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

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

R&O's silence in response to the arguments raised by the Gardners in their Opening Brief is deafening. Tellingly, R&O does not even attempt to defend the district court's grounds for dismissing the Gardners' reverse veil-piercing claim, *i.e.*, that such relief is unavailable in the absence of an uncollectible judgment and a corresponding allegation of negligence or other wrongful conduct. R&O's failure to address the merits of the underlying order amounts to a concession that the district court committed clear error.

R&O instead uses the district court's ruling as a platform to accuse the Gardners' counsel of "avarice," claiming that the sole purpose of this appeal is to ensure the lawyers do not "lose out on a multi-million dollar contingency fee." *See* Answering Brief at 14.[2] In so doing, R&O apparently hopes that *ad hominem* attacks on the Gardners and their counsel will generate a similar reaction from this Court (*i.e.*, affirmance) that such tactics engendered in the district court (*i.e.*, dismissal). Respectfully, the Court should ignore this sideshow.

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[1] For ease of reference, the Gardners will use the same terminology from their Opening Brief in the instant Reply.

[2] The Gardners will refer to R&O's erroneously titled "Opening Brief" as its "Answering Brief" for the purposes of this Reply. *See* NRAP 28(b) ("The respondent's brief shall be entitled "Respondent's Answering Brief.").

Because it cannot defend the indefensible, R&O pivots to other arguments it raised below in favor of dismissal even though they were not expressly addressed by the district court. *See* Answering Brief at 1. Specifically, R&O contends that the Gardners (i) did not allege that Orluff personally owns stock in the corporation as required to meet the unity of ownership and interest element under NRS 78.747(2)(b), and (ii) failed to adequately plead that manifest injustice would result in the absence of alter ego liability. Like the district court's erroneous order, R&O's backup arguments are wholly deficient under Nevada law.[3] The Court should permit the Gardners to proceed with their reverse veil-piercing claim against Orluff and R&O.

II. ARGUMENT

A. The Gardners Are Entitled To Pursue A Reverse Veil-Piercing Claim Against R&O Even If Orluff Has No Ownership Stake In The Company And, In Any Event, The Gardners Are Entitled To Leave To Amend.

R&O contends that the Gardners' 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 [TAC] fails as a matter of law to allege

[3] In violation of NRAP 28(e)(1), R&O makes numerous factual representations regarding disputed issues that are unsupported by citations to the record. *See, e.g.*, Answering Brief at 2 ("[N]one of [the Individual Defendants] engaged in day-to-day management of the Waterpark, but rather delegated that responsibility to its full-time manager, Shane Huish."). The Gardners will not argue the merits of their case to this Court as R&O's distorted portrayal of the underlying facts is irrelevant to the instant appeal.

the required unity of ownership." *See* Answering Brief at 9. 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 this Court has 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." *LFC Marketing Group, Inc. v. Loomis*, 116 Nev. 896, 904-05, 8 P.3d 841, 847 (2000). Simply put, R&O is asking this Court to alter (or disregard) established precedent.

Here, the Gardners alleged that Orluff owned 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. JA 394. R&O submits that the existence of this family trust divested Orluff of any personal ownership in R&O, *see* Answering Brief at 9-11, and even went so far as to present an incomplete version of the trust agreement to the district court as evidence of its terms. JA 457-458, 504-506. 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 as Orluff's ownership of R&O—personally or through his family trust—is not determinative of whether the Gardners can pursue a reverse veil-piercing claim.[4]

[4] 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

Even if Orluff did not personally own a single share of stock, 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 alter its holding in *Loomis*, the Gardners would be entitled to leave to amend as evidence produced after the Third Amended Complaint was filed demonstrates Orluff personally held a substantial ownership interest in R&O during the relevant time period. The Gardners will address each point in turn.

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

Again, the *Loomis* court expressly ruled on this issue and rejected R&O's recycled 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* Answering Brief at 7. R&O then engages in a meandering analysis of the legislative history behind NRS 78.747 in an effort to persuade this Court to depart from well-settled Nevada law. R&O's analysis is unconvincing at best, and sophistry at worst.

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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.

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* Answering Brief at 6-9. That is because such language is nowhere to be found in the legislative history. R&O cannot seriously contend that the Nevada Legislature sought to alter this Court's jurisprudence on the alter ego doctrine when the "unity of interest and ownership" language it chose to employ in NRS 78.747 is identical to that used by this Court in *Loomis* years earlier. *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). In other words, R&O's argument relies on the codification of the "unity of interest and ownership element" in NRS 78.747, but that language was taken directly from Nevada's longstanding common law test applied in *Loomis,* and that test has long-recognized that the absence of ownership does not preclude a finding of alter ego so long as other indicia of control are satisfied. Accordingly, the Court should reject R&O's desperate claim that *Loomis* was superseded by statute.

Multiple other courts considering this issue have reached the same conclusion following the enactment of NRS 78.747. For example, 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 this Court's holding in *Loomis*:

> 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).

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*).[5]

[5] 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.").

The Court should reject R&O's unfounded position as it is contradicted by the plain language of NRS 78.747, binding precedent from this Court in *Loomis*, and persuasive precedent from other courts that have interpreted NRS 78.747. Assuming *arguendo* that Orluff did not own a single share of R&O during the relevant time period—a dubious proposition at best—the Gardners 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 the lengths it will go to prevent the Gardners from pursuing this meritorious claim.

2. Even if the nature and extent of Orluff's ownership stake in R&O was determinative—and it is not—the Gardners are entitled to leave to amend.

As stated previously, the Gardners alleged that Orluff owned approximately eighty-five percent (85%) of the outstanding shares in R&O through his family trust. JA 394. This allegation was based on the deposition testimony of Slade. JA 545-546.[6] Following the filing of the Third Amended Complaint, the Gardners obtained additional evidence from the Bank of Utah establishing that Orluff personally owned

[6] R&O claims that the Gardners "left their allegations concerning the Opheikens Family Trust intentionally vague" because they did not plead "the identity of the grantor, the trustee, or the beneficiaries." *See* Answering Brief at 10. While this information is entirely inconsequential to Plaintiffs' reverse veil-piercing claim, the allegations in the Third Amended Complaint were 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 disingenuous for R&O to claim that the Gardners pleaded their reverse veil-piercing claim in a manner that "would buy them 'wiggle room' in the face of the clear and strictly construed alter ego statute" as R&O is well aware that the trust was never the subject of discovery in this action. *Id*.

21.28% of the outstanding stock in R&O in early 2014—just months after Orluff assumed his position as Chairman of the Management Committee. JA 549-550, 560. Importantly, this evidence postdates the creation of the Opheikens Family Trust by approximately fourteen months as evidenced by the fact the trust also held 19.32% of the outstanding shares in R&O. *Id*. Accordingly, it appears that R&O's primary argument in favor of dismissal is based on a false premise, *i.e.*, that Orluff did not own stock in R&O when he, in fact, was the largest shareholder during the relevant timeframe.

While the Gardners do not suggest that the Court should consider this extraneous evidence in assessing the viability of their reverse veil-piercing claim, it does confirm that the Gardners should be granted leave to amend if personal ownership of stock is to become a prerequisite to alter ego liability under NRS 78.747. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 22, 62 P.3d 720, 734 (2003) ("[W]hen a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy."). Even the district court—which was seemingly inclined to disregard binding precedent and adopt R&O's argument that ownership of stock is a required element under NRS 78.747—indicated that it would grant the Gardners leave to amend. JA 622. Dismissal, thus, is improper here for a variety of reasons.

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

R&O's argument that the Gardners did not adequately allege the element of manifest injustice in the absence of alter ego liability is similarly fallacious. Indeed,

R&O asserts that the Gardners' pleading of the manifest injustice element in the Third Amended Complaint is entirely premised on their potential inability to satisfy a future judgment. *See* Answering Brief at 11-15. R&O further claims that there is no way Orluff's involvement in the operations and management of Cowabunga Bay—which R&O readily admits was designed to avoid an economic "calamity" and allow the company to recoup its devastating financial losses—could work an injustice because "this decision by R&O [ ] was at worst a prudent business decision and more realistically an act of altruism[.]" *Id.* at 3-4. This could not be farther from the truth.[7]

The Gardners' pleading of this element was not solely based on the fact that any potential judgment in this action will be uncollectible.[8] The Gardners 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

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[7] In the court below, R&O focused on the fact that the Gardners did not use the magic word "manifest" when pleading the "manifest injustice" element. JA 459. R&O has wisely appeared to retreat from this hyper-technical argument given that this 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)).

[8] To be clear, this Court found that the inability to collect a judgment does, in fact, promote injustice sufficient to support a reverse veil-piercing claim. *See Loomis*, 116 Nev. at 905, 8 P.3d at 847 (finding adherence to the corporate entity would promote injustice where "[t]he record reveals that the Loomises were unable to recover their judgment against William for over three years, despite William's being the dominating force behind a Nevada corporation.").

> 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 JA 396.

R&O makes much of its purported "act of altruism" to prevent an economic "calamity" by bankrolling Orluff's involvement in the management and operations of Cowabunga Bay. *See* Answering Brief at 3-4. Notwithstanding that this "calamity" was the result of R&O's own missteps, R&O acted only to save itself. R&O's and 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 while simultaneously avoiding any liability caused by that same gross mismanagement. Indeed, Plaintiffs' corresponding allegation—which is supported by abundant 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.

JA 389.

Based on these allegations, which must be taken as true at this stage, there can be no doubt that adherence to the corporate form of R&O would promote manifest injustice. It is undisputed that Orluff acted as R&O's instrument when he served as the Chairman of HWP's Management Committee for the *admitted* purpose of ensuring that R&O did not suffer devastating financial losses arising out of the botched construction project at Cowabunga Bay. R&O's and Orluff's supposed lack of ill-intent at the beginning is not determinative of any fact of consequence because the end result of this arrangement is that Orluff bore the risk of the Management Committee's grossly negligent operation of Cowabunga Bay while R&O obtained the financial benefits.[9] Indeed, Orluff and his co-managers intentionally slashed labor costs

[9] The Gardners seriously doubt that R&O's and Orluff's motives were as "altruistic" as R&O would have this Court believe. R&O easily could have invested directly in HWP and assumed a corporate role in the management and operations of Cowabunga Bay. R&O, however, did not take this direct path and instead utilized Orluff as a vehicle to funnel capital into HWP and ensure R&O's debts were recouped. The only logical reason for creating this circuitous arrangement is that R&O and Orluff sought to shield R&O from the significant potential liabilities arising from the (negligent) operation of a large-scale waterpark.

(including lifeguards at the wave pool) and created an extreme risk to the public to ensure that R&O and Cowabunga Bay's other creditors were paid back. It is axiomatic that allowing R&O to shield itself from liability arising out of Orluff's negligent actions while retaining the millions of dollars it obtained from the hazardous operation of Cowabunga Bay would promote manifest injustice.

Courts regularly find that this type of conduct will promote injustice if the corporate form is upheld. *See, e.g.*, *Canal Ins. Co. v. Montello, Inc.*, 822 F.Supp.2d 1177, 1186-87 (N.D. Okla. 2011) (allegation that parent corporation was misusing corporate form "for the improper purpose of shielding itself from liability" was sufficient to plead element of "promotes injustice"); *Stauffacher v. Lone Star Mud, Inc.*, 54 S.W.3d 810, 818 (Tex. Ct. App. 2001) ("[T]he trial court rationally concluded that Stauffacher paid expenses on the well because DGS Oil was his alter ego and it hoped to make a profit from the well. Moreover, if Stauffacher successfully acted individually through DGS Oil, he could shield himself from personal liability to Lone Star Mud in the courts of Texas and thereby perpetrate an injustice on Lone Star Mud."); *Sea-Land Servs., Inc. v. The Pepper Source*, 941 F.2d 519, 524 (7th Cir. 1991) ("[C]ourts that properly have pierced corporate veils to avoid 'promoting injustice' have found that, unless it did so, [ ] a parent corporation that caused a sub's liabilities and its inability to pay for them would escape those liabilities."). This Court should reach the same result.

C. The Gardners' Reverse Veil-Piercing Claim Is Adequately Pleaded Under Any Standard.

It should go without saying that the Gardners met their burden of pleading under NRCP 8, which only requires that a complaint 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[.]"). Nevada law 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.").

In a last-ditch effort to obtain dismissal, Defendants urge the Court to adopt the *Iqbal-Twombly* pleading standard employed by federal courts based on the false assumption that adoption of this new standard will retroactively provide another basis to uphold the district court's dismissal. *See* Answering Brief at 15-20. That is wishful thinking.

While the Gardners will defer to the Court's wisdom on whether Nevada should adopt *Iqbal-Twombly*, their Third Amended Complaint easily alleges sufficient facts to plead a reverse veil-piercing claim under any pleading standard, including

Iqbal-Twombly. *See* JA 379-398 at ¶¶ 22-36, 47, 72-81. R&O's only substantive critique of the Gardners' pleading is that they did not adequately allege "manifest injustice," *see* Answering Brief at 11-20, an argument the Gardners have conclusively refuted elsewhere. *See supra* at Section II.B. There is absolutely no basis to grant dismissal under NRCP 12(b)(5) especially when leave to amend would be the appropriate remedy for any alleged pleading deficiencies—and there are none.

VII. CONCLUSION

Based on the foregoing, the Gardners respectfully request that the Court reverse the district court's erroneous dismissal of their reverse veil-piercing claim under the alter ego doctrine against R&O. As stated in their pending Motion to Expedite and Reassign Upon Remand, the Gardners further request that the Court reassign this matter to a different district court judge following remand.

DATED this 16th day of January, 2019

CAMPBELL & WILLIAMS

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VERIFICATION

I, J. Colby Williams, declare as follows:

1. I am one of the attorneys for Peter and Christian Gardner, individually and on behalf of minor child, Leland Gardner.

2. I verify that I have read and compared the foregoing APPELLANTS' REPLY BRIEF and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I, as legal counsel, am verifying the Reply because the questions presented are legal issues, which are matters for legal counsel.

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

DATED this 16th day of January, 2019

/s/ ***J. Colby Williams***
J. Colby Williams, Esq. (#5549)

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Reply, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the Nevada Rules of Appellate Procedure.

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) as it does not exceed fifteen (15) pages.

Finally, I certify that the Appendix accompanying this brief complies with NRAP 30 in that the Appendix includes a copy of the District Court's order that is challenged, the pertinent parts of the record before the respondent judge, and the other original documents, which are essential to understand the matter set forth in

this Appeal.

DATED this 16th day of January, 2019

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 16th day of January 2019, I caused true and correct copies of the foregoing Appellants' Reply Brief to be delivered to the following counsel and parties:

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