counts for FCA Liability Based on Purportedly False Claims for Services Provided by "Unqualified Therapists" Are Insufficient As A Matter of Law.

Count VI of the Complaint alleges that the defendants submitted claims to Medicaid and Medicare for services provided by persons who were not qualified to provide those services. (Comp. at ¶¶ 338-42). However, as the Chlebowski Defendants' Brief aptly notes (*see* Chlebowski Defendants' Brief at 14-15), by the Government's own allegations, Medicaid and Medicare administrators were evidently aware of the provision of services by unqualified individuals based on random spot checks. (Compl. at ¶¶ 286, 288, 351) Nowhere does the Complaint allege that, as a result of the spot checks, the administrators denied claims for payment for the services provided by unqualified individuals, or that the administrators sought reimbursement of payments for such services, or that the administrators pursued FCA claims based on any payments for such services. If this had occurred, under Rule 9(b), this should have (and presumably would have) been pled by the Government.[3] The failure to do so merits judgment on the pleadings.

If, alternatively, the administrators did not seek reimbursement or did not deny the claims after the spot checks, the Martinez Defendants are still entitled to judgment on the pleadings on this count for two reasons. First, "if the defendant knew that despite the government's awareness of the statement's falsity it 'was willing to pay anyway,' the defendant 'cannot be said to have knowingly presented a fraudulent or false claim.'" *U.S. ex rel. Thomas v. Siemens AG*, 991 F. Supp. 2d 540, 568-69

(E.D. Pa. 2014) (quoting *United States v. Southland Mgmt. Corp.*, 326 F. 3d 669, 682 (5th Cir. 2003) (concurring opinion)). Thus, the lack of prior government action after learning of the defendants' billing for the services of unqualified therapists negates the requirement that the defendants acted knowingly. Second, the fact that the administrators paid the claims, did not seek a refund of those claims, and did not pursue FCA relief based on these violations dispositively demonstrates that these conditions are not conditions of payment. *Mikes*, 274 F.3d at 697 ("Since the Act is restitutionary and aimed at retrieving ill-begotten funds, it would be anomalous to find liability when the alleged noncompliance would not have influenced the government's decision to pay."). For these reasons, the Martinez Defendants are entitled to judgment on the pleadings with respect to the FCA claims premised on the services of unqualified therapists.

D. The Government's Allegations of False Claims Premised on "Unsupervised Therapy" Services Are Factually and Legally Unsupportable.

Count VII of the Government's Complaint in Intervention alleges that the defendants improperly submitted claims for the unsupervised services performed "auxiliary personnel" who were required to be under the supervision of a physician. (Compl. at ¶¶ 295-314, 343-46) As described in the Chlebowski Defendants' Brief, the allegations concerning the lack of supervision are insufficiently specific to satisfy the heightened pleading requirements of Rule 9(b). (*See* Chlebowski Defendants' Brief at 15-17) Such conclusory allegations that it would have been impossible for a physician to be physically present are insufficient under Rule 9(b), and, as a result, the Martinez Defendants are entitled to judgment on the pleadings on Count VII.

E. There Are No Substantive Allegations Against MM Consultants And, Therefore, MM Consultants Is Entitled to Judgment on The Pleadings.

The Complaint in Intervention makes almost no mention of MM Consultants; in fact, only 8 paragraphs of the 373-paragraph Complaint reference MM Consultants, One of those paragraphs states, in conclusory fashion, that Martinez created MM Consultants to "obscure his large, personal financial interests in the PA clinics." (Compl. at ¶ 39) The other paragraphs relating to MM Consultants allege that Martinez transferred his ownership interests in some of the clinic properties to MM Consultants. (Compl. at ¶¶ 40-42, 185, 187, 189, 207) The Complaint does not, and cannot, allege that Martinez, as part of the exclusion, was precluded from owning properties housed by the clinics or serving as the clinics' landlord. The Government cannot group MM Consultants in with the other defendants and rely on the allegations against the other defendants to bring claims against MM Consultants. *See Swartz*, 476 F.3d at 764-65 ("Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant ..."). Because the Government failed to allege that Martinez's and MM Consultant's ownership of properties rented to the clinics is at all improper or relevant to the claims, and because there are no substantive allegations against MM Consultants, MM Consultants is entitled to judgment on the pleadings.

F. The Government's Common Law Claims are Insufficient As A Matter of Law.

In addition to the FCA claims, the Government, in Counts IX, X, and XI, alleged claims for common law mistake of fact, unjust enrichment, and fraud. For the reasons stated in the Chlebowski Defendants' Brief, these claims are legally insufficient, both in their failure to identify which jurisdiction's common law is being relied upon and in their failure to adequately plead that the defendants' actions were fraudulent. (See Chlebowski Defendants' Brief at 19-21) For the same reasons that the Government cannot establish the falsity of the claims for FCA purposes, the Government cannot establish these common law claims premised on the same allegations. And, the underlying premise of all these common law claims is that the defendants' conduct was fraudulent, and therefore, the heightened Rule 9(b) pleading standard applies. But, as discussed with respect to the various FCA claims, the Government has continuously failed to plead fraud with the requisite particularity. Moreover, the allegations do not suggest that the services underlying the defendants' claims to the administrators were not actually provided; as such, the defendants have not been unjustly enriched. Thus, the Martinez Defendants are entitled to judgment on the pleadings on the Government's common law claims.

IV. CONCLUSION

For these foregoing reasons and pursuant to Rules 9(b) and 12(c) of the Federal Rules of Civil Procedure, the Martinez Defendants respectfully ask the Court to enter judgment on the pleadings in favor of the Martinez Defendants and to permit the Martinez Defendants to join in the motions to dismiss previously field in this action by codefendants (DE # 58 and # 59).

Respectfully submitted,

PASHMAN STEIN, P.C.

Attorneys for Defendants Melchor Martinez and MM Consultants, LLC

By: <<signature>>

AIDAN P. O'CONNOR

RACHEL A. MILLS

Dated: May 2, 2016

Footnotes

1 The Martinez Defendants are not named in the *qui tarn* Complaint filed by the Relator, Karen Smith. Therefore, they seek judgment only with respect to the Government's Complaint in Intervention.

2 The Supreme Court has granted a writ of certiorari to evaluate the viability of the implied certification theory and, if the theory is viable, to determine whether the underlying condition must be expressly designated as such. *See Universal Health Servs., Inc. v. U.S. & Mass. ex. rel. Escobar*, 136 S.Ct. 582 (2015). Because the Government clearly relies on the implied certification theory, the Court's decision in *Universal Health Services* will necessarily impact the viability of the Government's claims. Therefore, this Court may wish to defer its decision on this motion until the Supreme Court decides *Universal Health Services* this term.

3 In fact, the Government alleged that administrators did recoup some payments after spot checks purportedly identified other issues, but it did not allege recoupment with respect to the provision of services by unqualified therapists. (*Compare* Comp. at ¶ 353 (The administrator "recouped an overpayment based on med checks Lehigh Valley improperly documented and/or billed in 2012 and/or early 2013."), *with* Compl. at ¶ 352 (referencing that the administrator's "credentialing audits showed Northeast had improperly billed Medicaid for the services of unqualified therapists" but stating nothing about the administrator's recoupment)).

End of Document

© 2018 Thomson Reuters. No claim to original U.S. Government Works.

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER,

Plaintiff,

vs.

HENDERSON WATER PARK, LLC,

Defendant.

CASE NO. A722259
DEPT. NO. XXX

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION TO DISMISS R&O CONSTRUCTION

BEFORE THE HONORABLE JERRY A. WIESE, II

WEDNESDAY, OCTOBER 10, 2018

AT 10:19 A.M.

LAS VEGAS, NEVADA

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

APPEARANCES:

For the Plaintiffs:

JON C. WILLIAMS, ESQ.
PHILIP R. ERWIN, ESQ.

For the Defendants:

MAX E. CORRICK, II, ESQ.
JOHN E. GORMLEY, ESQ.
JEFFREY VAIL, ESQ.
BRETT GODFREY, ESQ.
DOUGLAS DUESMAN, ESQ.
KEVIN SMITH, ESQ.
DAWN DAVIS, ESQ.

LAS VEGAS, NEVADA, WEDNESDAY, OCTOBER 10, 2018

P R O C E E D I N G S

* * * * * * *

THE COURT: Gardner v. Henderson Water Park. A lot of lawyers making a lot of money on this case.

MR. WILLIAMS: Maybe on that side, Your Honor.

THE COURT: You guys want to state your appearances for the record.

MR. VAIL: Jeff Vail and Brett Godfrey for R&O Construction.

MR. CORRICK: Max Corrick and John Gormley on behalf of the Opheikens defendants.

MR. SMITH: Kevin Smith, Hall, Jaffe & Clayton, representing Shane Huish individually.

MS. DAVIS: Dawn Davis for Craig Huish, Scott Huish, and West Coast Water Parks.

MR. DUESMAN: Douglas Duesman of Thorndal Armstrong for Henderson Water Park.

MR. WILLIAMS: Colby Williams, bar no. 5549, on behalf of the plaintiffs.

MR. ERWIN: Philip Erwin, Campbell and Williams, on behalf of the plaintiffs.

MR. GODFREY: Your Honor, Brett Godfrey here

with Mr. Vail. We have been admitted pro hoc vice in this matter, but we still have, as yet, an unapproved motion to associate. From a procedural standpoint, I thought that might serve the Court's convenience to point that out early.

THE COURT: Do you have an order with you?

MR. CORRICK: The motion is pending before Your Honor.

MR. WILLIAMS: Your Honor, let me make it easy. We have no objection to them participating.

THE COURT: I'm going to grant it.

MR. GODFREY: Your Honor, I'm not going to be arguing the motion. Can I plant myself over there?

THE COURT: Sure. Make yourself comfortable. Whatever you like.

All right. So we've got defendants' motion to dismiss. Who is arguing this?

MR. VAIL: I will, Your Honor.

Your Honor, thank you. I appreciate the time to consider this case. I know it is an emotional matter -- emotionally charged case, and understandably so. I do have some brief prepared remarks, but first I'd like to ask if there's any specific area that the Court would like to inquire or have me focus on. I'd be happy to do so.

THE COURT: Well, not necessarily. I think you need to address the Supreme Court's decision already in this case. Because, I mean, I think you realize that I initially said that I didn't think they could bring in these individuals. And the Supreme Court disagreed with me. So I understand you want to get these individuals out.

MR. VAIL: Your Honor, this motion here is actually not about getting the individuals out. It's about getting a company that is punitively owned in part by a trust that is related to one of the individuals that they're seeking to reverse pierce the corporate veil to bring R&O Construction in and that today's motion is solely to dismiss R&O Construction from the case. But to address --

THE COURT: Explain to me how that's different from what the Supreme Court already said that I have to allow.

MR. VAIL: I will do that, Your Honor. There's an alter ego issue here. Fundamentally, reverse piercing claim is a species of alter ego claim. The argument that plaintiffs have been advancing is that Loomis v. LFC, back in 2000, the Nevada Supreme Court said there's kind of a mix of elements and you can pick and choose and there's not an absolute, strict

requirement for overlapping ownership between the two parties, two entities, where you're seeking to have a finding of alter ego.

Immediately after that, in 2001, Nevada legislature enacted 78.747 which expressly laid out a conjunctive and mandatory list of requirements overruling exactly that portion of the Supreme Court's holding saying that there must be unity of ownership and interest as an absolute requirement before there can be a finding of alter ego.

Now, here in this case we have Orluff Opheikens, who is one of the individual defendants. That's one of the individuals the Supreme Court said, yes, he can be in the case. And now what the plaintiffs are asking is they're saying, well, this is a construction company R&O, and we'd like to have them be found through a reverse piercing tactic to also be the alter ego of Mr. Opheikens. But they've provided no coherent pleading that shows that mandatory overlap of ownership.

What they've said, paragraph 79 in the third amended complaint, is simply that Orluff Opheikens, through his family trust, owns 85 percent of R&O. Now, the family trust is not a party to this case. It has not been described how possibly through this family

trust that ownership flows. And the reality is -- so we've attached because under *Baxter* it's clear the result of the trust document is implied and incorporated in the complaint. So we've attached a portion of that that shows the three key elements. And that's simply is Orluff is not the trustee. He's not the beneficiary. He was merely the grantor of this trust.

So there's kind of this chain of reasoning, but the trust is a separate legal entity. It owns, per their allegation in the complaint, R&O, not Orluff. There's no overlap and, therefore, under NRS 78.747, they failed on that key element. Without that overlapping ownership, there cannot be an alter ego finding.

And that -- the point the plaintiffs bring up, then, is, well, no *LFC v. Loomis* back in 2000 is controlling precedent in this case. They say that there the court said, you don't have to absolutely have overlapping ownership to have an alter ego finding. And the point that R&O is making in its motions and its reply, and this is why we cite to legislative history, is that, no, in fact, immediately after that *LFC v. Loomis* Supreme Court case, that is why the Nevada legislature put in statute the alter ego requirements.

Previously, it was only common law. And in the legislative history, which we cite in our opening brief, they make it clear that the reasoning was that there would be fixed and defined standards that businesses in Nevada could rely on for knowing when there's a potential for alter ego liability.

So under statute, and that is now applicable, not the preexisting Supreme Court case, under statute, one of those mandatory conjunctive requirements is a unity of ownership.

Here, all plaintiffs, if you take everything they're saying as true in the light most favorable to them, there is some third-party trust that once was created by Orluff Opheikens that now owns some portion of R&O. That's not unity of ownership, Your Honor. If that trust were a party, if they had -- they've taken discovery in this case. They could try to bring a further chain of alter ego cascade. They have not done that.

What they've alleged in the third amended complaint is simply that Orluff Opheikens through his family trust owns R&O, and under the statute in Nevada that's not sufficient.

Are there other issues? I'd like to bring up one -- one issue, Your Honor, on the question of

whether this is even an appropriate prejudgment remedy. And I think that's a critical question here. Because we don't know several things. Another mandatory element of this alter ego finding that they're asking for is a showing of manifest injustice. But right now, so the causation of this injustice that they report may happen down the road would be if there's a judgment against Mr. Opheikens that then couldn't be collected, there would be an injustice if we didn't have R&O's pockets there to pay the judgment.

This is fundamentally putting things backwards and demonstrates why reverse piercing as opposed to a traditional, simple alter ego allegation of negligence must be a post-judgment remedy, not a prejudgment claim. Right now we do not know if there will be a judgment, how much that judgment will be, who it will be against, jointly or severally. And, most importantly, will any portion of a prospective judgment be uncollectible. These are all unknowns that cannot permit the valid pleading of the injustice based on that un-collectability.

That issue, and this is the challenge that I've issued plaintiffs, why not dismiss R&O without prejudice at this stage. And then when we know the answers to all of those questions, when we know, is

there a judgment, how much, who is it against, and is there some portion that couldn't be collected, then in a post-judgment context, they would be perfectly positioned to either have no argument or to say with facts behind them there's manifest injustice unless we bring R&O in as a post-judgment remedy. But here, today that's premature.

That's all I have, your Your Honor.

MR. CORRICK: Your Honor, may I just briefly? On behalf of the Opheikens defendants, we provided a joinder. And I just want to start by apologizing to the Court. I think through the briefing in this case some of the rhetoric has gotten a little bit unnecessary. And to the extent that, from my office, that that occurred, I want to apologize to the Court and to counsel.

I think this is a very simple issue, purely a legal issue. And it's whether or not Nevada law allows reverse pierce in a non-post-judgment context. That's it. And the case is *LFC*, and we've cited it comprehensively in the joinder and comprehensively in the response to the opposition.

And, again, I'll issue another challenge to plaintiffs. We have yet to hear a case, a single case, in Nevada or in any other jurisdiction, where a

prejudgment reverse pierce other than in a tax case or in a bankruptcy case has ever been permitted. We weren't able to find one. Perhaps if Your Honor's office, clerk, was able to find one, I would love to hear what it is. I didn't see one in the opposition. And we tried to make a point of documenting quite clearly why the cases cited by the plaintiffs and the cases relied upon by the plaintiffs don't get them where they need to go.

As Mr. Vail said, this is premature. Nothing is lost by granting this motion and waiting to see what happens with respect to a trial in this matter. They aren't going to be foreclosed later.

If they are able to secure a judgment against Orluff Opheikens and then try and go through the elements as set forth in *Loomis*, the *LFC* case, in terms of what you need to establish alter ego, but we're not there yet. At this point in time, you cannot get there from here. *LFC* doesn't give them the vehicle to do that. No case in Nevada gives them the vehicle to do that. Equity does not give them the vehicle to do that at this time. We ask -- and we just continue to join the motion. The motion should be granted.

MR. WILLIAMS: Good morning, Your Honor. So the defendants have raised a number of arguments, Your

Honor. And I think I counted, we've heard three of them. And I'm going to address each one of them. Before I do, I'll pose the same question to the Court. Is there anything you want me to focus on, because I don't want to waste the Court's time on things that I don't think are really the focus here.

THE COURT: No.

MR. WILLIAMS: Let me start with *Loomis*. And let me start with counsel's representation that *Loomis* has been overruled. Your Honor, it hasn't been overruled. It hasn't been abrogated. That is pure fiction.

I looked up last night the citations to *Loomis*. It's been cited in 91 cases, I'll represent to the Court. And not a single one of them says it's been overruled or abrogated by the NRS 78.747 statute that counsel is relying on.

And they're relying on that to tell you that Orluff -- and I don't mean to use his first name to be disrespectful, but there's several Opheikens. So I just want to make it clear what I'm talking about. They say that Orluff has to be an owner in order to pursue this came, and if you haven't alleged that he's an owner, then you haven't pled it properly. Your Honor, that is pure -- purely wrong. And let me tell

you why.

The statute that was enacted they're relying on for this contemplates three categories of people that can be liable for alter ego. And this was decided by Judge George. And they tell you in their reply brief that Judge George got it wrong. He's been sitting on the Federal bench for quite a long time. I think he knows how to interpret a Nevada statute.

What he said was, if directors can be held liable for alter ego and if officers can be held liable for alter ego, that tells you in the statute that it's not limited to purely owners. It references stockholders. And, sure, can directors and officers be stockholders of a company and be an owner? Sure, they can, but oftentimes they aren't.

That right there, tells you that the statute 78.747 wasn't intended to limit the ability to be liable for alter ego to owners. All sorts of people can be liable for it, Your Honor. And that's what *Loomis* says. *Loomis* addressed it directly and said -- because this exactly argument was raised, you have to be an owner. And *Loomis* says, no, you don't. It's a consideration, but that's not dispositive of the issue.

Your Honor, if you look at that legislative history, nowhere in that legislative history does it

talk about this issue. It never says it's addressing *Loomis* because *Loomis* has to be overruled or abrogated. You can look to your heart's content. You don't find it in there.

So, Your Honor, I think the fundamental premise that you have to be an owner is wrong. But let's talk about --

THE COURT: How do you address the statute, then? What does the statute mean if it doesn't require ownership?

MR. WILLIAMS: What does it mean? Your Honor, it sets forth the three elements -- it basically embodies what was already in the case law, both traditional veil piercing and in the reverse veil piercing setting. Your Honor, it codifies the elements that the Supreme Court had already employed in its jurisprudence.

If you look at the unity of ownership and unity of interest element, that's the language that the court had used consistently for 40 plus years in the alter ego setting. It didn't change anything in that regard, most respectfully, at all. So when *Loomis* -- if you look at the language of *Loomis*, it talks about having a unity of interest and ownership, Your Honor. And the argument was then raised, well, he wasn't an

owner, so he can't be held liable in the reverse piercing setting. The court said, no, that's not true. It's a consideration, but that is not dispositive of the issue.

So, Your Honor, if the statute contemplates that directors and officers can be liable, a director and an officer is not synonymous with stockholder. You wouldn't have even needed to use those terms if it was limited purely to stockholders, i.e., owners of a corporation. Why have it in there? Your Honor knows the statutory construction very well. And you can't disregard language that's contained within the statute. And so by including directors and officers, the legislature is telling you it can be beyond just a stockholder who's an owner.

But let's talk about the ownership issue. Because we did allege that Orluff, through his trust, was the 85 percent owner of R&O. And they come back and what do they do, Your Honor -- and this is unique in a motion to dismiss setting -- they attach exhibits in order to defeat our pleading.

And what do they attach? Now, I don't know how it's done in Colorado, Your Honor, but they attached two pages of a trust. That trust is not signed. We have no signature page. It's not

authenticated by a declaration telling us what it is. And, yet, they're going to ask this Court to rely on it for its accuracy and its authenticity and its truthfulness. Your Honor, that's not anything any of us can rely on. We don't even know what it is.

It purports to be two pages of Orluff's trust. We don't know that. There is nothing to say that. But let's even set that defect aside, Your Honor.

Because after we filed our motion for leave to amended, we got documents from the Bank of Utah. And our position is that you shouldn't consider the trust document, but if the Court is at all inclined to do so, that would convert this to a 56 motion. Because while we referenced Orluff's ownership, the trust document is not the centerpiece of our claims. We didn't reference that document. You can't consider it under *Baxter* as a -- as being incorporated in the complaint, and thus, something you can consider on a motion to dismiss. It would have to be converted to summary judgment.

So we said, okay, you want to treat this as a summary judgment, let's look at just one piece of evidence that came in after we moved for leave to amended. And what was it? It's an email from the CFO

of R&O Construction identifying Orluff as being an individual owner of R&O. The trust is also an owner, but he's an individual owner. And that post-dates by two years the alleged creation of the trust.

So if Your Honor was at all inclined to accept this argument, I would request leave to amend. Because we'll allege that he's an owner individually based on that document, Your Honor, if we were to get that far, but I most respectfully submit we don't even need to get there.

Now, with respect to the next argument about this reverse veil piercing having to be brought post-judgment. Your Honor, again, I disagree with that. Counsel said -- you know, they challenge me to tell the Court what case this has been allowed to be brought prejudgment. Your Honor, we've cited a number of cases where reverse veil piercing claims were brought prior to there being a judgment.

But, Your Honor, the same is equal; I can pose the same challenge. Point out one case that has stood for the proposition you can't bring these theories of relief prior to the judgment. You can look in vein for that as well and you won't find it. They don't say that, Your Honor.

And I mentioned this briefly when we were

here before on the motion for leave to amend. This case, they want to try and create a distinction between traditional alter ego and the reverse veil piercing that we're here on. Your Honor, they're designed to do the same thing, and that's to prevent injustice from using the corporate fiction in an improper manner. They are species of the same thing.

And we are presently pursuing traditional alter ego claims in this case right now. We don't have a judgment. The Nevada Supreme Court, when they sent the case back down, didn't say, you can only grant their leave to amend once they get a judgment. They said we're permitted to bring the claims now, and that's what we did. We filed in December. We've brought traditional alter ego claims before having a judgment. And we're seeking to do the same thing here with respect to reverse veil piercing.

Now, I will acknowledge when you look at *Loomis* or you look at some of these other cases, are they in the post-judgment context? Of course, they are, from this standpoint, Your Honor. By the time an appellate court is reviewing the issue, the matter has, in all likelihood, gotten to trial. There's been a result, and there's been a finding that alter ego. So the court is reviewing it. It doesn't mean that the

party couldn't have brought the alter ego theory for relief until after it got its judgment. As we've cited in a number of these cases, it's in the case as you go along.

Now, from a practical standpoint, when are you actually effectuating the result of getting an alter ego finding? It's after you have a judgment. Your Honor, if you grant -- or if you deny this motion, we're allowed to pursue this claim, doesn't mean we've won anything. We keep developing the facts. And either at the end of the day we're going to have the facts to show that alter ego applies or we're not, but you don't make that determination whether we can even pursue it at this point because we don't have a judgment. That's just not the way it works.

And, again, *Loomis* is dealing with a post-judgment situation, but it never says, we're limiting our decision to these facts, or that you can't bring this claim before you have a judgment. It never says that, Your Honor.

So I think the final point that counsel raised is that we didn't include the word "manifest," quote/unquote, in the complaint. And the argument, I guess, is that the statute requires us to use that magic language. Your Honor, I'm not aware of the

Supreme Court requiring parties in the context of filing a notice pleading in this Court under Rule 8 where we have to provide fair notice to the other side requiring us to use any special language. We've alleged that allowing the situation to occur that has gone on here will promote an injustice. That is the language used in the cases throughout all of the Nevada opinions addressing this matter.

The fact that we didn't include the word "manifest" is not a basis to dismiss this complaint. And if the Court was even inclined to consider that argument to be valid, then we would again ask for leave to include that.

So I think I've answered everything they argued, Your Honor. They made other arguments in their papers that I'm happy to address, but I don't think that they're relying on those. If they are going to raise those now on rebuttal, I'd ask for the opportunity to address those, but I don't think I need to unless the Court has any further questions.

THE COURT: Okay. Thank you.

MR. VAIL: Your Honor, briefly in response to Mr. Williams' statements. I'd like to begin with one of the things he said at the very end of his argument. He raised the question -- he posed the challenge,

what's the difference between traditional alter ego and reverse veil piercing. They're both alter ego. They both fall under Nevada Statute 78.747. The answer is simple. In a traditional alter ego, such as where the Supreme Court said the individual defendants may be brought in and may potentially be held liable as defendants in this case, there the injustice of not having them in the case is due to the allegations of their wrongful acts. In contrast, in reverse pierce, the injustice stems from un-collectibility.

There's no argument that R&O, anyone at R&O, has done anything wrong in their capacity at R&O. The only reason R&O is in the case is the claim that in the future if a judgment can't be collected against the rest of the people, there needs to be someone with pockets deep enough to permit collection. That's a fundamental difference in why alter ego for a negligence claim can be brought prejudgment, whereas, a reverse pierce claim must be brought only in the post-judgment context.

Now, I'd also like to briefly address what the statute actually intended to limit as far as ownership 78.747. Just to read for Your Honor a couple of quotes from the legislative history in this case, because it is, in fact, exactly what happened, that

after *Loomis* -- and *Loomis* has been cited many times for many propositions, but for this issue, the elements for altre ego liability, the legislature stated their goal was, quote, "To limit common law and statutory liability by passing 78.747, and specifically to address the problem of, quote, 'no fixed criteria' to use the alter ego doctrine to pierce the corporate veil."

That's why, while there was a common law test that was sort of taken piecemeal, and you can pick and choose and weigh these factors as necessary pre-statutory, with the enactment of the statute there's the requirement 78.747(2)(b), I believe it is, that says there's a requirement for showing a unity of interest and ownership. And that's simply not shown here, not in the plaintiff's allegations.

If Your Honor has any questions about the issues raised by Mr. Williams, I'm happy to address those. Otherwise, I would yield my time to Mr. Corrick.

THE COURT: Do you have more?

MR. CORRICK: Very briefly again, Your Honor. I think we're now at the point where you're to decide does *Loomis* say you can have a post-judgment reverse pierce? We know it does. We know it says

post-judgment. We know that.

Now, the argument has devolved from plaintiff's side to, well, it doesn't say you can't do it in a prejudgment scenario. That's an interesting position. Because the Court doesn't specifically say you can't do it, therefore, you can? That asks this Court to ignore the entire context not only of the *LFC* or *Loomis* case, but every single case relied upon in that *LFC* case, which are all post-judgment cases, and which asks this Court to ignore every other case across the country where the topic and the issue of reverse pierce is only in post-judgment unless, again, we have the carve-out of tax cases and bankruptcy cases, which this isn't one of them.

If that's where we are at, the decision is purely a legal one. There's no factual issue to be fought over now. It's plainly does *Loomis* say what *Loomis* says and what we say it is or is it something that is -- or is it consigned to what it doesn't say and what all these other cases -- ignore all the other cases. Ignore the body of cases across the country that say this is only allowed in post-judgment context.

Again, I didn't hear any meaningful response to that question other than, well, it doesn't say we can't. That's not sufficient to state a claim upon

which relief can be granted. We think the motion should be granted. And if you're going to grant it, we would ask that it be certified pursuant to 54(b) so that this issue can be brought before the Nevada Supreme Court. Because I think the plaintiffs want that to occur.

While that's happening, no prejudice is going to befall the plaintiffs with respect to this. They will continue to prosecute this case. And down the road if a writ is entertained, they'll be in the same position as before. Nothing will have been lost. Because it's an issue that is consigned and focused solely to what happens in post-judgment context. Thank you.

THE COURT: All right, guys. So *Loomis* says what it says. NRS 78.747 says what it says. There isn't any allegation that I see in this case that R&O did anything individually wrong, that there's any liability on their part for any actions done on anybody's part for R&O. It's only to try to get a deep pocket or another pocket. And I understand that. But I don't think that the statute or the cases anticipate or say that that's what we want to have happen. Whether I rely on the *Loomis* case or not, I think it confuses the issues for a jury.

It's one of those things under 48.035 that I'm going to look at what evidence is going to come in. Even if it's relevant, is it more unduly prejudicial or burdensome or does it confuse the issues for the jury. And I think that having a defendant who is only there as a means of collection I think confuses a jury because they can't find any liability against them. I think it just makes more sense to be a post-judgment process and a post-judgment party.

So I don't think that there's any manifest injustice by precluding them from being a party at this time. I'm going to grant the motion to dismiss. It will be without prejudice. You can bring them back in and do a reverse pierce at the end of the trial, if there's a need to do that. But I don't know that there's a need to have them in the case at this point, specifically based on the fact that there is no liability on their part.

Now, I understand the issue of the unity of ownership issue. And if I was going to allow them to remain in, I would allow you to amend so that you could assert your allegation that there is a unity of ownership, which, you know, I think alleviates some of that problem, that issue. But I don't know that we need them in. I think it's too confusing. So I think

we take R&O out of it for now. You can put them back in at the end of the trial if there's not a way to collect.

I'll grant 54(b) cert on that. You can take it up and see what they say. I don't know that there's a need to. I don't know that the plaintiff has expressed a good reason why you need them in now as opposed to bringing them in later if necessary.

MR. WILLIAMS: Well, Your Honor, may I respond?

THE COURT: Go ahead, yeah. Sure.

MR. WILLIAMS: And I'm not looking to reargue anything. It's more in the context of seeking clarification at this point. Given what the Court has said about our ability to bring R&O back at the appropriate time, the reason that we want them in now, Your Honor, is for a variety of reasons, not the least of which is the efficiency of doing this at once. Because under His Honor's scenario, if we proceed, I'm not clear -- is the Court contemplating we go through trial, see what happens, and then we can bring a new claim? Are we amending within this case? Are we going to have to bring a separate action? That's where some of the confusion lies.

I think a way to address this, Your Honor, if

the Court is inclined to want to delay dealing with this issue, would not be to grant the motion at this time, but would simply be to continue it, and then potentially bifurcate the trial so that you deal with the confusion issues that the Court has expressed some concern on. After all, Your Honor, they've argued that they think this is a question for the Court. And I think that there are factual issues that are going to need to be determined by a jury. But to the extent that it's the Court making the call at the end of the day, it seems to me we could accomplish what you're trying to do by simply continuing this matter and allowing for bifurcation to deal with it to prevent some of the issues you're talking about. That would be my first response, Your Honor.

THE COURT: I think that the -- you know, I don't remember which one of them argued it, but there is an issue of do you even need to get to this. First you need to get a verdict. Then you need to have a verdict that's uncollectible in order to do a reverse pierce. Otherwise, it's not necessary; right?

MR. WILLIAMS: Well, I disagree with that. So that's -- it's helpful for me to understand where the Court's coming from. Is it, in fact, the Court's position that reverse veil piercing can only be pursued

once you have a judgment, once you've determined it's uncollectible, and the other two elements that they've talked about? Is that where the Court is, just for my own clarification.

THE COURT: I don't know that I would say that it's the only way to do it, but it makes more sense than to try to clutter up a negligence case.

MR. WILLIAMS: With respect to the efficiency, Your Honor, having them in now allows the discovery to be conducted. And that can be managed by the Court. I mean, to the extent if this goes on in the context of punitive damages, for example. You can have a punitive damages claim in the case. You make a request for production, regarding, say, for example, financial condition. The Court allows the discovery to be produced in camera. And then you hold it until you find out whether you get -- the jury is going to award punitive damages. Then that discovery would be made available. I think something similar could be done here, and would be more efficient. That's why it's important to have R&O in now. We get the discovery done, rather than having to bring another claim down the road with potentially a new jury and start the process over again. And so the Court, to the extent that it was concerned again about this confusion issue

or wondering why R&O -- you could manage that discovery and have it not be produced until after there's been an initial determination made whether alter ego is going to apply. It just seems to me that there are more efficient ways to deal with it than dismissing now and saying bring this down the road.

THE COURT: I understand the efficiency argument, but that only makes sense if you say that -- if we assume that there's going to be a verdict that's uncollectible. Otherwise, you're doing things now that you would never have to do. So it would be more efficient to not do it now and see if there's ever a need to do it.

MR. WILLIAMS: But, Your Honor, we're going to be doing discovery on alter ego in this case regardless. Alter ego is in this case. Just so that there's no ambiguity here, there are alter ego claims right now in this case that have not been moved on that will stay in this case. And discovery will be done on those, Your Honor. And so -- and that's the traditional veil piercing that we've talked about. And I don't have a judgment on that yet. And my position is that's not required and my position is that's the same with regards to veil piercing. I don't need the judgment in order to have that theory of relief in the

case right now so that we can do what we need to do to either have it proved at the end of the day or not.

THE COURT: Tell me if I'm incorrect, but what I remember from the Supreme Court's decision in this case was that they allowed the alter ego claims based on the allegations that the plaintiffs have that those individuals did something individually wrong and that there was some individual negligence on their part. That's how I interpret --

MR. WILLIAMS: Most respectively, there were two issues in front of the Supreme Court. And the issues were as follows: The first was whether we could bring in the individuals personally. And that was the debate over what the LLC statute said or didn't say. And we had a difference of opinion on that. My position was if you allege that a member of the LLC has engaged in personal misconduct or violated a personal duty, then then you can bring them in individually. That was issue one, and the Supreme Court agreed with us on that.

The second issue was that we were also alleging alter ego liability. Henderson Water Park is comprised of two member LLCs. And we were seeking alter ego liability against them, Your Honor.

And the decision at that time in the District

Court was that you can't pursue alter ego against an LLC because there's no similar LLC statute like the one that exists for corporations. And the Nevada Supreme Court said, no. Because you can engage in the exact same type of fraud through an LLC that you could through a corporation, you don't need a statute in order to pursue that theory of relief. So as part of its order, it said we were permitted to bring that claim now based on alter ego. That didn't have anything to do with the individual liability matters, Your Honor, most respectfully. It was separate.

MR. VAIL: Your Honor, if I could comment briefly on that. The issue with respect to the LLC law, I agree with Mr. Williams, that the Supreme Court said, we're simply going to apply corporate LLC statute to the LLCs. It's the issue with the individuals that is more analogous to the situation here. There the individuals were allowed to be brought in by the Supreme Court saying, it's fine if you're a member of an LLC. That, by itself, can't make you liable, but your individual acts can.

And that's where it's analogous here. There are no individual acts by R&O that is suggesting R&O has done something bad. The only potential source of injustice that could ground bringing in R&O is that

un-collectibility.

THE COURT: I feel like I have to dismiss this one, guys. If you think -- if you think I'm missing something, do a motion to reconsider and try to convince me what I'm missing. I'm not too proud to do that. I'd rather have you convince me than have the Supreme Court tell me I'm wrong. But at this point, I'm just not convinced.

So I'm going to grant the motion. It's going to be without prejudice. And if you think I'm wrong, do a motion to reconsider, like I said. Otherwise, take it up and see what they say.

MR. WILLIAMS: Fair enough, Your Honor. And you did -- pursuant to counsel's request, you did indicate that you'd grant 54(b) certification as far as whatever order gets submitted to His Honor?

THE COURT: Sure.

MR. CORRICK: That's right, Your Honor. We'll work together with counsel to run it by them, make sure the order says what it needs to say.

Can I make sure that it's clear, based upon your ruling from the bench, that you have not taken into consideration at all any of the exhibits that were attached to --

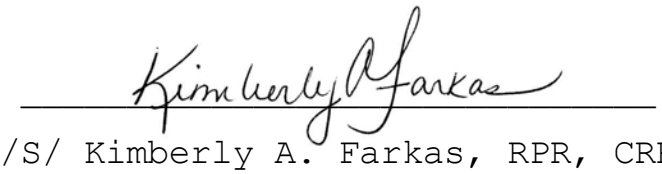
THE COURT: I have not. We'll consider it a

motion to dismiss. Thanks, guys.

(Proceedings concluded at 10:58 A.M.)

-o0o-

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



/S/ Kimberly A. Farkas, RPR, CRR

ORDR

John E. Gormley, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701

Karen Porter
Nevada Bar No. 13099
Brett Godfrey (Admitted *Pro Hac Vice*)
Jeffrey Vail (Admitted *Pro Hac Vice*)
GODFREY | JOHNSON
9557 S. Kingston Court
Englewood, Colorado 80112
Telephone: 303-228-0700
Facsimile: 303-228-0701

Attorneys for Defendants
R&O CONSTRUCTION,
TOM WELCH; ORLUFF OPHEIKENS;
SLADE OPHEIKENS; and CHET OPHEIKENS

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, a Nevada limited liability company; 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 HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an

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

ORDER GRANTING DEFENDANT R & O CONSTRUCTION, INC.'S MOTION TO DISMISS AND MOTIONS TO ASSOCIATE

Date of Hearing: October 10, 2018
Time of Hearing: 9:00 a.m.

individual; R&O CONSTRUCTION, INC., a Utah corporation, and DOES I through X, inclusive; ROE CORPORATIONS I through X, inclusive, and ROE LIMITED LIABILITY COMPANY I through X, inclusive,

Defendants.

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

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

This matter having come on for hearing on the 10th day of October, 2018, before the Honorable Judge Jerry Wiese, on Defendant R & O CONSTRUCTION, INC.'s ("R&O") MOTION TO DISMISS; Plaintiffs appearing by and through their counsel J. Colby Williams, Esq., and Philip R. Erwin, Esq., of Campbell & Williams; Defendant R&O appearing by and through its counsel Jeffrey S. Vail, Esq. and Brett M. Godfrey, Esq., of Godfrey | Johnson, P.C., and Defendants TOM WELCH, ORLUFF OPHEIKENS, CHET OPHEIKENS, AND SLADE OPHEIKENS (collectively "The Individual Defendants") appearing by and through their counsel Max E. Corrick, II, Esq. and John E. Gormley, Esq., of Olson, Cannon, Gormley, Angulo, and Stoberski, who also represent R&O in this matter.

The Court having considered the papers, pleadings, and oral arguments, orders as follows:

1. Plaintiffs filed their Third Amended Complaint on July 30, 2018, which asserted in its Third Cause of Action a single claim for relief against R&O for Reverse Piercing of the Corporate Veil.
2. Defendant R&O has filed a Motion to Dismiss this sole claim for relief against R&O pursuant to NRCP 12(b)(5), asserting, *inter alia*, that Plaintiffs had failed to properly

state an *alter ego* claim under NRS § 78.747, and that a pre-judgment claim for relief for reverse piercing of the corporate veil is impermissible under the circumstances presented in this case. The Individual Defendants filed a timely joinder to R&O's Motion. An Opposition was timely filed by Plaintiffs, and R&O and The Individual Defendants filed their respective Replies.

3. Additionally, at oral argument, R&O's counsel moved for the Court to grant their pending Motion to Associate, and thereby to appear before this Court *pro hac vice*. Plaintiffs did not oppose that Motion. The Court grants the pending Motion to Associate.

4. Pursuant to *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000), NRS 78.747, and because Plaintiffs' sole claim for relief against R&O does not allege negligence or any other wrongful conduct by R&O and will, therefore, confuse the jury, Plaintiffs are barred from asserting their claim of relief for reverse piercing of the corporate veil against R&O prior to an uncollectible judgment being entered in this case against Orluff Opheikens.

5. Accordingly, the Court finds that Plaintiffs have failed to state a claim against R&O upon which relief may be granted. The Court specifically notes that it has not considered any exhibit to any filing related to R&O's Motion in reaching its conclusion. Therefore, the Court grants R&O's Motion to Dismiss Plaintiffs' Third Cause of Action pursuant to NRCP 12(b)(5) without prejudice.

WHEREFORE, it is hereby ordered, adjudged and decreed that R & O Construction, Inc.'s Motion to Dismiss is granted without prejudice, and its Motion to Associate is granted. Furthermore, there being no just reason for delay, this Court determines, directs and certifies that final judgment is entered in favor of R&O pursuant to NRCP 54(b).

Dated this 22 day of October, 2018.

HONORABLE JERRY WIESE

Respectfully submitted by:

Dated this 19th day of October, 2018

GODFREY | JOHNSON

By: */s/ Karen Porter*
KAREN PORTER
Nevada Bar No. 13099
9557 S. Kingston Ct.
Englewood, CO 80112
Attorneys for R&O

Approved as to form and content by:

Dated this 19th day of October, 2018

CAMPBELL & WILLIAMS

By: */s/ Philip R. Erwin*
PHILLIP R. ERWIN
Nevada Bar No. 11563
700 S. Seventh St.
Las Vegas, NV 89101
Attorneys for Plaintiffs

NEOJ

John E. Gormley, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701

Karen Porter
Nevada Bar No. 13099
Brett Godfrey (Admitted *Pro Hac Vice*)
Jeffrey Vail (Admitted *Pro Hac Vice*)
GODFREY | JOHNSON
9557 S. Kingston Court
Englewood, Colorado 80112
Telephone: 303-228-0700
Facsimile: 303-228-0701

Attorneys for Defendants
R&O CONSTRUCTION,
TOM WELCH; ORLUFF OPHEIKENS;
SLADE OPHEIKENS; and CHET OPHEIKENS

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, a Nevada limited liability company; 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 HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an

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

NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT R & O CONSTRUCTION, INC.'S MOTION TO DISMISS AND MOTIONS TO ASSOCIATE

Date of Hearing: October 10, 2018
Time of Hearing: 9:00 a.m.

individual; R&O CONSTRUCTION, INC., a Utah corporation, and DOES I through X, inclusive; ROE CORPORATIONS I through X, inclusive, and ROE LIMITED LIABILITY COMPANY I through X, inclusive,

Defendants.

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

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT R & O CONSTRUCTION, INC.'S MOTION TO DISMISS AND MOTIONS TO ASSOCIATE

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL

///

///

///

///

///

///

///

///

///

///

PLEASE TAKE NOTICE that an Order Granting Defendant R & O Construction, Inc.'s Motion to Dismiss and Motions to Associate has been entered in the above-entitled Court on the 23rd day of October, 2018, a copy of which is attached hereto.

Dated October 24, 2018.

OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI

JOHN E. GORMLEY, Esq.
Nevada Bar No. 001611
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Attorney for Defendants

Karen Porter
Nevada Bar No. 13099
Brett Godfrey (Admitted Pro Hac Vice)
Jeffrey Vail (Admitted Pro Hac Vice)
GODFREY JOHNSON
9557 South Kingston Court
Englewood, CO 80112
Attorneys for Defendants
R&O CONSTRUCTION,
TOM WELCH; ORLUFF OPHEIKENS;
SLADE OPHEIKENS; and CHET
OPHEIKENS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of October, 2018, I sent via e-mail a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF ORDER GRANTING DEFENDANT R & O CONSTRUCTION, INC.'S MOTION TO DISMISS AND MOTIONS TO ASSOCIATE** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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 GARNDER on behalf of minor child, LELAND GARDNER

Paul F. Eisinger, Esq.
Douglas J. Duesman, Esq.
THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER
1100 East Bridger Avenue
P.O. Drawer 2070
Las Vegas, NV 89125-2070
Attorneys for Defendant/Third-Party Plaintiff
HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK

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

Marsha L. Stephenson, Esq.
STEPHENSON & DICKINSON
2820 W. Charleston Blvd, Suite 17
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 HUISH

Jane Hollingsworth
An Employee of OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

ORDR

John E. Gormley, Esq.
Nevada Bar No. 001611
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Telephone: 702-384-4012
Facsimile: 702-383-0701

Karen Porter
Nevada Bar No. 13099
Brett Godfrey (Admitted *Pro Hac Vice*)
Jeffrey Vail (Admitted *Pro Hac Vice*)
GODFREY | JOHNSON
9557 S. Kingston Court
Englewood, Colorado 80112
Telephone: 303-228-0700
Facsimile: 303-228-0701

Attorneys for Defendants
R&O CONSTRUCTION,
TOM WELCH; ORLUFF OPHEIKENS;
SLADE OPHEIKENS; and CHET OPHEIKENS

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, a Nevada limited liability company; 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 HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an

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

ORDER GRANTING DEFENDANT R & O CONSTRUCTION, INC.'S MOTION TO DISMISS AND MOTIONS TO ASSOCIATE

Date of Hearing: October 10, 2018
Time of Hearing: 9:00 a.m.

individual; R&O CONSTRUCTION, INC., a Utah corporation, and DOES I through X, inclusive; ROE CORPORATIONS I through X, inclusive, and ROE LIMITED LIABILITY COMPANY I through X, inclusive,

Defendants.

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

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

This matter having come on for hearing on the 10th day of October, 2018, before the Honorable Judge Jerry Wiese, on Defendant R & O CONSTRUCTION, INC.'s ("R&O") MOTION TO DISMISS; Plaintiffs appearing by and through their counsel J. Colby Williams, Esq., and Philip R. Erwin, Esq., of Campbell & Williams; Defendant R&O appearing by and through its counsel Jeffrey S. Vail, Esq. and Brett M. Godfrey, Esq., of Godfrey | Johnson, P.C., and Defendants TOM WELCH, ORLUFF OPHEIKENS, CHET OPHEIKENS, AND SLADE OPHEIKENS (collectively "The Individual Defendants") appearing by and through their counsel Max E. Corrick, II, Esq. and John E. Gormley, Esq., of Olson, Cannon, Gormley, Angulo, and Stoberski, who also represent R&O in this matter.

The Court having considered the papers, pleadings, and oral arguments, orders as follows:

1. Plaintiffs filed their Third Amended Complaint on July 30, 2018, which asserted in its Third Cause of Action a single claim for relief against R&O for Reverse Piercing of the Corporate Veil.
2. Defendant R&O has filed a Motion to Dismiss this sole claim for relief against R&O pursuant to NRCP 12(b)(5), asserting, *inter alia*, that Plaintiffs had failed to properly

state an *alter ego* claim under NRS § 78.747, and that a pre-judgment claim for relief for reverse piercing of the corporate veil is impermissible under the circumstances presented in this case. The Individual Defendants filed a timely joinder to R&O's Motion. An Opposition was timely filed by Plaintiffs, and R&O and The Individual Defendants filed their respective Replies.

3. Additionally, at oral argument, R&O's counsel moved for the Court to grant their pending Motion to Associate, and thereby to appear before this Court *pro hac vice*. Plaintiffs did not oppose that Motion. The Court grants the pending Motion to Associate.

4. Pursuant to *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 8 P.3d 841 (2000), NRS 78.747, and because Plaintiffs' sole claim for relief against R&O does not allege negligence or any other wrongful conduct by R&O and will, therefore, confuse the jury, Plaintiffs are barred from asserting their claim of relief for reverse piercing of the corporate veil against R&O prior to an uncollectible judgment being entered in this case against Orluff Opheikens.

5. Accordingly, the Court finds that Plaintiffs have failed to state a claim against R&O upon which relief may be granted. The Court specifically notes that it has not considered any exhibit to any filing related to R&O's Motion in reaching its conclusion. Therefore, the Court grants R&O's Motion to Dismiss Plaintiffs' Third Cause of Action pursuant to NRCP 12(b)(5) without prejudice.

WHEREFORE, it is hereby ordered, adjudged and decreed that R & O Construction, Inc.'s Motion to Dismiss is granted without prejudice, and its Motion to Associate is granted. Furthermore, there being no just reason for delay, this Court determines, directs and certifies that final judgment is entered in favor of R&O pursuant to NRCP 54(b).

Dated this 22 day of October, 2018.

HONORABLE JERRY WIESE MD

Respectfully submitted by:

Dated this 19th day of October, 2018

GODFREY | JOHNSON

By: */s/ Karen Porter*
KAREN PORTER
Nevada Bar No. 13099
9557 S. Kingston Ct.
Englewood, CO 80112
Attorneys for R&O

Approved as to form and content by:

Dated this 19th day of October, 2018

CAMPBELL & WILLIAMS

By: */s/ Philip R. Erwin*
PHILLIP R. ERWIN
Nevada Bar No. 11563
700 S. Seventh St.
Las Vegas, NV 89101
Attorneys for Plaintiffs