CASE NO. _____

IN THE SUPREME COURT OF THE STATE OF NEVADA

ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, and TOM WELCH,
Petitioners

v.

The EIGHTH JUDICIAL DISTRICT COURT OF the STATE OF NEVADA in and for the COUNTY OF CLARK, DEPARTMENT XXX, the Honorable Judge Jerry A. Wiese II,
Respondent

and

PETER GARDNER & CHRISTIAN GARDNER on behalf of minor child L.G.; HENDERSON WATER PARK, LLC doing business as the COWABUNGA BAY WATER PARK; ORLUFF OPHEIKENS; SLADE OPHEIKENS; CHET OPHEIKENS; SHANE HUISH; SCOTT HUISH; CRAIG HUISH; TOM WELCH; WILLIAM PATRICK RAY, JR.; and R&O CONSTRUCTION COMPANY, INC.,
Real Parties in Interest

APPENDIX TO EMERGENCY PETITION FOR A WRIT OF MANDAMUS, VOLUME 1

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

District Court Case No. A-15-722259-C

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, L.G. L.G.,

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 Corporations I through X, inclusive; and ROE Limited Liability Company I through X, inclusive,

Defendants.

AND ALL RELATED CLAIMS

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

THIRD AMENDED COMPLAINT

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

IDENTIFICATION OF THE PARTIES

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

2. Plaintiff Christian Gardner ("Mrs. Gardner") is an individual and a Nevada resident. Mrs. Gardner is married to Mr. Gardner and is L.G. mother.

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

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

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

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

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

8. Defendant Slade Opheikens ("Slade") is a Utah resident who, at all relevant times, conducted business in Clark County, Nevada and served as a member of HWP's Management Committee.

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9. Defendant Chet Opheikens ("Chet") is a Utah resident who, at all relevant times, conducted business in Clark County, Nevada and served as a member of HWP's Management Committee. At times, Orluff, Slade and Chet will be referred to collectively as the "Opheikens Family."

10. Defendant Shane Huish ("Shane") is a Nevada resident who, at all relevant times, served as a member of HWP's Management Committee.

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

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

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

14. Defendant R&O Construction Company ("R&O") is a Utah corporation that regularly conducts business in Clark County, Nevada. 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.

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

business, were done so with the actual or constructive knowledge and authorization of the other members of HWP's Management Committee.

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

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

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

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

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

GENERAL ALLEGATIONS

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

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The Original Ownership Structure Behind the Cowabunga Bay Project and the "Nightmare" Scenario That Ensued During R&O's Construction of the Park

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 6.1 Rights and Powers of Management: Except as otherwise expressly provided in this Operating Agreement, all management rights, powers and authority over the business, affairs and operations of the Company shall be solely and exclusively vested in the Management Committee.
>
> . . . . .
>
> [T]he Management Committee shall have the full right, power and authority to do all things deemed necessary or desirable by it, in its reasonable discretion, to conduct the business, affairs and operations of [Cowabunga Bay].

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

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

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

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

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

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

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

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

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

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

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

47. 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 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 jeopardized compliance with 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 nine million dollars ($9,000,000). 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.

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

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

L.G. Drowns in the Wave Pool at Cowabunga Bay When Only Three Lifeguards Were on Duty

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

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

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

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

53. The Individual Defendants, as the members of HWP's Management Committee, knew or should have known of these hazardous conditions that threatened physical injury to their patrons like L.G., yet failed to take any action to avoid this harm and, in fact, took action which exacerbated the risk to patrons like L.G.. Indeed, the Individual Defendants knowingly operated Cowabunga Bay and

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the Wave Pool with far less than the required amount of lifeguards in order to meet their strict budgetary constraints.

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

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

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

FIRST CAUSE OF ACTION

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

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

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

a. The duty to keep L.G. safe;

b. The duty to use reasonable care to protect L.G. from known dangers such as drowning;

c. The duty to adequately staff lifeguards throughout Cowabunga Bay;

d. The duty to properly train and certify employees, lifeguards and managers/supervisors to protect customers from dangers such as drowning;

e. The duty to provide ongoing training to employees, lifeguards and managers/supervisors to protect customers from dangers such as drowning;

f. The duty to maintain clean and clear water within Cowabunga Bay;

g. The duty to use reasonable care in the hiring, supervision, training and retention of its employees; and

h. The duty to act in a matter that does not violate State of Nevada, City of Henderson and Clark County statutes, laws and ordinances.

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

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

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

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

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

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SECOND CAUSE OF ACTION

(Negligence – Individual Defendants)

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

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

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

a. The duty to keep L.G. safe;

b. The duty to use reasonable care to protect L.G. from known dangers such as drowning;

c. The duty to adequately staff lifeguards throughout Cowabunga Bay;

d. The duty to properly train and certify employees, lifeguards and managers/supervisors to protect customers from dangers such as drowning;

e. The duty to provide ongoing training to employees, lifeguards and managers/supervisors to protect customers from dangers such as drowning;

f. The duty to maintain clean and clear water within Cowabunga Bay;

g. The duty to use reasonable care in the hiring, supervision, training and retention of its employees; and

h. The duty to act in a matter that does not violate State of Nevada, City of Henderson and Clark County statutes, laws and ordinances.

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

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

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

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

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

THIRD CAUSE OF ACTION

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

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

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

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

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

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

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

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

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

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

79. 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 attempted to shield itself from any liability related to the hazardous operations of the water park.

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

81. 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.

JURY DEMAND

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

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PRAYER FOR RELIEF

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

1. For compensatory damages in excess of $15,000.00;

2. For punitive damages to be determined by the jury;

3. For attorney's fees and costs of suit incurred herein;

4. For pre-judgment and post-judgment interest, as allowed by law; and

5. For such other and further relief as is appropriate under the circumstances.

DATED this 30th day of July, 2018.

CAMPBELL & WILLIAMS

By /s/ *Donald J. Campbell*
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 30th day of July, 2018 I caused the foregoing document entitled **Third Amended Complaint** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ ***Lucinda Martinez***
An Employee of Campbell & Williams

MSJD

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DISTRICT COURT
CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually, and on behalf of minor child L.G. [redacted],

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

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

HEARING REQUESTED

DEFENDANTS ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, AND TOM WELCH'S FIRST MOTION FOR SUMMARY JUDGMENT AS TO ISSUES OF DUTY AND BREACH ON NEGLIGENCE CLAIM

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.

Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens, and Tom Welch (hereinafter the "Opheikens-Welch Defendants"), by and through their counsel of record, GODFREY | JOHNSON, P.C. and OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, do herein submit their First Motion for Summary Judgment as to the Issues of Duty and Breach on the sole remaining claim of Negligence against them ("Motion") in the above-entitled action pursuant to Nevada Rule of Civil Procedure 56.

This Motion is made and based upon all of the papers and pleadings on file herein, the Points and Authorities hereinafter to follow, and such oral argument and testimony as this Honorable Court may entertain at a hearing of the subject Motion, if so desired.

RESPECTFULLY SUBMITTED this 31st day of May, 2019.

GODFREY | JOHNSON, P.C.

/s/ Jeffrey S. Vail

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DECLARATION OF ATTORNEY JEFFREY S. VAIL, ESQ.

STATE OF COLORADO)
) ss:
COUNTY OF ARAPAHOE)

JEFFREY S. VAIL, ESQ. declares and states as follows:

1. That I am a Partner with the law firm of Godfrey | Johnson, P.C., and am duly licensed to practice law before all of the Courts in the State of Colorado. I am admitted *pro hac vice* to practice law in the instant case in the Eighth Judicial District Court, Clark County, Nevada.

2. I am an attorney retained to represent the Opheikens-Welch Defendants. Defendants in this matter and have personal knowledge of the contents of this Motion.

3. The documents attached as Exhibits to this Motion are true and accurate copies of those documents.

_____
JEFFREY S. VAIL, ESQ.

POINTS AND AUTHORITIES

I. INTRODUCTION

This Court is familiar with the basic averments in this action, to wit, that Cowabunga Bay Water Park ("the Water Park") breached certain duties that caused L.G. [redacted] to suffer a severe brain injury. The merits of that averment are addressed in these Defendants' second and third motions for summary judgment, relating to accident causation and medical causation, respectively. The instant motion is premised upon the notion that the evidence in this matter falls fall short of satisfying the requirements of Nevada law—inclusive of those articulated by the Nevada Supreme Court in the instant action—to establish liability on the part of individual members of the LLC and/or members of the management committee of the LLC.[1]

Initially, Plaintiffs sued Cowabunga Bay, but their attorneys soon learned that Cowabunga Bay had *only* five million dollars in insurance coverage. They started hunting for deeper pockets regardless of whether those parties were connected to the incident, including these Defendants: Orluff Opheikens, Slade Opheikens, Chet Opheikens, and Tom Welch (the "Opheikens-Welch Defendants"), four individuals peripherally involved in the construction of the water park, who helped save it from financial collapse when its initial source of funding fell through before completion, and who then served in roles identical to that of corporate directors on its management committee, but who were otherwise entirely uninvolved in the water park's operation. This Court rejected those claims based upon the lack of legal merit, the but the Nevada Supreme Court reversed that ruling on the basis that Nev. R. Civ. P. 15 requires that amendments shall be freely granted. In that decision, the Nevada Supreme Court recognized limited

[1] The Nevada Supreme Court reversed this Court's denial of Plaintiffs' motion to amend to add these Defendants to the action, and found that the amendment should have been permitted. It did not rule in any way on the sufficiency of the evidence (which is the gravamen of this motion) or even upon the sufficiency of the averments, as that was not before the Court at that time.

circumstances in which individuals may be liable, but now that disclosure and discovery deadlines have passed, it is clear that none of those circumstances are present in this case. At this stage in the proceedings, the sufficiency of the averments are not the issue, but rather the existence of evidence controls the outcome.

The ultimate the question before this court: is there sufficient evidence of *direct and intentional wrongdoing* by any of these four individual defendants *individually* that, as a matter of law, may suffice to subject them to *personal* liability in this case?

II. STATEMENT OF UNDISPUTED FACTS

1. Each of the Opheikens-Welch Defendants was, at the time of the incident in question, a member of the Management Committee of Henderson Water Park, LLC. *See* Declaration of Orluff Ophiekens, *attached hereto* at **Exhibit A**; Affidavit of Slade Opheikens, *attached hereto* at **Exhibit B**; Affidavit of Chet Opheikens, *attached hereto* at **Exhibit C**; Affidavit of Tom Welch, *attached hereto* at **Exhibit D**.

2. The Management Committee of Henderson Water Park, LLC performs the same function as the board of directors of a corporation, and the Opheikens-Welch Defendants filled the same role as those of directors in a corporation. *Id*.

3. The Management Committee of Henderson Water Park, LLC, had, at the time of the incident in question, delegated all responsibility for the operation of the water park to Shane Huish as General Manager and Richard Woodhouse as Operations Manager, including compliance with the applicable permits, laws and ordinances; the training, certification and staffing of lifeguards; providing life poles for use in rescuing; posting appropriate safety signage; and maintaining proper water quality. *Id*.

4. The Opheikens-Welch Defendants had no knowledge of the allegations made by Plaintiffs concerning the operation of the wave pool including that the wave pool was operated with an

insufficient number of certified lifeguards, that it had incomplete signage, that it did not have a life-saving pole, or that water quality was impermissible on May 27, 2015, the date of L.G. [redacted]'s incident. *Id*.

5. All actions Plaintiffs allege were taken by the Opheikens-Welch Defendants concerning the operation of the water park were within the course and scope of their duties as members of the Management Committee of Henderson Water Park, LLC, and not in any individual capacity. *Id*.

6. No Opheikens-Welch Defendant ever engaged in any intentional misconduct, fraud, or a knowing violation of the law in any way associated with the water park or with respect to L.G. [redacted]. *Id*.

III. LEGAL STANDARD

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. NRCP 56(c); *see also Dermody v. City of Reno*, 113 Nev. 207, 931 P.2d 1354 (1997).

As the Nevada Supreme Court reminded us in *Wood v. Safeway, Inc*., 121 Nev. 724, 121 P.3d 1026 (2005), Rule 56 should not be regarded as a "disfavored procedural shortcut." *Id*. Most importantly, the Court dispelled the notion that even the "slightest doubt as to the operative facts" can preclude summary judgment by explicitly abrogating this slightest doubt standard from Nevada jurisprudence. *Id*. at 1031. "While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered in the moving party's favor." *Id*. *Wood v. Safeway* is also instructive that "the substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id*. (citing *Liberty Lobby*, 477 U.S. 242, 248

(1986)). "In order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Cuzze v. University and Comm'ty College Sys. of Nevada*, 172 P.3d 131 (Nev. 2007) (internal quotation marks omitted).

Here, Plaintiffs alleged that the Opheikens-Welch Defendants committed individual acts of negligence that resulted in injury to L.G. [redacted]. However, "A claim for negligence in Nevada requires that the plaintiff satisfy four elements: (1) an existing duty of care, (2) breach, (3) legal causation, and (4) damages." *Turner v. Mandalay Sports Entertainment, LLC*, 180 P.3d 1172, 1175 (Nev. 2008). In Nevada, the existence and nature of a duty is a question of law, and accordingly is particularly appropriate for disposition on summary judgment. *See Butler ex rel. Biller v. Bayer*, 168 P.3d 1055, 1062 (Nev. 2007).

IV. ARGUMENT

The only remaining claim against the Opheikens-Welch Defendants is Plaintiffs' Second Cause of Action for individual negligence against each of them in their personal capacities.[2] This Motion focuses on the nature of the duty owed by the Opheikens-Welch Defendants *personally* under the Business Judgment Rule in Nevada, and shows that there is no admissible evidence sufficient to create a genuine issue of fact that any of them breached that duty.

A. Nevada Law Requires An Intentionally Wrongful Act To Create Personal Liability For An LLC Manager.

The Nevada Supreme Court, in this same case, *Gardner v. Eighth Judicial District Court*, 405 P.3d 651 (Nev. 2017), reiterated that "a manager cannot be personally responsible in a negligence-based tort action against the LLC solely by virtue of being a manager." *Id*. at 655.

[2] Plaintiffs other initial claim against the Opheikens-Welch Defendants in the Third Amended Complaint was for alter ego liability. That claim has been dismissed by stipulation of the parties and subsequent order of this Court.

However, the Court carefully worded its Opinion permitting Plaintiffs to amend their complaint to add the Opheikens-Welch Defendants as individuals specifically because Plaintiffs' Third Amended Complaint "alleges that the Managers . . . owed personal duties to their patrons that they intentionally and willfully breached." *Id*. (emphasis added). This wording implicitly recognizes—though it was not the subject of that particular appeal—that Nevada law will only impose personal liability on an LLC manager for acts within the course and scope of the LLC's business if they involve "intentional misconduct, fraud or a knowing violation of the law." NRS 78.138(7)(b)(2).[3] Specifically, NRS 78.138(3) states that:

> [D]irectors and officers [of a corporation], in deciding upon matters of business, are presumed to act in good faith . . . A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.

NRS 78.138(7) continues, stating:

> [A] director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless: (a) The presumption established by subsection 3 has been rebutted; and (b) it is proven that (1) the director's or officer's act or failure to act constituted a breach of his or her fiduciary duties; **and** (2) **Such breach involved intentional misconduct, fraud or a knowing violation of the law**.

Id. (emphasis added). Indeed, the legislative history of NRS 78.138 makes it clear that the Legislature's intent was specifically to ensure that "directors and officers [can] act in the best interest of the corporation without concern that they are going to be personally liable because someone disagreed with their decision." NV S. Comm. Min., 4/10/2017 at *21, *attached hereto* at **Exhibit E**.

[3] The version of NRS 78.138 cited in this Motion and in effect at the time of the incident in question has subsequently been amended at NV. Stat. 78.138 (2019). The minor textual changes are inconsequential to the instant argument, and accordingly an analysis of whether the Nevada Legislature intended NV. ST. 78.138 (2019) to be retroactively applicable is unnecessary.

While Nevada state appellate courts have never explicitly held that this expression of the "Business Judgment Rule"[4] contained in Nevada's Private Corporation Code also applies to LLC managers, the United States District Court for the District of Nevada has repeatedly stated, "Federal and state courts have consistently applied the law of corporations to LLCs, including for the purposes of piercing the corporate veil, the 'alter ego' doctrine, determining standing, the '**business judgment rule**,' and derivative actions." *Montgomery v. eTrepped Technologies, LLC*, 548 F. Supp. 2d 1175, 1183 (D. Nev. 2008) (emphasis added); *see also PacLink Comm's v. Superior Court*, 90 Cal.App.4th 958 (2001); *Flippo v. CSC Assoc. III, LLC*, 547 S.E.2d 216 (Va. 2001) (applying Virginia's statutory business judgment rule for corporations to LLCs, stating "there is no basis to apply a different rule to managers seeking protection from liability . . . ."); *In re Tri-River Trading, LLC*, 329 B.R. 252, 267-68 (8th Cir. BAP 2005) (treating an LLC like a corporation pursuant to Missouri law for the purposes of the Business Judgment Rule).

In fact, the Nevada Supreme Court cited this section of *Montgomery* with approval in this very case when it held that "the alter ego doctrine applies to LLCs" as set forth in NRS §78.747. *Gardner*, 405 P.3d 651, 655. Accordingly, in order for any of the Opheikens-Welch Defendants to be held individually liable in this case, their breach of duty to Plaintiffs must constitute "intentional misconduct, fraud or a knowing violation of the law." NRS 78.138(7)(b)(2).

To hold otherwise would precipitate a wholly untenable situation for the LLC form and business generally in Nevada. Imagine, for example, if any LLC manager could be held *personally* liable if a jury, second-guessing the manager's decision, could find him liable for accidentally but negligently delegating management to a store's manager. The CEO or a member

[4] While Nevada's Private Corporation Code does not label NRS 78.138 as the "Business Judgment Rule," it has been recognized by the Nevada Supreme Court to be the Nevada expression of that common-law principle. *See, e.g., Wynn Resorts, Ltd. v. Eighth Judicial District Court in and for the County of Clark*, 399 P.3d 334, 341 (Nev. 2017) ("Nevada's Business Judgment Rule is codified at NRS 78.138").

of the board of directors of a major corporate casino or airline would never be held *personally* liable for their *accidental* failure to weed out every potential 'bad apple' pit boss or pilot—indeed, the Business Judgment Rule exists precisely because such attribution of *personal* liability in simple negligence would make it impossible to recruit senior managers or directors, or to organize companies with more than a small handful of employees. Moreover, "because directors of necessity devolve upon subordinate officers the immediate management of the particular business," arguments that corporate officers or directors "should have exercised greater oversight over the [day-to-day management of the business]" necessarily fail. *Maxum Sports Bar & Grill, Ltd. v. Serafin*, 109 N.E.3d 811, 830 (IL App. (2d) 2018).

As stated by Nevada District Court, this same Business Judgment Rule should and does apply equally to LLCs. Accordingly, as a matter of law, the Opheikens-Welch Defendants cannot be held *personally* liable in simple negligence for ordinary—even if in hindsight unfortunate—decisions made in the course of their roles as managers of Henderson Water Park, LLC. Simple negligence by the Opheikens-Welch Defendants in the forms suggested by Plaintiffs—*viz*., negligent delegation of the management of the water park to Shane Huish, or negligent failure to ensure the water park was, in fact, staffing the approved number of life guards—must fail as a matter of law.

B. There Is No Genuine Issue Of Fact That Any Opheikens-Welch Defendant Engaged In Any Intentional Misconduct, Fraud, Or Knowing Violation Of The Law.

1. The deposition transcripts and affidavits make it clear that no Opheikens-Welch Defendant engaged in any intentional misconduct, fraud, or knowing violation of the law.

Discovery in this case has taken nearly four years, has included approximately 50 depositions, over a dozen expert witnesses, and tens of thousands of pages of documents. Nothing in this record could support a reasonable jury finding that Orluff, Slade, or Chet Opheikens or Tom Welch ever engaged in any "intentional misconduct, fraud or knowing violation of the law."

NRS 78.138(7)(b)(2). Each of the Opheikens-Welch Defendants has been deposed at length by Plaintiff. Nothing in any of these depositions could support a finding of intentional misconduct, fraud, or knowing violation of the law. *See generally*, **Exhibit F** (Depositions of Orluff Opheikens); **Exhibit G** (Deposition of Slade Opheikens); **Exhibit H** (Deposition of Chet Opheikens); **Exhibit I** (Deposition of Tom Welch). Moreover, each of these defendants provides sworn testimony that they have never, at any time, or in any way involved with the water park or L.G. , engaged in intentional misconduct, fraud or knowing violation of the law. *See* **Exhibit A** (Orluff Opheikens Decl.); **Exhibit B** (Slade Opheikens Aff.); **Exhibit C** (Chet Opheikens Aff.); **Exhibit D** (Tom Welch Aff.). Indeed, none of them ever gave any direction concerning, or otherwise supervised, the lifeguard count at the wave pool or the lifeguard training at the water park in general. *Id*. The record demonstrates that none of the Opheikens-Welch Defendants were substantively involved in the day-to-day operations of the water park, and that these responsibilities were delegated to Shane Huish and Richard Woodhouse:

Exhibit F, Deposition of Orluff Opheikens at 152:2-6:

> Well, there is a management committee, but the park is not managed by that committee. The park was delegated to Shane Huish and Richard Woodhouse as the general manager and/or the operational managers of the park.

Exhibit G, Deposition of Slade Opheikens at 180:10-20:

> Q: Your father testified that you had no involvement in the operations of the park. Do you agree with that?
>
> A: I agree that the day-to-day operations of the park was not my role. That was what we delegated to Shane and to Rich Woodhouse who was his assistant.
>
> Q: And there were no occasions in which you were involved in the day-to-day operations of the park; is that correct?
>
> A: Yeah. I was not involved in the day-to-day operations.

Exhibit H, Deposition of Chet Opheikens, 99:9-13, 100:5-12:

> Q: . . . did you engage in any sort of managerial duties with respect to the park becoming operational and opening?

A: No.

. . . .

A: It was always that the Huishs – that's why the management committee was formed was to appoint the Huishes to be the operations. They were the operations group. We were to get it built.

Q: You were what?

A: We were to get it built. They were to operate the park. We know nothing about a water park and how to run it.

Exhibit I, Deposition of Tom Welch at 158:1-6, 17-18:

Q: He [Orluff] testified that the management committee, quote, subordinated and assigned, end quote, all the operational duties of the park to Shane. Do you remember him saying that?

A: I think so.

. . .

Q: Do you agree with that testimony?

A: I do.

Even Shane Huish's deposition testimony fully supports these accounts:

A: I'm responsible for the overall day-to-day operation in each one of the departments. I'm responsible for the financial performance. I'm responsible for making sure that it is run properly, safely, and to our expectations.

. . .

Q: All right. But you do answer to other owners at some point in time; is that correct?

A: I report to them, yes.

Q: Okay. And who do you report to? Just give me their names:

A: Scott Huish, Craig Nielsen, Orluff Opheikens, Slade Opheikens, and Chet Opheikens.

Q: And how frequently do you report to them?

A: We meet once a year to review the performance of the park.

Exhibit J, Deposition of Shane Huish at 42:1-5, 15-24. When asked who decided to operate the water park wave pool with less than the required 17 lifeguards through the time of the incident,

Shane Huish clearly testified that it was his unilateral decision, and that none of the Opheikens-Welch Defendants, or other members of the management committee, were aware of this:

> Q: So the most [lifeguards] that you would have there on any given day, irrespective of the amount of people, would be seven persons would be designated –
>
> A: Correct.
>
> Q: - as lifeguards? Okay. And once again, that was your unilateral decision, correct?
>
> A: Yes.
>
> . . .
>
> Q: Okay. And what was the management committee's position on that? Did they agree with you in that regard?
>
> A: They weren't aware of it.
>
> Q: They weren't aware of it?
>
> A: No.
>
> Q: Okay. Why weren't they aware of it?
>
> A: Because they are not involved in that sort of thing, the day-to-day stuff like that.
>
> . . .
>
> Q: So they have nothing to do with the management of the park at all?
>
> A: No.

Id. at 156:16-23, 157:5-13, 158:16-18.

Richard Woodhouse, the assistant manager over operations testified:

> Q. Okay. As I understand it, both you and Mr. Huish are essentially the management of the park, is that fair to say, senior management of the park?
>
> A. Well, we have three other managers there too, so. But, yes, Shane and I on the operations of it handle just about everything.

Exhibit K, Deposition of Richard Woodhouse at 47:23-48:3.

Put simply, the record could not be more clear that the Opheikens-Welch Defendants had nothing to do with any day-to-day management decisions at the water park that even allegedly

could have caused L.G. [redacted]'s injuries, let alone that they engaged in "intentional misconduct, fraud or a knowing violation of the law" as required to sustain a negligence action against them. NRS 78.138(7)(2).

2. Plaintiffs' interrogatory responses fail to identify any specific, non-conclusory evidence of intentional misconduct, fraud, or knowing violation of the law by any Opheikens-Welch Defendant.

The lack of evidence in the record that identifies any relevant individual action by any of the Opheikens-Welch Defendants, let alone any intentional misconduct, is underscored by the repeated efforts to force Plaintiffs to identify any such actions with particularity through interrogatories. Plaintiffs have either been unwilling, or unable, to do so.[5]

In the Opheikens-Welch Defendants' First Set of Interrogatories to Plaintiffs, they asked, with respect to Plaintiffs' allegations as to each individual defendant, "Describe in detail how [each named defendant] authorized or participated in this alleged unlawful scheme, including describing precisely what actions **YOU** contend he took, when each such action was taken, and identifying all individuals and **DOCUMENTS** that support or refute this contention." *See* **Exhibit L**, Responses to Interrogatories Nos. 14-17.

Plaintiffs' response, served December 3, 2018, first states, without any reference to deposition, documents or other evidence, that "the Individual Defendants personally participated in the negligent formulation and implementation of a lifeguard staffing policy at Cowabunga Bay . . . ." *Id*. Not only have Plaintiffs failed to provide any meaningful response as to each of the Opheikens-Welch Defendants, but even if this attorney-argument—devoid of any reference to specific witness testimony or documents—were accepted as true, it falls squarely within the protections provided to LLC managers under the Business Judgment Rule. Second, Plaintiffs' attorneys argue (again without any reference to specific witness testimony or documents) that

[5] Furthermore, Plaintiffs' interrogatory responses are not verified by any plaintiff—they appear to be nothing more than attorney argument in their entirety.

"the Individual Defendants negligently delegated primary responsibility over the daily operations and implementation of safety measures at Cowabunga Bay to Shane Huish." *Id*. Not only is this in fact an admission that the Opheikens-Welch Defendants had delegated this responsibility to Shane Huish, and were not personally and directly involved in operations, but this claim of negligent delegation again falls squarely within the protections of the Business Judgment Rule. Third, and finally, Plaintiffs' response argues that "the Individual Defendants negligently failed to oversee and supervise the safe operation of Cowabunga Bay . . . ." *Id*. Again, even if Plaintiffs could produce specific, admissible evidence to support this contention (and the fact that they refused to do so in response to this interrogatory is telling), it still falls squarely within the protection of the Business Judgment Rule.

In an effort to ensure they had identified any potentially valid basis for the claims against them, the Opheikens-Welch Defendants propounded a second set of interrogatories on Plaintiffs *See* **Exhibit M**. In Interrogatories Nos. 24-27, the Opheikens-Welch Defendants asked, with respect to each individual defendant, "what specific knowledge you contend [each individual defendant] individually had prior to the date of the **INCIDENT** that made his decision to delegate responsibility to Shane Huish for management of Cowabunga Bay negligent, and identify all documents that support that [this individual] had this knowledge prior to the date of the **INCIDENT**." *Id*.

Plaintiffs served their response February 6, 2019. Other than stating that these interrogatories "cannot be adequately answered until discovery is completed," which had then been ongoing for three and a half years, and now closed with no supplement being served, the Plaintiffs again refused to answer these interrogatories. *Id*. Additionally, in Interrogatories Nos. 32-35, the Opheikens-Welch Defendants asked Plaintiffs to "state what specific action(s) you contend [each individual defendant] took to reduce lifeguard count at the wave pool prior to the date of the

INCIDENT, and identify all documents that support this contention." *Id*. Again, other than incorporating by reference their responses to Interrogatories Nos. 14-17, discussed above, the Plaintiffs continued to refuse to specifically identify even *one single action*, by any individual defendant, in response to this interrogatory.

The only response Plaintiffs reference that even theoretically touches on intentionality by the Opheikens-Welch Defendants is the speculative and inadmissible "opinions" of Plaintiffs expert accountant, Frank Campagna, CPA. *Id*. These are both inadmissible and insufficient even if admissible, as discussed in more detail in **Section B.3**, below.

Through their responses to these two sets of written interrogatories, Plaintiffs have been given more than ample opportunity (and, in fact, had the obligation) to identify any evidence at all that might create a genuine question of fact as to whether Orluff, Slade, or Chet Opheikens, or Tom Welch engaged in any "intentional misconduct, fraud or a knowing violation of the law." NRS 78.138(7)(b)(2). They have wholly failed to do so—dispositive of the negligence claim against the Opheikens-Welch Defendants—and should not now be permitted under Rule 37(c)(1) to amend or supplement these discovery responses in opposing this Motion. Indeed, this court may impose other appropriate sanctions including the striking of Plaintiffs' Amended Complaint against the Opheikens-Welch Defendants and dismissing the action. *See* Rule 37(c)(10)(C). Rather, as the Opheikens-Welch Defendants have met their burden to show that there is no genuine issue of fact for trial, "plaintiff can no longer rest on mere allegations but must set forth by affidavit or other admissible evidence specific facts" which Plaintiffs have failed to do. *Gerlinger v. Amazon.com, Inc.*, 526 F.3d 1253, 1255-56 (9th Cir. 2008).

3. Plaintiffs' expert witness Frank Campagna, CPA's speculative statements as to intentionality are inadmissible and, regardless, do not establish misconduct, fraud, or knowing violation of the law by any Opheikens-Welch Defendant.

The only evidence Plaintiffs point to in their interrogatory responses that even hints at

intentionality is the opinion from the report of Plaintiffs' expert accountant Frank Campagna, CPA, which states "management, for the 2015 season, was trying to get down to unrealistic labor numbers based on the financial information," and "that labor was willfully reduced by management early in the 2015 season." **Exhibit N** at 7, 8. Initially, the Opheikens-Welch Defendants have contemporaneously filed a Motion in Limine to Exclude the Opinions of Frank Campagna, CPA due to numerous issues including errors in distinguishing between "labor" and "lifeguards" (only a fraction of labor) and repeated, rank speculation about the subjective intent of managers based on his tea-leave reading of financial statements. That motion is incorporated herein, and all these opinions of Mr. Campagna should be excluded under *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008).

However, even if the Court wishes to wait until closer to trial to rule on the admissibility of Mr. Campagna's opinions, they still do not support the notion that any of the Opheikens-Welch Defendants engaged in any "intentional misconduct, fraud or knowing violation of the law." NRS 78.138(7)(b)(2). All of Mr. Campagna's opinions refer to "management" generically, and never specify whether any opinion pertains specifically to Tom Welch, or Orluff, Slade, or Chet Opheikens. *See* **Exhibit N** at 4,7, 8. But even if his opinion that "labor was willfully reduced by management" was admissible, it still does not qualify as evidence of their "intentional misconduct, fraud or knowing violation of the law." NRS 78.138(7)(b)(2). First, Mr. Campagna cannot identify whether lifeguards were reduced at all—only "labor" generically including attendants, ticket-takers, kitchen staff, janitorial staff, and maintenance staff. For example, in his deposition, he responded as follows:

> Q: So you can't at any point say lifeguard numbers – spending on lifeguard wages went up for this period and then went down for this period?
>
> A: Specifically, no.

Exhibit O, Deposition of Frank Campagna, at 10:1-4, *see also, generally id*. at 8:15-10:15.

Second, he never opines that this labor reduction constituted the *intentional* reduction of lifeguard counts below any required level—a necessary predicate for "misconduct" or "violation of the law." *See generally*, **Exhibit N** (report). Third, he does not and cannot make the final leap and offer an opinion (regardless of its admissibility) that any specific manager took any intentional act individually, but rather only that some undefined "management" element generically did so:

> Q: . . . With respect to every individual defendant in this case – Scott Huish, Shane Huish, Craig Huish, Orluff Opheikens, Chet Opheikens, Slade Opheikens, Tom Welch – you don't have any evidence to support that any of those individuals specifically participated in any of the management decisions that you talk about in your report?
>
> A: Specifically, I don't know what all of those people do as far as management of the company, but I would have the same answer, that specific – specific decision-making on specific issues I don't have that information.

Exhibit O (Campagna Depo.) at 22:6-18. Therefore, Mr. Campagna's opinions do not support "intentional misconduct" or "knowing violation of the law" by any specific individual, let alone one of the Opheikens-Welch Defendants. Accordingly, Mr. Campagna's opinions are nothing more than a speculative smoke screen, and cannot suffice—alone or in combination—to create a genuine issue of fact as to violation of the required standard.

4. The depositions, answers to interrogatories, and affidavits before the Court demonstrate that no reasonable jury could determine that any of the Opheikens-Welch Defendants engaged in any intentional misconduct, fraud, or knowing violation of the law.

The Opheikens-Welch Defendants have met their burden, under NRCP 56, by "showing—that is, pointing out through argument—the absence of evidence to support plaintiff's claim." *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000). Movant has, in fact, gone far beyond this standard, and laid out with deposition testimony, affidavit, and Plaintiffs' own discovery responses both the absence of evidence of any breach, as well as substantial admissible evidence that there was no breach. Accordingly, the burden shifts to Plaintiffs to produce specific, admissible evidence, by affidavit or otherwise, that each of the Opheikens-Welch Defendants did, in fact, engage in some intentional misconduct, fraud, or knowing

violation of the law. *Id*. ("defendant may shift the burden of producing evidence to the non-moving party" through this showing). Plaintiffs, to meet this burden, must do more than conjure up the "gossamer threads of whimsy, speculation, and conjecture." *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1031 (Nev. 2005). Indeed, Plaintiffs must do even more than point to evidence that is "merely colorable," but must produce evidence in response that is "significantly probative." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). Where, as here, the reality is that the Opheikens-Welch Defendants are only in this case due to their perceived deep pockets, and not because of any direct involvement in the incident in question, it is not surprising that Plaintiffs cannot produce any admissible evidence of the required *intentionally* tortious actions. This "complete failure of proof concerning [the single essential element of intentional misconduct, fraud, or knowing violation of the law alone] necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Accordingly, the Opheikens-Welch Defendants are entitled to summary judgment as a matter of law.

C. Even Under A Standard of Direct Knowledge or Active Participation, The Opheikens-Welch Defendants Are Entitled To Summary Judgement.

In *Gardner Estate of L.G. v Eight Judicial District Court*, 405 P.3d 651, 655 (Nev. 2017), the Nevada Supreme Court also cited to the Oregon case of *Cortez v. Nacco Material Handling*, 337 P.3d 111 (Or. 2014). In the *Cortez* case the Oregon Supreme Court reversed a denial of summary judgment sought by the manager of an LLC because, "the evidence on summary judgment does not permit an inference that [manager Swanson] either had actual knowledge of the conditions that resulted in plaintiff's injury or actively participated in creating them." *Id*. at 125. The *Cortez* language on this point, however, is at most dicta. Not only did *Cortez* involve a member-managed LLC (as opposed to the manager-managed LLC here, which is more analogous to a corporate board of directors), but Oregon also does not have a corporate Business Judgment Rule applicable outside the derivative suit context. *Id*. at 125. Accordingly, *Cortez* is of limited

relevance at best. However, even if this Court held the appropriate standard of duty to be this *Cortez*-derived "actual knowledge" or "active[] particip[ation]" standard, *id*., that standard still cannot be met by any evidence in the record here.

The Oregon Court interpreted Oregon's Statute 63.165(1), which is similar to NRS §86.371 ("manager cannot be personally responsible in a negligence-based tort action against the LLC solely by virtue of being a manager" 405 P.3d at 655). In *Cortez,* the plaintiff argued that the Oregon Statute only makes managers immune from vicarious liability. Whereas, the defendant manager (Swanson) argued that under the Oregon Statute, "merely having the authority to require the LLC to prevent a workplace accident is not sufficient for personal liability to attached to a managing-member for every act of negligence that arises out of the operations of the LLC's business," but instead requires active participation. *Cortez*, 337 P.3d at 116. Even if this court concludes that the non-binding dicta of the *Cortez* case from Oregon is indicative of how the Nevada Supreme Court would rule on the standard imposed on managers of an LLC under NRS §86.371, this case is still ripe for summary judgment.

Because it is undisputed that the Opheikens-Welch Defendants had no direct knowledge of the lifeguards reductions or other alleged breaches of duty *by the waterpark*, nor did they actively participate in the operation of the water park as described in *Cortez* because such operation had been delegated to Shane Huish and Richard Woodhouse, this Court must grant summary judgment as to Plaintiffs' Second Cause of Action, and dismiss these defendants. As set forth in **Sections B.1**, **B.2**, and **B.3**, above, and in more detail below, there is simply no admissible evidence that any of the individual Opheikens-Welch Defendants engaged in any active participation or had any actual knowledge of any of the alleged breaches.

It is undisputed that none of the Opheikens-Welch Defendants were at the water park on May 27, 2015 prior to or during the incident. *See* **Exhibits A** through **D** (Affidavits of Opheikens-

Welch Defendants). All but Chet Opheikens were in locations other than Nevada at the time, and Chet Opheikens did not stop by the water park until after the incident when he was informed of what had happened. *Id*. Other than inadmissible attorney argument in response to Interrogatory Nos. 14-17, **Exhibit I**, there is simply no evidence in the record that any of the Opheikens-Welch Defendants actively participated in or had actual knowledge of (1) in the setting of the lifeguard count at the water park, (2) any derogatory facts related to the delegation of responsibility of the operation of the water park to Shane Huish and Richard Woodhouse, or that (3) the oversight and supervision of the safe operation of the water park. *Id*. In fact, Plaintiffs' discovery responses do not identify an act of active participation or any actual knowledge by any Opheikens-Welch Defendant individually—all of their responses simply lump all four of these individuals together with conclusory statements and attorney argument. *Id*. While this kind of conclusory group pleading may be sufficient under NRCP 12, as a matter of law the Plaintiffs' failure in their discovery responses to identify any single act of active participation or instance of actual knowledge by any single, specific defendant is dispositive on the issue of duty and breach for all four of them individually.

Even construing the documents, deposition transcripts, and exhibits introduced in this case through the close of discovery in the light most favorable to Plaintiffs, there remains no evidence sufficient to create a triable issue of fact as to any one of the Opheikens-Welch Defendants individually as even the lower *Cortez* standard of breach (though *Cortez* is far higher than the standard for ordinary negligence). Initially, there is simply no evidence that Defendant Tom Welch did anything concerning the operation of the water park, and his sole involvement concerned the financing and deal-structuring that permitted completion of construction. *See* **Exhibit D** (Welch Affidavit). At most, Orluff and Slade Opheikens were actively involved in water park *construction*, but again there is no evidence to show that either Orluff or Slade

engaged in active participation, or had any actual knowledge, in any way related to lifeguard count or supervision of lifeguards at the wave pool. While the management committee undisputedly delegated the responsibility for operation of the park to park manager Shane Huish and operations manager Richard Woodhouse, Plaintiffs have not endorsed any expert witness to establish that Shane Huish and Richard Woodhouse were not qualified to act in those roles, let alone that the Opheikens-Welch Defendants somehow actively participated in ignoring or had actual knowledge of any 'disqualifying' information—lay testimony cannot speak to the qualification of an individual to manager a waterpark, and without admissible testimony on this theory summary judgment must be granted on any "negligent delegation" theory. Chet Opheikens, while located in Las Vegas and therefore in more frequent direct contact with Shane Huish, similarly never actively participated in setting an unsafe lifeguard count or supervising lifeguards, nor did he have actual knowledge of some unsafe lifeguard count or supervision of lifeguards at the water park.

It is anticipated that Plaintiffs will point to one email, from Chet Opheikens to Shane Huish, where Chet congratulated Shane on making progress with the Southern Nevada Health District ("SNHD") on lifeguard count requirements. *See* **Exhibit P** (TOSC-1565). In that email, sent March 31, 2015, Chet Opheikens stated:

> Great job sticking it to the SNHD, and having them open their minds to reality. Great week. Can't tell you how neat it was to see you in action serving our customers ice cream today while in line. Your just simply great at what you do.

Id. Plaintiffs will surely claim that this could be viewed by a jury as evidence that Chet actively participated in or had active knowledge of some effort to reduce lifeguard counts below that required by the SNHD. Plaintiffs could have asked Chet about this email at his deposition, *but chose not to*. *See generally*, **Exhibit H** (Chet Opheikens Deposition). Regardless, no reasonable jury could interpret this email as a *directive* to reduce lifeguard count at all—let alone active

participation or actual knowledge of the illegal reduction in lifeguard count below a required level—without formal approval to do so by the SNHD. This email from Chet was a reply to the following email from Shane Huish, stating:

> The best news of the day is, I was able to persuade the SNHD to revise the codes which allows us to determine the best number of lifeguards to operate the park. We are no longer required to staff lifeguards based on square footage of pools or the number of slides. **We will be able to submit a revised plan** allowing us to operate attractions based on our needs not some stupid code!

*Id. (*emphasis added). The only reasonable interpretation of this statement was that Shane Huish was stating he would "submit a revised plan"—that he would continue to work within the regulatory process to obtain approval for a lower number of lifeguards (which was ultimately granted). *Id*. Indeed, there is no evidence, after nearly four years of discovery, that any of the Opheikens-Welch Defendants had actual knowledge at or prior to the time of the incident that the wave pool was not staffed with the number of lifeguards required by the SNHD. *See* **Exhibits A** to **D** (Opheikens-Welch Defendants' Affidavits). To the extent this is Plaintiffs' 'smoking gun,' it is woefully inadequate to create a genuine issue of fact sufficient to survive summary judgment that there was any active participation in or actual knowledge of the decision to understaff lifeguards (let alone the appropriate "intentional misconduct, fraud or knowing violation of the law" standard required by NRS 78.138(7)(b)(2)). Moreover, Shane Huish subsequently did submit a request for a variance which the SNHD granted, allowing a reduced number of lifeguards of 7-8 at the wave pool—demonstrating that this is the correct interpretation of this email.

D. Plaintiffs Have Failed To Identify Any Statute Or Regulation Creating A Personal Duty By Any Opheikens-Welch Defendant That Could Support Individual Negligence Per Se Liability.

Initially, as set forth in **Section A**, above, a claim of negligence *per se* against the manager of an LLC in their individual capacity for acts occurring in the course or scope of their role as manager would require, at a minimum, a "knowing violation of the law," not merely a violation

of the law as under a standard negligence *per se* analysis. NRS 78.138(7)(b)(2). Here, however, regardless of whether this Court accepts the argument in **Section A** or decides to implement the questionably appropriate *Cortez* standard, Plaintiffs have not set forth any statute or regulation the violation of which *by the water park* could impute negligence *per se* liability to the individual Opheikens-Welch Defendants.

The only statutes allegedly violated by the water park as set forth in the Third Amended Complaint are NRS § 444.080 and NRS § 444.115. NRS 444.080 pertains to operating a water park without a permit. It is undisputed that the water park did have a permit, but even if this section had been violated, it was violated by the park, not by the Opheikens-Welch Defendants. NRS 444.115 pertains to competency of lifeguards *at facilities owned by the state or local government*. It is undisputed that the water park is not owned by any state or local government, and accordingly this statute could not have been violated. There is simply no evidence that any violation of any statute or regulation was known in advance of the incident by any Opheikens-Welch Defendant. *See* NRS 78.138(7)(b)(2) (requiring "knowing violation of the law" to create individual liability for LLC managers). The deposition testimony and affidavits attached hereto make it clear this was not the case. Accordingly, there is no viable theory of negligence *per se* that could affect an end-run around the Business Judgment Rule protections afforded to LLC managers.

E. Even If Any Opheikens-Welch Defendant Is Found To Have Had And Breached A Personal Duty To L.G. [redacted] (Whether In Negligence Or Negligence Per Se), There Is No Admissible Evidence That Such Breach—Requiring Intentional Conduct—Was The Direct And Proximate Cause Of Plaintiffs' Damages.

Finally, even if this Court determines that there is a genuine issue of fact that any of the Opheikens-Welch Defendants breached a duty to L.G. [redacted] personally, there is no evidence that such negligence caused L.G. [redacted]'s injuries. *See Van Cleave v. Kietz-Mill Mini Mart*, 633 P.2d 1220, 1221 (Nev. 1981) (negligence is not actionable if it causes no injury). In support

of this argument, the Opheikens-Welch Defendants incorporate by reference their contemporaneously filed Motions for Summary Judgment Regarding the Lack of Evidence that any Alleged Breach of the Water Park's Duty Negatively Impacted L.G.'s Rescue, and Regarding the Lack of Evidence that the Water Park's Breaches were the Medical Cause of L.G.'s Injury. Germane to this Motion, however, it is essential to point out that, even in the event that Plaintiffs can identify some specific and sufficient evidence of action by the Opheikens-Welch Defendants, any such action is protected by the Business Judgment Rule could not, as a matter of law, a *breach* to be considered for causation analysis as to the Opheikens-Welch Defendants in their personal capacities unless it was intentionally wrongful, fraudulent, or in knowing violation of the law. As set forth above, no such evidence exists at all.

V. CONCLUSION

For all of the reasons and authorities cited above, the Opheikens-Welch Defendants respectfully request that this Court grant their Motion and enter summary judgment in each of their favor on the sole remaining claim of negligence asserted against them.

RESPECTFULLY SUBMITTED this 31st day of May, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of May, 2019, I served a true and correct copy of the foregoing document (and any attachments) entitled: ***Opheikens-Welch Defendants' First Motion to For Summary Judgment, or, in the Alternative, for a Hearing on Alter Ego Determination and Bifurcation as to the Issue of Liability,*** 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:

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DISTRICT COURT
CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually, and on behalf of minor child L.G.

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; 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 I through X, inclusive,

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

DEFENDANTS ORLUFF OPHEIKENS, SLADE OPHEIKENS, CHET OPHEIKENS, AND TOM WELCH'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PUNITIVE DAMAGES

HEARING DATE REQUESTED

Third-Party Defendants.

Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens, and Tom Welch (hereinafter the "Opheikens-Welch Defendants"), by and through their counsel of record, GODFREY | JOHNSON, P.C. AND OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, do herein submit their Motion for Partial Summary Judgment as to Punitive Damages in the above-entitled action pursuant to Nevada Rule of Civil Procedure 56.

This Motion 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: May 31, 2019.

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DECLARATION OF ATTORNEY JOHN E. GORMLEY, ESQ.

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

JOHN E. GORMLEY, ESQ. declares and states as follows:

1. That I am a Partner with the law firm of Olson, Cannon, Gormley, Angulo & Stoberski and is duly licensed to practice law before all of the Courts in the State of Nevada.

2. I am an attorney retained to represent the Opheikens-Welch Defendants, Defendant-in this matter and have personal knowledge of the contents of this Declaration.

3. The documents referenced and incorporated into this Motion for Partial Summary Judgment, in particular the exhibits to Defendants' contemporaneously filed Motions for Summary Judgment and Motion in Limine re: Frank Campagna are true and accurate copies of those documents.

JOHN E. GORMLEY, ESQ.

POINTS AND AUTHORITIES

I.

SUMMARY OF THE ARGUMENT

This is a "no evidence" Motion. Specifically, the Opheikens-Welch Defendants are entitled to partial summary judgment as to the Plaintiffs' prayer for punitive damages because there is no evidence, let alone clear and convincing evidence, that the Opheikens-Welch Defendants engaged in oppressive, fraudulent, or malicious conduct. *See* NRS 42.005. Extensive discovery has been conducted and there is no evidence that any of the Opheikens-Welch Defendants had any direct knowledge of, or individually acted in, anything remotely resembling oppressive, fraudulent or malicious conduct towards the Plaintiffs. Thus, this Court should grant

partial summary judgment on the issue of punitive damages in favor of the Opheikens-Welch Defendants.

II.

FACTUAL BACKGROUND

The Court is well versed in the facts of this case and the Opheikens-Welch Defendants will not recite them here. Rather, the Opheikens-Welch Defendants adopt, and hereby incorporate by reference, the factual statements and arguments set forth in their contemporaneously filed Motions for Summary Judgment and Motion in Limine regarding Frank Campagna. In short, though, this matter involves the unfortunate injury suffered by L.G. on May 27, 2015 at the Cowabunga Bay. On the day of the incident, L.G. attended a play date with a classmate hosted by the classmate's father William Ray. *See* Third Amended Complaint ("TAC") at ¶ 49. Mr. Ray took his son and L.G. to Cowabunga Bay, and subsequently into the Wave Pool. *Id.* at ¶ 50. At some point L.G. became separated from Mr. Ray and shortly thereafter was identified and rescued by lifeguard Armoni Hanson. Armoni Hanson attempted to revive L.G. along with other Water Park employees while waiting for Emergency Response Services to arrive.

As a result of this incident, Plaintiffs filed litigation in this matter. Following numerous motions, dispositive motions, and several writs accepted by the Nevada Supreme Court, Plaintiffs filed the TAC naming the following parties as direct defendants: Henderson Water Park, LLC dba Cowabunga Bay Water Park; West Coast Water Parks, LLC; Double Ott Water Holdings, LLC; Orluff Opheikens, Slade Opheikens, Chet Opheikens; Shane Huish; Scott Huish; Craig Huish; Tom Welch; and R&O Construction Company. Mr. Ray and the insurance brokers who provided specific advice regarding the amount of insurance coverage necessary for the Water Park have also been named as third-party defendants.

As a result of L.G.'s incident in the wave pool, Plaintiffs have sought punitive damages against the various defendants, including the Opheikens-Welch Defendants in their individual capacities. Discovery has closed and there is no evidence the Opheikens-Welch Defendants acted oppressively, fraudulently, or maliciously, relative to the Plaintiffs or anyone else. Rather, discovery has conclusively shown the Opheikens-Welch Defendants had no involvement with, or knowledge of, the issues the Plaintiffs contend were the cause of L.G.'s incident in the wave pool. This Motion follows.

III.

STATEMENT OF RELEVANT AND UNCONTESTED FACTS

The following facts, set forth within, are undisputed and have not been rebutted by the Plaintiffs with admissible evidence:

1. Each of the Opheikens-Welch Defendants was, at the time of the incident in question, a member of the Management Committee of Henderson Water Park, LLC. *See* Motion for Summary Judgment as to issues of Duty and Breach, filed contemporaneously herewith.

2. The Management Committee of Henderson Water Park, LLC performs the same function as the board of directors of a corporation, and its members filled the same role as those of directors in a corporation. *Id.*

3. The Management Committee of Henderson Water Park, LLC, had, at the time of the incident in question, delegated all responsibility for the operation of the water park to Shane Huish as General Manager and Richard Woodhouse as Operations Manager, including compliance with the applicable permits, laws and ordinances; the training, certification and staffing of lifeguards; providing life poles for use in rescuing; posting appropriate safety signage; and maintaining proper water quality. *Id.*

4. The Opheikens-Welch Defendants had no knowledge of the allegations made by

Plaintiffs concerning the operation of the wave pool with an insufficient number of certified lifeguards on May 27, 2015, the date of L.G.'s incident. *Id.*

5. All actions Plaintiffs allege were taken by the Opheikens-Welch Defendants concerning the operation of the water park were within the course and scope of their duties as members of the Management Committee of Henderson Water Park, LLC, and not in any individual capacity. *Id.*

6. No Opheikens-Welch Defendant ever engaged in any intentional misconduct, fraud, or a knowing violation of the law in any way associated with the water park or with respect to L.G. *Id.*

7. The Opheikens-Welch Defendants had no knowledge (whether direct or otherwise) of the lifeguards reductions before May 27, 2015. Each of the Opheikens-Welch Defendants has denied having any such knowledge, and the Plaintiffs have produced no admissible evidence to the contrary. *Id.*

8. The Opheikens-Welch Defendants did not actively participate in the day to day operation of the water park or make any decisions regarding staffing the wave pool – especially on May 27, 2015. Rather, it is undisputed that Shane Huish (as General Manager) and Richard Woodhouse (as Operations Manager) were responsible for the day to day operations of the water park, and it is undisputed that Emily Decker made the staffing decision for lifeguards on May 27, 2015. *Id.*

9. The Opheikens-Welch Defendants were not aware of the details involving the Southern Nevada Health District's rejection of the initial lifeguard plan. This information was held by others. *Id.*

10. Shane Huish did not inform the Opheikens-Welch Defendants (whether individually or as members of the Management Committee) that the approved lifeguard plan required seventeen lifeguards at the wave pool. Again, Shane Huish and Richard Woodhouse

were responsible for day to day operations and there is no evidence the Opheikens-Welch Defendants ever knew about the details of the approved lifeguard plan. *Id.*

11. Shane Huish did not have approval from the Opheikens-Welch Defendants (whether individually or as members of the Management Committee) to operate the wave pool with less lifeguards then required by the Southern Nevada Health District. *Id.*

12. Shane Huish informed the Management Committee members that the Southern Nevada Health District revised the code to permit Cowabunga Bay to determine the proper number of lifeguards and that the Opheikens-Welch Defendants had no information to the contrary prior to May 27, 2015. *Id.*

13. The Opheikens-Welch Defendants were not aware the Wave Pool was being operated with less lifeguards than required by the Southern Nevada Health District on any date prior to, and including, May 27, 2015. As noted above, Emily Decker made the decision to staff the Wave Pool with only three lifeguards on May 27, 2015 and she did so without the Opheikens-Welch Defendants' knowledge or permission. *Id.*

14. Prior to the incident, the Opheikens-Welch Defendants were not aware that L.G. was at Cowabunga Bay. *Id.*

IV.

LEGAL STANDARD

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions and affidavits on file, show that there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[1] In determining whether summary judgment is proper, the non-moving party is entitled to have the

[1] *Villescas v. CNA Ins. Cos.*, 109 Nev. 1075, 864 P.2d 288 (1993).

evidence and all reasonable inferences accepted as true.[2]

However, the non-moving party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture."[3] Indeed, an opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial she will be able to discredit the movant's evidence; she must be able to point out to the court something indicating the existence of a triable issue of fact and is required to set forth specific facts showing that there is a genuine issue for trial.[4]

Although summary judgment may not be used to deprive litigants of trials on the merits where material factual doubt exists, the availability of summary proceedings promotes judicial economy and reduces litigation expenses associated with actions clearly lacking in merit. Therefore, it is readily understood why the party opposing summary judgment may not simply rest on the allegations of the pleadings. To the contrary, the non-moving party must, by competent, admissible evidence, produce specific facts that demonstrate the presence of a genuine issue for trial.[5]

As the Nevada Supreme Court announced in *Wood v. Safeway, Inc.* the "slightest doubt" standard has been abrogated.[6] Instead, the *Wood* Court adopted the standard enunciated by the United States Supreme Court in *Celotex Corp v. Catrett* and *Anderson v. Liberty Lobby, Inc.* stating:

> [w]hile the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to do more than simply show that there is some metaphysical doubt as to the operative facts in order to avoid

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[2] *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 774 P.2d 432 (1989).

[3] *Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983), *quoting Hahn v. Sargent*, 523 F.2d 461, 469 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976).

[4] *Hickman v. Meadow Wood Reno*, 96 Nev. 782, 617 P.2d 871 (1980); *and see Aldabe v. Adams*, 81 Nev. 280, 402 P.2d 34 (1965), *overruled on other grounds, Siragusa v. Brown*, 114 Nev. 1384, 971 P.2d 801 (1996) ("The word 'genuine' has moral overtones; it does not mean a fabricated issue.").

[5] *See Elizabeth E. v. ADT Sec. Sys. W.*, 108 Nev. 889, 839 P.2d 1308 (1992).

[6] *Wood v. Safeway, Inc.*, 121 Nev 724, 121 P.3d 1026 (2005).

summary judgment being entered in the moving party's favor.[7]

Indeed, the substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant.[8]

More recently, the Nevada Supreme Court in *Cuzze v. University and Community College System of Nevada*, further explained the appropriate framework for assessing a summary judgment motion:

> The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. If such a showing is made, then the party opposing summary judgment assumes the burden of production to show the existence of a genuine issue of material fact.[9]

The *Cuzze* Court continued:

> If the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either: (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out . . . that there is an absence of evidence to support the nonmoving party's case.[10]

In order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.[11]

V.

ARGUMENT

The Opheikens-Welch Defendants are entitled to summary judgment on Plaintiffs' prayer for punitive damages because there is no evidence to support an inference Plaintiffs suffered an injury due to oppression, fraud, or malice harbored by the Opheikens-Welch Defendants.

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[7] *Wood*, 121 Nev. at 731, 121 P.3d at 1030-1031, *citing Matsushita Electrical Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

[8] *Id.* at 731, 121 P.3d at 1031, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248.

[9] *Cuzze v. University and Community College System of Nevada*, 172 P.3d 131 (Nev. 2007).

[10] *Id.* at 134.

[11] *Id.*

Punitive damages are awarded not as compensation to a plaintiff, but only to punish the offender for severe wrongdoing supported by clear and convincing evidence of culpability. *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). Instead, NRS 42.005 authorizes an award of punitive damages only when a plaintiff proves by clear and convincing evidence that the defendant has been guilty of (1) oppression, (2) fraud, or (3) malice. NRS 42.005(1). Summary judgment follows because the record is devoid of evidence, let alone clear and convincing evidence, the Opheikens-Welch Defendants engaged in oppressive, fraudulent, or malicious conduct which caused Plaintiffs to suffer harm. Imposing punitive damages based on a mere inference or presumption would run afoul of both Nevada's clear and convincing evidentiary requirement and the Constitution's guarantee of due process.

In resisting summary judgment, the evidentiary standard to establish punitive damages is an onerous one. To satisfy the clear and convincing evidentiary standard, the evidence supporting the prayer for punitive damages must be "'so strong and cogent as to satisfy the mind and conscience of a common man . . . It need not possess such a degree of force as to be irresistible, but there must be evidence of tangible facts from which a legitimate inference . . . may be drawn.'" *Vu v. Second Jud. Dist. Ct*, 132 Nev. Adv. Op. 21, 371 P.3d 1015, 1022 (2016); *Ricks v. Dabney*, 124 Nev. 74, 79, 177 P.3d 1060, 1063 (2008); *see also Weeks v. Baker & McKenzie*, 74 Cal.Rptr.2d 510, 533 (Cal. Ct. App. 1998) (defining clear and convincing evidence in punitive damages case as "evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the facts for which it is offered as proof. . . higher standard of proof than proof by a preponderance of the evidence."). It thus "requires a finding of high probability." *Shade Foods, Inc. v. Innovative Prods. Sales & Marketing, Inc.*, 93 Cal. Rptr. 2d 364, 394 (2000). The evidence must be "'so clear as to leave no substantial doubt'" and "'sufficiently strong to command the unhesitating assent of every reasonable mind.'" *Id.* at 394 (*quoting In re Angelia P.*, 171 Cal. Rptr. 637 (1981)).

Nor are punitive damages a matter of right. *Bongiovi*, 122 Nev. at 581. NRS 42.005(1) provides that a court may award punitive damages "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied ... for the sake of example and by way of punishing the defendant." "'Malice, express or implied' means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." NRS 42.001(3). "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." NRS 42.001(4). This statutory definition of punitive damages thus "denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence." *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 255 (Nev. 2008); *Wyeth v. Rowatt*, 126 Nev. 446, 473, 244 P.3d 765, 783 (2010) (internal quotation marks omitted).

In other words, punitive damages require compelling evidence of a subjective state of mind with far greater blameworthiness than mere negligence or even recklessness. In that respect, dismissal of a prayer for punitive damages is always appropriate when the evidence in the case merely supports an underlying negligence claim. *See Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 484, 851 P.2d 459, 463 (1993) (finding that because party had not even established a right to punitive damages under the prima facie standard [a standard lower than clear and convincing required by court as a matter of law], dismissal of the punitive damages claim was proper); *Wichinsky v. Mosa*, 109 Nev. 84, 89 847 P.2d 727, 730 (1993) ("Tort liability alone is insufficient to support an award of punitive damages.").

In the present case, Plaintiffs cannot present any evidence, much less clear and convincing evidence that the Opheikens-Welch Defendants acted with oppression, fraud or malice -- that is, engaged in conduct that is "despicable" and which reflects "conscious disregard for the safety of others." NRS 42.001(3) and (4); *see Countrywide Home Loans*, 192 P.3d at 255. The following undisputed facts negate any claim that the Opheikens-Welch Defendants' conduct meets that

onerous standard.

First, it is undisputed that the Opheikens-Welch Defendants had no knowledge (whether direct or otherwise) of the lifeguards reductions before May 27, 2015. Each of the Opheikens-Welch Defendants has denied having any such knowledge, and the Plaintiffs have produced no admissible evidence to the contrary. *Second*, it is undisputed that the Opheikens-Welch Defendants did not actively participate in the day to day operation of the water park or make any decisions regarding staffing the Wave Pool – especially on May 27, 2015. Rather, it is undisputed that Shane Huish (as General Manager) and Richard Woodhouse (as Operations Manager) were responsible for the day to day operations of the water park, and it is undisputed that Emily Decker made the staffing decision for lifeguards on May 27, 2015. *Third*, it is undisputed that the Opheikens-Welch Defendants were not aware of the details involving the Southern Nevada Health District's rejection of the initial lifeguard plan. This information was held by others.

Fourth, it is undisputed that Shane Huish did not inform the Opheikens-Welch Defendants (whether individually or as members of the Management Committee) that the approved lifeguard plan required seventeen lifeguards at the wave pool. Again, Shane Huish and Richard Woodhouse were responsible for day to day operations and there is no evidence the Opheikens-Welch ever knew about the details of the approved lifeguard plan. *Fifth*, it is undisputed that Shane Huish did not have approval from the Opheikens-Welch Defendants (whether individually or as members of the Management Committee) to operate the wave pool with less lifeguards then required by the Southern Nevada Health District.

Sixth, it is undisputed that Shane Huish informed the Management Committee members that the Southern Nevada Health District revised the code to permit Cowabunga Bay to determine the proper number of lifeguards and that the Opheikens-Welch Defendants had no information to the contrary prior to May 27, 2015. *Seventh*, it is undisputed the Opheikens-Welch Defendants

were not aware the wave pool was being operated with less lifeguards than required by the Southern Nevada Health District on any date prior to, and including, May 27, 2015. As noted above, Emily Decker made the decision to staff the wave pool with only three lifeguards on May 27, 2015 and she did so without the Opheikens-Welch Defendants' knowledge or permission.

All of the above leads to only one conclusion: the Opheikens-Welch Defendants did not act with oppression, fraud or malice. The Plaintiffs have not produced, nor will they ever be able to produce clear and convincing **admissible evidence** that the Opheikens-Welch Defendants acted in violation of NRS 42.005 in any respect. Summary judgment on the issue of punitive damages should therefore be granted in favor of the Opheikens-Welch Defendants.

VI.

CONCLUSION

WHEREFORE, the Opheikens-Welch Defendants respectfully request that this Court enter an Order granting partial summary judgment on the issue of punitive damages in their favor.

Dated: May 31, 2019.

OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of May, 2019, I served a true and correct copy of the foregoing document (and any attachments) entitled: ***Opheikens-Welch Defendants' Motion For Partial Summary Judgment as to Punitive Damages*** 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:

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DISTRICT COURT
CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, L.G. [redacted],

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 Corporations I through X, inclusive; and ROE Limited Liability Company I through X, inclusive,

Defendants.

AND ALL RELATED CLAIMS

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

PLAINTIFFS' OPPOSITION TO THE INDIVIDUAL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT ON THE ISSUES OF DUTY AND BREACH

Hearing Date: July 31, 2019
Hearing Time: 9:00 a.m.

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Plaintiffs, by and through their undersigned counsel, hereby submit the following Opposition to (i) Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens and Tom Welch's First Motion for Summary Judgment as to Issues of Duty and Breach on Negligence Claim; (ii) Defendant Scott Huish's Motion for Summary Judgment; (iii) Defendant Craig Huish's Motion for Summary Judgment; and (iv) Defendant Shane Huish's Motion for Summary Judgment.[1] This Omnibus 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 evidence of the Individual Defendants' personal participation in the negligent conduct that caused L.G. [redacted]'s drowning is overwhelming. First, the Individual Defendants directly participated in the chronic understaffing of lifeguards at Cowabunga Bay by imposing severe budgetary restrictions and authorizing labor cuts in order to avoid financial catastrophe. Second, the Individual Defendants participated by negligently delegating authority over day-to-day operations at Cowabunga Bay to Shane despite the fact that he was admittedly unqualified for the position. Lastly, the Individual Defendants retained oversight authority over Shane and owed a duty to ensure he operated Cowabunga Bay in compliance with the law yet the Individual Defendants completely abdicated that responsibility. The Nevada Supreme Court has already ruled that these Individual Defendants may be held personally liable for their own negligence, and the undisputed evidence developed on this subject raises numerous genuine issues of material fact that defeat summary judgment.

[1] With the exception of Tom Welch ("Welch"), Plaintiffs will refer to Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens, Scott Huish, Craig Huish and Shane Huish by their first names to avoid confusion. Plaintiffs will also collectively refer to these defendants as the "Individual Defendants" or the "Management Committee." Finally, Plaintiffs will collectively refer to Orluff, Slade, Chet and Welch as the "Opheikens-Welch Defendants."

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Because the evidence of their personal negligence is insurmountable, the Individual Defendants attempt to tip the playing field in their favor by asking the Court to impose heightened legal requirements on Plaintiffs or to accept gross mischaracterizations of governing law. For example, based on a tortured reading of NRS 78.138, the Opheikens-Welch Defendants claim that the Individual Defendants' conduct is protected by the corporate business judgment rule such that they may only be held liable for intentional torts, not negligence. This is utter nonsense as the business judgment rule is wholly inapplicable to third party tort claims. While the Huishs do not join the Opheikens-Welch Defendants' misguided contention that they can only be held liable for intentional torts, they nevertheless demonstrate a fundamental misunderstanding of the Nevada Supreme Court's prior decisions in this action by re-arguing the failed proposition that the corporate shield protects them from all personal liability if they are acting on behalf of the company. That the Individual Defendants would resort to such utterly flawed legal arguments is a tacit admission that the evidence adduced in this case is clearly sufficient to defeat summary judgment and impose personal liability for negligence.

Plaintiffs will first set forth the undisputed facts and evidence that support their negligence claims against the Individual Defendants. Plaintiffs will then detail the legal standard required to impose personal liability on the manager of a limited liability company ("LLC") and, in doing so, refute the Individual Defendants' specious legal arguments. Finally, Plaintiffs will apply the law to the undisputed facts and evidence thereby establishing the Individual Defendants' negligent conduct that caused L.G. 's drowning in the wave pool at Cowabunga Bay on May 27, 2015.

II. STATEMENT OF UNDISPUTED FACTS

A. The Original Ownership Structure Behind the Cowabunga Bay Project and the "Nightmare" Scenario That Ensued During Construction of the Park.

1. In or around September 2012, Splash Management, LLC ("Splash")—a business entity operated by three individuals named Shawn Hassett, Ben Howell and Marvin Howell—partnered with

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the Huish Family, through their business entity, West Coast Water Parks, LLC ("West Coast"), to develop Cowabunga Bay.[2]

2. Together, Splash and West Coast formed Cowabunga Las Vegas Land, LLC to hold the land on which Cowabunga Bay would be built.[3] Splash and West Coast likewise formed Cowabunga Las Vegas Operations, LLC to conduct the water park's operations after the completion of construction.[4]

3. Because Splash and West Coast did not have the ability to independently finance the construction of Cowabunga Bay, Splash and West Coast sought loans from financial institutions and hard money lenders with little to no success.[5] In early November 2012, however, Splash and West Coast obtained a commitment for financing that would close within 90 days and be used to pay for the construction of Cowabunga Bay, which was originally anticipated to cost approximately $12-15 million.[6]

4. That same month, Cowabunga Las Vegas Operations, LLC hired R&O Construction, Inc. ("R&O") as the general contractor to oversee the construction of Cowabunga Bay.[7] The Opheikens Family—individually and through their family trust—owned more than eighty percent (80%) of the outstanding stock in R&O.[8]

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[2] Ex. 1 (Dep. Tr. of Scott Huish) at 71:14-90:5.

[3] *Id.*

[4] *Id.*

[5] Ex. 1 (Dep. Tr. of Scott Huish) at 97:9-101:9.

[6] *Id.*; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 101:5-9; Ex. 3 (Dep. Tr. of Tom Welch) at 99:19-25, 151:14-25.

[7] Ex. 1 (Dep. Tr. of Scott Huish) at 93:1-97:5; Ex. 4 (Dep. Tr. of Slade Opheikens) at 45:11-48:9.

[8] Ex. 5 (2/25/14 E-mail Correspondence from Charlie Augur).

5. Although the financing for the project was not yet secure, R&O hired subcontractors and immediately began construction of Cowabunga Bay in December 2012 with the goal of opening the park in Spring 2013.[9]

6. The prospective financing arranged by Splash and West Coast fell through just months after R&O started construction.[10] As a result, Cowabunga Las Vegas Operations, LLC failed to pay R&O several millions of dollars in construction costs that had already been incurred by R&O and its various subcontractors.[11] With its subcontractors on the verge of bankruptcy, R&O was forced to halt construction in April 2013.[12]

7. The consequences of R&O overextending itself on the Cowabunga Bay project threatened to cause irreparable harm to the company. First, R&O would lose millions of dollars if its construction costs were not paid.[13] Second, R&O would be forced to default on its subcontractors, which would cause them to declare bankruptcy and ruin R&O's reputation in the Las Vegas construction market.[14] The Individual Defendants uniformly described this scenario as a "nightmare."[15]

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[9] Ex. 4 (Dep. Tr. of Slade Opheikens) at 49:8-55:11; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 93:14-99:8.

[10] Ex. 1 (Dep. Tr. of Scott Huish) at 97:6-101:9; Ex. 4 (Dep. Tr. of Slade Opheikens) at 49:8-55:11; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 93:14-99:8.

[11] Ex. 4 (Dep. Tr. of Slade Opheikens) at 49:8-55:11.

[12] *Id.*

[13] *Id.*

[14] *Id.*; Ex. 3 (Dep. Tr. of Tom Welch) at 90:21-91:19.

[15] Ex. 1 (Dep. Tr. of Scott Huish) at 101:25-102:3; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 112:20-23; Ex. 4 (Dep. Tr. of Slade Opheikens) at 81:14-21; Ex. 3 (Dep. Tr. of Tom Welch) at 90:21-91:10.

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8. As a result of this disastrous turn of events, Orluff became personally involved in order to salvage the Cowabunga Bay project and rescue R&O from severe harm.[16] Orluff arranged meetings with Splash and West Coast where it was discussed that Orluff would make a capital contribution to the Cowabunga Bay project in exchange for an ownership stake in the business.[17] Those funds would then be funneled through the Cowabunga Bay project and paid back to R&O so the company could compensate the subcontractors and cover its own construction costs.[18]

9. In order to fund his capital contribution to the Cowabunga Bay project, Orluff obtained a $10 million credit line from R&O on August 6, 2013.[19] In exchange for this injection of capital, Orluff would receive an ownership stake in the Cowabunga Bay project that the Opheikens Family hoped would generate sufficient funds to repay the loan from R&O, which eventually exceeded $9 million.[20]

10. To facilitate the loan from R&O and his investment in the Cowabunga Bay project, Orluff formed Double Ott Water Holdings, LLC ("Double Ott") to hold his membership interest in HWP.[21]

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[16] Ex. 4 (Dep. Tr. of Slade Opheikens) at 54:9-24; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 98:2-101:20.

[17] Ex. 4 (Dep. Tr. of Slade Opheikens) at 54:9-24, 56:11-57:5; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 98:2-101:20.

[18] Ex. 4 (Dep. Tr. of Slade Opheikens) at 54:9-24; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 98:2-101:20.

[19] Ex. 6 (8/6/13 Credit Line Promissory Note); Ex. 2 (Dep. Tr. of Orluff Opheikens) at 104:25-107:17; Ex. 4 (Dep. Tr. of Slade Opheikens) at 76:17-79:2.

[20] Ex. 4 (Dep. Tr. of Slade Opheikens) at 79:3-7, 80:22-81:12, 85:6-87:16.

[21] Ex. 7 (Articles of Organization of Double Ott); Ex. 4 (Dep. Tr. of Slade Opheikens) at 76:17-79:2; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 104:2-105:5.

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11. Splash, West Coast and Orluff initially contemplated that each group would maintain an equity interest in Cowabunga Bay based on their respective capital contributions.[22] Splash, however, refused to accept a decreased equity interest and instead informed Orluff and the Huish Family that it would take the project into bankruptcy.[23]

12. In the face of a looming fight over ownership between Splash, on one hand, and Orluff and the Huish Family, on the other, Orluff turned to his close friend and advisor, Tom Welch, for advice on how to remove Splash from the equation.[24] In anticipation of litigation with Splash, Welch activated his dormant law license and devised a scheme whereby West Coast—which had voting control of Cowabunga Las Vegas Land, LLC and Cowabunga Las Vegas Operations, LLC—would sell the land and all of the park's assets to a new business entity formed by Orluff and the Huish Family.[25] Through the new business entity, Orluff and the Huish Family would own and operate Cowabunga Bay to the exclusion of Splash.[26]

13. Welch formed HWP on or about August 8, 2013, and was the sole member and manager of the company in its original iteration.[27]

14. Orluff and the Huish Family successfully executed the scheme in which HWP bought the land and assets from Cowabunga Las Vegas Land, LLC and Cowabunga Las Vegas Operations,

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[22] Ex. 4 (Dep. Tr. of Slade Opheikens) at 56:11-25; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 101:22-102:16; Ex. 1 (Dep. Tr. of Scott Huish) at 104:4-25.

[23] Ex. 1 (Dep. Tr. of Scott Huish) at 105:1-19; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 101:22-102:16; Ex. 4 (Dep. Tr. of Slade Opheikens) at 56:11-57:25; Ex. 3 (Dep. Tr. of Tom Welch) at 91:11-92:16.

[24] Ex. 1 (Dep. Tr. of Scott Huish) at 105:22-107:12; Ex. 4 (Dep. Tr. of Slade Opheikens) at 58:1-59:3; Ex. 3 (Dep. Tr. of Tom Welch) at 91:11-100:22.

[25] *Id.*

[26] *Id.*

[27] Ex. 8 (Operating Agreement of HWP), §§ 1.2 and 1.5; Ex. 3 (Dep. Tr. of Tom Welch) at 101:4-109:14.

LLC and, in turn, removed Splash from the Cowabunga Bay project.[28] Splash filed suit against HWP and West Coast in the Eighth Judicial District Court for Clark County, which was later resolved by a confidential settlement.[29]

B. The Formation And Role Of HWP's Management Committee.

15. Pursuant to the Operating Agreement, HWP was operated and controlled by its Management Committee. HWP's Operating Agreement contains the following provisions pertaining to the Management Committee's absolute control over every aspect of Cowabunga Bay's operations:

> 6.1 Rights and Powers of Management: Except as otherwise expressly provided in this Operating Agreement, all management rights, powers and authority over the business, affairs and operations of the Company shall be solely and exclusively vested in the Management Committee.
>
> . . . . .
>
> [T]he Management Committee shall have the full right, power and authority to do all things deemed necessary or desirable by it, in its reasonable discretion, to conduct the business, affairs and operations of [Cowabunga Bay].[30]

16. Among other specific powers identified in the Operating Agreement, HWP's Management Committee has direct and absolute control over: (i) "the making of any expenditures;" (ii) "the disposition [ ] of any and all assets of the Company;" (iii) "the use of the assets of the Company (including, without limitation, cash on hand) for any purpose [ ] including, without limitation, the financing of the conduct of the operations of the Company;" (iv) "the selection and dismissal of

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[28] Ex. 3 (Dep. Tr. of Tom Welch) at 110:21-116:20; Ex. 4 (Dep. Tr. of Slade Opheikens) at 58:1-59:3.

[29] Ex. 4 (Dep. Tr. of Slade Opheikens) at 58:1-59:3; Ex. 2 (Dep. Tr. of Orluff Opheikens) at 80:18-83:2.

[30] Ex. 8 (Operating Agreement of HWP), § 6.1.

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employees;" and (v) "tak[ing] all actions which may be necessary or appropriate to accomplish the purpose of the [Cowabunga Bay]."[31]

17. On September 17, 2013, Welch executed the First Addendum to HWP's Operating Agreement.[32] Pursuant to the First Addendum, Double Ott and West Coast were named voting members of HWP and granted ownership interests in the company.[33] HWP also amended Section 1.5 of the Operating Agreement to expand the Management Committee to seven members; four appointed by Double Ott (Orluff, Slade, Chet and Welch) and three appointed by West Coast (Shane, Scott and Craig).[34] Orluff was named Chairman of the Management Committee.[35]

18. At Orluff's direction, Welch designed the Management Committee to grant Orluff control over the operations of Cowabunga Bay because Orluff and R&O had a greater amount of money invested in the business and, therefore, more risk.[36] According to Welch, Orluff's appointees to the Management Committee on behalf of Double Ott—*i.e.* Orluff, Slade, Chet and Welch—intended to exercise their "voting control to control expenses and maximize ebitda growth."[37]

19. On December 5, 2013, Double Ott and West Coast executed the Third Addendum to HWP's Operating Agreement.[38] HWP amended Section 6.1 of the Operating Agreement to provide

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[31] *Id.*

[32] Ex. 9 (First Addendum to Operating Agreement of HWP).

[33] *Id.* HWP likewise named Craig Nielson, through his business entity, Chem Aquatics, as an owner and non-voting member. *Id.*

[34] *Id.*

[35] *Id.*

[36] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 159:5-19; Ex. 4 (Dep. Tr. of Slade Opheikens) at 98:16-100:2; Ex. 3 (Dep. Tr. of Tom Welch) at 134:11-136:12.

[37] Ex. 10 (E-mail Correspondence from Tom Welch to Aviva Gordon dated December 5, 2013).

[38] Ex. 11 (Third Addendum to Operating Agreement of HWP).

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that all decisions of the Management Committee shall be decided by majority vote of the managing members.[39] Additionally, HWP added a new subparagraph (xiv) to Section 6.1 that provided as follows: "by majority vote, which vote shall be documented in the minutes of the Management Committee meeting or by written authorization executed by a majority of the managing members of the Management Committee, the Management Committee may authorize one (1) or more of the managing member(s) to conduct any and all business on behalf of the Management Committee and empower such managing members with any and all powers reserved to the Management Committee under Article 6 of the Operating Agreement."[40]

20. Orluff, Slade, Welch and Scott each testified that the members of the Management Committee had a common goal to successfully operate Cowabunga Bay and, in that regard, not only owed a duty to comply with the law themselves but also to ensure those acting on their behalf complied with the law.[41] Orluff further testified that the Management Committee had a duty and responsibility "[t]o put people in place to operate the water park [ ] in a lawful way and in a safe manner."[42]

C. Orluff Obtains Additional Financing From Bank Of Utah To Complete The Construction Of HWP.

21. In order to complete the construction of Cowabunga Bay, Orluff personally approached Bank of Utah and negotiated a $12.2 million loan to HWP.[43] To obtain the loan, Orluff, R&O, Double Ott, West Coast, Shane Huish, Scott Huish, and other relatives of the Huish Family obligated

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[39] *Id.*

[40] *Id.*

[41] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 198:23-199:15; Ex. 4 (Dep. Tr. of Slade Opheikens) at 106:1-15; Ex. 3 (Dep. Tr. of Tom Welch) at 141:12-23; Ex. 1 (Dep. Tr. of Scott Huish) at 260:19-262:17.

[42] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 156:18-22.

[43] *Id.* at 107:21-120:16; Ex. 4 (Dep. Tr. of Slade Opheikens) at 71:16-73:25.

themselves as borrowers and guaranteed payment on the note to Bank of Utah.[44] Orluff testified that Bank of Utah agreed to loan the funds because "everything [he] owned [was] on the line."[45]

22. Bank of Utah required HWP to maintain a certain level of positive cashflow and make timely repayments throughout the fiscal year as well as annual balloon payments in the hundreds of thousands of dollars.[46] HWP was likewise obligated to provide Bank of Utah with budgets and financial projections.[47] If HWP violated any of these loan covenants, Bank of Utah would be entitled to declare default and seek repayment of the entire $12.2 million loan plus interest.[48]

23. Through a combination of the loan from R&O to Orluff, the financing provided by Bank of Utah, and funds invested by the Huish family, HWP was able to substantially complete the construction of Cowabunga Bay by July 2014.[49] The construction of Cowabunga Bay ultimately cost in excess of $30 million, which was more than double the group's original estimate of $12-15 million.[50]

24. Cowabunga Bay consists of a twenty-two acre for-profit water park featuring dozens of water slides and attractions. One of its marquee attractions is the Surf-A-Rama Wave Pool ("the

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[44] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 107:21-120:16; Ex. 12 (Dep. Tr. of NRCP 30(b)(6) Designee of Bank of Utah) at 63:16-65:3; Ex. 13 (Authorization, Certificate and Consent of Management Committee Members and Members of HWP.

[45] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 115:7-13.

[46] *Id.* at 123:1-137:17; Ex. 4 (Dep. Tr. of Slade Opheikens) at 222:20-224:5; Ex. 1 (Dep. Tr. of Scott Huish) at 146:17-149:13.

[47] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 123:1-137:17; Ex. 1 (Dep. Tr. of Scott Huish) at 114:14-119:11.

[48] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 123:1-137:17; Ex. 4 (Dep. Tr. of Slade Opheikens) at 269:14-19; Ex. 1 (Dep. Tr. of Scott Huish) at 146:17-147:1.

[49] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 115:21-116:15; Ex. 4 (Dep. Tr. of Slade Opheikens) at 63:8-70:25; Ex. 3 (Dep. Tr. of Tom Welch) at 146:7-147:24.

[50] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 88:11-19; Ex. 4 (Dep. Tr. of Slade Opheikens) at 71:7-10; Ex. 3 (Dep. Tr. of Tom Welch) at 146:7-147:24.

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Wave Pool"), which is 35,000 square feet, holds up to 2,619 bathers and produces waves up to four (4) feet high.[51]

D. The Management Committee Names Shane As The General Manager Of Cowabunga Bay.

25. Orluff claimed that the Management Committee "subordinated and assigned" all responsibilities regarding the operations of Cowabunga Bay to Shane by appointing him as General Manager.[52] Specifically, Orluff testified "[i]t's our testimony or my testimony that we subordinated and assigned that responsibility to the operations people running the park. I'm an investor, I'm not – I don't run – I'm not a water park guy." *Id.* Notably, Orluff provided this canned testimony in response to the first substantive question of his deposition regarding his "understanding of what this case is all about" but later conceded that he was more than a "passive investor" or mere "shareholder" in HWP as he originally claimed.[53]

26. Slade, Chet, Welch and Scott echoed Orluff's testimony that the Management Committee delegated all authority over Cowabunga Bay's day-to-day operations to Shane.[54]

27. Shane likewise testified that the Management Committee "abdicated" its managerial responsibilities to him and was "not involved in the day-to-day operation" of Cowabunga Bay.[55] According to Shane, the Management Committee only "votes on things if we are going to sell the park

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[51] Cowabunga Bay Home Page, https://www.cowabungabayvegas.com/things-to-do/attractions/ (last visited June 28, 2019).

[52] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 17:18-18:2.

[53] *Id.* at 193:3-196:8. Suffice it to say, the Opheikens-Welch Defendants' newly-minted assertion that the Management Committee is analogous to a corporate board of directors, *see* Opheikens-Welch MSJ at 6, directly contradicts their original defense strategy of trying to portray themselves as "passive investors" or mere "shareholders."

[54] Ex. 4 (Dep. Tr. of Slade Opheikens) at 115:16-120:16; Ex. 3 (Dep. Tr. of Tom Welch) at 156:1-158:18; Ex. 14 (Dep. Tr. of Chet Opheikens) at 130:3-25; Ex. 1 (Dep. Tr. of Scott Huish) at 49:25-50:4; Ex. 15 (Dep. Tr. of Shane Huish) at 41:22-42:5.

[55] Ex. 15 (Dep. Tr. of Shane Huish) at 157:5-159:10.

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or if we're going to divide the partnerships[.]"[56] In sum, Shane claimed his fellow members of the Management Committee were "just investors" who were not involved in staffing or safety decisions at Cowabunga Bay.[57]

28. The Management Committee, however, did not delegate any authority or responsibility over the operations of HWP to Shane by a majority vote documented in the minutes of the Management Committee or by written authorization executed by a majority of the managing members of the Management Committee as required by the Third Addendum to HWP's Operating Agreement.[58] In fact, Shane did not even have an employment agreement with HWP memorializing his appointment as the General Manager of Cowabunga Bay.[59]

29. Rather, it was simply a "foregone conclusion" and "understood amongst all of [the members of the Management Committee] that Shane Huish would be in that position."[60] The Management Committee did not post the position of General Manager to the public or engage a consultant to identify qualified candidates for the position.[61] The Management Committee did not interview Shane or any other potential candidates for the position.[62] The Management Committee

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[56] *Id.*

[57] *Id.*

[58] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 164:14-20; Ex. 4 (Dep. Tr. of Slade Opheikens) at 121:16-131:7; Ex. 3 (Dep. Tr. of Tom Welch) at 158:19-159:21.

[59] Ex. 3 (Dep. Tr. of Tom Welch) at 170:17-19.

[60] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 167:22-168:3; Ex. 3 (Dep. Tr. of Tom Welch) at 170:17-19.

[61] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 173:11-15; Ex. 4 (Dep. Tr. of Slade Opheikens) at 151:23-154:23; Ex. 3 (Dep. Tr. of Tom Welch) at 165:22-166:12.

[62] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 173:11-15; Ex. 4 (Dep. Tr. of Slade Opheikens) at 154:25-155:7; Ex. 3 (Dep. Tr. of Tom Welch) at 166:12-167:4.

similarly did not run a background check on Shane or contact any of his prior employers in the water park industry to obtain additional information about his experience or qualifications.[63]

30. Orluff, Slade and Welch testified that they reviewed Shane's resume prior to designating him as the General Manager.[64] Defendants, however, have not produced Shane's resume in this litigation and Orluff, Slade and Welch testified that they were not in possession of the document.[65]

31. Had the Management Committee members investigated Shane's background before naming him General Manager, they would have learned that Shane had no experience operating a water park like Cowabunga Bay. While Shane was employed at large water parks operated by Paramount Parks and Six Flags, his experience was limited to design and marketing rather than aquatic operations.[66] Shane's only operational experience came as the general manager of the Huish Family's water park in Draper, Utah, which is a small fraction of the size of Cowabunga Bay—occupying two acres compared to twenty-two acres—and lacks any water attractions on scale with the Wave Pool.[67] Indeed, the Huish Family's Draper facility does not have a wave pool; it instead has a "splash pad" where water shoots up out of the concrete.[68]

32. Shane later confirmed that he did not have adequate experience in water park operations, admitting to his lack of fitness as follows:

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[63] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 168:4-8; Ex. 4 (Dep. Tr. of Slade Opheikens) at 158:16-160:17; Ex. 3 (Dep. Tr. of Tom Welch) at 167:5-168:9.

[64] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 172:3-173:5; Ex. 4 (Dep. Tr. of Slade Opheikens) at 155:8-158:1; Ex. 3 (Dep. Tr. of Tom Welch) at 168:10-16.

[65] *Id.*

[66] Ex. 15 (Dep. Tr. of Shane Huish) at 19:24-24:21; Ex. 1 (Dep. Tr. of Scott Huish) at 55:6-58:2.

[67] Ex. 1 (Dep. Tr. of Scott Huish) at 41:17-44:23; Ex. 3 (Dep. Tr. of Tom Welch) at 169:1-3.

[68] *Id.*

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> I really feel we need the expertise to help us manage for a season or two and help set up the Aquatics department. I feel absolutely confident with all other areas of the park [ ] but I have major concerns with Aquatics and Risk Management. I strongly feel we need to bring in experts to set up programs, training, policies and procedures to make our Aquatics department top notch! ***I really need help in this area and I don't feel confident that Rich [Woodhouse] or myself has the experience to bring the department to where it needs to be***.[69]

33. Any investigation by the Management Committee also would have uncovered that Shane had been arrested on three separate occasions, including one arrest for making false statements to a police officer and obstructing of justice.[70] Shane's criminal background ultimately resulted in the denial of his application for a liquor license for Cowabunga Bay when he falsely informed the City of Henderson that he had no prior arrests.[71]

E. HWP's Efforts To Obtain An Operating Permit From The Southern Nevada Health District.

34. Before opening Cowabunga Bay, Nevada law required HWP to first obtain a permit to operate from the Southern Nevada Health District ("SNHD").[72] NRS Chapter 444 and NAC Chapter 444 govern the operation of public swimming pools, and establish rules and regulations for a water recreation business such as Cowabunga Bay.[73]

35. In that regard, NRS 444.080 states that it is "unlawful for any person, firm, corporation, institution or municipality to construct or to operate or continue to operate any public swimming pool [ ] within the State of Nevada without a permit to do so from the health authority." In order to obtain the requisite permit, the operator must submit an application or "lifeguard plan" to

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[69] Ex. 16 (12/1/15 E-mail Correspondence from Shane Huish) (emphasis added).

[70] Ex. 15 (Dep. Tr. of Shane Huish) at 212:17-216:3; Ex. 1 (Dep. Tr. of Scott Huish) at 255:5-256:25; Ex. 17 (Denial of Liquor License Application).

[71] *Id.*

[72] Ex. 18 (Dep. Tr. of NRCP 30(b)(6) Designee for SNHD) at 25:8-26:13.

[73] *Id.*

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the health authority clarifying *inter alia* "[t]he lifesaving apparatus and measures to insure safety of bathers." Cowabunga Bay was required to submit a lifeguard plan to SNHD that would adequately guard against drownings in order to obtain a permit to open to the public.[74]

36. On February 19, 2014, Cowabunga Bay submitted its "Lifeguard Location Plan, Responsibilities & Rotation Schedule" to SNHD, which provided that Cowabunga Bay would post only 6 lifeguards at the Wave Pool.[75]

37. SNHD denied HWP's application for a permit on March 13, 2014 because, among other deficiencies, Nevada law required that Cowabunga Bay post 17 lifeguards to monitor the Wave Pool.[76]

38. As a result, HWP submitted a revised "Lifeguard Location Plan, Responsibilities & Rotation Schedule" to SNHD that assigned 17 lifeguards to monitor the Wave Pool at all times.[77] SNHD approved HWP's revised "Lifeguard Location Plan, Responsibilities & Rotation Schedule" on June 30, 2014 and issued the required permit to operate.[78]

F. Cowabunga Bay's Financially Disastrous 2014 Season And The Management Committee's Desperate Efforts Slash Operating Costs.

39. Cowabunga Bay opened to the public on the weekend of July 4, 2014—approximately three months later than the desired opening period of early Spring.[79] Seventeen lifeguards were posted to monitor the Wave Pool consistent with HWP's permitting requirements.[80]

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[74] *Id.* at 26:10-27:23.

[75] Ex. 19 (2/19/14 Cowabunga Bay Lifeguard Location Plan, Responsibilities & Rotation Schedule).

[76] Ex. 20 (3/13/14 SNHD Memorandum).

[77] Ex. 21 (6/30/14 Cowabunga Bay Lifeguard Location Plan, Responsibilities & Rotation Schedule).

[78] *Id.*

[79] Ex. 3 (Dep. Tr. of Tom Welch) at 152:19-153:17.

[80] Ex. 22 (7/5/14 Wave Pool Staffing Sheet).

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40. In the weeks following the opening of Cowabunga Bay, Slade—who acted as the point person for the Opheikens-Welch Defendants[81]—communicated extensively with Shane and Scott regarding aquatic operations and safety issues including, but not limited to, the following instances:

- July 5, 2014 – Slade e-mailed Shane and Scott "Lifeguard Tips for Slides 7-4-14" and directed them to pass the information along to Woodhouse and the lifeguards. Therein, Slade provided detailed instructions on how the lifeguards should operate the slides, where the lifeguards should be posted, and how the lifeguards should be rotated.[82]

- July 6, 2014 – Slade e-mailed Shane and Scott a link to jury verdicts for negligent maintenance and operation of water parks so the Management Committee could "learn from what others have paid for already." Slade stated his belief that "we need to have specialists at the mat racer, rocket and tower 1 as well as the wave pool." Slade further provided instructions related to the manner in which lifeguards should supervise the slides and Wave Pool.[83]

- July 9-14, 2014 – Slade e-mailed Shane and Scott a list of "critical items for Cowabunga" including detailed instructions for safety signage at the water park. Slade reminded Shane that in the absence of appropriate signage, "we have all liability."[84]

- July 10-11, 2014 – Slade directed a R&O employee to conduct a "recon visit" to Wet & Wild and document safety procedures and signage in place at the competing water park. The R&O employee then provided a detailed written report of his "recon visit" to Wet & Wild including safety mechanisms at the wave pool, which Slade forwarded to Shane and Scott.[85]

- July 11, 2014 – Slade texted Shane and Scott about safety and liability issues related to the sale of alcohol at Cowabunga Bay. Slade stated "[h]aving an alcohol license may sell more tickets but it honestly scares the shit out of me for liability. Slips, trips, stumbles, falls, wave

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[81] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 134:19-135:8; Ex. 4 (Dep. Tr. of Slade Opheikens) at 71:23-72:5.

[82] Ex. 23 (7/5/14 E-mail Correspondence from Slade Opheikens).

[83] Ex. 24 (7/6/14 E-mail Correspondence from Slade Opheikens).

[84] Ex. 25 (7/9/14-7/14/14 E-mail Correspondence from Slade Opheikens). Ironically, Defendants' expert witnesses testified that Cowabunga Bay's safety signage was deficient on the day of L.G.'s drowning. Ex. 26 (Dep. Tr. of Thomas Griffiths) at 77:3-78:19. In fact, Defendants' expert witness in aquatics, William Rowley, included pictures of safety signs in his report that were not in place on the date of the incident. Ex. 27 (Dep. Tr. of William Rowley) at 24:15-50:8. When Plaintiffs' alerted Mr. Rowley to this fact in his deposition, he testified that he felt "misled" because Defendants had informed him those signs were, in fact, present at Cowabunga Bay when L.G. drowned in the Wave Pool. *Id.*

[85] Ex. 28 (7/10/14-7/11/14 E-mail Correspondence from Slade Opheikens).

pool exhaustion, increased argumentative attitudes with drunken persons… Who is going to manage it because the 18 year old lifeguards can't hardly deal with the sober persons." Slade informed Shane and Scott that he would be "on site Monday and want[ed] to discuss."[86]

- July 15, 2014 – Slade e-mailed Shane with additional safety issues from his visit to Cowabunga Bay including the need for more safety signage and instructions for lifeguards. With respect to one slide, Slade raised the issue of posting an additional lifeguard to address a safety concern and stated "don't want to pay for another lifeguard, but don't want an injury either."[87]

41. On August 15, 2014, Shane e-mailed the Management Committee to arrange a conference call to discuss Cowabunga Bay's operations and financial performance.[88] Shane provided a detailed agenda of items to be discussed on the Management Committee conference call.[89]

42. On September 17, 2014, Slade e-mailed Orluff to schedule a meeting of the Management Committee to "[d]iscuss financials, successes, things to change, how to pay for it, cost overruns, Tower 3 and other challenges yet to address."[90]

43. HWP forecasted EBITDA in 2014 between $3.28 million and $3.91 million in three different projections to Bank of Utah, but only achieved $194,694 in actual results.[91] Crucially, HWP's

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[86] Ex. 29 (7/11/14 Text Message from Slade Opheikens).

[87] Ex. 30 (7/15/14 E-mail Correspondence from Slade Opheikens). Despite the existence of these e-mails reflecting his involvement in operational issues, Slade testified that he was not involved in the day-to-day operations at Cowabunga Bay and his role on the Management Committee was limited to insurance, slide certifications and coordinating with Scott for feedback on "budgets or bank items." Ex. 4 (Dep. Tr. of Slade Opheikens) at 181:14-183:23. Moreover, Shane falsely testified that he only spoke with Slade "roughly two times a year through the season." Ex. 15 (Dep. Tr. of Shane Huish) at 42:15-43:10.

[88] Ex. 31 (8/15/14 E-mail Correspondence from Shane Huish).

[89] *Id.*

[90] Ex. 32 (9/17/14 E-mail Correspondence from Slade Opheikens).

[91] Ex. 33 (Expert Report of Frank Campagna) at 5-6. Attached hereto as Exhibit 34 is a sworn declaration from Mr. Campagna verifying under penalty of perjury that he will testify to the substance of his expert report at trial. As such, the Court may consider Mr. Campagna's report. *See, e.g.*, *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 538-39 (4th Cir. 2015) (district court could consider unsworn expert reports on motion for summary judgment where

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financial underperformance violated the loan covenants with Bank of Utah and exposed HWP, Orluff, R&O, Double Ott, West Coast, Shane, Scott, and other relatives of the Huish Family to default.[92] Defendants' expert witness in forensic accounting, Kevin Kirkendall, agreed that the borrowers on the Bank of Utah loan were in default based on HWP's failure to meet financial benchmarks and, thus, subjected to "mounting financial pressure."[93] Mr. Kirkendall further opined that "[c]ertainly, Cowabunga management and investors had cause for concern about the results of operations and lack of positive cash flow. On a number of occasions Cowabunga investors were informed by Bank of Utah that the loan was in default due to the investors' failure to meet certain performance benchmarks/covenants within the loan documents."[94]

44. On September 30, 2014, Scott communicated to Bank of Utah that labor at Cowabunga Bay was "heavy at start-up—wanted to make good first impression w/new guests" and that in advance of the 2015 season, the Management Committee was "now cutting employees—now cross training" and would have "less supervision."[95]

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non-movant "submitted declarations from the experts attesting that they would testify to the matters set forth in their respective reports."); *DG & G, Inc. v. Flexsol Packaging Corp. of Pompano Beach*, 576 F.3d 820, 826 (8th Cir. 2009) ("Subsequent verification or reaffirmation of an unsworn expert's report, either by affidavit or deposition, allows the court to consider the unsworn expert's report on a motion for summary judgment."); *F.T.C. v. Ideal Fin. Solutions, Inc.*, 2015 WL 4032103, at *3 (D. Nev. June 30, 2015) ("It is well-settled under Fed.R.Civ.P. 56(e), unsworn expert reports are not admissible to support or oppose summary judgment and that to be competent summary judgment evidence, an expert report must be sworn or otherwise verified, usually by a deposition or affidavit.") (listing cases).

[92] Ex. 12 (Dep. Tr. of NRCP 30(b)(6) Designee of Bank of Utah) at 126:10-128:21.

[93] Ex. 35 (Dep. Tr. of Kevin Kirkendall) at 39:16-40:23.

[94] Ex. 36 (Expert Report of Kevin Kirkendall) at 4.

[95] Ex. 37 (9/30/14 Bank of Utah Notes).

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45. On October 20, 2014, Slade circulated the below agenda for the Management Committee meeting, which was scheduled to take place on October 30 and 31, 2014.[96] As evidenced by the agenda, the Management Committee's primary focus during this meeting was to assess HWP's financial performance in 2014—which led to a $600,000 shortfall on the Bank of Utah loan—and determine how costs could be reduced for the upcoming 2015 season.[97]

Cowabunga Owner meeting – Draft of Agenda (please comment on any changes)

RESCHEDULED to October 30th and 31st at waterpark in Las Vegas

Items to Discuss

- **Park financial performance**: Review August and September financials.
  - Identify fixed costs and variable costs to determine breakeven analysis for next year.
  - Identify and cost savings we may have operationally.
  - Review season pass sales assumptions and how realistic they are.
  - Review cash on hand and ability to pay bills.
    - Need to bring a summary of costs owed or owing
      - Shane provide this for Park
      - Slade provide these for construction
- **Park financial forecast**: Review forecasted cost and revenues for the next year
  - Forecasted revenues and assumptions- Shane & Scott
    - Bring copy of forecast for next year- Scott
  - Compare previous proforma to actual costs and revenues
    - Would like a side by side comparison of original proforma to new forecasted if possible. If not, we can have copies of both to review previous assumptions to new assumptions.
- **Review Costs incurred and cost coming due to be paid**
  - Review construction costs of park. Cost overruns caused by design changes, Polin, acceleration to open on July 4th, etc. (Slade to provide)
  - Review costs incurred that are still owing which exceed the bank loan
  - Review fixed costs to be paid between now and next operating year such as bank loan, utilities, taxes, etc (Scott or Shane to Provide)
- **Discuss how costs to be paid will/ can be funded**.
  - Scott Projected apporox $600k shortfall on bank loan. Is this the correct amount.
  - Slade will provide shortfall on bank loan to cover construction costs overruns.
  - Polin cost overruns and tower 3 TBD?
    - Should we pursue finding another partner to contribute monies to help cover these costs?
    - Other options?
- **Park Issues to address: Wants vs. Needs**
  - Risk Assessment previously conducted by insurance carrier. What is done and what needs to be done.
  - Items Owneship feels need to be addressed before next season.
  - Polin open issues: Space Shuttle water supply, Green Slide, mat racer start, other?

46. As stated in the October 2014 agenda, the Management Committee analyzed fixed costs versus variable costs to identify potential savings that would increase revenue.[98] Indeed, as Mr.

[96] Ex. 38 (10/20/14 E-mail Correspondence from Slade Opheikens).

[97] *Id.*

[98] *Id.*

Kirkendall testified, "[i]t doesn't make sense to reduce fixed costs and many of them you can't."[99] Slade explained "[a] fixed cost is a cost that you have regardless of whether the park is open or not open. For instance, a bank loan that you are going to have. Variable costs [are] when you're open, you'll more likely be using more power, you'll be hopefully consuming more food. You will have labor. You will have variable costs."[100] Importantly, HWP's most significant variable cost was labor, and the primary component of labor was lifeguards.[101]

47. Mr. Kirkendall stated "[i]t is normal, reasonable and even expected that a business entity, when faced with debt financing challenges, will undertake measures to minimize costs. Certainly, it appears that Cowabunga Bay took steps to minimize its costs due to such measures."[102]

48. Cowabunga Bay's financial performance and cost control were the primary topics of discussion during meetings of the Management Committee.[103] Shane testified that the Management Committee "review[ed] the financial success or problems of the park and then [made] decisions [about] how to take the company and move it forward."[104] Indeed, Shane testified that the Management Committee extensively discussed Cowabunga Bay's financial performance and the Bank of Utah loan because "there [were] some pretty tight financial situations" and the Individual Defendants needed to

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[99] Ex. 35 (Dep. Tr. of Kevin Kirkendall) at 42:2-3.

[100] Ex. 4 (Dep. Tr. of Slade Opheikens) at 218:23-219:7.

[101] Ex. 33 (Expert Report of Frank Campagna) at 7; Ex. 35 (Dep. Tr. of Kevin Kirkendall) at 33:9-34:23; Ex. 4 (Dep. Tr. of Slade Opheikens) at 218:19-220:13, 271:10-11; Ex. 1 (Dep. Tr. of Scott Huish) at 138:12-139:21; Ex. 3 (Dep. Tr. of Tom Welch) at 144:1-6.

[102] Ex. 35 (Expert Report of Kevin Kirkendall) at 4 (emphasis added).

[103] The Management Committee did not keep minutes, notes or other voting records reflecting what actions were taken or discussed during meetings or conference calls. Ex. 2 (Dep. Tr. of Orluff Opheikens) at 162:14-166:11; Ex. 4 (Dep. Tr. of Slade Opheikens) at 106:16-109:7. As such, the agendas prepared in advance of the Management Committee meetings are the best evidence of the business that was conducted.

[104] Ex. 15 (Dep. Tr. of Shane Huish) at 113:15-25.

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"make sure that there is enough money in the bank to get us through the season so the investors don't have to put any more money into the park."[105] Slade likewise testified that "what we would normally do at a [Management Committee] meeting is review budgets[.]"[106]

49. Following the October 2014 Management Committee meeting, Scott and Shane began exchanging drafts of Cowabunga Bay's employee schedule for the 2015 season. Again, the employee schedule for the 2014 season provided that 17 lifeguards would be assigned to the Wave Pool.[107] On December 1, 2014, however, Scott amended the 2015 employee schedule to reduce the number of lifeguards at the Wave Pool from 17 to 11.[108] Then, Shane e-mailed Scott revisions to the 2015 employee schedule that further reduced the number of lifeguards throughout the park and cut the number of lifeguards at the Wave Pool from 11 to 7.[109] On December 3, 2014, Scott incorporated Shane's drastically reduced lifeguard numbers on the employee schedule entitled "Budget Max[,]" which also projected daily labor cost, weekly labor cost, labor cost per season, and labor percentage compared to sales.[110]

50. The staffing cuts reflected on the "Budget Max" spreadsheet were not limited to lifeguards at the Wave Pool.[111] Indeed, according to the "Budget Max" schedule, lifeguards at the

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[105] *Id.* at 115:5-19.

[106] Ex. 4 (Dep. Tr. of Slade Ophiekens) at 263:14-23.

[107] Ex. 39 (2014 Employee Schedule).

[108] Ex. 40 (2015 Employee Schedule last modified on 12/1/2014).

[109] Ex. 41 (Revised 2015 Employee Schedule).

[110] Ex. 42 (Budget Max 2015 Employee Schedule).

[111] *Id.*

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tube slides and lazy river were cut as were parking lot attendants, kitchen staff and other non-aquatics personnel.[112]

51. Scott testified that the spreadsheets were only "working documents" and blamed the reduction in lifeguards on a "formula error" even though certain reductions to lifeguards were accompanied by notations such as "could go away" and "cut 4."[113] Scott further claimed to not "know what a Budget Max is[,]" that HWP did not "have a Budget Max[,]" and that he "never use[d] that term" despite the fact that the Microsoft Excel file obtained from his own computer was titled "HWP_Employee_Schedule_2015_Budget Max.xls."[114] Finally, Scott testified that HWP did not calculate daily operational costs for lifeguards until 2016 or 2017 yet the "Budget Max" spreadsheet contained detailed calculations of labor costs. Moreover, Defendants separately produced a 2015 Lifeguard Budgetary Projection breaking out the daily cost of lifeguards.[115]

52. By the end of 2014, HWP had only $19,839 in cash on hand with limited revenue expected to be achieved before late Spring 2015.[116] As anticipated by the Management Committee in October 2014, Double Ott was required to infuse almost $600,000 in capital to cover the financial shortfalls in early 2015.[117]

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[112] *Id.*

[113] Ex. 1 (Dep. Tr. of Scott Huish) at 167:13-183:13; Ex. 42 (Budget Max 2015 Employee Schedule).

[114] Ex. 1 (Dep. Tr. of Scott Huish) at 183:15-186:4; Ex. 42 (Budget Max 2015 Employee Schedule).

[115] Ex. 1 (Dep. Tr. of Scott Huish) at 241:5-242:24; Ex. 42 (Budget Max 2015 Employee Schedule); Ex. 43(2015 Lifeguard Budgetary Projection).

[116] Ex. 33 (Expert Report of Frank Campagna) at 5-6.

[117] *Id.*

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G. Defendants Implement Their Plan To Reduce Lifeguard Numbers At Cowabunga Bay For 2015 Season.

53. On January 29, 2015, Shane e-mailed Takuya Ohki, the general manager of Wet & Wild, to discuss a joint strategy for reducing the lifeguard requirements imposed on the water parks by SNHD.[118] Ohki responded that HWP would need to seek a variance from SNHD to reduce the required lifeguard count, but stated that Wet & Wild "decided not to in case we have an incident[.] We did not want the attorney to point out that we asked for a reduction in lifeguard counts."[119] Shane forwarded Ohki's e-mail to Scott and stated "[l]ooks like we need to file a variance."[120]

54. On March 9, 2015, Slade scheduled a telephonic conference for the Management Committee to discuss the budget (a draft of which had been provided to Bank of Utah in December) and cashflow required for opening through May 2015.[121]

55. Cowabunga Bay opened for business on March 21, 2015 and implemented the lifeguard scheme set forth on the "Budget Max" employee schedule created by Scott and Shane following the October 2014 Management Committee meeting. Indeed, Cowabunga Bay's 2015 Budgetary Projection and lifeguard staffing sheet for March 21, 2015 reflect "Budget Max" staffing levels with 7 lifeguards assigned to the Wave Pool.[122]

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[118] Ex. 44 (1/30/15 E-mail Correspondence from Shane Huish).

[119] *Id.*

[120] *Id.*

[121] Ex. 45 (3/9/15 E-mail Correspondence from Slade Ophiekens).

[122] Ex. 43 (2015 Lifeguard Budgetary Projection); Ex. 46 (3/21/15 Wave Pool Staffing Sheet). This evidence, of course, directly contradicts Shane's nonsensical testimony that HWP intentionally understaffed the Wave Pool in violation of Nevada law because it was the safest way to operate. Ex. 15 (Dep. Tr. of Shane Huish) at 201:20-205:22.

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56. At the same time Cowabunga Bay was reducing lifeguard staffing levels at the Wave Pool, Shane texted his brother, Dave Huish, that "[s]ome of our new lifeguards can't even swim half way across the wave pool…lame."[123]

57. In line with Scott's September 2014 discussion with the Bank of Utah, HWP also implemented "cross-training" during the 2015 season and began pulling maintenance workers and kitchen staff with no prior training in water safety to monitor attractions at Cowabunga Bay.[124]

58. On March 31, 2015, Shane e-mailed the Management Committee with an update on Cowabunga Bay's financial performance.[125] Shane also informed the Management Committee members that he "was able to persuade the SNHD to revise the codes which allows us to determine the best number of lifeguards to operate the park. We are no longer required to staff lifeguards based on square footage of pools or the number of slides. ***We will be able to submit a revised plan allowing us to operate attractions based on our needs not some stupid code***."[126]

59. The Management Committee members did not express surprise or inquire further into the basis for reducing lifeguard numbers at Cowabunga Bay. To the contrary, Chet stated ***"[g]reat job sticking it to SNHD, and having them open their minds to reality."***[127] Slade gave Shane "[e]ven bigger congratulations on getting the lifeguard count down" and commended him for a "nice job staying persistent."[128] Slade testified that he congratulated Shane on "staying persistent" because

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[123] Ex. 47 (3/16/15 Text Message from Shane Huish).

[124] Ex. 48 (Dep. Tr. of Sierra Beggs) at 47:6-51:11. The definition of "cross-train" is "to train (an employee) to do more than one specific job." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/cross-train.

[125] Ex. 49 (4/1/15 E-mail Correspondence from Chet Opheikens).

[126] *Id.* (emphasis added).

[127] *Id.* (emphasis added).

[128] Ex. 50 (4/1/15 E-mail Correspondence from Slade Opheikens).

Shane was allegedly working with a "committee" to change the SNHD regulations governing lifeguard staffing levels at public pools.[129]

60. Orluff testified that he also discussed lifeguard staffing with Shane during a visit to Cowabunga Bay's offices where Shane informed him that SNHD had committed to reducing the lifeguard requirements.[130] Orluff testified that he cautioned Shane not to reduce Cowabunga Bay's lifeguard numbers until after SNHD had officially changed the legal requirement.[131]

61. On April 16, 2015, the Management Committee met at R&O's office in Salt Lake City to discuss budgets, unforeseen costs, financial performance and other operational issues at Cowabunga Bay.[132] The notes from this Management Committee meeting directed that "Scott and Shane will forward what an operating cost per day is for a slow day vs a busy day" because Cowabunga Bay had further reduced costs by decreasing lifeguard staffing when it was a "slow day" with respect to "attendance."[133] According to this policy, Cowabunga Bay only assigned 5 lifeguards to monitor the Wave Pool if it was a "slow day" with minimum projected attendance.[134]

62. Orluff confirmed that the Individual Defendants discussed the budget and expected "profit and loss" for the 2015 season during this Management Committee meeting.[135] Orluff testified that the Management Committee also discussed SNHD's alleged commitment to reduce Cowabunga

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[129] Ex. 4 (Dep. Tr. of Slade Opheikens) at 227:3-234:11.

[130] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 245:11-249:25.

[131] *Id.*

[132] Ex. 51 (4/17/15 E-mail Correspondence from Slade Opheikens).

[133] Ex. 43 (2015 Lifeguard Budgetary Projection).

[134] *Id.*; Ex. 52 (Example of "Minimum Rotation" Staffing Schedule).

[135] Ex. 51 (4/17/15 E-mail Correspondence from Slade Opheikens). Again, this evidence contradicts Scott's testimony that the Management Committee did not calculate daily operational costs until 2016 or 2017.

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Bay's lifeguard requirements at which time Orluff again cautioned Shane not to act before the law changed.[136] Despite these purported directives, Orluff testified that he "had no idea [and] never even thought about" how many lifeguards were required by law.[137]

63. Despite the fact that he had twice cautioned Shane not to prematurely reduce lifeguard numbers at Cowabunga Bay, Orluff testified that neither he nor anyone else on the Management Committee took steps to ensure that Shane complied with Nevada law governing lifeguard staffing at Cowabunga Bay.[138]

64. SNHD did not amend the NAC provisions governing lifeguard staffing in 2015; nor did Cowabunga Bay request a variance to its permit, which required that 17 lifeguards be posted to the Wave Pool at all times.[139] Instead, HWP chose to intentionally violate Nevada law by staffing the Wave Pool with significantly less than the required 17 lifeguards.[140]

65. Just a few days after the April 2015 Management Committee meeting, Shane responded to a proposal from HWP's public relations consultant concerning potential promotions for water safety month as follows: "[w]hat is it with all this 'flip flop month, water safety month, fitness month' sounds like a lot of 'bullshit month[.]' Let's focus on the things that will bring in the dollars rather than the feel good fluffy stuff."[141]

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[136] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 230:9-235:8, 250:8-253:18.

[137] *Id.* at 248:15-25.

[138] *Id.* at 230:9-235:8, 250:8-253:18. Slade also testified that he did not take any steps to ensure that Shane complied with Nevada law after congratulating him on "staying persistent." Ex. 4 (Dep. Tr. of Slade Opheikens) at 227:3-233:23.

[139] Ex. 18 (Dep. Tr. of NRCP 30(b)(6) Designee for SNHD) at 37:17-39:17; Ex. 15 (Dep. Tr. of Shane Huish) at 154:6-155:12.

[140] Ex. 15 (Dep. Tr. of Shane Huish) at 154:6-155:12.

[141] Ex. 53 (4/20/15 E-mail Correspondence from Shane Huish).

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66. Lifeguard supervisors at Cowabunga Bay raised concerns with management regarding the inadequate number of lifeguards on duty at the Wave Pool in Spring 2015. Sierra Beggs testified that she repeatedly asked assistant general manager, Richard Woodhouse, to hire more lifeguards because the understaffing and inability to give lifeguards sufficient breaks presented a safety concern.[142] Emily Decker—the other Aquatics Supervisor for Cowabunga Bay in 2015—also testified that she complained about the lack of lifeguards because it was a safety concern.[143] Rebecca Raebel, a lifeguard supervisor, similarly testified that the deficiency in lifeguard coverage at the Wave Pool was a constant "topic of frustration."[144]

67. The chronic understaffing of lifeguards at the Wave Pool was particularly concerning because the Wave Pool was the most dangerous attraction at Cowabunga Bay.[145] Indeed, all twelve lifeguard rescues at Cowabunga Bay during the 2014 season occurred in the Wave Pool.[146]

68. On May 27, 2015—the day of L.G. 's drowning—the 2015 Lifeguard Budgetary Projection called for the absolute minimum number of lifeguards, and Cowabunga Bay's staffing sheet only assigned **3** lifeguards to monitor the 35,000 square foot Wave Pool.[147] The testimony of the lifeguards present that day also confirms that there were only **3** lifeguards posted to monitor the Wave Pool.[148]

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[142] Ex. 48 (Dep. Tr. of Sierra Beggs) at 31:17-33:6.

[143] Ex. 54 (Dep. Tr. of Emily Decker) at 67:2-68:1.

[144] Ex. 55 (Dep. Tr. of Rebecca Raebel) at 130:3-16, 149:9-150:9.

[145] *Id.* at 80:15-19, 132:17-21.

[146] Ex. 56 (2014 NASCO Water Rescue Report).

[147] Ex. 57 (5/27/15 Staffing Sheet).

[148] Ex. 55 (Dep. Tr. of Rebecca Raebel) at 106:25-107:4; Ex. 58 (Dep. Tr. of Lourdes Barreras) at 43:3-46:17.

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69. Beggs testified that the lifeguards on duty "would have caught [L.G. 's drowning] sooner [ ] if we had more lifeguards on stand[;]" a sentiment shared by other lifeguard supervisors at Cowabunga Bay.[149] Decker, in fact, testified that she warned Woodhouse ***on the day of the incident*** that the Wave Pool should be closed because she did not want a patron to suffer severe injuries from drowning.[150] Further, Raebel testified that the Wave Pool was unsafe on the day of the incident, and Cowabunga Bay's management should have warned the public and closed the attaction.[151]

70. L.G. drowned in the Wave Pool at Cowabunga Bay on May 27, 2015 and suffered severe neurological injuries. It is undisputed that only **3** lifeguards were on duty at the time of L.G. 's drowning.[152]

H. The Aftermath Of L.G. 's Drowning.

71. Immediately following L.G. 's drowning, Cowabunga Bay's assistant general manager, Richard Woodhouse, directed lifeguard supervisor, Chase Dorsey, to complete a form certifying that Armoni Hansen, the lifeguard who pulled L.G. out of the pool, had undergone the required recertification training prior to the incident.[153] Dorsey testified that Woodhouse instructed

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[149] Ex. 48 (Dep. Tr. of Sierra Beggs) at 67:24-69:11.

[150] Ex. 54 (Dep. Tr. of Emily Decker) at 68:2-70:1.

[151] Ex. 48 (Dep. Tr. of Sierra Beggs) at 67:22-68:25; Ex. 55 (Dep. Tr. of Rebecca Raebel) at 138:2-139:8, 147:21-148:1.

[152] The facts surrounding L.G. 's drowning are addressed in greater detail in Plaintiffs' Opposition to the Opheikens-Welch Defendants' (i) Second Motion for Summary Judgment on the Lack of Evidence that the Water Park's Breaches Delayed the Rescue of L.G. , and (ii) Third Motion for Summary Judgment Regarding the Lack of Evidence Supporting Plaintiffs' Theory of Medical Causation. Because those facts are not necessarily germane to the Court's resolution of instant Motions concerning duty and breach, Plaintiffs hereby incorporate their Statement of Undisputed Facts regarding causation by reference.

[153] Ex. 59 (Dep. Tr. of C. Dorsey) at 76:10-79:22, 233:10-235:15.

him to complete the false certification because Cowabunga Bay would need to provide the documentation to investigators from the City of Henderson.[154]

72. On the evening of May 27, 2015, Slade forwarded Scott the report generated by the R&O employee following his "recon visit" to Wet & Wild in 2014.[155] Slade specifically highlighted the additional safety mechanisms employed by Wet & Wild at the park's wave pool.[156]

73. On May 28, 2015—the day after L.G. 's drowning—representatives from the Bank of Utah visited Cowabunga Bay and met with Shane, Scott and Chet.[157] The purpose of Bank of Utah's visit was to conduct a site visit and management review, which included a discussion of "new labor savings" and Cowabunga Bay's current financial condition.[158] The Bank of Utah representatives specifically noted that Cowabunga's financial performance for the 2015 season had exceeded budgeted EBITDA.[159]

74. From May 28, 2015 through May 30, 2015, Cowabunga Bay's staffing levels remained consistent with the minimal amount of lifeguard coverage called for in the 2015 Lifeguard Budgetary Proposal.[160] Put another way, Cowabunga Bay continued to illegally understaff lifeguards *even after* L.G. 's drowning in the Wave Pool.

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[154] *Id.*

[155] Ex. 60 (5/27/15 E-mail Correspondence from Slade Opheikens).

[156] *Id.*

[157] Ex. 61 (5/27/15 E-mail Correspondence from Scott Huish); Ex. 62 (6/1/15 Memorandum from Spencer Ritchens).

[158] *Id.*

[159] *Id.*

[160] Ex. 63 (5/28/15-5/29-15 Staffing Sheets).

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75. On May 29, 2015, SNHD visited Cowabunga Bay to investigate L.G.'s non-fatal drowning.[161] SNHD observed that although Cowabunga Bay was not scheduled to open for another hour, there were only 14 lifeguards on duty at the park when 35 were required by the lifeguard plan.[162]

76. On June 9, 2015, SNHD returned to Cowabunga Bay to conduct an additional investigation while the park was open for business and found only 8 lifeguards on duty at the Wave Pool instead of the 17 lifeguards required by law.[163] SNHD also found lifeguard staffing violations at other attractions in Cowabunga Bay.[164] SNHD ultimately cited and fined Cowabunga Bay for its inadequate staffing of lifeguards.[165]

77. Orluff and Slade testified that the Individual Defendants' roles on the Management Committee and involvement in the operations of Cowabunga Bay did not change after L.G.'s drowning.[166] In that regard, Slade scheduled a Management Committee meeting for early August 2015 to, among other things, "dial down" on HWP's financial statements including Cowabunga Bay's income and expenses.[167] The Management Committee also planned to conduct a "budget forecast" for the rest of the year and make a significant balloon payment to the Bank of Utah since HWP now

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[161] Ex. 64 (5/29/15 SNHD Report and Notice of Inspection).

[162] *Id.*

[163] Ex. 65 (6/9/15 SNHD Report and Notice of Inspection).

[164] *Id.*

[165] *Id.*

[166] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 308:15-19; Ex. 4 (Dep. Tr. of Slade Opheikens) at 183:10-23.

[167] Ex. 66 (7/22/15 E-mail Correspondence from Slade Opheikens).

had sufficient funds in the bank.[168] Additionally, Slade requested an update on any incidents at Cowabunga Bay.[169]

78. On September 16, 2015, Scott scheduled another Management Committee meeting in October to discuss the 2015 season.[170] Scott suggested breaking the Management Committee meeting into "two parts, one being operations, the day to day issues the managers deal with and second, the big picture problems and where do we go in the second full year."[171] Slade followed up on Scott's e-mail and itemized specific topics for discussion including a comparison of "additional costs for lifeguards and other operating [costs] to be open so we can calculate the cost/benefit analysis."[172] Slade also noted that the Management Committee would "review all incidents/accidents and status of each, which slide they occurred on, what could have prevented them, [and a] current update on where there are at."[173]

79. In late 2015, the Management Committee hired Innovative Attraction Management ("IAM") to oversee the aquatics and risk management aspects of Cowabunga Bay's operations.[174] The hiring of IAM followed Shane's admission that neither he nor Woodhouse were qualified to manage aquatics at Cowabunga Bay.[175]

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[168] *Id.*

[169] *Id.*

[170] Ex. 67 (9/17/15 E-mail Correspondence from Slade Ophiekens).

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 308:20-312:13; Ex. 4 (Dep. Tr. of Slade Opheikens) at 154:1-11, 171:2-175:4.

[175] Ex. 16 (12/1/15 E-mail Correspondence from Shane Huish).

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I. The Individual Defendants Step Down From The Management Committee.

80. The Nevada Supreme Court granted Plaintiffs' Petition for Writ of Mandamus on November 22, 2017 and allowed Plaintiffs to amend their complaint to assert direct claims for negligence against the Individual Defendants related to their tortious conduct that resulted in L.G.'s drowning.[176] Plaintiffs, in turn, filed their Second Amended Complaint naming the Individual Defendants as parties to this case on December 18, 2017.[177]

81. On February 27, 2018, Double Ott, West Coast and Welch executed the Fourth Addendum to HWP's Operating Agreement and drastically changed the structure of HWP to insulate the Opheikens-Welch Defendants from further liability.[178] Specifically, the Fourth Addendum amended Section 1.5 of the Operating Agreement to state that the Management Committee would now consist of only three members appointed exclusively by West Coast.[179] Under the Fourth Addendum, Double Ott could no longer appoint individuals to serve on the Management Committee and only retained the right to have a non-voting observer attend Management Committee meetings.[180] The Fourth Addendum further amended Section 1.5 of the Operating Agreement to prohibit the Management Committee from taking certain actions in the absence of majority approval by HWP's members.[181]

82. Welch testified that he asked Cass Butler to draft the Fourth Addendum after the Nevada Supreme Court issued its order because "the risk/reward of participating in the management

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[176] *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court*, 405 P.3d 651 (2017).

[177] Second Amended Complaint (on file).

[178] Ex. 68 (Fourth Addendum to HWP Operating Agreement).

[179] *Id.*

[180] *Id.*

[181] *Id.*

[of HWP] really changed."[182] Welch further testified that by February 2018, "less was being contributed by us [*i.e.* the Double Ott appointees] than before [a]nd that [ ] the team that's in place now could and should be able to run the park."[183] In sum, Welch stated that serving on the Management Committee "wasn't worth it and wasn't needed."[184]

83. Although he attempted to claim that the decision to resign from the Management Committee was driven by Orluff's health, Slade had to admit that insulating the Opheikens-Welch Defendants from liability was a component of his and Orluff's decision to step down.[185] And, for his part, Scott forthrightly testified that "[t]he purpose of [the Fourth Addendum] was to get the Opheikens off the management committee" and that decision had "everything [ ] to do" with L.G. 's drowning as well as the fatal drowning of another young boy in 2017.[186]

84. Notwithstanding the resignations of the Opheikens Family and Welch from the Management Committee via the Fourth Addendum, the Bank of Utah approved an additional line of credit to HWP on March 7, 2018 and expressly noted that "[Orluff] Opheikens and others from R&O Construction [*i.e.* Slade and Chet Opheikens] are involved in the affairs of the business and regularly visit and monitor the project."[187]

III. STATEMENT OF DISPUTED FACTS

1. Plaintiffs object to the Opheikens-Welch Defendants' Statement of Undisputed Facts as follows:

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[182] Ex. 3 (Dep. Tr. of Tom Welch) at 160:16-165:5.

[183] *Id.*

[184] *Id.*

[185] Ex. 4 (Dep. Tr. of Slade Opheikens) at 132:4-143:3.

[186] Ex. 1 (Dep. Tr. of Scott Huish) at 128:4-129:12.

[187] Ex. 69 (3/7/18 Loan Approval Report).

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a. Undisputed Fact No. 2 – The Opheikens-Welch Defendants' assertion that the Management Committee is directly equivalent to a corporation's board of directors and that they each served in the same capacity as corporate directors is an impermissible blanket statement that is unsupported by evidence.

b. Undisputed Fact No. 3 – The Management Committee did not delegate "all responsibility for the operation of the water park to Shane Huish as General Manager and Richard Woodhouse as Operations Manager" as evidenced by the Opheikens-Welch Defendants' control over the finances of HWP, which directly impacted Cowabunga Bay's operations including lifeguard staffing. *See* Statement of UDF at ¶¶ 18, 41-55, 57-62, 73, 77-78, 81-84. Further, the Opheikens-Welch Defendants retained oversight authority concerning the day-to-day operations at Cowabunga Bay. *See* Statement of UDF at ¶¶ 40-45, 58-63, 72, 77-78, 82.

c. Undisputed Fact No. 4 – The evidence demonstrates that the Opheikens-Welch Defendants and their fellow Management Committee members were directly responsible for the understaffing of lifeguards at the Wave Pool on May 27, 2015. *See infra* at Section IV.C.

d. Undisputed Fact No. 5 – The Opheikens-Welch Defendants' allegation that they at all times acted in their capacity as members of the Management Committee and not in their individual capacities is an impermissible conclusion of law. Regardless, the fact that the Opheikens-Welch Defendants engaged in tortious conduct while acting on behalf of HWP's Management Committee does not shield them from liability. *See infra* at Section IV.B.

e. Undisputed Fact No. 6 – The Opheikens-Welch Defendants' contention that they did not engage in "intentional misconduct, fraud, or a knowing violation of the law" is an impermissible conclusion of law related to a doctrine that has no application to the instant action. *See infra* at Section IV.B.3. Moreover, the evidence demonstrates that the Opheikens-Welch Defendants engaged in intentional misconduct by negligently mandating budgetary restrictions and cost-cutting measures that resulted in the understaffing of lifeguards at the Wave Pool on May 27, 2015. *See infra* at Section IV.C.1.

2. Plaintiffs object to Scott's Statement of Undisputed Facts as follows:

a. Undisputed Fact No. 8 – The Management Committee did not delegate "all responsibility for the operation of the water park to Shane Huish as General Manager and Richard Woodhouse as Operations Manager" as evidenced by Scott's participation in the financial operations of Cowabunga Bay. *See* Statement of UDF ¶¶ at 18, 41-55, 57-62, 73, 77-78, 81-84. Further, Scott retained oversight authority concerning the day-to-day operations at Cowabunga Bay. *See* Statement of UDF ¶¶ at 40-45, 58-63, 72, 77-78, 82.

b. Undisputed Fact No. 9 – The evidence demonstrates that Scott and his fellow Management Committee members were directly responsible for the understaffing of lifeguards at the Wave Pool on May 27, 2015. *See infra* at Section IV.C.

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3. Plaintiffs object to Craig's Statement of Undisputed Facts as follows:

a. Undisputed Fact Nos. 9, 10 and 12 – Craig's assertion that he was removed from the Management Committee prior to July 4, 2014 is demonstrably false. In reality, Craig remained a member of the Management Committee until the execution of the Fourth Addendum to HWP's Operating Agreement in February 2018. *See* Statement of UDF at ¶¶ 15-19, 88.[188] In addition, Craig continued to receive meeting agendas and materials provided to the Management Committee after July 4, 2014. Statement of UDF at ¶¶ 41, 54. Craig's claim that his involvement was limited to his duties as HWP's accountant is also contradicted by his testimony that his partner, Chris Frazier, solely prepared HWP's financial statements and tax returns.[189]

b. Undisputed Fact Nos. 11 and 12 – The evidence demonstrates that the Management Committee was directly responsible for the understaffing of lifeguards at the Wave Pool on May 27, 2015. *See infra* at *See infra* at Section IV.C. Further, Craig retained oversight authority concerning the day-to-day operations at Cowabunga Bay. *See* Statement of UDF at ¶¶ 40-45, 58-63, 72, 77-78, 82.

4. Shane's meager Statement of Undisputed Facts consists of four paragraphs and does not support or even address the factual contentions in his Motion. Shane's failure to comply with NRCP 56(c) is grounds for the summary denial of his Motion. *See, e.g.*, *A.M. Capen's Co. v. Am. Trading and Prod. Corp.*, 202 F.3d 469, 472 n. 4 (1st Cir. 2000) (where there is a rule requiring the movant [for summary judgment] to supply the court with a list of uncontested facts with supported specific citations to the record, a party's failure to comply is grounds for judgment against that party); *Stepanischen v. Merchants Despatch Transp. Corp.*, 722 F.2d 922, 931-32 (1st Cir. 1983) (same).

5. Whether the Individual Defendants negligently implemented budgetary restrictions and cost-cutting measures requiring reductions to labor and the understaffing of lifeguards is a disputed question of fact.

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[188] Ex. 70 (Dep. Tr. of Craig Huish) at 87:16-88:18.

[189] *Id.* at 55:15-56:17, 88:19-89:2.

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6. Whether the Individual Defendants negligently delegated primary responsibility over the day-to-day operations at Cowabunga Bay to Shane given his admitted lack of operational experience and red flags about his background is a disputed question of fact.

7. Whether the Individual Defendants negligently exercised their oversight authority concerning Cowabunga Bay's operations is a disputed question of fact.

IV. ARGUMENT

A. Legal Standard On Summary Judgment.

Summary judgment is appropriate when, after viewing the evidence and any reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). An issue of material fact is genuine when the evidence is such that a rational jury could return a verdict in favor of the nonmoving party. *Id.* at 731, 121 P.3d at 1031. To prevail on summary judgment, "a moving defendant must show that one of the elements of the plaintiff's prima facie case, such as duty, breach, causation, or damages, is clearly lacking as a matter of law." *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007).

"In a negligence action, summary judgment should be considered with caution." *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1100, 864 P.2d 796, 798 (1993), *superseded by statute on other grounds as stated in Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. Adv. Op. 76, 265 P.3d 688 (2011)); *see also Bayer*, 123 Nev. at 461, 168 P.3d at 1063 ("We are reluctant to affirm summary judgment in negligence cases because, generally, the question of whether a defendant was negligent in a particular situation is a question of fact for the jury to resolve."); *Glover-Armont v. Cargill*, 134 Nev. Adv. Op. 49, 426 P.3d 45, 51 (Nev. Ct. App. 2018) ("Nevada's appellate courts are reluctant to affirm summary judgment on negligence claims because the question of whether a defendant exercised reasonable care is nearly always a question of fact.").

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"The determination of whether there has been a breach of duty is generally a question for the jury." *Anderson v. Baltrusaitus*, 113 Nev. 963, 967, 944 P.2d 797, 800 (1997) (citing *Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1, 4, 805 P.2d 589, 590 (1991)); *Klasch v. Walgreen Co.*, 127 Nev. 832, 841, 264 P.3d 1155, 1161 (2011) ("Breach of duty and causation are classically questions of fact."); *Joynt v. California Hotel & Casino*, 108 Nev. 539, 541, 835 P.2d 799, 800 (1992) ("[Q]uestions of negligence [ ] are generally questions of fact. A party's negligence becomes a question of law only when the evidence will support no other inference.").

B. Legal Standard Governing Plaintiffs' Negligence Claims Against The Individual Defendants.

The Court is familiar with the procedural history of this matter including the proceedings before the Nevada Supreme Court in *Gardner v. Henderson Water Park, LLC*, 399 P.3d 350 (Nev. 2017) ("*Gardner I*") and *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court*, 405 P.3d 651 (Nev. 2017) ("*Gardner II*"). Nevertheless, because the Individual Defendants either misunderstand the Nevada Supreme Court's rulings (the Huishs) or, worse, intentionally distort them (the Opheikens-Welch Defendants), Plaintiffs will briefly recount the earlier proceedings in *Gardner I* and *II* before addressing the hornbook law governing a LLC manager's liability for personal participation in tortious conduct. Plaintiffs will then refute the Opheikens-Welch Defendants' spurious argument that Nevada's business judgment rule has any application in this matter.

1. The Nevada Supreme Court's *Gardner* Decisions.

In May 2016, Plaintiffs sought leave to amend to assert direct claims for negligence against the Individual Defendants.[190] This Court denied Plaintiffs' Motion on grounds that the Individual Defendants were immune from liability for negligence pursuant to NRS 86.371, which provides that "no member or manager of any limited-liability company formed under the laws of this State is

[190] Plaintiffs' Mot. for Leave to File Amended Complaint (on file).

individually liable for the debts and liabilities of the company."[191] The Court subsequently granted summary judgment in favor of Double Ott and West Coast—which were originally named as defendants in Plaintiffs' complaint—on the same basis.[192] Plaintiffs sought review of both rulings from the Nevada Supreme Court.

The Nevada Supreme Court issued its first opinion in *Gardner I* and affirmed the Court's entry of summary judgment on behalf of Double Ott and West Coast. In *Gardner I*, the Nevada Supreme Court confirmed that "NRS 86.371 and NRS 86.381 do not shield members from liability for personal negligence[,]" but determined that Plaintiffs did not "allege any conduct by the member-LLCs that is separate and apart from the challenged conduct of the Water Park—i.e. [Plaintiffs did] not specify how any individual act or omission by the member-LLCs contributed to [L.G.'s] injuries." *Id.* at 351. In support of its holding, the Nevada Supreme Court cited the Oregon Supreme Court's decision in *Cortez v. Nacco Material Handling Grp., Inc.*, 337 P.3d 111, 119 (Or. 2014) for the proposition that "a member remains responsible for his or her acts or omissions to the extent those acts or omissions would be actionable against the member if that person was acting in an individual capacity." *Gardner I*, 399 P.3d at 351.

The Nevada Supreme Court addressed Plaintiffs' negligence claims against the Individual Defendants in *Gardner II*.[193] There, the Nevada Supreme Court reaffirmed that NRS 86.371 and NRS 86.381 "are not intended to shield members or managers [of a LLC] from liability for personal

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[191] *See* Order Denying Plaintiffs' Motion for Leave to Amend Complaint (on file).

[192] *See* Order Granting Motion for Summary Judgment as to Defendants West Coast and Double Ott Only.

[193] The Nevada Supreme Court likewise held that Plaintiffs were entitled to bring alter ego claims against HWP, Double Ott, West Coast and the Individual Defendants. *Gardner II*, 405 P.3d at 655-56. Plaintiffs' alter ego claims have been resolved and the Court may disregard the Individual Defendants' arguments regarding those claims.

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negligence." *Id.* at 655. Again relying on the Oregon Supreme Court's opinion in *Cortez*, the Nevada Supreme Court validated Plaintiffs' negligence claims against the Individual Defendants as follows:

> [T]he Gardners' proposed amended complaint contained multiple allegations of individual negligence by the Managers concerning their direct knowledge and actions that threatened physical injury to patrons, including L.G. Specifically, the proposed amended complaint alleges that the Managers, who had authority and control over the Water Park, owed personal duties to their patrons that they intentionally and willfully breached. Thus, the Gardners' proposed amended complaint alleges that the Managers breached a duty owed to L.G. arising out of their individual capacities. Therefore, we conclude that NRS 86.371 is not applicable, the amended complaint adequately states a negligence claim against the Managers in their individual capacities, and the district court abused its discretion by denying the Gardners' motion for leave to amend.

Id. (internal citation to *Cortez* omitted).

As such, the Nevada Supreme Court explicitly held that the Individual Defendants—as Managers of HWP—owed personal duties to keep L.G. safe as alleged in Plaintiffs' Third Amended Complaint.[194] This comports with longstanding corporate law. *Frances T. v. Village Green Owners Ass'n*, 723 P.2d 573, 581 (Cal. 1986) ("[D]irectors individually owe a duty of care, independent of the corporate entity's own duty, to refrain from acting in a manner that creates an unreasonable risk of personal injury to third parties. The reason for this rule is that otherwise, a director could inflict injuries upon others and then escape behind the shield of his or her representative character, even though the corporation might be insolvent or irresponsible."); *Dulaney v. Fruge*, 257 So.2d 827, 830 (La. Ct. App. 1972) ("The only duty which an executive officer of a corporation owes to a third person, whether he is an employee of the corporation or a complete stranger, is the same duty to exercise due care not to injure him which any person owes to another.").[195]

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[194] Following the Nevada Supreme Court's decision in *Gardner II*, Plaintiffs filed their Third Amended Complaint and amplified on their allegations concerning the Individual Defendants' misconduct. *See* Third Amended Complaint (on file).

[195] In *Gardner I*, the Nevada Supreme Court invoked case law addressing individual liability for corporate officers when it found that "NRS 86.371 and NRS 86.381 do not shield members from liability for personal negligence." *Id.* at 351 (citing *Semenza*). In *Cortez*, the Oregon Supreme Court likewise found that a LLC manager should be held to the standard of a corporate officer for the purpose of assessing individual liability. 337 P.3d at 119 ("Swanson argues that, in acting as the

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Similarly, the Nevada Supreme Court recognized that the Individual Defendants could be held liable even if they were acting in their capacity as Management Committee members on behalf of HWP. This, too, follows well-settled corporate law. *See, e.g*, *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1098, 901 P.2d 684, 689 (1995) ("An officer of a corporation may be individually liable for any tort which he commits, and, if the tort is committed within the scope of employment, the corporation may be vicariously or secondarily liable under the doctrine of respondeat superior); *Hoang v. Arbess*, 80 P.3d 863, 867-68 (Colo. Ct. App. 2003) ("[A]n officer may be held personally liable for his or her individual acts of negligence even though committed on behalf of the corporation, which is also held liable" and, "[m]oreover, that a defendant is at all times acting on behalf of the corporation does not relieve the defendant of liability.") (applying corporate officer standard to a LLC manager); *Industria de Alimentos Zenu S.A.S. v. Latinfood U.S. Corp.*, 2017 WL 6940696, at *23 (D.N.J. Dec. 29, 2017) ("The fact that an officer is acting for a corporation [ ] does not relieve the individual of his responsibility."); *Childs v. Purll*, 882 A.2d 227, 239 (D.C. Ct. App. 2005) (corporate officers "are individually liable for the torts which they commit, participate in, or inspire even though the acts are performed in the name of the corporation.").

2. The Individual Defendants are Liable if Plaintiffs Demonstrate that they "Personally Participated" in the Tortious Conduct Through Direct Actions, Negligent Delegation or Negligent Oversight.

Because the Nevada Supreme Court has expressly held ***in this case*** that the Individual Defendants personally owed L.G. duties of care and may be held liable for their negligent conduct as Management Committee members, this Court must assess whether genuine issues of fact exist as to whether the Individual Defendants breached those duties. The Court's inquiry in this regard turns on whether the Individual Defendants "personally participated" in the negligent conduct. *See, e.g.*,

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member-manager of Sun Studs, its role was comparable to that of a corporate officer and should be judged by the same standard. We agree with both the premise and conclusion of that argument[.] Having agreed with Swanson's premise, we also agree with its conclusion that the negligence standards that apply to corporate officers and managers apply to Swanson.").

Grayson v. Jones, 101 Nev. 749, 750-51, 710 P.2d 76, 76-77 (1985) (holding a member of a professional legal corporation is not individually liable "unless he/she personally participated in those tortious acts."); *Cortez*, 337 P.3d at 120 ("[A] director or officer of a corporation will be liable for a subordinate's tortious acts if the officer knew of those acts or participated in them.").[196]

Like Scott and Craig, Plaintiffs submit that the Oregon Supreme Court's analysis of "personal participation" in *Cortez* should guide this Court's analysis.[197] Specifically, the Oregon Supreme Court analyzed whether the LLC manager personally participated in the negligent conduct that resulted in a workplace forklift accident as follows:

> In this case, a reasonable juror could infer that Swanson "participated" in worksite safety at Sun Studs in three respects: Swanson formulated a general safety policy that it directed Sun Studs to implement; it delegated primary authority for safety at Sun Studs to Sub Studs' HR director and mill manager; and Swanson undertook to oversee those persons' implementation of Swanson's general safety policies. However, there was no evidence from which a reasonable juror could infer that Swanson negligently had formulated the general safety plan that it directed Sun Studs to implement. Similarly, a reasonable juror could not infer that Swanson negligently delegated primary

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[196] *See also D'Elia v. Rice Dev., Inc.*, 147 P.3d 515, 524-25 (Utah Ct. App. 2006) ("We are persuaded by those authorities that hold that both limited liability members and corporate officers should be treated in a similar manner when they engage in tortious conduct. We therefore conclude that *Harrison's* imposition of personal liability on corporate officers who participate in a corporation's tortious acts [ ] also applies to limited liability members or managers."); *Rothstein v. Equity Ventures, LLC*, 299 A.2d 472, 474 (N.Y.App.Div. 2002) ("We agree that members of limited liability companies, such as corporate officers, may be held personally liable if they participate in the commission of a tort in furtherance of company business."); *Mbahaba v. Morgan*, 44 A.3d 472, 476 (N.H. 2012) ("When [ ] a member or manager commits or participates in the commission of a tort, whether or not he acts on behalf of his LLC, he is liable to third persons injured thereby."); *Allen v. Dackman*, 991 A.2d 1216, 1228-29 (Md. Ct. App. 2010) ("These cases discuss tort liability for corporate officers and agents who personally committed, inspired, or participated in torts in the name of the corporation. We have not previously determined whether these same principles apply to members of LLCs. We agree, however, with other jurisdictions that have come to that conclusion.").

[197] In keeping with their well-established desire to lead the Court astray as to governing law, the Opheikens-Welch claim that *Cortez* is of "limited relevance." *See* Opheikens-Welch MSJ at 20-21. First, Plaintiffs cited dozens of cases regarding the individual liability of LLC managers to the Nevada Supreme Court, which consciously chose to cite *Cortez* in ***two*** separate published opinions. The Nevada Supreme Court's choice of persuasive authority is clearly significant. Moreover, the Opheikens-Welch Defendants distinguish *Cortez* on grounds that the LLC in that case was dissimilar from HWP's corporate model. *Id.* But the Oregon Supreme Court expressly found that the LLC had "adopted a corporate model" and, in turn, applied the negligence standards governing corporate officers and managers. *Cortez*, 337 P.3d at 119.

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> responsibility for safety to Sun Studs' HR director and mill manager. Finally, there was no evidence from which a reasonable juror could infer that Swanson negligently exercised the oversight authority that it retained over Sun Studs' implementation of Swanson's safety policies.

Cortez, 337 P.3d at 120 (internal citations omitted); *see also Keams v. Tempe Technical Inst., Inc.*, 993 F.Supp. 714, 724 (D. Ariz. 1997) ("Liability may be imposed [on corporate directors] if the directors participate or have knowledge amounting to acquiescence or are guilty of negligence in the management or supervision of the corporate affairs causing or contributing to the injury.").

Put simply, the *Cortez* decision established three avenues by which Plaintiffs can demonstrate the Individual Defendants "personally participated" in the negligent understaffing of lifeguards that caused L.G. 's injuries. ***First***, Plaintiffs can prove that the Individual Defendants participated by implementing policies that resulted in the understaffing of lifeguards at the Wave Pool on May 27, 2015. ***Second***, Plaintiffs can prove that the Individual Defendants negligently delegated responsibility and authority over Cowabunga Bay's day-to-day operations to Shane. ***Third***, Plaintiffs can prove that the Individual Defendants negligently exercised the oversight authority that they retained over Cowabunga Bay's operations. As demonstrated below, Plaintiffs have ample evidence to prevail on all three theories of personal participation.

For the purpose of these Motions, however, Plaintiffs must only demonstrate that a reasonable juror ***could infer*** that the Individual Defendants personally participated in the negligent conduct. *See, e.g.*, *Cortez*, 337 P.3d at 120, 125 (to overcome summary judgment on a negligence claim against a LLC manager, the plaintiff must demonstrate that "a reasonable juror could infer" that the LLC manager participated in the tortious conduct and concluding "that the evidence does not permit an inference that Swanson either had actual knowledge of the conditions that resulted in plaintiff's injury or actively participated in creating them.")];[198] *Grothe v. Helterbrand*, 946 S.W.2d 301, 304-05 (Mo.

[198] In yet another brazen distortion of the law, the Opheikens-Welch Defendants refer to this language from *Cortez* as "at most, dicta" even though it is literally in the holding of the case where the Oregon Supreme Court "summarize[d] [its] conclusions." *See* Opheikens-Welch Defendants

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Ct. App. 1997) (reversing entry of directed verdict because "a jury could have reasonably inferred" that the corporate officer participated in the tortious conduct); *Childs*, 882 A.2d at 239-40 ("Sufficient participation for the attachment of liability can exist when there is an act or omission by the officer which logically leads to the inference that he had a share in the wrongful acts of the corporation which constitute the offense.").

To that end, Plaintiffs are "entitled to have the evidence and all reasonable inferences accepted as true" for the purposes of summary judgment under NRCP 56. *Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). Moreover, the law is clear that the question of whether the Individual Defendants "approved of, directed, actively participated in, or cooperated in the negligent conduct is a question of fact for the jury." *Hoang*, 80 P.3d at 868; *see also List Interactive, Ltd. v. Knights of Columbus*, 303 F.Supp.3d 1065, 1078 (D. Colo. 2018) (same);[199] *Ventres v. Goodspeed Airport, LLC*, 881 A.2d 937, 962 (Conn. 2005) ("[T]he issue of whether a corporate officer has committed or participated in the wrongful conduct of a corporation is a question of fact."); *Bo Phillips Co. v. R.L. King Props., LLC*, 783 S.E.2d 445, 450-51 (Ga. Ct. App. 2016) (reversing summary judgment because "[i]f King Properties committed the tort of conversion of BPC's and Benn's property, a jury could find that King participated in and directed that conversion and was therefore personally liable.").

3. The Business Judgment Rule has no Application to Third Party Claims Against an Officer, Director or Manager Arising Out of his own Tortious Conduct.

Because the applicable legal standard combined with the overwhelming evidence of the Opheikens-Welch Defendants' personal negligence is fatal to their attempt to obtain summary

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MSJ at 20. Moreover, the *Cortez* court referred to the standard of whether a "reasonable juror could infer" that the LLC manager participated in tortious conduct on no less than eleven occasions.

[199] The Opheikens-Welch Defendants' counsel, Jeffrey Vail, should be familiar with this principle considering he represented the plaintiff/counter-defendant in this Colorado proceeding. *Knights of Columbus*, 303 F.Supp.3d at 1069.

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judgment, the Opheikens-Welch Defendants urge the Court to import Nevada's corporate business judgment rule as codified in NRS 78.138 into the LLC context and require Plaintiffs to demonstrate that the defendants engaged in "intentional misconduct, fraud or a knowing violation of the law" before they can recover in this case[200] In other words, the Opheikens-Welch Defendants contend that they can only be found liable if it is proved they engaged in an intentional tort. Mere negligence, according to the Opheikens-Welch Defendants, will not suffice. This argument is as novel as it is baseless. Tellingly, none of the other Individual Defendants have joined the Opheikens-Welch Defendants in taking the Court down this rabbit hole. *See* Scott MSJ at 6-9 (applying the *Cortez* court's analysis of personal participation in negligent conduct); Craig MSJ at 8-11 (same). This is for good reason as the Opheikens-Welch Defendants' reliance on the business judgment rule fails in multiple respects.[201]

NRS 78.138 only governs the fiduciary duties that a corporate director or officer owes to the corporation itself, not third parties such as Plaintiffs. NRS 78.138(1) ("The fiduciary duties of directors and officers are to exercise their respective powers in good faith and with a view to the interests ***of the corporation***.") (emphasis added). To that end, NRS 78.138(7)—the statutory provision co-opted by the Opheikens-Welch Defendants—specifically provides that "a director or officer is not individually liable ***to the corporation or its stockholders or creditors*** for any damages as a result of any act or failure to act in his or her capacity as a director or officer" unless certain conditions are met. *Id.* (emphasis added). Accordingly, by its plain language, NRS 78.138 does not protect corporate directors or officers from damages arising out of their own tortious conduct that injures a third party. *See Savage*

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[200] NRS Chapter 86 does not contain an equivalent to NRS 78.138 nor has the Nevada Supreme Court recognized that LLC managers are entitled to the protections of the business judgment rule. *See* Opheikens-Welch MSJ at 10. Nevertheless, given that the business judgment rule has absolutely no application to the instant proceeding, Plaintiffs will assume for the sake of this argument that NRS 78.138 applies to LLCs.

[201] Tellingly, the Opheikens-Welch Defendants cherry-pick one line from NRS 78.138 and completely ignore the other provisions in the multi-paragraph statute. The fact that the Opheikens-Welch Defendants' argument is premised on an incomplete recitation of what is required to overcome Nevada's business judgment rule is indicative of its lack of legal merit.

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v. Pierson, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) ("When examining a statute, a purely legal inquiry, this court should ascribe to its words their plain meaning, unless this meaning was clearly not intended.").

It speaks volumes that the Nevada Supreme Court has never invoked or even mentioned the business judgment rule when assessing whether a director, officer or manager of a corporate entity may be held personally liable for his or her own tortious conduct. *See Gardner I*, 399 P.3d at 350; and *Gardner II*, 405 P.3d at 65; *Semenza*, 111 Nev. at 1098, 901 P.2d at 689; *Grayson*, 101 Nev. at 750-51, 710 P.2d at 76-77. In fact, the language from *Gardner II* on which the Opheikens-Welch Defendants place so much weight is the Nevada Supreme Court's description of Plaintiffs' allegations in this very case, *i.e.,* that Plaintiffs alleged "that the Managers, who had authority and control over the Water Park, owed personal duties to their patrons that they intentionally and willfully breached." *Id.* at 655. This restatement of Plaintiffs' allegations is not an unspoken invocation of NRS 78.138, and the Opheikens-Welch Defendants have not cited a single case where a court applied the business judgment rule to shield a corporate director or officer from tort liability to a corporate outsider. [202]

That is no coincidence as the overwhelming weight of authority holds that the business judgment rule does not apply to actions brought by third parties seeking recovery for damages arising out of a corporate officer or director's tortious conduct. *See, e.g.*, *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 980 P.2d 940, 951 (Cal. 1999) ("[B]usiness judgment rule applies to parties (particularly shareholders and creditors) to whom the directors owe a fiduciary obligation, but does not abrogate the common law duty which every person owes to others—that is, the duty to

[202] The Opheikens-Welch Defendants try to distinguish *Cortez* by claiming that Oregon's business judgment rule is more limited in its application than NRS 78.138. *See* Opheikens-Welch MSJ at 20. This is nonsense. In reality, Oregon's business judgment rule (like Nevada's) provides "[a]n officer is not liable for any action taken as an officer, or any failure to take any action, if the officer performed the duties of the office in compliance with this section." ORS § 60.377(4). Like Nevada, the Oregon Supreme Court in *Cortez* plainly held that a LLC manager may be held liable for tortious conduct in which he personally participated without reference to the business judgment rule.

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refrain from conduct that imposes an unreasonable risk of injury to third parties.") (quoting *Frances T*, 723 P.2d at 582-83);[203] *Shefts v. Petrakis*, 2012 WL 4049509, at *6 n. 11 (C.D. Ill. Sept. 13, 2012) ("[T]he business judgment rule, a doctrine of corporate law, protects a corporate officer, acting reasonably in the corporation's interest, from suit on behalf of the corporation for mismanagement of the corporation. It cannot immunize him from suits by third-party victims of his conduct, and such conduct would unquestionably violate public policy."); *Fletcher v. Dakota, Inc.*, N.Y.S.2d 263, 267 (N.Y. App. Div. 2012) (There is no "safe harbor from judicial inquiry for directors who are alleged to have engaged in conduct not protected by the business judgment rule[.] On the contrary, it has long been held by this Court that a corporate officer who participates in the commission of a tort may be held individually liable[.]").[204]

In sum, Nevada's business judgment rule as codified in NRS 78.138 only serves to insulate management from second-guessing by corporate insiders and to prevent "a court from replacing a well-meaning decision by a corporate board with its own decision." *Wynn Resorts*, 399 P.3d at 342. It has no application to tort claims brought against LLC managers by a third party victim such as L.G. . The Opheikens-Welch Defendants' desperate attempt to interpolate a corrupted version of Nevada's business judgment rule into the well-settled legal standard governing their personal liability for negligence is an implicit concession that summary judgment is out of reach.

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[203] The Nevada Supreme Court cited *Lamden* with approval in the seminal case addressing the business judgment rule in this State. *See Wynn Resorts v. Eighth Judicial Dist. Court*, 399 P.3d 334, 342 (Nev. 2017).

[204] *See also Willmschen v. Trinity Lakes Improvement Ass'n*, 840 N.E.2d 1275, 1279-80 (Ill. Ct. App. 2005) (rejecting application of business judgment rule in tort action brought by third party because "[w]hile courts ordinarily will not inferfere with management decisions on the basis of their wisdom or lack thereof, the business judgment rule does not afford a corporation *carte blanche* to behave unlawfully."); *Case Credit Corp. v. Magnum Res., Inc.*, 2004 WL 2049769, at *5 (Minn. Ct. App. Sept. 13, 2004) ("Appellants' argument that Kutil is protected by the business judgment rule fails. The business judgment rule is irrelevant to the question of whether Kutil is liable for conversion because that rule is designed to protect officers and directors against shareholder claims that unprofitable business decisions were made. That is far different from the circumstances here; the claim here is that Kutil participated in and helped commit an intentional tort.").

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C. Summary Judgment Is Inappropriate Because Genuine Issues Of Material Fact Exist, And A Reasonable Juror Could Infer That The Individual Defendants Participated In The Negligent Conduct That Caused L.G. 's Injuries.

Turning to the evidence, Plaintiffs will begin by addressing the manner in which the Individual Defendants imposed budgetary restrictions and cost-cutting measures to rectify HWP's dire financial performance in 2014. These measures resulted in the chronic understaffing of lifeguards at the Wave Pool during the 2015 season, including on the day of L.G. 's drowning. Next, Plaintiffs will describe the incontrovertible evidence that the Management Committee negligently delegated authority over aquatic operations and safety at Cowabunga Bay to Shane. Finally, Plaintiffs will evaluate the Individual Defendants' negligent exercise of oversight authority concerning the unsafe manner in which Cowabunga Bay operated during the 2015 season.

1. The Individual Defendants Directly Participated in Negligent Conduct by Mandating Budgetary Cuts That Impacted Cowabunga Bay's Labor Force and Directly Resulted in the Reduction of Lifeguards at Cowabunga Bay.[205]

Here, a reasonable juror can—and will—infer that the Individual Defendants each directed and/or participated in the decision to reduce lifeguard staffing at Cowabunga Bay. As a result of the "nightmare" that occurred during Cowabunga Bay's construction, Orluff stood to lose "everything" if HWP folded. *See* Statement of UDF at ¶¶ 4-14, 18, 21-23. It is, moreover, undisputed that he, Welch, Slade and Chet intended to exercise their control of the Management Committee to "control expenses and maximize ebitda growth." *Id.* at ¶ 18. It is likewise undisputed that HWP's financial performance in 2014 was so dire that HWP along with Orluff and R&O stood in default on the loan with Bank of Utah. *Id.* at ¶¶ 43, 52. As their own expert witness, Mr. Kirkendall, testified: "[c]ertainly, Cowabunga management and investors had cause for concern about the results of operations and

[205] While Plaintiffs maintain that genuine issues of fact regarding negligent delegation and negligent oversight preclude summary judgment as to Craig, *see infra* at Sections IV.C.2 and IV.C.3, Plaintiffs do not contend that he directly participated in the negligent conduct that caused L.G. 's drowning. Accordingly, Plaintiffs' references to the Individual Defendants in this Section will exclude Craig.

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lack of positive cash flow. On a number of occasions Cowabunga investors were informed by Bank of Utah that the loan was in default due to the investors' failure to meet certain performance benchmarks/covenants within the loan documents."[206] *Id.* at ¶ 43. The Individual Defendants' motivation to reduce operating costs by any means necessary is beyond question.

The evidence is likewise clear that the Individual Defendants mandated budgetary restrictions and cost-cutting measures in Fall 2014 in order to improve HWP's profitability and avoid a financial catastrophe. *Id.* at ¶¶ 41-55, 61-62, 73. Indeed, as Mr. Kirkendall observed: "***It is normal, reasonable and even expected that a business entity, when faced with debt financing challenges, will undertake measures to minimize costs. Certainly, it appears that Cowabunga Bay took steps to minimize its costs due to such measures***." *Id.* at ¶ 47 (emphasis added).

In that regard, Scott told the Bank of Utah in September 2014 that labor at Cowabunga Bay was "***heavy at start-up—wanted to make good first impression w/new guests***" and that in advance of the 2015 season, the Management Committee was "***now cutting employees—now cross training***" and would have "***less supervision***." *Id.* at ¶ 44 (emphasis added). The Management Committee subsequently met over two days in October 2014 to discuss the following issues: (i) "Identify fixed costs and variable costs to determine breakeven analysis for next year;" (ii) "Identify [ ] cost savings we may have operationally;" (iii) "Review cash on hand [including] a summary of costs owed or owing;" (iv) "Review forecasted costs and revenues for the next year"; (v) "Compare previous proforma to actual costs and revenues;" (vi) "Review costs incurred and costs coming due to be paid" including "[c]ost overruns[,]" "costs incurred that are still owing which exceed bank loan[,]" and "fixed costs to be paid between now and next operating year such as bank loan, utilities, taxes, etc[;]" and

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[206] Indeed, HWP missed its EBITDA projections to Bank of Utah by more than $3 million in 2014, achieving only $194,694 in actual results. Mr. Kirkendall agreed that the borrowers including Orluff, Scott and Shane were under "mounting financial pressure" due to HWP's poor financial performance during the 2014 season, which resulted in a $600,000 shortfall on the Bank of Utah loan that had to come out of the Opheikens Family's pocket.

(vii) "[p]rojected apporox [sic] $600k shortfall on bank loan[.]" *Id.* at ¶ 45. Again, the Management Committee's focus on slashing costs and becoming profitable is incontrovertible.

The impact of the Management Committee's cost-cutting measures on lifeguard safety is evidenced by the "Budget Max" spreadsheet created by Scott and Shane in early December 2015.[207] *Id.* at ¶¶ 49-51. At the outset, the creation of a budgetary spreadsheet reflecting position cuts and average labor costs is exactly the type of task that the Opheikens-Welch Defendants would assign to Scott and Shane—*e.g.* "Scott and Shane will forward what an operating cost per day is for a slow day vs a busy day."[208] *Id.* at ¶ 61. Additionally, the term "Budget Max" itself infers that Scott and Shane were given a hard budget to meet for the 2015 season and Scott's fantastical testimony that this spreadsheet was a "formula error" only lends further doubt to the Individual Defendants' story. *Id.* at ¶¶ 49-51. And the fact that Scott and Shane created the "Budget Max" spreadsheet with lifeguard counts well below the required figure in December 2014 eviscerates the Individual Defendants' claim that the reduction resulted from an innocent misunderstanding between Shane and SNHD regarding lifeguard requirements in March 2015. *Id.* at ¶¶ 49-51, 59-60.[209]

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[207] The Opheikens-Welch Defendants will likely argue that Plaintiffs have no direct evidence that they mandated reductions to the labor force at Cowabunga Bay. First, Slade's agendas and the Individual Defendants' testimony make it crystal clear what subjects were discussed at Management Committee meetings. *See* Statement of UDF at ¶¶ 41-42, 45, 48, 54, 61-62, 77-78. Second, HWP's financial statements and other records demonstrate that Cowabunga Bay's labor costs signicantly decreased during the early months of the 2015 season. *See generally* Ex. 33 (Expert Report of Frank Campagna). Third, the Opheikens-Welch Defendants cannot rely on their own failure to maintain minutes or records of actions taken by the Management Committee to defeat Plaintiffs' claims. *See Brintnall v. Prof'l Investors of Iowa*, 218 N.W.2d 453, 455 (Iowa 1974) ("A corporation may not defeat legitimate claims against it by the simple device of failing to record its doings.").

[208] Slade's reference to "an operating cost per day [ ] for a slow day vs a busy day" indicates an awareness on the part of the Management Committee that Cowabunga Bay was altering its employee schedule based on attendance rather than compliance with Nevada law. *See* Statement of UDF at ¶ 61.

[209] The Opheikens-Welch Defendants are understandably sensitive to Chet's e-mail to Shane congratulating him on a "[g]reat job sticking it to SNHD, and having them open their minds to reality." *See* Opheikens-Welch Defendants MSJ at 23-24. Plaintiffs do not believe this e-mail is a

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Moreover, the staffing schedule established by the "Budget Max" spreadsheet was implemented during the 2015 season and in place through May 27, 2015 when L.G. drowned in the Wave Pool. *Id.* at ¶¶ 55, 68, 70, 74-76. In fact, Shane, Scott and Chet met with representatives from the Bank of Utah on May 28, 2015—***the day after*** L.G. ***'s drowning***—to discuss "new labor savings" at Cowabunga Bay. *Id.* at ¶ 73. These labor reductions were reflected in HWP's financial performance as the actual labor percentage against total revenue for May 2015 was only 13.8% compared to the 2014 average of 33.8%.[210] *See* Ex. 33 (Expert Report of Frank Campagna) at 5-6. Indeed, the Bank of Utah representatives who attended the meeting at Cowabunga Bay on May 28, 2015 specifically noted that, unlike the 2014 season, HWP's financial performance through May 2015 had exceeded budgeted EBITDA. *See* Statement of UDF at ¶ 73. In other words, the Individual Defendants' drive to cut variable costs paid dividends in the form of improved financial performance, but resulted in the consistent understaffing of lifeguards that ultimately caused L.G. 's drowning on May 27, 2015.[211]

"smoking gun[,]" but certainly find Chet's statement to be highly questionable if SNHD's lifeguard requirements—and the concommittant labor costs—were not a source of frustration for the Management Committee. Suffice it to say, Plaintiffs look forward to Chet's prepared explanation of his true meaning at trial.

[210] The Opheikens-Welch Defendants' objections to the expert testimony of Frank Campagna are addressed in Plaintiffs' Opposition to their separately-filed Motion to Exclude Opinions and Testimony of Frank Campagna, CPA, Expert Witness for the Plaintiffs. In short, the Opheikens-Welch Defendants cannot seriously dispute the accuracy of Mr. Campagna's testimony when their own expert in forensic accounting, Mr. Kirkendall, echoed many of Campagna's observations and any critiques regarding his interpretation of HWP's financial records only go to weight. In any event, Mr. Campagna is not seeking to testify to the Individual Defendants' state of mind as there is overwhelming evidence of their intentional actions and reasons for cutting variable costs including labor.

[211] Scott, of course, cannot credibly contend that he did not participate in reductions to lifeguards when he (i) specifically informed Bank of Utah that HWP was "cutting employees" in Fall 2014, (ii) created the "Budget Max" spreadsheet with Shane, and (iii) boasted about "new labor savings" to Bank of Utah along with Chet and Shane on the day after L.G. drowned. *See* Statement of UDF at ¶¶ 43, 49-51, 73. And, for his part, Shane does not even attempt to argue that he did not participate in the tortious conduct that resulted in L.G. 's drowning. *See* Shane MSJ.

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The Opheikens-Welch Defendants would have this Court believe that Plaintiffs must demonstrate they were actually at Cowabunga Bay dictating the specific lifeguard assignments on May 27, 2015 to be held liable. *See* Opheikens-Welch MSJ at 22-24. Not exactly. As one court observed, this is a "myopic view of 'direct participation' [that] does not withstand scrutiny." *Hill v. Beverly Enterprises-Mississippi, Inc.*, 305 F.Supp.2d 644, 647 (S.D. Miss. 2003) (stating "[t]here is no requirement of personal *contact* but rather personal *participation* in the tort[.]") (emphasis in original); *Grothe*, 946 S.W.2d at 304-05 ("Contrary to Defendant's argument, Plaintiff was not required to prove that Defendant personally participated in the sale of each ounce of Plaintiff's silver to be held liable for its misappropriation."); *Spear v. Somers Sanitation Serv., Inc.*, 162 F.R.D. 1, 3 (D. Mass. 1995) ("Cases which have found personal liability on the part of corporate officers typically involve instances of direct participation, as where the defendant was the 'guiding spirit' behind the wrongful conduct.").[212]

In an analogous fact pattern, the Illinois Supreme Court denied summary judgment on a direct participation claim where a parent corporation "mandated an overall business and budgetary strategy [for its subsidiary] and carried that strategy out by its own specific direction or authorization." *Forsythe v. Clark USA, Inc.*, 864 N.E.2d 227, 237 (Ill. 2007). The Illinois Supreme Court found that "Defendant's overall business strategy at the time of the tragic accident involved here mandated increased productivity driven, at least in part, by budgetary cuts." *Id.* at 238. The *Forsythe* court further determined that "[t]he additional evidence produced by plaintiffs indicating that [the company president] knew both that the budgetary reductions involved here had to come in large part from ***controllable costs*** such as education, training, repairs and equipment maintenance, and that these

[212] Opheikens-Welch Defendants' reliance on their purported ignorance of the SNHD lifeguard requirements is particularly troubling given their unequivocal testimony that they each owed a duty to operate HWP in a manner that complied with the law. *See* Statement of UDF at ¶ 20. Regardless, it is axiomatic that "ignorance of the law will not excuse any person, either civilly or criminally[,]" *Barlow v. United States*, 32 U.S. 404, 411 (1833), and "a corporate officer cannot evade responsibility by insulating himself with a layer of ignorance." *Spears*, 162 F.R.D. at 3.

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reductions were compromising safety at the refinery raises an issue of material fact[.]" *Id.* at 240 (emphasis added).

The same rationale applies here especially when the Management Committee does not enjoy the protections of a parent-subsidiary relationship and instead acts as the "board of directors" of HWP. *See* Opheikens-Welch MSJ at 6. There is no question that the Individual Defendants committed to reducing variable—*i.e.* controllable—costs in order to increase HWP's profitability after the financially disastrous 2014 season. *See* Statement of UDF at ¶¶ 41-55, 61-62, 73. Similarly, the Individual Defendants knew that labor was HWP's largest variable cost with lifeguards making up the majority of Cowabunga Bay's labor force. *Id.* at ¶ 46. And, of course, the Individual Defendants cannot dispute that lifeguards were a vital safety measure to protect the public at Cowabunga Bay.[213] Summary judgment is improper and the jury should determine whether the Individual Defendants directly participated in the understaffing of lifeguards at Cowabunga Bay.

2. The Individual Defendants Negligently Delegated Responsibility Over Cowabunga Bay's Operations To Shane.[214]

The Individual Defendants also cannot prevail on summary judgment due to their grossly negligent decision to delegate responsibility over Cowabunga Bay's operations to Shane. It is undisputed that the Individual Defendants as members of the Management Committee assumed "all management rights, powers and authority over the business, affairs and ***operations***" of Cowabunga Bay pursuant to HWP's Operating agreement. *See* Statement of UDF at ¶¶ 15-16. Pursuant to the Third Addendum to HWP's Operating Agreement, however, the Individual Defendants were granted

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[213] Ex. 2 (Dep. Tr. of Orluff Opheikens) at 186:15-187:8; Ex. 30 (7/15/14 E-mail Correspondence from Slade Opheikens) (stating "don't want to pay for another lifeguard, but don't want an injury either."). Even Defendants' expert witness in forensic accounting, Mr. Kirkendall, testified it would be inappropriate to reduce lifeguard staffing numbers below the amount required by law "because someone could drown." Ex 35 (Dep. Tr. of Kevin Kirkendall) at 42:5-43:7.

[214] Because Sections IV.C.2 and IV.C.3 address the the Management Committee' delegation to, and oversight of, Shane, the term "Individual Defendants" as used herein shall exclude Shane.

the right to delegate any and all responsibility to a fellow Management Committee member. *Id.* at ¶ 19.

This in and of itself is not controversial as the Oregon Supreme Court recognized in *Cortez* that "an officer with general responsibility may delegate that responsibility to a subordinate ***as long as the officer exercises due care in doing so***." 337 P.3d at 120 (citing *Schaefer v. D & J Produce, Inc.*, 403 N.E.2d 1015, 1021 (1978)) (emphasis added); *see also Esco v. Smith*, 468 So.2d 1169, 1175 (La. 1985) (a corporate officer who delegates responsibility to a subordinate must do so "with due care" to avoid liability). "'Due care' is a term of art generally used to describe the negligence element of breach – an element typically reserved for determination by the jury." *Estate of Smith ex rel. Smith v. Mahoney's Silver Nugget*, 127 Nev. 855, 869, 265 P.3d 688, 691 (2011).

In this case, however, the Individual Defendants' utter lack of due care in delegating responsibility over the day-to-day operations at Cowabunga Bay to Shane is stunning. They did not interview Shane or conduct any inquiry into his background prior to appointing him as General Manager. *See* Statement of UDF at ¶¶ 25-33. Moreover, the Individual Defendants did not seek other candidates for the position to whom Shane's qualifications (or lack thereof) could be compared. *Id.* The Individual Defendants did not even conduct a background check on Shane or contact his prior employers to obtain any information about his experience or qualifications to oversee the operations at a massive water park like Cowabunga Bay. *Id.*[215] Simply put, the Individual Defendants did nothing to satisfy themselves that Shane was fit for the job as his appointment as General Manager was a "foregone conclusion." *Id.* That is not due care under any definition of the term.[216]

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[215] Had the Individual Defendants run a simple background check on Shane, they would have learned that he had a lengthy arrest record, an established disregard for the law, and a penchant for dishonesty. *See* Statement of UDF at ¶ 33.

[216] The only thing the Individual Defendants allegedly did before delegating to Shane is review his resume. But none of the Individual Defendants have a copy of this resume, and it was never produced by HWP or Shane in the litigation. *See* Statement of UDF at ¶ 30. Obviously, the

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Because the lack of due care is inexcusable, the Individual Defendants argue that Shane was qualified based on his experience in the water park industry to oversee day-to-day operations at Cowabunga Bay. *See* Opheikens-Welch MSJ at 21-23; Scott MSJ at 11-13; Craig MSJ at 13-15. The Opheikens-Welch Defendants even go so far as to claim that Plaintiffs must introduce expert testimony to attack Shane's qualifications and experience. *See* Opheikens-Welch MSJ at 23. But why hire an expert witness when the Court can hear it straight from the horse's mouth:

> I really feel we need the expertise to help us manage for a season or two and help set up the Aquatics department. ***I feel absolutely confident with all other areas of the park [ ] but I have major concerns with Aquatics and Risk Management.*** I strongly feel we need to bring in experts to set up programs, training, policies and procedures to make our Aquatics department top notch! ***I really need help in this area and I don't feel confident that Rich [Woodhouse] or myself has the experience to bring the department to where it needs to be.***

Statement of UDF at ¶ 32 (emphasis added).

Indeed, Shane admitted that he (and Woodhouse) lacked experience in the two areas of expertise—aquatics and risk management—that directly contributed to L.G. 's drowning. *Id.* Shane had no experience managing aquatic operations at a water park on the scale of Cowabunga Bay. *Id.* at ¶ 31. The Individual Defendants correctly note that Shane worked for Paramount Parks and Six Flags, but fail to mention that he exclusively worked in design and marketing. *Id.* Similarly, the Individual Defendants point to Shane's experience as the general manager of the Huish Family's small facility in Draper, Utah, but that park was a tiny fraction of the size of Cowabunga Bay and did not have any attractions on par with the Wave Pool. *Id.* There can be no dispute that overseeing the safety of patrons in a 35,000 square foot Wave Pool is far different than supervising a "splash pad" akin to what one would find in a public park. *Id.*

That Shane was unfit for the position is borne out by his utter disdain for safety as the General Manager of Cowabunga Bay. Shane knowingly violated Nevada law by understaffing the Wave Pool

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Individual Defendants cannot demonstrate they acted with due care by pointing to a nonexistent resume.

with anywhere from 3 to 8 lifeguards when 17 lifeguards were required. *Id.* at ¶¶ 49-51, 53, 55, 57-58-60, 64, 66-71, 74-76. Shane and his subordinate, Woodhouse, also repeatedly ignored warnings from staff that the Wave Pool—Cowabunga Bay's most dangerous attraction—was unsafe due to the chronic understaffing of lifeguards and should have been closed on the day of L.G. 's drowning. *Id.* at ¶ 66. Shane's callous approach to the public's safety is further evidenced by his reference to water safety month as "bullshit month" and mocking comments about the fact that Cowabunga Bay's lifeguards "can't even swim half way across the wave pool." *Id.* at ¶¶ 56, 65. Shane and Woodhouse even assigned maintenance workers and fry cooks with no aquatics experience or training to monitor attractions at Cowabunga Bay. *Id.* at ¶ 57. It is hard to imagine a more unfit candidate for the position of General Manager than Shane, but the Individual Defendants failed to exercise any due care to discover that was the case.

Lastly, the Individual Defendants, particularly Scott and Craig, appear to seek refuge in the fact that the Management Committee acted as a group when it delegated responsibility to Shane as opposed to any specific member. *See* Shane MSJ at 11-12; Craig MSJ at 13-14. This artificial distinction—which is merely a rehash of the same flawed position that was rejected in *Gardner II*—is unspersuasive to say the least. As one court succinctly held:

> We affirm the trial court's decision because a nonprofit corporation's board of directors is not an entity, separate from the corporation, that is capable of being sued[.] It is made up of individuals who can be held liable for torts in their individual capacities only if they participated in the tortious conduct[.] Therefore, the trial court's decision granting judgment for the board is correct. If Flarey had wanted to recover from the members of the board, he should have sued the members of the board in their individual capacities.
>
> . . . . .
>
> When someone thinks he has been wronged by a corporation and that the board of directors may be individually liable for that tortious conduct, there will be times when that person will not have a clear idea of exactly what each member knew or could have done about the tortious conduct. Accordingly, it would behoove that person to name each member of the board of directors individually in his capacity as a member of the board until the course of the case shows which directors are or are not liable.

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Flarey v. Youngstown Osteopathic Hosp., 783 N.E.2d 582, 584, 586 (Ohio Ct. App. 2002); *see also Willmschen*, 840 N.E.2d at 1280 (same); *see supra* at Sections IV.B.1 and IV.B.2 (listing cases standing for proposition that a director, officer or manager is personally liable for tortious conduct committed on behalf of corporate entity in which he or she participates).

In this case, the Individual Defendants each maintain that they personally approved the delegation of the Management Committee's responsibilities over the operations of Cowabunga Bay to Shane. Shane, playing the role of scapegoat, agrees.[217] But because each of the Individual Defendants agreed to delegate such authority to Shane without the slightest semblance of due care, they acted negligently and are all personally liable.

3. The Individual Defendants Negligently Exercised Their Oversight Authority Over Cowabunga Bay.

Finally, the Court may hold the Individual Defendants liable based on the negligent exercise of oversight authority that they retained following the delegation of operational responsibilities to Shane. *See Cortez*, 337 P.3d at 120 (stating a LLC manager may be held liable for personal participation if "a reasonable juror could infer that [the manager] negligently exercised the oversight authority it retained[.]"). In this case, the Individual Defendants clearly retained oversight over Shane concerning the operations of Cowabunga Bay including risk management and safety functions but failed to exercise such oversight in a non-negligent manner to prevent the understaffing of lifeguards.

For starters, the Management Committee's records are clear that the Individual Defendants routinely received updates from Shane—both before and after L.G.'s drowning—regarding Cowabunga Bay's operations, including changes to the lifeguard requirements imposed by SNHD. *See* Statement of UDF at ¶¶ 40-41, 45, 54, 58-62, 77-78, 82. The testimony also reflects that the

[217] This is not a scenario where Plaintiffs are seeking to hold the Individual Defendants personally liable for a collective decision of the Management Committee even though certain members voted against the delegation of responsibility to Shane. Had one of the Individual Defendants objected to the delegation to Shane and been outvoted, that Individual Defendant would not be liable for the negligent act. But that is obviously not what happened here.

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Individual Defendants directly communicated with Shane concerning operational issues. *Id.* For example, Slade routinely communicated with Shane regarding safety matters including lifeguard staffing and assignments, signage, and risk management because "as a management committee member, [he had] the right and authority to make suggestions for them to consider." *Id.* at ¶¶ 40, 72.[218] Orluff also gave direction to Shane regarding lifeguard staffing at Cowabunga Bay even though he "had no idea [and] never even thought about" how many lifeguards were required by law. *Id.* at ¶¶ 60, 63. Additionally, the Opheikens-Welch Defendants readily acknowledge that Chet was in "more frequent contact" with Shane as a resident of Las Vegas. *See* Opheikens-Welch MSJ at 23. And, as evidenced by his role in the creation of the "Budget Max" employee schedule, Scott worked closely with Shane and "was really running the financial side of the [ ] business." *See* Statement of UDF at ¶¶ 49-51.[219]

Simply put, the Individual Defendants completely failed to exercise their established oversight authority with due care when it came to Cowabunga Bay's compliance with Nevada law concerning lifeguard staffing. None of the Individual Defendants took any steps to ensure or verify that Shane was operating Cowabunga Bay pursuant to the requirements imposed by SNHD. *Id.* at ¶ 63. The Individual Defendants abdicated that oversight despite the fact many of them expressly testified that the Management Committee had a duty to ensure Shane complied with the law in his capacity as General Manager. *Id.* at ¶ 20. This total abdication of oversight responsibility alone is sufficient to hold the Individual Defendants' liable for negligence.

D. The Individual Defendants Owed Duties To Keep L.G. Safe and Operate Cowabunga Bay In A Manner That Did Not Violate Nevada Law.

Because he cannot defend his abhorrent conduct, Shane attempts to reargue that same positions that were flatly rejected by the Nevada Supreme Court in *Gardner II*. Specifically, Shane claims that

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[218] Ex. 4 (Dep. Tr. of Slade Opheikens) at 193:22-24.

[219] Ex. 3 (Dep. Tr. of Tom Welch) at 157:16-17.

he did not owe duties to L.G. as an individual because he was acting in his capacity as General Manager of HWP. *See* Shane MSJ at 3-4, 20. As stated previously, however, the Nevada Supreme Court expressly rejected this argument and held that the Individual Defendants (including Shane) owed duties to L.G. in their individual capacities. *Gardner II*, 405 P.3d at 655-56. Moreover, the law is clear not only that Shane, as a member of HWP's Management Committee, owed a duty not to injure L.G., but also that he can be held liable for breaching this duty even if he acted solely on behalf of HWP. *See supra* at Sections IV.B.1 and IV.B.2. This is hornbook law. Shane's argument to the contrary reflects a fundamental misunderstanding of the Nevada Supreme Court's rulings in this case.

E. The Individual Defendants' Criticisms Of Plaintiffs' Interrogatory Responses Are Misleading In the Extreme.

The Opheikens-Welch Defendants castigate Plaintiffs for their allegedly deficient interrogatory responses concerning the Individual Defendants' personal negligence. In doing so, the Opheikens-Welch Defendants misrepresent the record by providing the Court with out-of-context snippets and ignoring the comprehensive nature of Plaintiffs' interrogatory responses. Indeed, in response to the Opheikens-Welch Defendants' first set of interrogatories, Plaintiffs detailed the manner in which the Individual Defendants participated in tortious conduct as follows:

> Objection. This Interrogatory is a contention discovery request relating to a fact or application of law to fact and cannot be adequately answered until discovery has been completed. This Interrogatory also improperly calls for a legal opinion. In addition, this Interrogatory is unduly burdensome in that it constitutes a "blockbuster" interrogatory that asks Plaintiff to provide a detailed narrative of his entire case, including by identifying every witness and document that supports each relevant fact. Without waiving and subject to the foregoing objections, Plaintiff contends that the Individual Defendants (including the Opheikens and Welch) authorized or participated in Defendants' tortious conduct as follows:
>
> ***First***, the Individual Defendants personally participated in the negligent formulation and implementation of a lifeguard staffing policy at Cowabunga Bay that violated the SNHD-approved lifeguard plan for the Wave Pool in order to meet budgetary projections and maintain the business's flagging profitability. Cowabunga Bay's financial condition and the Individual Defendants' actions in response thereto are described in detail in Paragraphs 22-47 of Plaintiffs' Third Amended Complaint. The expert report of Frank Campagna, CPA and exhibits thereto also reflect Cowabunga Bay's financial condition and its causal connection to the Individual Defendants'

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> decision to understaff lifeguards at the Wave Pool for monetary reasons in violation of law. The Individual Defendants also personally participated in and were aware of the operations and safety functions in place at Cowabunga Bay including but not limited to the staffing of lifeguards.
>
> ***Second***, the Individual Defendants negligently delegated primary responsibility over the daily operations and implementation of safety measures at Cowabunga Bay to Shane Huish. The Individual Defendants either knew or should have know that Shane Huish was unqualified to oversee the operations of Cowabunga Bay given the red flags in his background and lack of operational experience.
>
> ***Third***, pursuant to Henderson Water Park, LLC's operating agreement, the Individual Defendants expressly assumed all management rights, powers and authority over the business, affairs and operations of Cowabunga Bay. In that capacity, the Individual Defendants negligently failed to oversee and supervise the safe operation of Cowabunga Bay in compliance with all governing laws of the State of Nevada.
>
> Plaintiff refers Defendant to his Initial Disclosures and all Supplements thereto, including the documents introduced as exhibits during the depositions of Shane Huish, Scott Huish, Orluff Opheikens, Slade Opheikens, Craig Huish, and Bank of Utah as well as those documents produced by the Bank of Utah in this litiation and those relied upon by Frank Campagna in drafting his expert report. Discovery is ongoing and Plaintiff reserves the right to supplement this response as discovery continues.

See Opheikens-Welch MSJ at Ex. L (emphasis in original).

Accordingly, the Opheikens-Welch Defendants' claim that Plaintiffs "failed to provide any meaningful response" is categorically false as is their assertion that Plaintiffs did not identify supporting documents. To the contrary, Plaintiffs referred the Opheikens-Welch Defendants to the exhibits from the depositions of the Individual Defendants and Bank of Utah, many of which are attached hereto as supporting exhibits. Plaintiffs also objected to both sets of interrogatories propounded by the Opheikens-Welch Defendants and they did not contest those objections or seek relief from the Court.[220] Given that Plaintiffs adequately answered the Opheikens-Welch Defendants'

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[220] The Opheikens-Welch Defendants also misstate the scope of Plaintiffs' objections as well as the fact that their second set of interrogatories were tied to wholly improper requests for admission seeking legal conclusions. *Compare* Opheikens-Welch MSJ at 16 *with id.* at Ex. M. As such, Plaintiffs rightly objected and refused to respond beyond their prior answers. *Streck, Inc v. Diagnostic Sys., Inc.*, 2009 WL 1616629, at *2 (D. Neb. June 4, 2009) (stating that the defendant's refusal to respond to interrogatories corresponding with objectionable request for admission was

objectionable interrogatories and they failed to seek supplementation, the Opheikens-Welch Defendants cannot complain about the information that was provided.[221] This is nothing more than misdirection.

V. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny (i) Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens and Tom Welch's First Motion for Summary Judgment as to Issues of Duty and Breach on Negligence Claim; (ii) Defendant Scott Huish's Motion for Summary Judgment; (iii) Defendant Craig Huish's Motion for Summary Judgment; and (iv) Defendant Shane Huish's Motion for Summary Judgment.

DATED this 28th day of June, 2019.

CAMPBELL AND WILLIAMS

By /s/ ***Donald J. Campbell***
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"more than adequate."); *Downs v. Brasted*, 1993 WL 273370, **1-2 (D. Kan. June 28, 1993) ("Since defendants do not have to respond to [the objectionable requests for admission], the defendants have no need to respond to the follow-up interrogatory."). Again, the Opheikens-Welch Defendants did not challenge Plaintiffs' proper objections to their second set of interrogatories.

[221] The Opheikens-Welch Defendants and Shane allege that Plaintiffs failed to verify their interrogatory responses. First, Shane's claim is an outright falsehood as Plaintiffs' counsel e-mailed their verification pages to his counsel the day after the responses were served. *See* Ex. 71 (E-mail Correspondence dated 1/11/2019). Second, although Plaintiffs' counsel inadvertently neglected to attach the verification page for L.G.'s responses, Peter and Christian Gardner verified Plaintiffs' responses to the Opheikens-Welch Defendants' first set of interrogatories. *See* Ex. 72 (Verification Pages). Third, Plaintiffs objected and refused to respond to the Opheikens-Welch Defendants second set of interrogatories on this subject matter so no verification page was required. Regardless, the Individual Defendants' personal participation in tortious conduct is a legal argument about which Peter and Christian Gardner have no personal knowledge.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 28th day of June, 2019 I caused the foregoing document entitled **Plaintiffs' Opposition to (i) Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens and Tom Welch's First Motion for Summary Judgment as to Issues of Duty and Breach on Negligence Claim; (ii) Defendant Scott Huish's Motion for Summary Judgment; (iii) Defendant Craig Huish's Motion for Summary Judgment; and (iv) Defendant Shane Huish's Motion for Summary Judgment** 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

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, L.G. [redacted]

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 Corporations I through X, inclusive; and ROE Limited Liability Company I through X, inclusive,

Defendants.

AND ALL RELATED CLAIMS

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

PLAINTIFFS' OPPOSITION TO THE INDIVIDUAL DEFENDANTS' PARTIAL MOTIONS FOR SUMMARY JUDGMENT AS TO PUNITIVE DAMAGES

Hearing Date: July 31, 2019
Hearing Time: 9:00 a.m.

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Plaintiffs, by and through their undersigned counsel, hereby submit the following Opposition to (i) Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens and Tom Welch's Motion for Partial Summary Judgment as to Punitive Damages; (ii) Defendants Scott and Craig Huish's Motion for Partial Summary Judgment as to Plaintiffs' Prayer for Punitive Damages; and (iii) Defendant Shane Huish's Motion for Summary Judgment with respect to punitive damages. 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[1]

I. INTRODUCTION

Contrary to the Opheikens-Welch Defendants' claim that there is "no evidence" the Individual Defendants engaged in wrongful conduct, Plaintiffs have demonstrated that a reasonable jury can—and will—find that they directly participated in the tortious conduct that caused L.G. 's drowning at Cowabunga Bay on May 27, 2015. Motivated by a staggering amount of debt and HWP's dismal performance during the 2014 season, the Individual Defendants sought to increase profitability by imposing severe budgetary cuts at Cowabunga Bay that directly resulted in the chronic understaffing of lifeguards during the 2015 season. While the Management Committee's edict and "new labor savings" dramatically improved Cowabunga Bay's financial performance, the Individual Defendants' self-interested decision set in motion a chain of events that tragically culminated in L.G. 's drowning. As such, this is a quintessential case of profits over safety, which warrants the imposition of punitive damages under Nevada law.

[1] In the instant Opposition, Plaintiffs will use the same nomenclature as their Opposition to the Individual Defendants' Motions for Summary Judgment on the Issues of Duty and Breach. That said, Plaintiffs do not seek punitive damages against Craig and he is excluded from the term "Individual Defendants" for the purpose of this Motion.

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II. STATEMENTS OF UNDISPUTED AND DISPUTED FACTS

In the interest of brevity, Plaintiffs hereby incorporate by reference their Statements of Undisputed and Disputed Facts from their Opposition to the Individual Defendants' Motions for Summary Judgment on the Issues of Duty and Breach ("Duty and Breach Opposition"). To the extent the Individual Defendants' Motions for Partial Summary Judgment with respect to punitive damages contain any "undisputed facts" that were not addressed in the Duty and Breach Opposition, Plaintiffs will contest them below in Section III.B.

III. ARGUMENT

A. Legal Standard.

Summary judgment is appropriate when, after viewing the evidence and any reasonable inferences drawn from the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). An issue of material fact is genuine when the evidence is such that a rational jury could return a verdict in favor of the nonmoving party. *Id.* at 731, 121 P.3d at 1031. To prevail on their claim for punitive damages, Plaintiffs must demonstrate that the Individual Defendants' conduct falls within the parameters of NRS 42.005(1) by "clear and convincing" evidence, which can be adduced through either direct or circumstantial evidence that persuades the jury of the "high probability" of their conduct. *See Topaz Mutual Co. v. Marsh,* 108 Nev. 845, 839 P.2d 606 (1992); *Wynn v. Smith*, 117 Nev. 6, 16 P.3d 424 (2001).

Under NRS 42.005(1), Plaintiffs are entitled to punitive damages if the Individual Defendants are "guilty of oppression, fraud or malice, express or implied."[2] "'Opression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of

[2] Plaintiffs do not contend that the Individual Defendants engaged in fraud or express malice.

the rights of the person." NRS 42.001(4). "'Malice, express or implied, means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard for the rights and safety of others." NRS 42.001(3). "'Conscious disregard' means the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." NRS 42.001(1). A defendant's conduct "must exceed mere recklessness or gross negligence" to constitute "conscious disregard." *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 743, 192 P.3d 243, 255 (2008).[3]

The Nevada Supreme Court has determined that a defendant acts with conscious disregard where he proceeds with a course of action with the understanding that it involves an imminent, as opposed to merely a theoretical, risk of harm to the plaintiff. *Countrywide*, 124 Nev. at 743-44, 192 P.3d at 255-56 (affirming submission of punitive damages to jury where foreclosure specialist "presumably understood" that proceeding with foreclosure involved an imminent risk to the owner but failed to avoid the harm); *see also Terrell v. Cent. Washington Asphalt, Inc.*, 168 F.Supp.3d 1302, 1318 (D. Nev. 2016) (denying summary judgment because long-haul trucker acted with conscious disregard where he knew the dangers of fatigued driving and exceeded his hours-in-service requirement); *see* Scott and Craig Huish's MSJ at 6 (acknowledging that the Individual Defendants may be held liable for punitive damages if they "intentionally ignored the obvious risk" from the understaffing of lifeguards).

Although the definitions of "malice" and "conscious disregard" were subsequently clarified in *Countrywide*, the Nevada Supreme Court has recognized that punitive damages are expressly designed for situations where a defendant prioritizes profits over the public's safety. *See Granite Constr. Co. v. Rhyne*, 107 Nev. 651, 652-53, 817 P.2d 711, 713 (1991), *overruled on other grounds*

[3] Plaintiffs do not need to prove intent to cause harm as that mental state "plays no role in analyzing a defendant's conscious disregard for purposes of implied malice or oppression." *Countrywide*, 124 Nev. at 744, 192 P.3d at 256 n. 55.

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in Countrywide, 124 Nev. at 725, 192 P.3d at 243. In *Granite*, the Nevada Supreme Court found that punitive damages were justified when the defendant sacrificed public safety "in order to save itself time and money." *Id.* In his concurring opinion, Justice Mowbray put it more bluntly when he stated "the defendant consciously and deliberately disregarded known safety procedures—procedures designed to protect the public from serious harm—to save a few dollars." *Id.* at 654-55, 817 P.2d at 714.

Courts in other states that, like Nevada, require a mental state approximating "conscious disregard" have expressly determined that imposing staffing cuts to increase profitability at the risk of the public's safety "is precisely the type of egregious conduct punitive damages are meant to deter."[4] *See, e.g.*, *Vendevender v. Blue Ridge of Raleigh, LLC*, 901 F.3d 231, 239-40 (4th Cir. 2018) (reversing district court's dismissal of punitive damages where nursing facility imposed staffing cuts to increase corporate profitability); *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73 (W. Va. 2014) (affirming award of punitive damages where nursing home engaged in "chronic understaffing," "was able to achieve a higher profit by having fewer employees to pay," and achieved the profit "at the expense of the residents who were not properly cared for."); *Bremenkamp v. Beverly Enterprises-Kansas, Inc.*, 763 F.Supp. 884, 893-895 (D. Kan. 1991) ("[C]ourt ha[d] no trouble holding that plaintiff is entitled to seek punitive damages" where the "defendant made business decisions that were predicated upon its economic interests and profit desires rather than the best interests and medical needs of its patients.").[5]

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[4] In *Countrywide*, the Nevada Supreme Court looked to case law from other jurisdictions "requiring a mental state approximating conscious disregard" as persuasive authority. 124 Nev. at 745, 192 P.3d at 256 n. 57.

[5] *See also McLemore ex rel. McLemore v. Elizabethton Med. Inv'rs, Ltd. P'Ship*, 389 S.W.2d 764, 781-82 (Tenn. Ct. App. 2012) (sustaining award of punitive damages where the "evidence showed that taking high needs patients but limiting the staff to meet those needs increased profits" and "it was reasonable for the jury to conclude that these increased profits were the motivation for Life Care's conduct which caused grievous injury to Earl McLemore."); *Breslin v. Mountain View Nursing Home, Inc.*, 171 A.3d 818, 830 (Pa. 2017) (finding plaintiff stated a claim for punitive damages by

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B. The Individual Defendants' Intentional Misconduct And Conscious Disregard For The Public's Safety Is Worthy Of Punitive Damages.

The Individual Defendants' arguments against the imposition of punitive damages are identical to those submitted in defense of Plaintiffs' claims for negligence—*e.g.* the Management Committee delegated to Shane, did not participate in day-to-day operations, and was not aware of lifeguard cuts. Thus, Plaintiffs will rest on the facts and evidence submitted in support of their Breach and Duty Opposition as the Individual Defendants' direct participation in tortious activity is detailed at length therein. The only question then becomes whether punitive damages are available if a jury finds that the Individual Defendants engaged in the conduct alleged by Plaintiffs. As detailed above, the law from Nevada and other like-minded jurisdictions is clear that punitive damages are warranted where a defendant elevates profits over safety by imposing staffing cuts for budgetary reasons that increase the risk of harm to the public. *See supra* at Section III.A.

Here, the Individual Defendants knew or ignored the obvious—that slashing HWP's largest variable cost (*i.e.* labor) would directly impact the number of lifeguards at Cowabunga Bay because lifeguards were the single biggest component of labor. *See* Duty and Breach Opp. at Sections II and IV.C.1. The Individual Defendants likewise understood that lifeguards served a vital safety function for the patrons in attendance at Cowabunga Bay. *Id.* Nevertheless, the Individual Defendants proceeded with their plan to slash the budget at Cowabunga Bay in the face of imminent risk of harm to the public, including L.G. , because their own financial self-preservation was more important. *Id.* As the Fourth Circuit Court of Appeals stated, the Individual Defendants' decision to prioritize their own financial wellbeing by understaffing employees who are critical to public safety at Cowabunga

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alleging that nursing home, "motivated by a desire to increase profits, knowingly mismanaged and/or reduced staffing levels below the level needed to provide adequate care and supervision to its patients[.]"); *Wilson v. Americare Sys., Inc.*, 2014 WL 791936, at *3-7 (Tenn. Ct. App. Feb. 25, 2014) (affirming punitive damages award where assisted-living facility "chronically understaffed" the facility and "budget reasons were given as the reason for not hiring more staff.").

Bay "is precisely the type of egregious conduct punitive damages are meant to deter." *Vendevender*, 901 F.3d at 239-40.

Mere denials of wrongdoing in conclusory declarations or depositions will not insulate the Individual Defendants from liability for punitive damages. First, Plaintiffs submitted ample evidence to contradict the Opheikens-Welch Defendants' claims that they were removed from the decision-making process that led to three lifeguards being assigned to the Wave Pool on the day L.G. drowned. *See* Duty and Breach Opp. at Sections II and IV.C.1. Second, the Nevada Supreme Court has expressly held that the Opheikens-Welch Defendants' denials of wrongdoing—even if uncontradicted in the record—cannot not support the entry of summary judgment because the jury must weigh their credibility under cross-examination by Plaintiffs. *See Short v. Hotel Riviera, Inc.*, 79 Nev. 94, 100-101, 378 P.2d 979, 983 (1963); *Fox v. Cusick*, 91 Nev. 218, 220, 533 P.2d 466, 468 (1975); *NCP Bayou 2, LLC v. Medici*, 437 P.3d 173, *2 (Nev. March 21, 2019); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).[6]

The Opheikens-Welch Defendants' contention that punitive damages are only on the table if Plaintiffs demonstrate they knowingly violated the SNHD lifeguard requirements is also misplaced. As stated elsewhere, the Opheikens-Welch Defendants' reliance on their purported ignorance of the SNHD lifeguard requirements is dubious given their unequivocal testimony that they each owed a duty to operate HWP in a manner that complied with the law. *See* Duty and Breach Opp. at Sections II and IV.C.1. Additionally, the jury can easily infer that the Opheikens-Welch Defendants were well aware

[6] The Motions filed by Shane and Scott are particularly weak. For his part, Scott (i) specifically informed Bank of Utah that HWP was "cutting employees" in Fall 2014, (ii) created the "Budget Max" spreadsheet with Shane, and (iii) boasted about "new labor savings" to Bank of Utah along with Chet and Shane on the day after L.G. drowned. *See* Duty and Breach Opp. at Sections II and IV.C.1. Shane, of course, engaged in a host of despicable acts as General Manager of Cowabunga Bay and admitted that he intentionally violated Nevada law by understaffing lifeguards. *Id.* In fact, Shane encapsulated Cowabunga Bay's "profits over safety" mantra quite well when he derided National Water Safety Month as "bullshit month" and instructed staff to "focus on the things that will bring in the dollars rather than the feel good fluffy stuff." *Id.*

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of SNHD's lifeguard requirements given that this subject was discussed with Shane and at Management Committee meetings in connection with budgetary issues. *Id.*

Regardless, Nevada law does not require that a defendant knowingly engage in criminal conduct before imposing punitive damages based on oppression or implied malice. Instead, the Nevada Supreme Court has expressly held that the evidence must only indicate a willful and deliberate failure on the part of the defendant to avoid probable harm to the plaintiff. *Countrywide*, 124 Nev. at 744-45, 192 P.3d at 256. The evidence submitted by Plaintiffs concerning the Individual Defendants' decision to slash labor costs in the interest of increased profitability is clearly sufficient to create genuine issues of fact such that a jury should decide whether they acted with oppression or implied malice. *See* Duty and Breach Opp. at Section II and IV.C.1.

V. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny (i) Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens and Tom Welch's Motion for Partial Summary Judgment as to Punitive Damages; (ii) Defendants Scott and Craig Huish's Motion for Partial Summary Judgment as to Plaintiffs' Prayer for Punitive Damages; and (iii) Defendant Shane Huish's Motion for Summary Judgment with respect to punitive damages.

DATED this 28th day of June, 2019.

CAMPBELL AND WILLIAMS

By /s/ ***Donald J. Campbell***
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 28th day of June, 2019 I caused the foregoing document entitled **Plaintiffs' Opposition to the Individual Defendants' Partial Motions for Summary Judgment as to Punitive Damages** 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

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DISTRICT COURT
CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually, and on behalf of minor child L.G. [redacted],

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

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

OPHEIKENS-WELCH DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PUNITIVE DAMAGES

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.

Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens, and Tom Welch (hereinafter the "Opheikens-Welch Defendants"), by and through their counsel of record, GODFREY | JOHNSON, P.C. and OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, do herein submit this Reply in Support of their Partial Motion for Summary Judgment as to Punitive Damages (the "Motion") in the above-entitled action pursuant to Nevada Rule of Civil Procedure 56. This Reply is made and based upon all of the papers and pleadings on file herein, the Points and Authorities hereinafter to follow, and such oral argument and testimony as this Honorable Court may entertain at a hearing of the subject Motion, if so desired.

POINTS AND AUTHORITIES

I. INTRODUCTION

As set forth in the Opheikens-Welch Defendants' Motion, there is simply no evidence specific to either Orluff Opheikens, Slade Opheikens, Chet Opheikens, or Tom Welch individually acted with the oppression, fraud, or malice required to support any claim of punitive damages—

and certainly not the "clear and convincing evidence" of such conduct as expressly required by NRS § 42.005. Rather, Plaintiffs' suggestion in their Response that such evidence as to each of these individuals could potentially be inferred by a jury from other conduct not directly attributable to these individuals specifically cannot, as a matter of law, meet the evidentiary burden required by statute for punitive damages. Accordingly, the Opheikens-Welch Defendants are entitled to Partial Summary Judgment on the issue of punitive damages.

II. ARGUMENT

A. There Is No Individualized Evidence In The Record Of Oppression, Fraud, Or Malice By Any Of The Opheikens-Welch Defendants

As set forth in the Motion, this is a "no evidence" motion. Plaintiffs' Response fails to set forth any individualized evidence sufficient to create a prima facie case of oppression, fraud, or malice with respect to Tom Welch, Orluff Opheikens, Slade Opheikens, or Chet Opheikens. The Opheikens-Welch Defendants have carefully categorized and addressed all of Plaintiffs' claimed "undisputed facts" in their Reply in Support of Motion for Summary Judgment as to Duty and Breach ("Table of Evidence"), which is filed contemporaneously herewith and incorporated by reference herein. As set forth in the Table of Evidence, in their voluminous briefing Plaintiffs make only eight citations to the record that even purport to constitute breaches of any duty by the Opheikens-Welch Defendants to L.G. Gardner. *Id*. Initially, there is no allegation of fraud by any of the Opheikens-Welch Defendants in this case. As to malice and oppression, "[b]oth malice and oppression require a conscious disregard for a person's rights and 'knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences.'" *Yoshimoto v. Safeco Ins. Co. of Ill.*, 2018 WL 4335620 at *4 (D. Nev. 2018) (emphasis added) (Citing *Countrywide Home Loans, Inc. v. Thitchener*, 192 P.3d 243, 252 (Nev. 2008). Accordingly, both malice and oppression required, as a bare threshold matter, evidence of knowingly wrongful conduct. Nothing in the Table of Evidence even hints at a

knowingly wrongful act by any Opheikens-Welch Defendant individually. Indeed, the only individualized allegation in Plaintiffs' statement of 'undisputed' facts comes in ¶ 62, in which Plaintiffs actually cite to Orluff Opheikens' testimony concerning his *lack* of knowledge that anything was wrong. *Id*. at ¶ 62 (Orluff testifying "that 'he had no idea [and] never even thought about' how many lifeguards were required by law."). There is a complete lack of "clear and convincing" evidence that any Opheikens-Welch Defendant acted with oppression, fraud, or malice. NRS § 42.005. Accordingly, they are entitled to partial summary judgment on this issue as a matter of law.

B. An Inference As To Individual Defendants' State Of Mind Drawn From Evidence Of An Entity's Conduct Cannot Constitute Clear And Convincing Evidence As A Matter Of Law

In an attempt to save their punitive damages claim, Plaintiffs instead rely on the hope that a jury might *infer* "knowledge of the probable harmful consequences of a wrongful act and willful failure to act to avoid those consequences" by *each* individual Opheikens-Welch Defendant from the pure volume of proposed testimony that the *waterpark* knew of the understaffing of lifeguards. But, even setting aside the complete absence of evidence on this point as to any specific Opheikens-Welch individual defendant, such a speculative inference cannot constitute "clear and convincing" evidence that any of the Opheikens-Welch individuals actually knew of the understaffing of lifeguards, let alone that they willfully failed to act to address this shortage. To hold otherwise—that a jury could infer oppression or malice by a specific individual based on the alleged conduct of a separate entity—would open the door for a punitive damages claim reaching the jury in *every* case. A skilled plaintiff's attorney can always argue—evidence or not—that knowledge and conscious disregard can be *inferred* from any set of facts.

Similarly, where there is *no* admissible, affirmative evidence in the record whatsoever to support Plaintiffs' claim for punitive damages, challenging witness credibility is insufficient to create an issue of fact that defeats summary judgment. *See NCP Bayou 2, LLC v. Medici*, 437 P.3d

173, *2 (Nev. March 21, 2019); *see also Anderson v. Liberty Lobby,* 106 S.Ct. 2505, 2514, 477 U.S. 242, 257 (1986) ("[D]iscredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion . . . Instead, the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment.").

The Nevada Legislature enacted the "clear and convincing evidence" standard for NRS § 42.005 precisely to prevent just such a gossamer thread of speculation and inference from sufficing to subject defendants to not only intrusive discovery into their personal financial information, but more importantly from being subjected to trial on the specter of—in this case—a potentially 9-figure punitive damages award. It is the appropriate gate-keeper function of the Court to intervene at the summary judgment stage to keep such prejudicial and unfounded claims of punitive damages from proceeding.

III. CONCLUSION

As set forth in all of the arguments and authorities above, and in the Motion, the Opheikens-Welch Defendants are entitled to partial summary judgment in their favor on the issue of punitive damages as a matter of law.

RESPECTFULLY SUBMITTED this 19th day of July, 2019.

GODFREY | JOHNSON, P.C.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of July, 2019, I served a true and correct copy of the foregoing document (and any attachments), 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:

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DISTRICT COURT
CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually, and on behalf of minor child L.G. [redacted],

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

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

HEARING REQUESTED

OPHEIKENS-WELCH DEFENDANTS' REPLY SUPPORTING THEIR FIRST MOTION FOR SUMMARY JUDGMENT (DUTY & BREACH)

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.

Defendants Orluff Opheikens, Slade Opheikens, Chet Opheikens, and Tom Welch (hereinafter the "Opheikens-Welch Defendants"), by and through their counsel of record, GODFREY | JOHNSON, P.C. and OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI, do herein submit this Reply in Support of Their First Motion for Summary Judgment (the "Motion") on the sole remaining claim of Negligence against them in the above-entitled action pursuant to Nevada Rule of Civil Procedure 56. This Reply is made and based upon all of the papers and pleadings on file herein, the Points and Authorities hereinafter to follow, and such oral argument and testimony as this Honorable Court may entertain at a hearing of the subject Motion, if so desired.

POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs "Response" opposing the subject motion for summary judgment (the "Motion") consists of page upon page of vituperative attacks upon nearly every aspect of the construction and operation of Henderson Water Park, LLC's Cowabunga Bay facility (the "Water Park") from its conception through last week Tuesday. Plaintiffs' brief is full of sound and fury, but it does nothing to impeded this Court's adjudication of the Motion because Plaintiffs' fail, as a matter of law, to meet the Nevada standard required before a party may impose personal liability on the managers of a limited liability company ("LLC") like all four Opheikens-Welch Defendants. Accordingly, this Court should enter summary judgment for each Opheikens-Welch Defendant.

Nevada case law requires that Plaintiffs affirmatively demonstrate that they can present admissible evidence at trial sufficient to permit a reasonable jury to find that each of the Opheikens-Welch Defendants individually breached a personal duty (as set forth in the Complaint[1]) to Mr. Gardner. Thus, Nevada law requires proof of individualized negligence—not collective negligence by the Water Park and its management—in order to even put personal liability on the table.

Plaintiffs fail because their Response does not affirmatively point to admissible evidence in the record sufficient to create a genuine dispute of material fact that could allow a reasonable jury to find that any Opheikens-Welch Defendant individually breached a personal duty owed to Mr. Gardner. Plaintiffs' failure is dispositive of their claims against each Opheikens-Welch Defendant and this Court can—and should—grant summary judgment to them on this basis alone.

However, even if Plaintiffs meet the sufficiency of the evidence test, Plaintiffs must also overcome the protections provided to the Opheikens-Welch Defendants by Nevada's statutory

[1] "Complaint" here refers to Plaintiffs' Third Amended Complaint, the currently operative pleading.

Business Judgment Rule, NRS § 78.138(3). Overcoming Nevada's Business Judgment Rule requires Plaintiffs to meet a very narrow exception at NRS § 78.138(7) that contains four sequential tests—all heard by this Court, not the jury. First, Plaintiffs must be a creditor or shareholder (or a member in the case of an LLC) of the limited liability company. Second, Plaintiffs must overcome Nevada's statutory presumption that each that each Opheikens-Welch Defendant as an LLC manager acted in good faith, on an informed basis, and with a view to the interests of the LLC. Third, Plaintiffs must prove that a claimed act or omission of each Opheikens-Welch Defendant constituted a breach that manager's fiduciary duty to the LLC. Fourth, Plaintiffs must prove that that such breach involved intentional misconduct, fraud, or a knowing violation of law by each Opheikens-Welch Defendant. Accordingly, Plaintiffs' personal liability claims against each Opheikens-Welch Defendant fail if they are not a creditor or member of the LLC or they cannot overcome the presumption of good faith and informed decision making and establish that each Defendant committed a breach of a duty that constitutes a breach of fiduciary duty *and* intentional misconduct, fraud, or a knowing violation of the law even if this Court determines that Plaintiffs' can point to admissible evidence sufficient to establish that each Opheikens-Welch Defendant individually breached a duty owed personally to Mr. Gardner.

It is telling that Plaintiffs do not even attempt to demonstrate that they can produce admissible evidence sufficient to overcome the Business Judgment Rule set forth in the Nevada Revised Statutes. Instead, Plaintiffs' argue that Nevada's Business Judgment Rule does not protect LLC managers like the Opheikens-Welch Defendants from third-party negligence claims in the first place. However, Nevada's statutory Business Judgment Rule—unlike the common law of most states—explicitly protects a corporate officer (and their counterparts in LLCs: managers) from all personal liability in any case or cause of action, full stop. This protection necessarily includes third party tort claims unless and until the party meets the narrow exception via the four-part test set

forth above. Thus, the Business Judgment Rule serves as a bar to Plaintiffs' claims—and Plaintiffs' failure to even attempt to overcome that bar is fatal to their case. Accordingly, this Court should grant the Motion and enter judgment for the Opheikens-Welch Defendants on this ground as well.

Plaintiffs' failure to affirmatively demonstrate that they can introduce at trial admissible evidence sufficient to overcome *either* legal hurdle means that there is no disputed issue of material fact relevant to this Motion. Hence, Nevada law holds that Plaintiffs' *cannot* prove their personal liability claims against *any* of the four Opheikens-Welch Defendants. Accordingly, this Court should enter summary judgment for the Opheikens-Welch Defendants on Plaintiffs' personal liability claims.

II. DISCUSSION OF LAW

Before proceeding to discuss the merits—or lack thereof—of Plaintiffs' arguments in opposition to the Motion, it is worth a few moments of the Court's time to place Plaintiffs claims and the instant Motion in context. Plaintiffs bring claims in their Complaint against the Opheikens-Welch Defendants in their *personal* capacities for purported breaches of alleged duties owed to Mr. Gardner by each of the four of Opheikens-Welch Defendant's individually. But Plaintiffs also bring claims against the Water Park itself based on a theory of vicarious liability arising from the alleged breaches collectively by the Water Park's management. In other words, Plaintiffs bring claims against the Water Park for the alleged breaches of its managers *and* claims against each manager individually.

However, the instant Motion targets only the personal liability claims against the Opheikens-Welch Defendants; thus, the liability of the *Water Park* for the alleged breaches of its management is entirely outside of the scope of the Motion. Therefore, if this Court grants the Motion (as it should), it will enter judgment for the Opheikens-Welch Defendants only on Plaintiffs' *personal* liability claims—not on the vicarious liability claims against the Water Park

and its management. Thus, this Motion is concerned only with whether Plaintiffs' Response affirmatively demonstrates that Plaintiffs' can produce admissible evidence sufficient for this Court to find that they can overcome Nevada's Business Judgment Rule *and* for a reasonable fact finder to impose personal liability against each of the four Opheikens-Welch Defendants individually. Plaintiffs fail to clear *either* hurdle.

A. The Summary Judgment Standard: Plaintiffs Must Affirmatively Present Evidence Sufficient to Create a Genuine Dispute About a Material Fact Relevant to the Motion

To defeat summary judgment, the nonmoving party (here Plaintiffs) must point to "affirmative evidence" demonstrating a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). Such affirmative evidence must not only be otherwise admissible, s*ee* N.R.C.P. 56(c)(1)(B), but must also be specifically relevant to the claim(s) addressed in the motion for summary judgment in question. Thus, Plaintiffs must present affirmative evidence of a *genuine* dispute about a *material* fact. *Anderson*, 447 U.S. at 247. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment because those facts are "material." *Id.* Conversely, factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Thus, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment because the summary judgment standard requires only that there be no genuine dispute of *material* fact, not that there be no dispute of *any* fact. *Scott v. Harris,* 127 S. Ct. 1769, 1776 (2007). Moreover, a fact is inherently immaterial and accordingly of no use in defeating a motion for summary judgment if that fact is not relevant to the claim upon which the moving party seeks summary judgment. *Anderson,* 106 S. Ct. at 2510.[2] *Accord* with *Wood v. Safeway, Inc*., 121 P.3d

[2] Holding that the materiality determination on a motion for summary judgment rests on the substantive law and it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs the adjudication of the motion.

1026 (Nev. 2005), wherein the Nevada Supreme Court has long recognized that the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. The Nevada Supreme Court went on to state:

> While the pleadings and other proof must be construed in a light most favorable to the nonmoving party, that party bears the burden to do more than simply show that there is some **metaphysical doubt** as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. The nonmoving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him. The nonmoving party is not entitled to build a case on the **gossamer threads of whimsy, speculation, and conjecture**.

Id. at 1031 (emphasis added) (internal quotation marks omitted).

Accordingly, when Plaintiff fails to prove an essential element of a claim at summary judgment, all facts related to elements of that claim that Plaintiff can prove are rendered immaterial. *Celotex Corp.*, 477 U.S. at 317–18 (holding that "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial"). Thus, "[t]he moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof." *Id.* (internal quotation marks and citations omitted). In other words, the only facts relevant to this Motion for Summary Judgment are the facts necessary to prove the elements of Plaintiff's case at issue in this particular Motion. As explained below, this renders the vast majority of Plaintiffs' Response irrelevant to this Court's adjudication of the Motion.

1. ***Plaintiffs fail to affirmatively demonstrate the existence of admissible evidence sufficient to create a genuine dispute of a material fact relevant to the imposition of personal liability against the Opheikens-Welch Defendants.***

Plaintiffs seek to impose personal liability upon the Opheikens-Welch Defendants for their alleged breaches of duties Plaintiffs claim they owed individually and personally to [redacted].

However, the Nevada Supreme Court held in this very case that an LLC manager is only responsible for "those acts or omissions [that] would be actionable against the [manager] . . . if that person were acting in an *individual* capacity." *Gardner on Behalf of L.G. v. Eighth Judicial Dist. Court in & for County of Clark*, 405 P.3d 651, 655 (Nev. 2017) (hereinafter "*Gardner II*") (quoting *Cortez v. Nacco Material Handling Group, Inc.,* 356 Or. 254, 268 (2014)) (emphasis added). Thus, Plaintiffs must point to admissible evidence sufficient to establish that *each* Opheikens-Welch Defendant is individually responsible for breaching a personal duty owed to L.G. individually—as opposed to a duty owed to L.G. merely because of their position as managers of the Water Park. *See id.*[3] Accordingly, Plaintiffs must point to admissible evidence of individual wrongdoing by an Opheikens-Welch Defendant in order for a claim of personal liability against that individual Defendant to survive this Motion for Summary Judgment.

But Plaintiffs Response does not contain such individualized facts. Instead, Plaintiffs' recitation of "disputed" and "undisputed" facts is replete with facts related to purported breaches of duty by the Water Park and its "management committee,"[4] or by managers other than the Opheikens-Welch Defendants. It also includes extensive recitation of L.G. alleged damages and an overabundance of background information[5] already known to this Court—*none* of

[3] Holding that "[p]ursuant to NRS 86.371, a manager cannot be personally responsible in a negligence-based tort action against the LLC solely by virtue of being a manager" and that "the act of managing an LLC in and of itself cannot result in personal culpability because this notion would be in conflict with the manager's limited liability".

[4] Plaintiffs' Response contains one-hundred and twenty (120) references to the "management committee" collectively, another one-hundred and twenty (120) references to the "individual defendants" collectively, sixty (60) references to the Opheikens-Welch Defendants collectively. This powerfully demonstrates Plaintiffs' improper attempts to foist personal liability on the Opheikens-Welch Defendants based on purported evidence of *collective* negligence by the Water Park and its management, rather than any individual *negligence* each Opheikens-Welch Defendants.

[5] These background facts do not "make the existence of any fact of consequence to the determination of the action more or less probable" and are accordingly wholly irrelevant to the Motion. NRS § 48.015.

which is relevant to the instant Motion.[6] Simply put, Plaintiffs' assertion of page after page of immaterial (and often vituperative) "facts" serve only to obfuscate the real issue: that Plaintiffs have no individualized evidence that any Opheikens-Welch Defendant breached a duty owed personally to L.G. —must less that the purported breaches are sufficient to overcome the Business Judgement Rule.[7] Thus, Plaintiffs' Response does nothing more than try to prevent the Court from seeing the truth behind the curtain: that Plaintiffs have no case against any of the four Opheikens-Welch Defendants in their personal capacities.

2. Plaintiffs' Response does not create a genuine dispute of material fact because the vast majority of its contents are wholly irrelevant to this Motion.

To prove this point—and make it easier for the Court to see Plaintiffs' complete lack of a genuine dispute of material fact—the table below sets forth the Response's anthology of irrelevancies and the reasons why none of these "facts" are relevant to this Motion.

[6] Indeed, these "facts" appear to exist only to prejudice the Court by attempting to paint the Opheikens-Welch Defendants as 'bad people,' without actually offering evidence of *individual* acts or omissions sufficient to impose personal liability upon any one of them individually.

[7] Contrary to Plaintiffs' arguments in their Response at 40–41, the Nevada Supreme Court in *Gardner II* did not find that "the Individual Defendants personally owed L.G. duties of care and may be held liable for their negligent conduct as Management Committee members," but only that Plaintiffs had stated plausible claims at the motion to dismiss stage. The Nevada Supreme Court did not find that such duties actually existed, much less that any Opheikens-Welch Defendants breached them. Thus, at the motion to dismiss stage Plaintiffs must produce more than mere plausible allegations—they must produce admissible evidence. They failed to do so.

PURPORTEDLY RELEVANT TO:	PARAGRAPHS OF PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS	SUFFICIENT TO CREATE MATERIAL ISSUE OF FACT?
Background, Causation, Damages, and Events That Occurred After the Alleged Breach	¶¶ 1–14, 21–24, 34–43, 50, 52, 53, 54, 62, 69, 70, 77, 71–84 (These paragraphs consist only of background information, facts regarding causation, facts regarding damages, and facts regarding events that occurred *after* the purported breach(es). None of these "facts" provide admissible evidence sufficient for a reasonable finder of fact to conclude that any of the Opheikens-Welch Defendants in their individual capacities breached a duty owed personally to L.G.)	**No** Irrelevant to Personal Liability
Direct Negligence by the Water Park or the Collective Negligence of Its Management for Which It May Be Vicariously Liable	¶¶ 15–20, 25–29, 31, 33, 46–48, 55, 57, 61, 66–69 (These paragraphs address facts purporting to establish negligence by the Water Park and its management—which cannot by themselves create liability for the Opheikens-Welch Defendants. *See Gardner II.*) ¶ 30 (This paragraph alleges that Orluff, Slade, and Welch reviewed Shane Huish's resumé. However, reviewing Shane's resumé before making the decision to delegate operation control to him is within the scope of the duties of the managers, this alone cannot serve as the basis for personal liability. *See Gardner II.*) ¶ 45 (This paragraph discusses Slade circulating the agenda for a Management Committee meeting. However, the Response does not establish who wrote or read the agenda or for what purpose it was used. Moreover, the items on the agenda are all related to the finances of the Water Park and are, accordingly, within the scope of duties of the managers and cannot alone serve as the basis for personal liability. *See Gardner II.*)	**No** Evidence of the Opheikens-Welch Defendant Activities as Managers Does Not Constitute Evidence that an Individual Opheikens-Welch Defendant Breached a Personal Duty Owed to L. L.G.
Personal Liability of Individual Defendants Other Than the Opheikens-Welch Defendants	Shane Huish: ¶ 32 (This paragraph cites to Shane's testimony implying he had insufficient experience at water park operations); ¶ 56 (This paragraph cites Shane's email to Dave Huish addressing lifeguard competence); ¶ 57 (This paragraph references an email to the Management Committee stating "Was able to persuade the SNHD to revise the codes . . . we are no longer required to staff lifeguards based on square footage of pools"); ¶ 64 (This paragraph alleges that Shane chose to intentionally violate Nevada law on wavepool lifeguard staffing); ¶ 65 (This paragraph cites a statement by Shane that "Let's focus on the things that will bring in the dollars rather than the feel good fluffy stuff."); ¶ 79 (This paragraph cites an alleged admission by Shane that he was not qualified to manage an aqnatics facility like the Water Park) Scott Huish: ¶ 44 (This paragraph references an email to Bank of Utah stating "now cutting employees—now cross training . . . less supervision") Scott and Shane Huish: ¶ 49 (This paragraph cites emails between Scott and Shane addressing lifeguard staffing and the "Budget Max" spreadsheet); ¶ 53 (This paragraph references an email discussion by Shane and Scott with Takuya Ohki and an email regarding variance)	**No** Personal liability of another individual Defendant cannot create personal liability for a different individual—including all of the Opheikens-Welch Defendants

	¶¶ 62, 62 n. 138, 63 (These paragraphs cite Orluff's testimony "that he 'had no idea [and] never even thought about' how many lifeguards were required by law"; Slade's testimony that he had not taken any steps to ensure that Shane complied with Nevada law after congratulating him on "staying persistent"; Orluff's testimony that he had not taken "steps to ensure that Shane complied with Nevada law governing lifeguard staffing". cannot establish *personal* liability because neither Orluff or Slade had any *individual* obligation to Mr. Gardner to personally ensure a proper lifeguard count once they had delegated implementation of safety to Shane.[8]).	
Management Activities by the Opheikens-Welch Defendants	¶ 59 (This paragraph references emails between Chet/Slade and Shane about pushing for regulatory changes on lifeguard numbers from the Southern Nevada Health District. These facts are not only insufficient to permit a finding that Chet or Slade violated a duty owed to L. [redacted] personally, but instead establish that both Chet and Slade reasonably believed that lifeguard issues were being addressed lawfully through Shane's purported petitioning of the Southern Nevada Health District for a regulatory change; thus, Plaintiffs' ¶ 59 constitutes affirmative undisputed evidence that Chet and Slade did *not* breach a duty owed personally to L.G. [redacted] (or commit intentional misconduct, fraud, or a knowing violation of the law) but instead believe that Shane would follow the law regarding lifeguards while seeking change in that law) ¶ 60 (This paragraph addresses Orluff "caution[ing] Shane not to reduce Cowabunga Bay's lifeguard numbers until after SNHD had officially changed the legal requirement." Again, this is not evidence of individualized negligence on the part of Orluff, but instead constitutes affirmative undisputed evidence that Orluff did *not* breach any duty to L.G. [redacted] (or commit intentional misconduct, fraud, or a knowing violation of the law) and instead reasonably believed that Shane would maintain the proper lifeguard count unless and until the SNHD authorized a change.	**NO** Insufficient admissible evidence for a reasonable jury to determine that an individual Opheikens-Welch Defendant breached a personal duty to L.G. [redacted]

As demonstrated in the table above and discussed in greater detail below, Plaintiffs throw page after page of irrelevant, inadmissible, or immaterial "facts" at the Court in the hope that something might 'stick' and convince the Court to deny summary judgment—but upon even cursory

[8] Ironically, Plaintiffs' own citation of *Cortez*, 337 P.3d at 120 supports this conclusion:

> However, there was no evidence from which a reasonable juror could infer that Swanson negligently had formulated the general safety plan that it directed Sun Studs to implement. Similarly, a reasonable juror could not infer that Swanson negligently delegated primary responsibility for safety to Sun Studs' HR director and mill manager. Finally, there was no evidence from which a reasonable juror could infer that Swanson negligently exercised the oversight authority that it retained over Sun Studs' implementation of Swanson's safety policies.
>
> These facts are substantively identical to those at issue here because there is no evidence from which a reasonable juror could infer that the Opheikens-Welch Defendants negligently delegated primary safety (indeed, all operational) responsibility to Shane or negligently exercised any oversight authority (to the extent that they even had any) of Shane's implementation of the safety 'polices' at issue in this case.

inspection none of these "facts" are relevant to this Court's adjudication of the instant Motion because they do not establish (even taken in the light most favorable to Plaintiffs) that any Opheikens-Welch Defendant individually breached a duty owed personally to L.G. [redacted].

3. Plaintiffs improperly substitute evidence of purported collective negligence for evidence of individual negligence by an Opheikens-Welch Defendant.

Few of Plaintiffs' "facts" even purport to establish a breach by an individual Opheikens-Welch Defendant. Instead, Plaintiffs attempt to establish personal liability for the Opheikens-Welch Defendants by imputing a purported breach by the Water Park and its management or a breach by a manager[9] other than the Opheikens-Welch Defendants to *every* other manager as the basis for imposing personal liability upon those managers for which Plaintiffs have no individualized evidence of wrongdoing. Plaintiffs cite no law in support of this guilt-by-association method of imposing personal liability because there is no such law in Nevada. Thus, *none* of this evidence is sufficient to impose personal liability on any of the Opheikens-Welch Defendants because the evidence is insufficient to establish any breach of a duty owed personally by an Opheikens-Welch Defendant to L.G. [redacted]. This is *precisely* the type of liability claim the Nevada Supreme Court foreclosed in *Gardner II* because it attempts to impose personal liability upon an individual manager based on nothing more than that manager sitting on the management committee. Plaintiffs cannot create a genuine dispute of material fact through this tactic because evidence of a breach by anyone other than the Opheikens-Welch Defendant in question is by definition immaterial to the Motion. *See Celotex Corp,* 477 U.S. at 317–18. In other words, Plaintiffs' Response treats purported evidence against the Water Park and its management committee collectively or against any one

[9] For example, Plaintiffs repeatedly (19 times) reference the "Budget Max" spreadsheet in their Response. However, all nineteen references to the spreadsheet attribute it to Scott and Shane and point to no admissible evidence sufficient for a reasonable fact finder to determine that any of the Opheikens-Welch Defendants ever even saw the spreadsheet, much less understood the context in which Plaintiffs' place it. Accordingly, the purported existence and meaning of the Budget Max spreadsheet does not create a genuine dispute of material fact as to the personal liability of the Opheikens-Welch Defendants.

manager individually, as evidence against *all* of the managers personally. This is not the law.

Thus, Plaintiffs' position directly contradicts *Gardner II* because it attempts to impose personal liability on the Opheikens-Welch Defendants based exclusively on their being managers of the Water Park. Thus, Plaintiffs' Response fails to establish a single genuine dispute of a material fact relevant to Plaintiffs' personal liability claims against the Opheikens-Welch Defendants because their Response does not point to *any* admissible evidence sufficient for a reasonable fact finder to conclude that any individual Opheikens-Welch Defendant breached a duty personally owed to L.G. [redacted] by that Defendant.

Therefore, this Court should find as a matter of law that Plaintiffs failed to carry their burden to affirmatively point out admissible evidence in their Response sufficient for a reasonable jury to find that an individual Opheikens-Welch Defendant breached a duty owed personally to Mr. Gardner. This Court should accordingly grant the Opheikens-Welch Defendant's Motion for Summary Judgment and enter judgment against Plaintiffs' on their personal liability claims against the Opheikens-Welch Defendants.[10]

B. The Business Judgment Rule Protects Against Precisely the Claims Plaintiffs' Bring Here

The common law business judgment rule protects directors of corporations from suits by creditors and shareholders by applying a presumption of non-negligence to the decisions of corporate directors and permitting suit only when a creditor or shareholder puts forth sufficient evidence to overcome the presumption. *See, e.g., Grobow v. Perot,* 539 A.2d 180, 183 (Del. 1988), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000). Over the years, the courts of some states extended the Business Judgment Rule to protect officers as well as directors,

[10] While the Opheikens-Welch Defendants argue herein that Plaintiffs' admissible evidence, taken as true, is insufficient to establish a personal claim against any of them—if the Court determines that there is evidence against one or more—but not all—of the Opheikens-Welch Defendants sufficient to create a genuine dispute of a material fact sufficient to bar summary judgment, the Court should nevertheless grant summary judgment for any Opheikens-Welch Defendant not within the scope of that dispute because Plaintiff must demonstrate a dispute as to each of the four Opheikens-Welch Defendants independently to overcome summary judgment.

but the Rule originated very much as a creature of the common law.

1. The Nevada Legislature enshrined in statute one of the strongest Business Judgment Rules in the country with protections unique to Nevada's Statutory Rule.

Some states decided that strong protections against personal liability suits against officers and directors were necessary to encourage qualified persons to serve as officers and directors and thereby increase economic prosperity. These states enshrined their view of the ideal Business Judgment Rule in statute so that the people of the state, through their elected representatives, would control when personal liability can be imposed against officers and directors, rather than leave this to case law. Nevada was one of these states, and the Nevada Legislature codified the state's Business Judgment Rule at NRS § 78.138 in 1991. The statute was subsequently amended in 1993, 1999, 2001, 2003, 2017, and most recently in May 2019. NRSA § 78.138 (West).

The purpose of each amended was to strengthen Nevada's Business Judgment Rule into the strongest and most robust in the United States.[11] In 2017, following in the wake of Nevada court decisions applying the Delaware law to Nevada corporations and thereby weakening the state's Business Judgment Rule, the Nevada legislature amended NRS § 78.138 with the express purpose of ensuring that the language of that statute will exclusively control business judgment rule determinations in Nevada, without any reference to case law from other states or jurisdictions. *See* Nevada Senate Journal, 79th Session, Day No. 102 (attached hereto as Exhibit A). Therein, the Legislative Counsel's Digest of the 2017 amendments to NRS § 78.138 stated that "the laws of other jurisdictions must not supplant or modify Nevada law." *Id.* Following further case law developments in other states weakening their Business Judgment Rule, the Nevada legislature swiftly moved to strengthen its Rule once again. *See* Nevada Assembly Committee Minute of 28

[11] The Nevada Assembly Committee hearing on the 2019 amendments to NRS § 78.138 included testimony that "Assembly Bill 207 will distinguish Nevada from other competing states like Delaware, as it was mentioned, to make Nevada the most attractive place to do business." Statement of Ken Evans, President, Unban Chamber of Commerce, Exhibit B, Nevada Assembly Committee Minutes (Feb. 28, 2019).

February 2019 (attached hereto as Exhibit B). "This [amendment] is a culmination of efforts after last session with the Business Law Section of the State Bar of Nevada about how we can continue our momentum to make Nevada a leader and an attractive prospect for new business . . . [the amendments to NRS § 78.138] will solidify our consistent ranking as being one of the most business-friendly states in the country."[12]

2. This Court cannot give any weight to the cases Plaintiffs cite in opposition to the Opheikens-Welch Defendants' invocation of the personal liability protections of Nevada's Business Judgment Rule.

Plaintiffs' caselaw citations in opposition to the Opheikens-Welch Defendants application of the Business Judgment Rule in the Motion are irrelevant because all the cited cases either pre-date the critical 2017 amendments to Nevada's Rule that established the personal liability protections against third parties in the first place, or are out-of-state cases that have nothing to do with Nevada's Rule and its unique liability protections. Moreover, not only does the legislative history of the NRS § 78.138 establish that the Legislature did not want Nevada's Rule interpreted by reference to the statutes and caselaw of other states, when the Nevada Legislature amended NRS § 78.138 in 2017 to add the third-party protection, the Legislature went so far as to explicitly *forbid* the Nevada courts from considering non-Nevada law when interpreting Nevada's Business Judgment Rule:

> **The plain meaning of the laws enacted by the Legislature in this title, including,** without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in **NRS 78.138** and 78.139, **must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.**

[12] The amendment, 2019 Nev. Laws Ch. 19 (AB 207) is attached hereto as Exhibit C.

NRS § 78.012 (added by 2017 Nevada Laws Ch. 559 (S.B. 203)).[13]

Thus, not only are all of Plaintiffs' citations to non-Nevada case law utterly irrelevant to interpreting Nevada's Business Judgment Rule, this Court is flatly prohibited by legislative commandment from considering such cases.[14] Accordingly, this Court must summarily disregard

[13] The statute continues: ". . . the failure or refusal of a director or officer to consider, or to conform the exercise of his or her powers to, the laws, judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of a fiduciary duty" in Nevada. Thus, the Legislature made clear that the Nevada Business Judgment Rule cannot be overcome by reference to the laws of another state to establish the prerequisite breach of fiduciary duty need to bring a personal liability claim.

[14] Ironically, a non-Nevada Court, the Superior Court of Massachusetts (Suffolk, Business Litigation Section, the Hon. Judge Janet Sanders presiding) interpreted NRS § 78.012 in a shareholder suit brought in Massachusetts but involving a Nevada corporation and stated:

> This [2017] amendment would therefore suggest that court decisions predating it . . . should be viewed with some skepticism. Indeed, if those decisions impose duties beyond that set forth in Section 78 and do so based on common-law principles borrowed from other jurisdictions, those cases should be disregarded.

all Plaintiffs' Business Judgment Rule caselaw from courts outside of Nevada.[15]

Also facially irrelevant is any Nevada case that predates the 2017 amendments to NRS § 78.138 (which went into effect on 1 October 2017) because they added the critical third-party language to NRS § 78.138(3) that: "[a] director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7." Exhibit E, 2017 Nevada Laws Ch. 559 (S.B. 203).[16] This

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[15] Indeed, the Nevada Senate Committee made it clear how strongly the Legislature opposed out-of-state law being used to interpret NRS § 78.138. One of the most useful exchanges proceeded as follows:

> LORNE MALKIEWICH:
>
> . . . Senate Bill 203 presents a unique drafting challenge. How does the Legislature say that it really means it? We seek to clarify the Nevada statutes and express the legislative intent that statutory law be followed. Nevada corporations should be governed by Nevada law. It is important that the businesses that have chosen to incorporate in Nevada be able to rely on Nevada law
>
> . . .
>
> The intent of S.B. 203 is to clarify the law to state that the laws of the State must govern the incorporation and internal affairs of a domestic corporation. We will work on the tone of the bill to make sure it is appropriate.
>
> Section 2, subsections 1 to 6, of S.B. 203 is the declaration of legislative intent. The intent is that statutory law adopted by the Legislature should control over conflicting caselaw from other jurisdictions.
>
> SENATOR FORD:
>
> I have some heartburn about the legislative intent component. The general rule is that, if the Legislature puts something in a statute, it will be interpreted by our courts as the prevailing law. I would strongly encourage you to reconsider, especially with the strong language included in the bill. I am not comfortable with the way it is set up.
>
> MR. MALKIEWICH:
>
> Our dilemma is how to draft "and we really mean it" when you have the Legislature adopting statutes in response to cases but cannot rely on the court to apply the applicable law. Our intent is simply to clarify that Nevada law applies to Nevada corporations.

Nevada Senate Committee Minutes (Apr. 10, 2017) (attached hereto as Exhibit D).

[16] Prior to 2017 Subsection 3 read only "Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." *See 2003* Nevada Laws Ch. 485 (S.B. 436). Thus, it is understandable that there is no case law on the provision because it simply did not exist until October 2017. Thus, Plaintiffs are correct in calling the Opheikens-Welch Defendants' invocation of NRS § 78.138 "novel," but only to the extent that the law is so new that the Opheikens-Welch Defendants appear to be the first defendants to invoke it.

disposes of *all* of the Nevada caselaw cited by Plaintiffs in opposition to the Motion[17] (save *Gardner II*, which came down on 22 November 2017). Similarly, Plaintiffs claim that there are no published Nevada cases applying the rule to shield against third-party liability is not surprising when the relevant provision has only been in effect for some 21-months—hardly enough time for a case to work its way through the system on a new statute.[18]

However, *Gardner II* was decided only a month after the amendments went into effect and dealt only with the LLC-specific liability protections of NRS § 86.371, not the statutory Business Judgment Rule codified at NRS § 78.138. Thus, the Nevada Supreme Court's finding that NRS § 86.371 does not protect against tort liability to a third party (and its citation of *Cortez* therein) cannot and does not affect the statutory Business Judgment Rule codified at NRS § 78.138 which was not at issue in *Gardner II* in the first place. Thus, *Cortez* is irrelevant to interpreting and applying the Business Judgment Rule[19] both because it is an out-of-state case that this Court is prohibited from considering in its adjudication of the Opheikens-Welch Defendants' invocation of Nevada's Business Judgment Rule.

Thus, Plaintiffs' reliance on out of state case law is improper in light of the fact that Nevada's Business Judgement Rule is (and was intended to be) unique in its protection against *all*

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[17] *Gardner v. Henderson Water Park, LLC*, 399 P.3d 350 (Nev. 2017) (hereafter "*Gardner I*") was decided 3 August 2017, two months before the amendments went into effect. *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for County of Clark*, 399 P.3d 334, 341 (Nev. 2017) was decided 27 July 2017—over two months before the amendments went into effect. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1097, 901 P.2d 684, 689 (1995) predates the amendments by over twenty years, and *Grayson v. Jones,* 101 Nev. 749, 710 P.2d 76 (1985) was decided before the Nevada codified its original statutory Business Judgment Rule in 1991.

[18] Thus, is appears that this Court will be the first to interpret the new statute. If the Court desires more thorough briefing on Nevada's Business Judgment Rule (including a more thorough legislative history analysis if that would be helpful to the Court), the Court need only say the word and the Opheikens-Welch Defendants will provide such briefing forthwith.

[19] The Opheikens-Welch Defendant argued in their Motion that they prevailed even under *Cortez*. However, the legislative history research performed between the filing of the Motion and the filing of this Reply establishes that *Cortez*—and every other case from every other state—is inapplicable to an assertion of the Business Judgment Rule in *this* state. As a result, the Opheikens-Welch Defendants' respectfully request that the Court disregard *Cortez* unless and until the Court decides that Business Judgment Rule as argued herein does not protect the Opheikens-Welch Defendants.

claims of personal liability against officers and directors of corporations (managers and members for LLCs) except those brought by shareholders and creditors under the narrow exception of NRS § 78.138(7).

3. NRS § 78.138 protects managers of LLCs as analogues to officers of corporations.

As discussed in the Motion, the Nevada Supreme Court in *Gardner I* and *Gardner II* applied the statutory liability provisions of the Nevada corporations code to find potential liability for the various LLCs involved in this case at the time—including the Water Park LLC. Therefore, it would be entirely illogical, unreasonable, and probably unconstitutional (as a matter of due process) for an LLC and its members and managers to have liability imposed upon them under the Nevada corporations code, but be unable to call upon any of the statutory *defenses* set forth in the code. Accordingly, lacking a statute to the contrary a manager of an LLC may call upon the statutory liability defenses available to corporate officers—which necessarily includes the Nevada Business Judgment Rule codified at NRS § 78.138.

4. The Business Judgment Rule protects against claims by third parties seeking to impose personal liability on individual managers.

Nevada's Business Judgment Rule set forth in N.R.S. § 78.138 is simple, straightforward, and unambiguous. It currently[20] reads in pertinent part:

> 3. . . . directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation. **A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer** except under circumstances described in subsection 7.
>
> . . .
>
> 7. . . . a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless:
>
> (a) The trier of fact determines that the presumption established by subsection 3 has been rebutted; and
>
> (b) It is proven that:

[20] The quotations herein are from the 2017 amendments that will be superseded by A.B. 207 on 1 October 2019.

(1) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and

(2) Such breach involved intentional misconduct, fraud or a knowing violation of law.

8. This section applies to all cases, circumstances and matters . . .

Thus, NRS § 78.138(3) first establishes a presumption that LLC managers act in good faith and on an informed basis. Subsection 3 then states that an LLC manager is not individually liable for damages as a result of an act or omission that arose in his or her capacity as a manager, and Subsection 8 states that the liability protection of Subsection 3 applies "to all cases, circumstances and matters . . .." Therefore, the Opheikens-Welch Defendants as managers of the Water Park LLC are presumed to have acted in good faith and on an informed basis. Moreover, as discussed extensively above, all of Plaintiffs' claims against the Opheikens-Welch Defendants arise—per Plaintiffs' own pleadings—in their capacity as managers of the Water Park LLC. Thus, *all* of Plaintiffs' personal capacity claims against the Opheikens-Welch Defendants as individuals are barred by operation of law "except under circumstances described in subsection 7."

Subjection 7's exception has three elements that Plaintiffs would have to prove to bring an action against the Opheikens-Welch Defendants. First, Plaintiffs have to be a stockholder (member in the case of an LLC) or creditor of the LLC. Plaintiffs' claims accordingly fail to meet the exception on their face. If somehow Plaintiffs could get around that obvious and apparently insurmountable impediment, they would have to overcome the presumption of good faith and informed decision-making set forth in Subsection 7(a). Third, would have to prove that each Opheikens-Welch Defendant individually breached his fiduciary duty to the Water Park LLC. Fourth and finally, Plaintiffs would have to prove that such breach involved intentional misconduct, fraud, or a knowing violation of law.

As its legislative history reveals, NRS § 78.138 is designed to prohibit personal liability suits against officers and directors of corporations and the members and managers of limited

liability companies except when those suits are brought by the stockholders/members of the company or the company's creditors and allege more than mere negligence—but a breach of fiduciary duty that constitutes particularly egregious conduct: intentional misconduct, fraud, or a knowing violation of law. Thus, no personal liability suit may be brought against a manager of an LLC absent strict compliance with the narrow exception of Subsection 7.

5. The Business Judgment Rule only permits personal liability against an LLC manager where there is a breach of fiduciary duty involving intentional misconduct, fraud, or a knowing violation of law.

Although the statute is not remotely ambiguous (it just helps to read it from top to bottom rather than upside down),[21] the legislative history of the 2019 amendments further reinforces this reading of the Business Judgment Rule. The Committee minutes note:

> . . . in the end, the standard that a director and officer can only be individually liable is contained in subsection 7 of NRS 78.138. They have to have a breach of fiduciary duty involving intentional misconduct, fraud, or a knowing violation of law.

Statement of Robert C. Kim, Chair, Executive Committee, State Bar of Nevada Business Law Section, Exhibit B, Nevada Assembly Committee Minutes (Feb. 28, 2019).

6. This Court must determine whether Plaintiffs' can overcome the statutory presumption in favor of the Opheikens-Welch Defendants

The determination of whether Plaintiffs can overcome the Business Judgment Rule protection invoked by the Opheikens-Welch Defendants is a question that this Court—not a jury—must decide. NRS § 78.138(7)(a) previously read:

> A director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless: (a) The trier of fact determines that the presumption established by subsection 3 has been

[21] Plaintiffs base their entire argument against application of NRS 78.138(7), which they correctly argue applies only to suits by the entity itself, its creditors, and its stockholders (members for an LLC). However, Subsection 7 is the *exception* to the general prohibition on personal liability suits in NRS 78.138(3). Not only does the plain and unambiguous language of the statute establish that Subsection 3's prohibition of personal liability is the rule and Subsection 7 the narrow exception, but so does the legislative history cited herein. Moreover, for Plaintiffs to be right—totally aside from these substantive issues—one would have to read NRS § 78.138(7) from bottom to top—or the precise reverse of the rest of western civilization.

rebutted . . .

However, the 2019 amendments to NRS § 78.138, Exhibit C2019 Nev. Law Ch. 19 (A.B. 207), struck the previous language directing that Business Judgment Rule issues be decided by "the trier of fact" as follows:

> A director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless: (a) The ~~trier of fact determines that the~~ presumption established by subsection 3 has been rebutted . . .

Thus, after the 2019 amendments Subsection 7 reads:

> A director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless: (a) The presumption established by subsection 3 has been rebutted . . .

On its face, the purpose of the deletion is ambiguous. Fortunately, the Assembly Committee documented its reasoning for making the deletion as follows:

> ASSEMBLYWOMAN [LESLEY E.] COHEN [VICE CHAIRWOMAN]:
> I am looking at section 3, subsection 7, paragraph (a) on page 6 of the bill where the language about the trier of fact determining that the presumption established by section 3, subsection 3 of the bill has been rebutted. "Trier of fact determines" has been deleted. Why was that deleted?
>
> ALBERT [Z.] KOVACS [VICE CHAIR, EXECUTIVE COMMITTEE, STATE BAR OF NEVADA BUSINESS LAW SECTION]:
> That provision was added in 2017, and it has led to some confusion because the presumption established by section 3, subsection 3 of the bill is what is commonly referred to as the "business judgment rule." In Nevada, it is the presumption that directors and officers have acted in good faith and with a view to the interest of the corporation. Including the phrase "trier of fact" muddies the water in the sense that that is a legal presumption. Presumably whether or not the legal presumption has been overcome is a question of law for the court and not necessarily a jury. That phrasing has led to some confusion and we thought it would be best to revert to the phrasing pre-2017. So that is all this change does.
>
> ASSEMBLYWOMAN COHEN:
> **We are just taking it out of the hands of the jury and making sure it is in the hands of the judge?**

> ALBERT KOVACS:
> Ultimately if a case goes to trial, there will be certain matters that would have to be concluded by the jury and matters of fact found by the jury. But overcoming the legal presumption is better suited with a judge.

Exhibit B, Nevada Assembly Committee Minutes (Feb. 28, 2019) (emphasis added).

Thus, this Court—and only this Court—must decide whether Plaintiffs have rebutted the Business Judgment rule.[22] This Court should use summary judgment as the tool to make that determination because there are no genuine disputes of a material fact relevant to the Court's determination of whether Plaintiffs' have rebutted the Business Judgment Rule presumption.[23]

C. The Business Judgment Rule Forecloses Plaintiffs' Claims

Contrary to Plaintiffs outright dismissal of the Business Judgment Rule, Nevada law could not be clearer that Plaintiffs' negligence claims against the Opheikens-Welch Defendants' cannot survive the invocation of Nevada's Business Judgment Rule in this Motion. Indeed, the Legislature made it explicit when it passed the 2017 amendments that simple negligence is *never* enough to impose personal liability on an LLC manager:

> Section 4 [of S.B. 203] amends NRS 78.138 and clarifies the business judgment rule **that simple negligence is not enough to rebut a presumption that directors and officers acted in good faith for purposes of personal liability. Personal liability requires particular bad acts.**

---

[22] However, as explained below, Plaintiffs still cannot prevail because they are not a creditor or member of the Water park LLC eligible to even bring a claim under the Subsection 7 exception.

[23] If the Court disagrees and determines that there is one or more genuine disputes of a material fact related to the Business Judgment Rule, the Opheikens-Welch Defendants respectfully request that the Court conduct an evidentiary hearing in as expeditious of fashion as possible after ruling on the Motion for Summary Judgment so that the Court may adjudicate the Business Judgment Rule defense as to any Opheikens-Welch Defendant(s) for whom the Court declines to enter summary judgment.

An evidentiary hearing is the appropriate mechanism to resolve the matter because there is no reason to subject any remaining Opheikens-Welch Defendant(s) to the time and expense of a jury trial when their initial eligibility for personal liability has not even been established and must ultimately be decided by this Court anyway. Should the Court ultimately find against an Opheikens-Welch Defendant at the evidentiary hearing, then Plaintiffs could properly assert personal liability and the determination of that liability would then properly fall to the jury. If the Court instead finds that the presumption is not rebutted as to any Opheikens-Welch Defendant—as it should for all for Defendants for the reasons set forth in (D) below—then it can enter judgment for the applicable Defendant(s) at that time.

Statement of Lorne Malkiewich, Exhibit D, Nevada Senate Committee Minutes (Apr. 10, 2017) (emphasis added).

Therefore, all of Plaintiffs' negligence claims against the Opheikens-Welch Defendants are foreclosed by Nevada's statutory Business Judgment Rule because those claims cannot *ever* overcome the presumption. Moreover, Plaintiffs' remaining claims are also foreclosed because Plaintiffs' are not creditors or stockholders (read: members) of the Water Park LLC as required by NRS § 78.138(7), *and* because Plaintiffs have not even pled that the purported breaches by the Opheikens-Welch Defendants' constituted a breach of their fiduciary duties as a manager of the Water Park LLC, much less affirmatively pointed to any admissible evidence to support such a claim. Finally, Plaintiffs failed to affirmatively point to sufficient admissible evidence of intentional misconduct, fraud, or a knowing violation of law for the reasons set forth in the brief supporting the Motion. Therefore, Plaintiff's claims fail to survive the flat prohibition of personal liability suits against LLC member under NRS § 78.138(3) and are ineligible (for all of the reasons stated above) for the exception under NRS § 78.138(7). Accordingly, Plaintiffs' claims against the Opheikens-Welch Defendants fail as a matter of law.

III. CONCLUSION

It is worthy of remembrance that this Motion has no effect whatsoever on Plaintiffs' claims against the Water Park, including their vicarious liability claims against the Water Park based on the purported negligence of the Water Park's management. Plaintiffs are free to pursue their direct and vicarious negligence claims against the Water Park unimpeded by the Court's granting of this Motion. Instead, granting this Motion would start to put an end to Plaintiffs' never-ending search for deeper pockets—a search that has turned this case into a procedural nightmare that would give even a seasoned civil procedure professor ulcers—and would finally end the unlawful assertion of personal liability claims against Orluff Opheikens, Slade Opheikens, Chet Opheikens, and Tom

Welch that has eaten their time, their money, and their wellbeing over nearly a half-decade.To that end, Nevada law flatly prohibits bringing a personal liability claim against an individual LLC manager like the four Opheikens-Welch Defendants under these circumstances. Therefore, this Court should grant the Motion and enter judgment for the Opheikens-Welch Defendants forthwith.

RESPECTFULLY SUBMITTED this 19th day of July, 2019.

GODFREY | JOHNSON, P.C.

/s/ Jeffrey Vail

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of July, 2019, 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 Reply in Support of Their First Motion for Summary Judgment as to Issues of Duty and Breach on Negligence Claim**,** 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:

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An employee of GODFREY JOHNSON

Exhibit A

Thursday, May 18, 2017
Nevada Senate
Seventy-Ninth Session, 2017

Senate called to order at 11:41 a.m.

President Hutchison presiding.

Roll called.

All present.

Prayer by the Chaplain, Pastor Brennan Wilson.

Heavenly Father, thank You for Your watch and care over all things. I thank You for Your establishment of the United States of America and the Nevada State Legislature. In Job 12:23, the Bible says, speaking of You, Lord, "He makes the nations great, then destroys them; He enlarges the nations, then leads them away."

I ask that You might show mercy and kindness to this Country and to the leaders in government. Give them prudence in their leadership and please bless the work they do. I thank You that You are a God with love for all people including each individual here today. I pray this in the name of Jesus Christ, my God and Savior.
AMEN.

Pledge of Allegiance to the Flag

By previous order of the Senate, the reading of the Journal is dispensed with, and the President and Secretary are authorized to make the necessary corrections and additions.

REPORTS OF COMMITTEES

Mr. President:

Your Committee on Commerce, Labor and Energy, to which was referred Assembly Bill No. 223, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.
KELVIN ATKINSON, *Chair*

Mr. President:

Your Committee on Finance, to which was re-referred Senate Bill No. 233, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.
JOYCE WOODHOUSE, *Chair*

Mr. President:

Your Committee on Government Affairs, to which was referred Assembly Bill No. 36, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

Also, your Committee on Government Affairs, to which was referred Assembly Bill No.

Amendment adopted.

Bill read third time.

Remarks by Senators Ratti and Kieckhefer.

SENATOR RATTI:

(To be entered at a later time.)

SENATOR KIECKHEFER:

(To be entered at a later time.)

Roll call on Senate Bill No. 233:

YEAS—13.

NAYS—Goicoechea, Gustavson, Hammond, Hardy, Harris, Kieckhefer, Roberson, Settelmeyer—8.

Senate Bill No. 233 having received a constitutional majority, Mr. President declared it passed, as amended.

Bill ordered transmitted to the Assembly.

REPORTS OF COMMITTEES

Mr. President:

Your Committee on Transportation, to which were referred Assembly Bills Nos. 233, 261, 334, 364, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

MARK A. MANENDO, *Chair*

SECOND READING AND AMENDMENT

Senate Bill No. 203.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 699.

SUMMARY—Revises provisions relating to domestic corporations. (BDR 7-71)

AN ACT relating to business associations; expressing the intent of the Legislature concerning the law of domestic corporations; ~~[requiring attorneys to verify that they have read certain relevant statutes before filing a complaint for certain causes of action relating to domestic corporations;]~~ revising the presumption against negligence for the actions of corporate directors and officers; clarifying the factors that may be considered by corporate directors and officers in the exercise of their respective powers; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, with certain exceptions, a director or officer of a domestic corporation is presumed not to be individually liable to the corporation or its stockholders or creditors for damages unless: (1) an act or failure to act of the director or officer was a breach of his or her fiduciary duties; and (2) such breach involved intentional misconduct, fraud or a knowing violation of law. (NRS 78.138)

~~[Section 4 of this bill provides that evidence of simple negligence is insufficient to rebut this presumption.]~~ Section 4 ~~[additionally]~~ of this bill specifies that ~~[a rebuttal of this presumption is insufficient]~~ to establish liability on the part of a corporate director or officer ~~[, and instead]~~ requires : (1) a rebuttal of this presumption; and (2) a breach of a fiduciary duty accompanied by intentional misconduct, ~~[actual]~~ fraud or a knowing violation of law. Sections 4 and 5 of this bill clarify the factors that a director or officer of a domestic corporation is entitled to consider in exercising his or her respective powers in certain

circumstances, including, without limitation, resisting a change or potential change in the control of a corporation.

Section 2 of this bill expresses the intent of the Legislature regarding the law of domestic corporations, including that the laws of other jurisdictions must not supplant or modify Nevada law. ~~[Section 3 of this bill requires a plaintiff to verify that he or she has read certain statutes (NRS 78.138, 78.139) pertaining to the duties and powers of corporate directors and officers before filing a complaint that alleges a breach of a fiduciary duty or seeks to enforce a right of a shareholder against a domestic corporation.]~~

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 78 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *The Legislature hereby finds and declares that:*

1. It is important to the economy of this State, and to domestic corporations , ~~[and]~~ their directors ~~[,]~~ and officers, and their stockholders, employees , ~~[and]~~ creditors ~~[,]~~ and other constituencies, for the laws governing domestic corporations to be clear and comprehensible . ~~[without the need for undue or inappropriate reliance on judicial decisions.]~~

2. The laws of this State ~~[must]~~ govern the incorporation and internal affairs of a domestic corporation and the rights, privileges, powers, duties and liabilities, if any, of its directors, officers and stockholders.

3. The plain meaning of the laws enacted by the Legislature ~~[,]~~ in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified ~~[, and relying on the]~~ by laws or judicial decisions from any other jurisdiction . ~~[is contrary to the specific intent of the Legislature.]~~

4. ~~[Except in the limited circumstances set forth in NRS 78.139, an exercise of the respective powers of directors or officers of a domestic corporation, including, without limitation, in circumstances involving a change or potential change in control of a corporation, is not subject to a heightened standard of review.~~

~~5. The standards promulgated by the Supreme Court of Delaware in Unocal Corporation v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985), and Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), and their progeny have been, and are hereby, rejected by the Legislature.~~

~~6.~~ The directors and officers of a domestic corporation, in exercising their duties under NRS 78.138 and 78.139, may be informed by the laws and judicial decisions of other jurisdictions and the practices observed by business entities in any such jurisdiction, but the failure or refusal of a director or officer to consider, or to conform the exercise of his or her powers to, the laws, judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of a fiduciary duty.

Sec. 3. ~~[1. In an action involving or relating to a domestic corporation that is subject to the provisions of NRS 41.520 or alleges a breach of a fiduciary duty by a director or officer of a domestic corporation, the complaint must be verified by oath and must aver that each plaintiff named in the action has read the provisions of NRS 78.138 and 78.139 and section 2 of this act in their entirety.~~

~~2. A court shall give each plaintiff leave to amend the complaint to comply with the requirements of this section, and a dismissal for failure to comply with this section must not operate as an adjudication upon the merits.~~

~~3. The period in which any defendant must file an answer or other responsive pleading with the court commences only upon compliance with this section by all plaintiffs named in the action.]~~ (Deleted by amendment.)

Sec. 4. NRS 78.138 is hereby amended to read as follows:

78.138 1. ~~[Directors]~~ *The fiduciary duties of directors* and officers ~~[shall]~~ *are to* exercise

their *respective* powers in good faith and with a view to the interests of the corporation.

2. In ~~[performing]~~ *exercising* their respective ~~[duties,]~~ *powers,* directors and officers *may, and* are entitled to *,* rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence, but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. ~~[Directors]~~ *Except as otherwise provided in subsection 1 of NRS 78.139, directors* and officers *,* in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation. ~~*[Simple negligence, alone, is insufficient to rebut this presumption. As provided in subsection 6, rebuttal of this presumption, alone, is also insufficient to establish the individual liability of a]*~~ *A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer* ~~*[.]*~~ *except under circumstances described in subsection 7.*

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may *:* ~~[consider: , and are entitled, but not required to:]~~

(a) *Consider all relevant facts, circumstances, contingencies or constituencies, including, without limitation:*

(1) The interests of the corporation's employees, suppliers, creditors ~~[and]~~ *or* customers;

~~[(b)]~~ *(2)* The economy of the State ~~[and]~~ *or* Nation;

~~[(c)]~~ *(3)* The interests of the community ~~[and]~~ *or* of society; ~~[and~~

~~(d)]~~ *(4)* The long-term ~~[as well as]~~ *or* short-term interests of the corporation ~~[and its]~~ *, including the possibility that these interests may be best served by the continued independence of the corporation; or*

(5) The long-term or short-term interests of the corporation's stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(b) Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.

5. Directors and officers are not required to consider *, as a dominant factor, the* effect of a proposed corporate action upon any particular group *or constituency* having an interest in the corporation. ~~[as a dominant factor.]~~

6. ~~*[(b) Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.]*~~

~~*5.]*~~ The provisions of subsections 4 and 5 ~~*[subsection 4]*~~ do not create or authorize any causes ~~*[cause]*~~ of action against the corporation or its directors or officers.

7. ~~*[6.]*~~ Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless ~~[it]~~ :

(a) The ~~*[court]*~~ *trier of fact determines that the presumption established by subsection 3*

has been rebutted; and

(b) It is proven that:

~~[(a)]~~ *(1)* The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and

~~[(b) The]~~

(2) Such breach ~~[of those duties]~~ involved intentional misconduct, ~~*[actual]*~~ fraud or a knowing violation of law.

~~*[7.]*~~ *8. This section applies to all cases, circumstances and matters unless otherwise provided in the articles of incorporation, or an amendment thereto, including, without limitation, any change or potential change in control of the corporation.*

Sec. 5. NRS 78.139 is hereby amended to read as follows:

78.139 1. ~~[Except as otherwise provided in subsection 2 or the articles of incorporation, directors and officers, in connection with a change or potential change in control of the corporation, have:~~

~~(a) The duties imposed upon them by subsection 1 of NRS 78.138;~~

~~(b) The benefit of the presumptions established by subsection 3 of NRS 78.138; and~~

~~(c) The prerogative to undertake and act upon consideration pursuant to subsections 2, 4 >and 5 of NRS 78.138.~~

~~2.]~~ If directors or officers take action to resist a change or potential change in control of a corporation, which action impedes the exercise of the right of stockholders to vote for or remove directors:

(a) The directors must have reasonable grounds to believe that a threat to corporate policy and effectiveness exists; and

(b) The action taken which impedes the exercise of the stockholders' rights must be reasonable in relation to that threat.

If those facts are found, the directors and officers have the benefit of the presumption established by subsection 3 of NRS 78.138.

~~[3.]~~ *2.* The provisions of subsection ~~[2.]~~ *1* do not apply to:

(a) Actions that only affect the time of the exercise of stockholders' voting rights; or

(b) The adoption or signing of plans, arrangements or instruments that deny rights, privileges, power or authority to a holder of a specified number or fraction of shares or fraction of voting power.

~~[4.]~~ *3.* The provisions of subsections *1 and* 2 ~~[and 3]~~ do not permit directors or officers to abrogate any right conferred by ~~[statute]~~ *the laws of this State* or the articles of incorporation.

~~[5. Directors]~~

4. ~~*[Except as otherwise provided in]*~~ *Without limiting the provisions of NRS 78.138, a director* may resist a change or potential change in control of the corporation if the *board of* directors ~~[by a majority vote of a quorum determine]~~ *determines* that the change or potential change is opposed to or not in the best interest of the corporation ~~[:~~

~~(a) Upon]~~ *upon* consideration of ~~[the interests of the corporation's stockholders or any of the matters set forth in]~~ *any relevant facts, circumstances, contingencies or constituencies pursuant to* subsection 4 of NRS 78.138 ~~[; or~~

~~(b) Because]~~ *, including, without limitation,* the amount or nature of the indebtedness and other obligations to which the corporation or any successor to the property of either may become subject, in connection with the change or potential change, provides reasonable grounds to believe that, within a reasonable time:

Exhibit B

February 28, 2019
Nevada Assembly Committee on Judiciary
Eightieth Session, 2019

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:03 a.m. on Thursday, February 28, 2019, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/80th2019.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblywoman Lesley E. Cohen, Vice Chairwoman
Assemblywoman Shea Backus
Assemblyman Skip Daly
Assemblyman Chris Edwards
Assemblyman Ozzie Fumo
Assemblywoman Alexis Hansen
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblywoman Rochelle T. Nguyen
Assemblywoman Sarah Peters
Assemblyman Tom Roberts
Assemblywoman Jill Tolles
Assemblywoman Selena Torres
Assemblyman Howard Watts

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

Assemblyman Jason Frierson, Assembly District No. 8

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Bradley A. Wilkinson, Committee Counsel
Traci Dory, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

Robert C. Kim, Chair, Executive Committee, State Bar of Nevada Business Law Section
Albert Z. Kovacs, Vice Chair, Executive Committee, State Bar of Nevada Business Law Section
Ken Evans, President, Urban Chamber of Commerce
Sonny Vinuya, President, Las Vegas Asian Chamber of Commerce
Paul J. Moradkhan, Vice President, Government Affairs, Las Vegas Metro Chamber of Commerce
Patrick Leverty, President, Nevada Justice Association

Peter Guzman, President, Latin Chamber of Commerce
Bryan Wachter, Senior Vice President, Retail Association of Nevada
Ana Wood, Chair, Government Affairs Committee, Las Vegas Asian Chamber of Commerce
Matthew A. Taylor, representing Nevada Registered Agent Association
Erik Jimenez, Private Citizen, Carson City, Nevada
Jack Mayes, Executive Director, Nevada Disability Advocacy and Law Center
Lynne Bigley, Supervising Rights Attorney, Nevada Disability Advocacy and Law Center

Chairman Yeager:
[Roll was called. Committee protocol was explained.] We are going to take the two bills today in reverse order. I will open up the hearing on Assembly Bill 207, which revises various provisions relating to business entities. Welcome back, Speaker Frierson, to the Assembly Judiciary Committee.

Assembly Bill 207: Revises various provisions relating to business entities. (BDR 7-146)

Assemblyman Jason Frierson, Assembly District No. 8:
First, I would like to say how much of an honor it is to be back before a committee I hold so dear. As a former chair of this Committee, I know there are a lot of important issues that come before it. I appreciate the hard work and I miss it, quite frankly. I want to thank you for your indulgence in this matter.

I present to you today Assembly Bill 207. This is a culmination of efforts after last session with the Business Law Section of the State Bar of Nevada about how we can continue our momentum to make Nevada a leader and an attractive prospect for new businesses. I believe that A.B. 207 will solidify our consistent ranking as being one of the most business-friendly states in the country. We already have a clear business advantage. I think that distinction comes with a commitment to ensure that we do it right. We need to be constantly creating new and innovative laws and not just cutting and pasting from other states. We need to do this in order to safeguard that stable environment so that our business community can continue to have an environment of stability that they have come to expect.

You are going to hear from many business leaders in support of this legislation because I think they also share an interest in making sure that Nevada stays at the forefront. We are trying to constantly catch up with states like Delaware that have had the pleasure of being at the forefront when it comes to an environment for corporate formation. I think A.B. 207 does just that and makes us competitive with states like Delaware. I think it is also important to note that this bill does not impact existing business entities. This is not about handouts, this is prospective; this is moving forward, trying to help develop corporate formation in Nevada so that we continue to be an attractive prospect. I think passing this will send a message—not just here in Nevada but nationally—that Nevada is committed to cultivating a positive, stable business environment, and one that will have new businesses come to Nevada. Of course, we all know that our economy is dependent on that kind of development. We have to be responsible with it and make sure that there are safeguards in place. We want to encourage that kind of development in our state.

There are several technical aspects of this bill. A limited-liability company (LLC) is a typical form of corporation that gives businesses flexibility on how to move forward. We have several pieces of legislation this session dealing with various types of business formations, but this particular issue builds in a fiduciary obligation on the part of members and managers. I think that is an important distinction because our *Nevada Revised Statutes* (NRS) do not directly address that. It does for directors and officers, but not for members and managers. Our current statutory structure is kind of a look back, it is an after-the-fact application of a fiduciary duty. I believe A.B. 207 remedies that issue. Having to look back afterward is just bad for business. I believe this is an innovative effort to make us competitive nationally. It just moves forward with giving us new ways, new protections, and new businesses. I appreciate your indulgence. Those of you who know my background know corporations are not a part of it. But I have been meeting with members of the business community for the last year and a half trying to do what I could to make sure that we had a more stable and innovative business environment moving forward.

With me today I have Robert Kim, who is a managing partner at Ballard Spahr in Las Vegas, and he is the chair of the Executive Committee in the Business Law Section of the

State Bar of Nevada. I also have Albert Kovacs, a shareholder at Brownstein Hyatt Farber Schreck, who is the vice chair of the Executive Committee in the Business Law Section. They have found a way to talk to me in noncorporate ways so I would be comfortable moving forward with this bill. With that, Mr. Chairman, I would like to have both Robert and Albert go over the technical aspects of the bill and answer the technical questions. Unfortunately, I will not be able to hang out so I will hand it off to them with the Chairman's indulgence.

Chairman Yeager:
Thank you, Mr. Speaker. I know you have a lot going on in the building so we will excuse you from the hearing as I am sure you have able help here. Members, if you have questions for Speaker Frierson after today's hearing, feel free to grab him in the hallway or some other time in the building. Mr. Kim and Mr. Kovacs, welcome, and please proceed with the presentation of the bill.

Robert C. Kim, Chair, Executive Committee, State Bar of Nevada Business Law Section:

As noted by Speaker Frierson, we believe this bill will help advance Nevada's business laws, will help make it competitive, and in some points, make it surpass the laws of other jurisdictions including Delaware.

In terms of what you have before you, I wanted to make sure we are all looking at the same documents. There is the bill itself, an amendment to the bill (Exhibit C), and a memorandum that is a roadmap of what it is we are trying to accomplish (Exhibit D). The first page or two highlights the key elements of the bill, and the balance of it goes section by section and gives a more specific explanation of what is being changed in the particular section ranges noted.

The amendment (Exhibit C) is a product of discussions we had with the Nevada Justice Association, who is here and will be speaking to that point. We feel as though we have addressed any outstanding concerns they may have had and we have a mutually agreed upon amendment. We feel that both sides are ready to go forward with it. As background, this bill is a product of the Business Law Section's Executive Committee and is a product of the 15 members and various meetings. It was submitted to the State Bar of Nevada's Board of Governors for approval. The Board of Governors solicits comments from the other section leaders and resolves any questions or comments that might be raised. We exited that process with their approval to submit this bill and to speak on its behalf.

In terms of the purpose of the bill, there are three categories. There are technical, clarifying, and substantive amendments. In terms of the more technical amendments, the items we covered there relate to topics such as series LLCs, broker non-votes, and dissolution matters. In terms of clarifying amendments, we have offered up language relating to the delivery of records by the custodians for different entities, dealing with fractional shares, actions by written consent, dissenters' rights, and indemnification provisions.

In relation to the indemnification provisions—I would say that although it looks as though we have made a lot of changes—we have tried to reorganize the two sections that address indemnification of officers and directors so that they, in the end, read better and are clearer so that there is more predictability for people when they are trying to analyze those issues for directors and officers of a corporation.

The last area I would like to spend a little time on relates to the more substantive amendments that we have in this bill. The first one is in section 1 relating to forum selection. It is something that is overdue. Many other states already permit specifically and acknowledge the ability of a corporation in its bylaws to establish a forum or a venue for certain corporate disputes. We have corporations in Nevada that are incorporated here that already have them in their bylaws, and this just gives them peace of mind that there is nothing improper with that. These are standards that are already done in many other states including Delaware.

Section 19 relates to LLCs and the introduction of a standard relating to alter ego. It is a standard that currently exists for corporations. We felt it was appropriate instead of having judges or people trying to analogize a standard for LLCs, we would write it in LLC terms for those persons who could be implicated by that and have the standards contained with NRS Chapter 86 itself instead of having people go back and forth. That is essentially what

for future consideration.

Assemblyman Roberts:
I am not close to being an attorney and I tried to figure out exactly what this bill does or does not do. So, as I always do when I do not understand something, I consult with people in my private life that do. The verdict overall was that it was a pretty good bill. In section 19, when it talks about alter ego or veil-piercing theory, are there concerns about how it would impact a small business if it were to be sued? How would that be paid for? Could insurance kick in or would that be a prohibitive cost for somebody in a small LLC?

Albert Kovacs:
Insurance would likely not come into play in the alter ego context. The alter ego or veil-piercing statute is a rather extreme remedy that courts as a general matter are very, very hesitant to apply. What it actually does is, it is one of the few exceptions where you actually punch through the liability protections that people like so much about a corporation or an LLC. That protection, that limitation on liability that is in the name, this is one of the few areas where a court can pierce through that. Because of the way the statute is set up and the test is applied, there are three rather high hurdles that a court would have to clear in order to impose that kind of liability on the owner of an LLC. It does not happen very often and usually is reserved in its application in instances of fraud where there is actual malfeasance. You do not really find yourself in a veil-piercing scenario by accident.

Assemblyman Roberts:
With respect to the amendment, does it increase or decrease liability compared to the current statutes?

Robert Kim:
No, our intention is not to modify anything. Some items we had initially proposed but through discussion thought in the end were not really necessary. If you look at the proposed amendment (page 3, Exhibit C), on page 7, there is a deletion of lines 3 through 9. I think that related to distributions under NRS 78.288 and a related one in subsections 7 and 8 of NRS 78.138. We had language for those subsections, but in the end, the standard that a director and officer can only be individually liable is contained in subsection 7 of NRS 78.138. They have to have a breach of fiduciary duty involving intentional misconduct, fraud, or a knowing violation of law. We felt as though after discussing it, this reiterates that same standard. We did not want to introduce anything different and felt it was better to just take it out entirely.

Assemblywoman Cohen:
I am looking at section 3, subsection 7, paragraph (a) on page 6 of the bill where the language about the trier of fact determining that the presumption established by section 3, subsection 3 of the bill has been rebutted. “Trier of fact determines” has been deleted. Why was that deleted?

Albert Kovacs:
That provision was added in 2017, and it has led to some confusion because the presumption established by section 3, subsection 3 of the bill is what is commonly referred to as the “business judgment rule.” In Nevada, it is the presumption that directors and officers have acted in good faith and with a view to the interest of the corporation. Including the phrase “trier of fact” muddies the water in the sense that that is a legal presumption. Presumably whether or not the legal presumption has been overcome is a question of law for the court and not necessarily a jury. That phrasing has led to some confusion and we thought it would be best to revert to the phrasing pre-2017. So that is all this change does.

Assemblywoman Cohen:
We are just taking it out of the hands of the jury and making sure it is in the hands of the judge?

Albert Kovacs:
Ultimately if a case goes to trial, there will be certain matters that would have to be concluded by the jury and matters of fact found by the jury. But overcoming the legal presumption is better suited with a judge.

Assemblyman Watts:
As it relates to the fiduciary duty provisions—and I understand the idea of wanting to hold harmless existing LLCs—do you see any potential issues with essentially creating two

different classes of corporations and those responsibilities or requirements based on before this bill would take effect versus after?

Albert Kovacs:
Where we came down in terms of the dividing line is to try to be consistent with our overall approach, especially with respect to this area, and is to emphasize clarity, predictability and flexibility. If a company is in existence and in operation and they like the way things are going and they do not feel there is uncertainty as to what their obligations are, this statute does not change the ground under their feet. However, if they like this new approach, the statute, expressly in the rider, allows them to opt in. Going forward, if someone forms a new LLC, this will be the framework. This new framework still emphasizes that flexibility of contracts. If you form a new LLC under this framework and it does not work for you, you can change it to work however you want it to work, consistent with the contract-based nature of the LLC, the whole point of which is to give people that flexibility.

Chairman Yeager:
Do we have additional questions from Committee members? [There were none.] I want to thank you for your presentation of the bill, and I will open it up for testimony in support of A.B. 207 either in Carson City or Las Vegas.

Ken Evans, President, Urban Chamber of Commerce:
I am here today in support of A.B. 207. Assembly Bill 207 will distinguish Nevada from other competing states like Delaware, as it was mentioned, to make Nevada the most attractive place to do business. As a choice of entity, LLCs show tremendous flexibility to our members. A key element to the success of an LLC, however, is predictability. This bill enhances predictability for our members by allowing those starting LLCs to draft their operating agreements to precisely fit their needs. The overall social policy goal of business entity governance is to foster investor confidence while keeping transaction costs at a minimum. Assembly Bill 207 accomplishes this. Importantly, A.B. 207 is good for Nevada's businesses, big and small, much like the majority of the members at the Urban Chamber of Commerce. Therefore, thank you, Speaker Frierson, for establishing Nevada as the best place to start new businesses in the nation. Thank you.

Sonny Vinuya, President, Las Vegas Asian Chamber of Commerce:
Assembly Bill 207 establishes a clear legislative framework for our judges. It can be difficult to draw any conclusions about a party's state of mind at the time the LLC was formed, often with unanticipated results the parties did not bargain for. This bill will help produce better outcomes when our members find themselves in the unfortunate position of litigation. We appreciate Speaker Frierson's vision and leadership in backing our members in the Nevada business community. Thank you.

Paul J. Moradkhan, Vice President, Government Affairs, Las Vegas Metro Chamber of Commerce:

The Chamber would like to thank Speaker Frierson for sponsoring this bill and engaging the Las Vegas Metro Chamber of Commerce in those dialogues. The Chamber supports the overall intention of this bill, which will resolve current ambiguities in law and will focus on making sure that Nevada remains competitive compared to other states. As a large business association in the state, we agree with the sections of the bill that protect contractual freedom of businesses. One of the Chamber's governing principles is that members need predictability, and this bill provides that predictability in regards to the manager responsibilities in section 3; the fiduciary duties in section 18; delivery of records in sections 2, 17, and 22; clarifying the treatment of broker non-votes in section 10; and finally, forum selection in section 1. We appreciate the work that has been done today and appreciate Speaker Frierson for bringing this bill forward as well as the presentation by the State Bar of Nevada. Thank you.

Patrick Leverty, President, Nevada Justice Association:
We are testifying in favor of A.B. 207. We appreciate the State Bar of Nevada Business Law Section's working with us and getting our issues addressed in the amendment. They were a pleasure to work with, and with these changes we now support this bill and appreciate what Speaker Frierson has brought forward today. Thank you.

Peter Guzman, President, Latin Chamber of Commerce:
We, too, listen to our members. They are the most valuable asset we have, and we are constantly putting together roundtables that allow us to hear their voices. We are in

Exhibit C

2019 Nevada Laws Ch. 19 (A.B. 207)

NEVADA 2019 SESSION LAWS

REGULAR SESSION OF THE 80TH LEGISLATURE (2019)

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

Ch. 19
A.B. No. 207
BUSINESS AND COMMERCE—CORPORATIONS

AN ACT relating to business entities; revising provisions concerning certain records required to be kept by certain business entities; revising provisions relating to the breach of a fiduciary duty by a director or officer of a corporation; revising provisions relating to the ability of a stockholder to dissent in certain circumstances; revising the definition of the term "issuing corporation" as it relates to the acquisition of a controlling interest therein; authorizing stockholders of a corporation to approve an amendment to the articles of incorporation in writing; requiring written notice to certain stockholders after the dissolution of a corporation approved by written consent of the stockholders thereof; revising provisions relating to the individual liability of a person acting as the alter ego of a corporation and applying such provisions to limited-liability companies; revising provisions concerning the indemnification of certain persons by a corporation; establishing provisions relating to the duties owed to certain limited-liability companies and certain other persons by a manager or managing member of the limited-liability company; establishing provisions relating to a series of members of a limited-liability company; establishing the circumstances under which the merger of a publicly traded corporation without the vote of the stockholders is authorized; revising provisions relating to limitations on the right of a stockholder to dissent; making various other changes relating to business entities; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes various provisions relating to business entities, including private corporations, nonprofit corporations and limited-liability companies. (Chapters 78, 82 and 86 of NRS) This bill revises certain provisions relating to such specific business entities and makes certain other changes generally relating to business entities.

Section 1 of this bill authorizes a private corporation to include a forum selection clause within its articles of incorporation or bylaws.

Sections 2, 17 and 22 of this bill revise provisions relating to certain records required to be kept by a private corporation, nonprofit corporation and limited-liability company, respectively, and provide that if such records are not made available for inspection within this State after a demand by certain persons, such a person may serve a demand upon the registered agent of the private corporation, nonprofit corporation or limited-liability company, as applicable, that the records be sent to the person or the agent or attorney thereof.

Section 3 of this bill revises the acts that constitute a breach of the fiduciary duty of a director or officer of a corporation for the purpose of determining whether the director or officer is individually liable to the corporation or its stockholders or creditors for damages.

3. If the records required by subsection 1 are ~~kept outside of~~ **not made available for inspection at a location within** this State ~~, a~~ **pursuant to a proper demand made pursuant to subsection 2, the** stockholder or other person ~~entitled to inspect those records~~ **demanding the inspection** may serve a demand ~~to inspect the records~~ upon the corporation's registered agent ~~.~~ **that the records to be inspected be sent to the demanding stockholder or other person or the agent or attorney thereof.** Upon such a ~~request,~~ **demand,** the corporation shall send copies of the requested records ~~,~~ **required by subsection 1,** either in paper or electronic form, to the stockholder **,** ~~or~~ other person **, agent or attorney** entitled to inspect the requested records within 10 business days after service of the ~~request~~ **demand** upon the registered agent. ~~Every corporation that neglects or refuses to keep the records required by subsection 1 open for inspection, as required in this subsection, shall forfeit to the State the sum of $25 for every day of such neglect or refusal.~~

~~3.~~ **4.** If any corporation willfully neglects or refuses to make any proper entry in the stock ledger or duplicate copy thereof, or neglects or refuses to permit an inspection of the records required by subsection 1 upon demand by a person entitled to inspect them, or refuses to permit copies to be made therefrom, as provided in subsection 2, the corporation is liable to the person injured for all damages resulting to the person therefrom.

~~4.~~ **5.** In every instance where an attorney or other agent of the stockholder seeks the right of inspection, the demand must be accompanied by a power of attorney signed by the stockholder authorizing the attorney or other agent to inspect on behalf of the stockholder.

~~5.~~ **6.** The right to copy records under subsection 2 includes, if reasonable, the right to make copies by photographic, xerographic or other means.

~~6.~~ **7.** The corporation may impose a reasonable charge to recover the costs of labor and materials and the cost of copies of any records provided to the stockholder.

Sec. 3. NRS 78.138 is hereby amended to read as follows:

<< NV ST 78.138 >>

1. The fiduciary duties of directors and officers are to exercise their respective powers in good faith and with a view to the interests of the corporation.

2. In exercising their respective powers, directors and officers may, and are entitled to, rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence,

but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. Except as otherwise provided in subsection 1 of NRS 78.139, directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation. A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except ~~under circumstances~~ **as** described in subsection 7.

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may:

(a) Consider all relevant facts, circumstances, contingencies or constituencies, including, without limitation:

(1) The interests of the corporation's employees, suppliers, creditors or customers;

(2) The economy of the State or Nation;

(3) The interests of the community or of society;

(4) The long-term or short-term interests of the corporation, including the possibility that these interests may be best served by the continued independence of the corporation; or

(5) The long-term or short-term interests of the corporation's stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(b) Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.

5. Directors and officers are not required to consider, as a dominant factor, the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation.

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless:

(a) The ~~trier of fact determines that the~~ presumption established by subsection 3 has been rebutted; and

(b) It is proven that:

(1) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and

(2) Such breach involved intentional misconduct, fraud or a knowing violation of law.

8. This section applies to all cases, circumstances and matters **,** ~~unless otherwise provided in the articles of incorporation, or an amendment thereto,~~ including, without limitation, any change or potential change in control of the corporation ~~.~~ **unless otherwise provided in the articles of incorporation or an amendment thereto.**

Sec. 4. NRS 78.205 is hereby amended to read as follows:

<< NV ST 78.205 >>

Exhibit D

NV S. Comm. Min., 4/10/2017


Image 1 within document in PDF format.

Nevada Senate Committee Minutes, April 10, 2017

April 10, 2017
Nevada Senate Committee on Judiciary
Seventy-Ninth Session, 2017

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 1:18 p m. on Monday, April 10, 2017, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Nicole J. Cannizzaro, Vice Chair
Senator Moises Denis
Senator Aaron D. Ford
Senator Don Gustavson
Senator Michael Roberson
Senator Becky Harris

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Connie Westadt, Committee Secretary

OTHERS PRESENT:

John Cahill, Public Administrator, Clark County
Steven R. Scow
Preston Cochrane, American Research Bureau
The Honorable James W. Hardesty, Justice, Nevada Supreme Court
James E. Dzurenda, Director, Department of Corrections
Chuck Callaway, Las Vegas Metropolitan Police Department
Holly Welborn, American Civil Liberties Union of Nevada
Eric Spratley, Washoe County Sheriff's Office
Jennifer Noble, Nevada District Attorneys Association
Julie Butler, Division Administrator, General Services Division, Department of Public Safety
Jon Sasser, Washoe Legal Services; Legal Aid Center of Southern Nevada
Aaron D. MacDonald, Consumer Rights Project, Legal Aid Center of Southern Nevada
Malcolm Doctors
Michael R. Brooks, United Trustees Association
Greg Gemignani, Nevada Credit Union League
John J. Piro, Deputy Public Defender, Office of the Public Defender, Clark County
John T. Jones, Jr., Nevada District Attorneys Association

Lorne Malkiewich, U-Haul International Inc.

CHAIR SEGERBLOM:
I will open the hearing on Senate Bill (S.B.) 376.

SENATE BILL 376: Revises provisions relating to certain agreements between heir finders and apparent heirs. (BDR 12-480)

JOHN CAHILL (Public Administrator, Clark County):
Nevada Revised Statutes (NRS) 139.135 was added to the NRS during the Seventy-sixth Session in 2011. It provides that an agreement between an heir finder and an apparent heir to locate, recover or assist in the recovery of an estate for which the public administrator has petitioned for letters of administration is void and unenforceable if the agreement is entered into during the period beginning with the death of the person whose estate is in probate until 90 days thereafter. Senate Bill 376 would change the period from 90 days to 1 year. I have provided written testimony and exhibits (Exhibit C).

Since the enactment of NRS 139.135, the Clark County Public Administrator has not had a case that excluded an heir-hunting firm under the timelines set forth in section 1, subsection 1 of S.B. 376. The Public Administrators in both Clark and Washoe Counties investigate, secure assets, locate assets and file for legal status. Performing these tasks takes many months.

You will hear opposition testimony from Steven Scow that a year is too long. Mr. Scow uses the example that probate could be opened, heard by the court and assets distributed within less than one year thereby precluding the use of an heir finder. Mr. Scow's position is that if the distribution were incorrect, there would be no way to correct the erroneous distribution. I want to remind the Committee that this bill is exclusively for Nevada's Public Administrators. Our offices do not work with the kind of speed that would allow final distribution in less than one year. I wish we could. I wish we had the resources to do it faster.

In the example used by Mr. Scow, the individual died on March 17, 2013. I received the referral in September 2013. The letters of administration were issued with special status in September 2014. The estate was converted to a general status in April 2015. We searched for heirs. We secured assets. Mr. Scow brought us the heirs in July 2015. Had the one year been in place, the heir finder would have been prevented from being involved.

CHAIR SEGERBLOM:
When does the period start?

MR. CAHILL:
The period starts on the date of death.

CHAIR SEGERBLOM:
The case you just referred to took more than one year to administer.

MR. CAHILL:
Yes.

CHAIR SEGERBLOM:
We understand your position. You would like to increase the 90 days to 1 year. You do not want to have heir finders getting money that they do not deserve.

STEVEN R. SCOW:
I am an attorney, and over a period of approximately 20 years, I represented beneficiaries in estates in a dozen cases. It is my understanding that the Public Administrator wants to change the restriction period for heir finders in Public Administrator cases from 90 days to 1 year. I do not doubt his good faith. I do not doubt his sincerity. My concern is the unintended consequences. The Public Administrator typically hires an heir finder on an hourly basis. I am familiar with the one the Public Administrator uses in Clark County. He is a good researcher. He often finds the people. In the case we are talking about, he did not. It is possible to have a final distribution of an estate within one year. It is also possible that some, but not all, heirs would be found prior to final distribution. The typical administration of an estate takes six to eight months.

CHAIR SEGERBLOM:
You prefer 90 days to 1 year.

MR. SCOW:
The 90 days needs to stay. Without the shorter time, you lose the check and balance.

CHAIR SEGERBLOM:
What are you paid? Do you get a percentage of the heir's distribution?

MR. SCOW:
No. I am paid strictly as an attorney through the arrangements I have with my clients.

CHAIR SEGERBLOM:
Are your clients heir-finders firms or heirs?

MR. SCOW:
My clients are the heirs. I represent the beneficiaries.

CHAIR SEGERBLOM:
Do your clients have a contract with an heir finder too?

MR. SCOW:
Yes. The beneficiaries have their own contract with the heir hunter.

CHAIR SEGERBLOM:
Do heir finders charge a percentage or by the hour?

MR. SCOW:
The check and balance takes place when an heir finder is taking a free look at every case filed. No one is charging, but the facts are being double-checked. Many times, even when one brother says he is the only heir, there are others. One brother does not identify his own brothers. That is where there is benefit from having someone take a look, whether it is a public administrator case or not.

CHAIR SEGERBLOM:
Will heir finders sign a contract that provides that they will not take a percentage until after the one-year period is over?

MR. SCOW:
The law is that no one can enter into a contract in a public administrator case during the 90-day period following the date of death.

CHAIR SEGERBLOM:
If the period were extended to 1 year, could the heir finder sign the contract after 90 days but not actually collect until the 1-year period had expired?

MR. SCOW:
No. My understanding is that the heir finder could not legally sign a contract until after the one-year period.

CHAIR SEGERBLOM:
Senate Bill 376 could be amended to do that.

PRESTON COCHRANE (American Research Bureau):
We oppose S.B. 376. We have been researching estates for over 82 years. We work in many states throughout the Country and throughout the world. Heir finders provide a critical check and balance to the probate process. Nevada is the only state with a law that has a time-period prohibition. Assembly Bill No. 291 of the 76th Session proposed 1 year. After several hearings, a

compromise was reached on the 90 days. Nothing has changed since then to justify one year. We believe 90 days is sufficient. Increasing the requirement from 90 days to 1 year would erode consumer protections, increase staff workloads, which Mr. Cahill indicated he does not have the resources to do, and exacerbate government inefficiencies. In addition, the typical estate is distributed in six to eight months. If the one-year prohibition was put in place, it could put many estates into the distribution category without any double-check from a professional heir finder.

We are professionals. We are professional genealogists. We have the resources to locate heirs worldwide, not just within the U.S., to confirm who the proper heirs are. In the case Mr. Scow referred to, we found the additional heirs. If it were not for us, they would not have been notified or known that they were entitled to a share of their inheritance. The one-year period would open the door for potential fraudulent claims from unlawful claimants. It would add further delays for aging beneficiaries, and it would deny legitimate heirs their constitutional right to a speedy trial.

Legitimate heirs should not have to wait 12 months before they have any influence on estate assets that by law they are entitled to receive. We respect and appreciate the role that public administrators play in the process. We continue to support them in their jobs, which they are elected and entrusted to do. That is why we work together. We never try to take the administration of an estate away from the public administrator. We are in support of a more reasonable solution.

CHAIR SEGERBLOM:
Do you sign a contract with potential heirs?

MR. COCHRANE:
Yes. Heirs sign contracts with us. Sometimes, public administrators hire us. Sometimes, financial institutions or insurance companies hire us. Sometimes, we locate individuals who would not otherwise know about an estate to which they are entitled.

CHAIR SEGERBLOM:
Do you see that someone has died and start looking before you sign a contract?

MR. COCHRANE:
No. We would have to know there had been a death.

CHAIR SEGERBLOM:
You look at the obituaries. You know someone has died. Do you start researching to see if that person has heirs?

MR. COCHRANE:
No. We do not look at obituaries.

CHAIR SEGERBLOM:
Do you have a signed contract before you start looking?

MR. COCHRANE:
No. We start looking beforehand. We do all the research beforehand to identify if there are missing or unknown heirs to an estate.

CHAIR SEGERBLOM:
Do you find potential heirs?

MR. COCHRANE:
Yes.

CHAIR SEGERBLOM:
What does your contract with the heir say?

MR. COCHRANE:

The contract can range from an hourly fee to a contingency fee. It is a competitive industry. Contingency fees can vary from 5 percent up to 33.33 percent depending on the complexity or difficulty of the case.

CHAIR SEGERBLOM:
You find out someone has died. You start looking for heirs. Can you wait one year to sign a contract? You could be looking during that year.

MR. COCHRANE:
We could not enter into a contract with that individual during the one-year prohibition. We could do all the work. Then the estate may distribute assets before the one year is up.

CHAIR SEGERBLOM:
Mr. Cahill just said they never distribute before the year is up.

MR. SCOW:
In general, the typical administration of an estate can easily be six to eight months. Is it often six to eight months? Yes. In my experience, it is. Is it always six to eight months? No.

CHAIR SEGERBLOM:
Is that true of probate? Is it true when the public administrator is involved?

MR. SCOW:
Yes. The statutory requirement for probate is five months. The procedural requirements can be met in five months.

CHAIR SEGERBLOM:
The question is whether in Clark County the probate office closes an estate in less than one year.

MR. SCOW:
Are you asking about the probate administrator?

CHAIR SEGERBLOM:
I am asking about the public administrator.

MR. CAHILL:
Not once in the ten years that I have been Public Administrator have we finished an estate in six to eight months. The statute allows 18 months for a general administration. We rarely make that. We keep the court notified. We file the annual accountings. If I send the distribution to the State Treasurer as unclaimed property, NRS 120A.740 says that any agreement with a property owner entered into during the period commencing on the date the property was presumed to be abandoned and extending to a time that is 24 months after the date the property is paid or delivered to the Administrator is void and unenforceable. Compensation is limited to 10 percent of the total value of the property. The agreement is between the person claiming ownership and the heir finder. The State Treasurer sends the check to the person claiming ownership, and then it is up to the heir finder or asset hunter to collect and enforce the contract.

You should ask those testifying in opposition what would happen if they signed one heir up and then found another heir who does not sign a contract. If I find the second heir, the first heir will want to get out of his or her heir-finder contract because the second heir will not have to pay the heir-finder's fee.

CHAIR SEGERBLOM:
I will close the hearing on S.B. 376 and open the hearing on S.B. 277 and S.B. 451.

SENATE BILL 277: Revises provisions relating to criminal justice information. (BDR 14-1004)

SENATE BILL 451: Makes various changes relating to criminal justice. (BDR 14-1007)

THE HONORABLE JAMES W. HARDESTY (Justice, Nevada Supreme Court):
I am here to report to you on the recommendations of the Advisory Commission on the Administration of Justice. *The Advisory Commission on the Administration of Justice Final Report February 2017* is available at < https://www.leg.state nv.us/App/InterimCommittee/REL/Document/9887>.

I want to express my sincere appreciation to Counsel Nick Anthony for his research and assistance to the Advisory Commission. Policy Analyst Patrick Guinan also provided support to the Advisory Commission. We are grateful to the Legislative Counsel Bureau staff for assisting this important Commission.

I have provided the Committee a presentation (Exhibit D) and a Summary of Final Recommendations of the Advisory Commission (Exhibit E). Pages 2 and 3 of Exhibit D list the 18 members of the Advisory Commission. It was a diverse group with strong opinions on the various topics with which the Advisory Commission was charged. I want to thank all of these people. All attended all of the meetings. There were eight meetings and many went most of the day. We had thorough discussions and debates.

The statutory duties assigned to the Advisory Commission are listed on pages 4 and 5 of Exhibit D. The list of responsibilities statutorily placed on the Advisory Commission exceeds its capacity to reasonably produce a good work product in in the time allotted and with the staff provided. Some of these responsibilities should be eliminated either because they no longer exist or because they are irrelevant to the primary mission established in 1995 of truth in sentencing. Since that time, a potpourri of subject matters has been placed on the agenda of the Advisory Commission. I would be happy to share my personal recommendation of which duties could be eliminated.

CHAIR SEGERBLOM:
If you would send an email to the Committee, we will have a bill draft request tomorrow.

JUSTICE HARDESTY:
Page 6 of Exhibit D lists the subcommittees the Advisory Commission has established pursuant to statutory requirements to study various issues. I would draw your attention to the Subcommittee on Juvenile Justice. There is a plethora of juvenile justice committees. The Legislature has a Juvenile Justice Committee. There is a Subcommittee on Juvenile Justice within the Advisory Committee. Assembly Bill (A.B.) 472, proposed this Session by a task force chaired by First Lady Kathleen Sandoval and retired Supreme Court Justice Nancy Saitta, creates a Statewide Juvenile Justice Oversight Commission. This subcommittee should be eliminated.

ASSEMBLY BILL 472: Establishes policies for reducing recidivism rates and improving other outcomes for youth in the juvenile justice system. (BDR 5-918)

The Advisory Commission also has a statutorily required Subcommittee to Review Arrestee DNA. This subcommittee was created following the enactment of S.B. No. 243 of the 77th Session, known as Brianna's Law. That issue has been mostly resolved. The law is in place. There is no necessity for this subcommittee. While it is important to maintain the Subcommittee on Victims of Crime because that perspective is critical to the Advisory Commission, the Subcommittee on Medical Use of Marijuana has no business being in the Advisory Commission.

CHAIR SEGERBLOM:
I agree.

JUSTICE HARDESTY:
The Advisory Commission conducted eight substantive meetings from February to November 2016. The meetings addressed the Advisory Commission's statutory duties, subcommittees were appointed and recommendations were made in certain areas. The topics covered in the eight meetings are listed on page 7 of Exhibit D.

Early on, at the urging of Advisory Commission member Chuck Callaway, we discussed how to approach this rather significant agenda. We agreed to focus on where we could target a systematic change in the criminal justice process. That resulted in essentially seven recommendations for legislative changes. A couple are small, and a couple are big and critical to the future of the State.

Senate Bill 277 reflects two of the recommendations made by the Advisory Commission. At pages 122 and 123 of the *Final Report*, there is a summary of the first recommendation made by the Advisory Commission. This recommendation is section 3 of S.B. 277. The recommendation was to provide notification on medical marijuana. Commissioner Jorge Pierrott, a representative from the Division of Parole and Probation of the Department of Public Safety, requested this. The Parole and Probation sought legislation to amend NRS 453A.700 to allow the Division of Public and Behavioral Health of the Department of Health and Human Services to provide information to Parole and Probation when requested for the purpose of determining whether someone under supervision in the criminal justice system either by way of parole or probation was seeking a medical marijuana registry identification card. The information is not necessarily being sought to find a violation or punishment but rather to reconcile that use with prohibitions against the use of a controlled substance as a condition of parole or probation.

CHAIR SEGERBLOM:
Did Parole and Probation specifically say that it wanted to be sure that, if someone tested positive, it was all right?

JUSTICE HARDESTY:
Precisely. The report says that Commissioner Pierrott clarified that Parole and Probation is requesting notification so that it can speak with the offender and, if need be, refer the offender back to the court or to the Board of Parole Commissioners. If the use is consistent with Nevada law and the offender has a card, then Parole and Probation would work that out with the offender. If on the other hand controlled substance use constitutes a violation because the quantities are too high, the offender does not possess a card or does not qualify for a card, that would be a different story. This increases information sharing between Parole and Probation and Public and Behavioral Health.

Sections 1 and 2 of S.B. 277 are discussed at pages 123 and 125 of the *Final Report*. Senate Bill 35 creates a Subcommittee on Criminal Justice Information Sharing of the Advisory Commission on the Administration of Justice.

SENATE BILL 35: Creates the Subcommittee on Criminal Justice Information Sharing of the Advisory Commission on the Administration of Justice. (BDR 14-261)

The provisions in S.B. 35 are consistent with the provisions of S.B. 277 with two exceptions. Senate Bill 35 creates the same Subcommittee recommended by the Advisory Commission and sets up the same structure. There are two areas contained in section 1 of S.B. 277, subsection 4, paragraphs (a) and (b) that are critical to the Advisory Commission's consideration of information sharing reform in this State. We urge that these two paragraphs be included as part of whichever bill is adopted.

The Advisory Commission received important testimony regarding significant weaknesses in Nevada's criminal history information sharing systems. As discussed on page 124 of the *Final Report*, the Advisory Commission identified a number of issues. For example, there are multiple criminal justice information systems being used throughout the State. A reasonable person would ask if this is economically effective. There are potential overlaps and, more significantly, loopholes in services within each of the three primary information exchange services. There is a backlog of reported dispositions. This Legislature and prior Legislatures have had to address this issue from an economic standpoint to eliminate the backlog. Arrest records in criminal justice reports are also delayed and backlogged. Because of all of these issues, one of the most significant recommendations made by the Advisory Commission was to create this Subcommittee to study the issues raised in section 1, subsection 4 of S.B. 277.

Why do not these criminal justice information systems talk to one another? What information is available to the beat cop on the street about the person he or she has pulled over at 2:00 a m.? If our criminal history information is not sufficient to be able to tell the beat cop about that person, that is a problem. We need to get this fixed, and we need to get it fixed in the next two years.

How can the State make effective criminal justice decisions if the criminal history systems have weaknesses that create problems? There are three independent systems for criminal justice information: the Central Repository for Nevada Records of Criminal History, Shared Computer Operations for Protection and Enforcement (SCOPE), and Tiberon. These systems need to be connected and to work together. This will provide both information and economic benefit. Senate Bill 277 and S.B. 35 are similar and I ask that they be reconciled.

The work of the Subcommittee must have a deadline. A work product needs to be produced. The Subcommittee needs to be compelled to produce recommendations, not just drag things on so that ten Legislative Sessions from now somebody is still talking about what the Subcommittee is supposed to study.

Senate Bill 451 contains three recommendations from the Advisory Commission. The first is in sections 2, 13, 14, 15 and 16. For those of you who were involved in the Seventy-eighth Session, this bill represents a recommendation regarding the right of defendants to pay for their own DNA testing through postconviction relief. This was requested by Denise Brown and a majority of the Advisory Commission endorsed her request. That is what is contained in these sections.

I would like to discuss Advisory Commission recommendations 5 and 7 in Exhibit E. Recommendation 5 asks the Legislature to adopt a set of policies and principles from the "Report of the National Conference of State Legislatures Sentencing and Corrections Work Group" from August 2011 which outlines seven principles of effective state sentencing and corrections policy. Nevada does not have a set of policies that give guidance to the Legislature for assessing the variety of topics that should be considered when developing an approach to determine whether to criminalize and punish something. One of the things always missing is an assessment of fiscal impact.

The 2011 Report was presented to the Advisory Commission. It is the work product of an 18-member group that worked with the Pew Research Center. Seven principles were developed to guide the decision making of state lawmakers as they review and enact policies and make budgetary decisions that affect community safety, management of criminal offenders and allocation of correction resources. We urge the adoption of section 3 of S.B. 451, which are policies refined by the Advisory Commission to guide future decisions by the Legislature regarding criminal justice policy. Three examples are of this are: one, sentencing and corrections policies should embody fairness, consistency, proportionality and opportunity; two, a continuum of sentencing and corrections options should be available with imprisonment reserved for the most serious offenders and adequate community programs for diversion and supervision of other offenders; and three, criminal justice information should be a foundation for effective data-driven sentencing and correction policies. What we hope to achieve is true truth in sentencing.

The next and perhaps the most important recommendation of the Advisory Commission is a proposal to create the Nevada Sentencing Commission. This recommendation is No. 7 on page 2 of Exhibit E and in the *Final Report* on pages 128 to 131. It is contained in sections 4 through 12 and 17 and 18 of S.B. 451.

CHAIR SEGERBLOM:
If we adopt this recommendation, could we find funding through the Pew Research Center, the National Conference of State Legislatures or the Council of State Governments?

JUSTICE HARDESTY:
Perhaps. We will certainly make that request. The bill provides that the Sentencing Commission can receive such grants. I believe that you will hear from others that states undertaking sentencing commissions have done it on their own. The resources we have available in our State would allow us to accomplish many of the objectives of the Sentencing Commission without assistance from outside agencies.

I refer the Committee to the summary pages contained in the *Final Report* that explain what a sentencing commission is. It is not a new animal. It is present in 20 states. There are different permutations. The one before you is the one the Advisory Commission unanimously recommends. Nevada has five categories of crimes, A through E. Tell me what the definitions are for those categories. No one on the Advisory Commission was able to define these five categories. When these categories were first developed, they were supposed to range from the least problematic crime to the most egregious. So what are the

differences? What are the separations? Over time, these distinctions have been completely lost. The point of the categories has been completely lost as we criminalized behavior over the past two decades since truth in sentencing was enacted.

In order to deal with prison overcrowding, we have to address credits. Assembly Bill No. 510 of the 74th Session created credits, this kind of credit and that kind of credit. The purpose of credits was to deal with prison overcrowding, which is costing this State a lot. The State is facing prison overcrowding again. Are these credits diminishing truth in sentencing when a judge sentences somebody to prison and the prosecutor, the victim and the defendant do not know how credits are calculated or when the defendant will actually be eligible to get out of prison or to apply for parole?

Length of stay is a huge issue when dealing with prison overcrowding and when dealing with prison budgets. We have a wide disparity in the sentencing practices of the district judges across the State. Some judges will sentence a certain percentage of offenders charged with the same or similar offense with similar criminal histories at a higher rate. Other judges will sentence at a lower rate. The differences will be prison versus probation. Category B sentences account for two-thirds of the prison population; however, the sentencing ranges within Category B offenses are all over the map. They range from one-to-six to life. Such a disparity makes no sense. Nevada's criminal justice sentencing practices using five undefined categories is not working. This is why the Advisory Commission studied quite thoroughly the use of sentencing commissions.

Sentencing commissions have been successful in the states where they have been enacted. What are the primary objectives of sentencing commissions? One, they achieve certainty in sentencing. When someone gets a sentence, he or she knows what the sentence is and everyone in court knows what the sentence is as well. Two, it promotes fairness. Three, it reduces disparity. Four, it secures public safety by retaining the people that should stay in prison and providing for community services and probation for those who are rehabilitatable. Five, it helps the Department of Corrections manage the correctional capacity.

How does a sentencing commission work? The Sentencing Commission would look at every crime in our criminal code. The sentencing ranges for each crime would be examined. Based on a study of defendants sentenced for each particular crime, their criminal histories and backgrounds, the Sentencing Commission would establish sentencing guidelines and ranges. Some states develop sentencing grids. Other states develop ranges within ranges based on criminal history or the nature of the offense. A judge is provided with the recommended sentence based on the guidelines. The judge can deviate, but if he or she does, a statement is placed on the record of the basis for the deviation. The deviation would be subject to review on appeal.

We do not have this process in Nevada. If a sentence is imposed that fits within a sentencing range of one to ten years, for example, that sentence is not reversed unless there is a consideration by the trial judge of impalpable or extrinsic evidence outside the nature of the crime. Sentencing guidelines would stabilize the sentencing process and lengths of stay. Sentencing guidelines would have the effect of reducing the population of the prison rather than increasing it and would assist in helping Legislators develop a better understanding of how to approach the prison population from a financial and fiscal standpoint.

The Sentencing Commission proposed in S.B. 451 is put on a strict leash. It would start right after July 1, and it must provide recommendations through the one bill draft afforded to it establishing a set of guidelines that would be adopted by the 2019 Legislature. It is a broad-based representative Commission. It has prosecutors, defense lawyers, victims' advocates and the like.

CHAIR SEGERBLOM:
We are going to pass it.

JUSTICE HARDESTY:
I would ask the Committee to hear from the Director of Corrections, James E. Dzurenda, who is familiar with the sentencing commission operation in Connecticut. Connecticut is the state from which we modeled our proposed legislation.

CHAIR SEGERBLOM:
My concern is that when you do this, you will find out there is a lot of money saved but that money does not go back into corrections. I wondered if you have thought about having language in the legislation requiring part of the money saved go back to the Department of Corrections or to other underfunded functions.

JUSTICE HARDESTY:
The sentencing commission experience in other states has produced some savings. That is not the most important reason why we should do this. One savings that has occurred in several states is the complete abolition of the parole board. I do not know what that number is, but it is probably $3 million or $4 million. A parole board is not needed when you have a sentencing commission. We are a long way away from that decision. State Board of Parole Commission Chair Connie Bisbee is a supporter of this initiative.

JAMES E. DZURENDA (Director, Department of Corrections):
Connecticut had significant savings directly related to its sentencing commission. All those savings were directly assigned and reinvested into community wraparound services for addiction, mental health and other services lacking in the community. More savings are created by reducing recidivism.

The Department of Corrections is neutral on S.B. 451. I want to address the Advisory Commission's recommendation No. 7 to create a sentencing commission. My experience while serving as a legislatively appointed member of the Sentencing Commission in the State of Connecticut may help in understanding the benefits derived from a state sentencing commission.

I have submitted written testimony (Exhibit F). I have included in Exhibit F a copy of minutes from the Connecticut Sentencing Commission dated June 20, 2013. This is a sample of what is discussed and done by a sentencing commission. There is a difference between advisory commissions and sentencing commissions. The advisory commission in Connecticut is called the Criminal Justice Policy Advisory Commission. The difference between it and the Connecticut Sentencing Commission is that one develops and discusses policies and procedures and the other discusses matters directly related to sentencing.

Bail was included in sentencing in Connecticut. What is the appropriate bail amount for a lower economic society that will not exceed that which obviously cannot be afforded? What is the appropriate length of sentences for juveniles as they move from being treated as juveniles to adults? These matters were discussed in the Connecticut Sentencing Commission.

The Connecticut Criminal Justice Policy Advisory Commission discussed policies. It established statewide policies on matters such as the appropriate length of time for a police chase based on public safety. Other areas such as DNA consistency were defined so that all cities and towns acted in a consistent manner.

The Connecticut statutory language is also included in Exhibit F. It gives the purpose, mission and vision of the Connecticut Sentencing Commission as well as its mandatory members. Not only does the Connecticut Sentencing Commission evaluate existing statutes, policies and practices, it also develops and maintains a statewide sentencing database in collaboration with state and local agencies to provide a cost-benefit analysis identifying positive and negative trends in the community related to crime. The Connecticut Sentencing Commission also preserves judicial discretion, provides individualized sentencing and evaluates the impact of pretrial, sentence diversion, incarceration and postrelease supervision programs.

The Connecticut Sentencing Commission identifies potential areas of sentencing disparity related to racial, ethnic, gender and socioeconomic status. The Connecticut Sentencing Commission is deemed a Criminal Justice Agency allowing it to serve warrants, meet quarterly and produce reports directly to the governor, legislature and supreme court.

JUSTICE HARDESTY:
I would like to read from Mr. Dzurenda's statement to the Advisory Commission at our November 1, 2016, meeting.

> In 2011, when I was Deputy Commissioner for the Connecticut Department of Corrections, the prison population was about 19,000 inmates. Today, based on the change of statutes relating to the recommendations of the Sentencing Commission, the population is about the same as Nevada's is now, having dropped by 5,000 offenders in less than 5 years.

CHAIR SEGERBLOM:
That is huge, and I am sure we can do it too. You have our commitment. We are going to pass this bill.

SENATOR GUSTAVSON:

You mentioned in your testimony that you would like to see this not only pass but be implemented as soon as possible. The way the bill is written, there is a two-year term for each Commission member. Members may be reappointed for an additional term of two years. I did not see a date by which the Commission must act, but there is a biennial report to be given to the Legislative Counsel Bureau on odd-numbered years. Do you have any idea how long it will take to complete the studies?

JUSTICE HARDESTY:
Section 17 of S.B. 451 provides:

> For a regular session, the Nevada Sentencing Commission created by section 5 of this act may request the drafting of not more than 1 legislative measure which relates to matters within the scope of the Commission. The request must be submitted to the Legislative Counsel on or before September 1 preceding the regular session.

There are other provisions about the legislative measure. The expectation is that the 2019 Legislature will receive a bill draft request (BDR) with the sentencing guideline work product of the Commission. Any Senator serving here who does not get that BDR should ask the chair of the Sentencing Commission where it is.

SENATOR CANNIZZARO:
You mentioned that there would be an appeal of any sentencing deviation. The trial court judge that sits through an entire trial has an understanding of everything that happened in the case, why the jury came to the decision it did and what sorts of factors are relevant in sentencing. Our caselaw establishes that sentencing judges have wide discretion based on facts and circumstances. How will that change with this appellate process, and do you worry that this will create frivolous appeals? How will we ensure our trial court judges have discretion to make these kinds of decisions?

JUSTICE HARDESTY:
Nothing in the Sentencing Commission guidelines changes the fact that these are recommendations. What does change is that the judge, if he or she is going to deviate from the recommendations, has to put on the record the reason for the deviation. Unfortunately, in many instances when a sentence is too long or too short, there is no explanation whatsoever. If the sentence is within the range, the victim and the defendant are deprived of an explanation. The standard of review is that, if the sentence is within the range, deference is given to the judge. Senate Bill 451 changes that. From a legislative standpoint, I think the question is, should we sentence people who commit the same or similar offense whose criminal history is the same or similar to the same length of sentence?

What we found in a study done by the Advisory Commission in 2011 is that there are judges sentencing two-thirds of the cases they hear to prison. Other judges sentence at a rate of 30 percent. The net effect on the prison is a substantial length of incarceration for people for the same crime with the same criminal history as someone who is given probation. This system flattens that out. It at least provides some level of review. As for the workload of the appellate courts, so be it. To me that is justice. Why should we not expect defendants to be treated fairly and equally and victims to expect the same thing from the system?

SENATOR CANNIZZARO:
I appreciate that. I know exactly what you are talking about. There can be very different ranges. My concern is that we are going to be second-guessing every decision made by a trial court judge versus giving him or her discretion that, unless abused, would not result in an appeal. Can the State appeal if it believes the sentence is too low?

JUSTICE HARDESTY:
That is something the Sentencing Commission will have to talk about.

CHUCK CALLAWAY (Las Vegas Metropolitan Police Department):
We support S.B. 277. Information sharing is exactly as described by Justice Hardesty. It is the ability of a police officer in the field 24/7 on a highway between Ely and Elko to get information real time. We talk about the three primary systems: the Central Repository for Nevada Records of Criminal History, SCOPE and Tiberon. Three independent systems have criminal justice information. The analogy I use are iBooks on an iPad versus the library. You may have the same book in the library as you have on your iPad, but you cannot go into the library at 2:00 a m. and read the book. You can read it on your iPad. There is

redundancy and overlap. The creation of a subcommittee to look at these issues and provide recommendations on how we can all be on the same page and how these systems can communicate with each other for officer safety in the field is critical.

With regard to S.B. 451, we support the Sentencing Commission. There are a number of unanswered questions. For example, if the Sentencing Commission determines that certain crimes should be Category C, but a bill is introduced recommending that these crimes be Category B, how is that reconciled? I would like to see a member from the Las Vegas Metropolitan Police Department (LVMPD) added to the Sentencing Commission. The Sheriffs' and Chief's Association has a member. The Advisory Commission has members from both of the Sheriff's and Chiefs' Association and LVMPD because the Sheriffs' and Chiefs' Association represents 17 predominantly rural counties whereas the LVMPD represents the urban areas.

We oppose the first part of S.B. 451. We oppose the DNA testing portion of the bill. It is the same language included in A.B. 268 sponsored by Assemblyman Justin Watkins, Assembly District No. 35.

ASSEMBLY BILL 268: Authorizes certain persons to file a postconviction petition to pay the cost of a genetic marker analysis. (BDR 14-638)

There is a system in place that allows petitions to be filed with the court to review potential DNA evidence that might be relevant to a case but is untested. The process outlined in the bill creates a system in which, if you have money, you can have DNA tested, but if you are indigent, you cannot. It will impact our laboratories. We already have several bills this Session which will impact our laboratories for the testing of sexual assault kits. Throw into the mix allowing offenders to petition and fish for evidence.

For example, a person murders his wife, and during the murder, he gets blood and DNA on his fingernails and shirt. He runs out of the house with the murder weapon, witnesses see him, he jumps in a car, flees and is caught. He is convicted, but there was a cigarette butt in the front yard of that house dropped by someone walking a dog. Now the defendant, even though all the evidence that convicted him was shown to the jury, petitions the court to have the cigarette butt tested so that his attorney can find some reasonable doubt to get him out of prison. This will create a lot of work for the crime laboratories when there is a system already in place that works. I know of no evidence that the system does not work.

SENATOR ROBERSON:
Chair Segerblom, I have heard similar concerns from the District Attorneys Association. Are you willing to accommodate those concerns in this bill?

CHAIR SEGERBLOM:
I had not heard this last concern until now. I am willing to add LVMPD to the Advisory Committee.

SENATOR ROBERSON:
All the concerns.

CHAIR SEGERBLOM:
I had not thought about this DNA issue. Mr. Callaway said there is another bill coming from the Assembly. We can take it out of S.B. 451 and let this issue be heard in Assembly Bill 268.

SENATOR FORD:
We will take the DNA component out of S.B. 451, and we can pass the Sentencing Commission with the addition of the LVMPD member.

HOLLY WELBORN (American Civil Liberties Union of Nevada):
The Sentencing Commission is the single most important piece of legislation this Session. The ACLU has been advocating for proportionate, individualized assessments for sentencing forever. It is critical that this legislation be enacted. The Sentencing Commission can decide many of the concerns raised. Last Session, 71 bills were passed providing for increased penalties or sentence enhancements without any guidance on appropriate proportionate sentencing. Bills have been heard this Session imposing heftier sentences on money laundering than sex trafficking.

We are neutral on section 3 of S.B. 277 now that it is clear that the intent on accessing the information for patients with medical marijuana cards is to establish whether a person has a lawful license. If the intent was to determine whether the offender or parolee was violating a condition of parole, it would not likely hold up in court. In Arizona, there was a case under its medical marijuana law that prohibited parole and probation from being able to access that information. A California case was decided under patient privacy laws.

SENATOR FORD:
I want to acknowledge Justice Hardesty for leading the Advisory Commission during the Interim. He has done a yeoman's job bringing this all together to ensure that we could make unanimous recommendations to this Legislative Body. I have been known to say that criminal justice reform has become a bipartisan issue. I am looking forward to working with my colleagues to ensure that things like this are done.

I agree the Sentencing Commission is the most important piece of criminal justice reform legislation we are passing this Session. It will ensure that we are fair, not just to those who are currently incarcerated but to those who will go into the system. The issue about similarly situated individuals being charged with the same crime but getting a disproportionately different sentence is something we all can understand, acknowledge and appreciate. We need to fix that. This is an opportunity to do that. I support Mr. Callaway's recommendation to add the LVMPD to the Sentencing Commission. I want to remove any impediment to our ability to proceed with this.

ERIC SPRATLEY (Washoe County Sheriff's Office):
I am a commissioner on the Advisory Commission. I echo the comments of Mr. Callaway in support for S.B. 277. With Senator Ford's comments that the DNA petition process will be removed, we support S.B. 451.

JENNIFER NOBLE (Nevada District Attorneys Association):
With the understanding that the DNA testing will be removed, we support S.B. 451.

JULIE BUTLER (Division Administrator, General Services Division, Department of Public Safety):
The Central Repository for Nevada Records of Criminal History prefers S.B. 35 to S.B. 277 because S.B. 35 includes provision for the Criminal History Repository's local-user community working groups. They give us input into our system's design, which is critical to our operations. Senate Bill 277 does not include this provision. Further, S.B. 35 would include a member of the Central Repository on the Advisory Commission for the Administration of Justice. That is important if our advisory group is reconstituted as a subcommittee. We are open to amending either S.B. 35 or S.B. 277.

CHAIR SEGERBLOM:
I would like to hear a motion on S.B. 451.

SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 451 BY ADDING THE LVMPD TO THE SENTENCING COMMISSION AND STRIKING SECTIONS 1, 2, 14 AND 15.

SENATOR CANNIZZARO:
I would like clarification that we are striking the portions of S.B. 451 that deal with genetic marking.

NICK ANTHONY (Counsel):
The amendment would strike sections 1, 2, 14 and 15 that relate to genetic marker analysis. The Las Vegas Metropolitan Police Department would be added as a member to the Nevada Sentencing Commission.

SENATOR DENIS SECONDED THE MOTION.

SENATOR ROBERSON:
I think Republicans would be willing to vote in favor of S.B. 451, but we would like to see the amendment. There were many changes discussed today. There is no reason to vote today and make it partisan. Give it a day or so. Let us see the proposed language, and you will probably get a unanimous vote. Mr. Chair, you can have a partisan vote today, or you can have a unanimous vote if you wait so we can see the changes. It is your call.

SENATOR FORD:
I will, contrary to what has been done in the past, acquiesce to the request for an additional day, and we can bring this back for a work session. I withdraw my motion.

SENATOR DENIS:
I withdraw my second.

CHAIR SEGERBLOM:
The motion is withdrawn. I will close the hearing on S.B. 277 and S.B. 451. I will open the work session on S.B. 10.

SENATE BILL 10: Revises provisions governing the publication of information concerning unclaimed and abandoned property. (BDR 10-407)

PATRICK GUINAN (Policy Analyst):
The work session document (Exhibit G) summarizes S.B. 10 and the proposed amendments.
SENATOR HARRIS MOVED TO AMEND AND DO PASS AS AMENDED S.B. 10.
SENATOR FORD SECONDED THE MOTION.
THE MOTION CARRIED UNANIMOUSLY.

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CHAIR SEGERBLOM:
I will open the work session on S.B. 230.

SENATE BILL 230: Makes various changes relating to judgments. (BDR 2-512)

MR. GUINAN:
The work session document (Exhibit H) summarizes S.B. 230.
SENATOR FORD MOVED TO DO PASS S.B. 230.
SENATOR DENIS SECONDED THE MOTION.
THE MOTION CARRIED. (SENATOR GUSTAVSON VOTED NO.)

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CHAIR SEGERBLOM:
I will open the work session on S.B. 255.

SENATE BILL 255: Revises provisions relating to common-interest communities. (BDR 10-789)

MR. GUINAN:
The work session document (Exhibit I) summarizes S.B. 255 and the proposed amendment.
SENATOR DENIS MOVED TO AMEND AND DO PASS AS AMENDED S.B. 255.
SENATOR FORD SECONDED THE MOTION.

SENATOR HARRIS:
I was not able to be here for the Committee hearing since I was testifying on another bill. I want to be sure that everyone is comfortable with cancellation by email. Did you discuss what happened if it went into spam or for some other reason the intended recipient did not receive the electronic communication?

SENATOR DENIS:

The discussion was that email is allowed on other business transactions. Cancellation was the one thing that required hand delivery or mailing. Removing the hand delivery or mailing requirement for notice of cancellation made it consistent with all of the other electronic transactions. We did not talk about any specifics. Those provisions are there for other things already.

SENATOR HARRIS:
Are there consumer protections provisions somewhere for when an electronic notice does not reach where it needs to go? That is a hefty consequence.

SENATOR DENIS:
We did not have that discussion. I know that for the other electronic transactions there are those provisions.

SENATOR HARRIS:
I am going to vote yes today and follow up with the realtors about what their customary practices are to make sure there are consumer protections in place. I will let you know if I change my mind.
THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIR SEGERBLOM:
I will open the work session on S.B. 264.

SENATE BILL 264: Revises various provisions relating to business entities. (BDR 7-479)

MR. GUINAN:
The work session document (Exhibit J) summarizes S.B. 264 and the amendments.

CHAIR SEGERBLOM:
Senator Harris has an issue with this bill. We will take no action on S.B. 264 today. I will close the work session on S.B. 264 and open the work session on S.B. 267.

SENATE BILL 267: Revises provisions governing the expedited process for the foreclosure of abandoned residential property. (BDR S-822)

MR. GUINAN:
The work session document (Exhibit K) summarizes S.B. 267 and the proposed amendments.
SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 267.
SENATOR DENIS SECONDED THE MOTION.
THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIR SEGERBLOM:
I will open the work session on S.B. 306.

SENATE BILL 306: Revises provisions relating to offenders. (BDR 16-298)

MR. GUINAN:
The work session document (Exhibit L) summarizes S.B. 306 and the proposed amendments.
SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 306.
SENATOR CANNIZZARO SECONDED THE MOTION.
THE MOTION CARRIED. (SENATOR GUSTAVSON VOTED NO.)

*****

CHAIR SEGERBLOM:
I will open the work session on S.B. 398.

SENATE BILL 398: Establishes various provisions relating to the use of blockchain technology. (BDR 59-158)

MR. GUINAN:
The work session document (Exhibit M) summarizes S.B. 398 and the proposed amendments.
SENATOR HARRIS MOVED TO AMEND AND DO PASS AS AMENDED S.B. 398.
SENATOR DENIS SECONDED THE MOTION.
THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIR SEGERBLOM:
I will open the work session on S.B. 438.

SENATE BILL 438: Revises provisions relating to time-shares. (BDR 10-992)

MR. GUINAN:
The work session document (Exhibit N) summarizes S.B. 438 and a proposed amendment.

SENATOR HARRIS:
I have consulted with legal counsel, and it has been determined that inducement or solicitation more accurately captures this activity as opposed to marketing. I propose to the Committee changing “marketing” to “inducement and solicitation.”

CHAIR SEGERBLOM:
Mr. Callaway, can you arrest somebody for inducement and solicitation, or is this more complicated than that? The current language would prohibit marketing. It has been proposed to change “marketing” to “inducement and solicitation.”

MR. CALLAWAY:
I cannot answer that question. I do not believe that was the intent of the proposal.

SENATOR HARRIS:
The reason for the language change is that legal counsel pointed out the term inducement and solicitation is more in alignment with the way the statute is currently written. “Sales” was the wrong word in the original bill. The sponsor proposed to change “sales” to “marketing.” I think that “inducement” is certainly something that was contemplated. “Solicitation” may not be the correct word since it implies sales. Do you have other language to suggest?

MR. CALLAWAY:
Brian O'Callaghan and my office worked on the language for this bill. I was not at the hearing. I can find out if there is a better word to insert.

CHAIR SEGERBLOM:
We will talk about this some more. We will close the work session on S.B. 438 and open the hearing on S.B. 490.

SENATE BILL 490: Revises provisions relating to the Foreclosure Mediation Program. (BDR 9-488)

SENATOR HARRIS:
Senate Bill 490 is a bill to revive the Foreclosure Mediation Program with several differences. The first difference is that the Foreclosure Mediation Program will be moved from the Administrative Office of the Courts to the Housing Division of the Department of Business and Industry. Notices and the administration of the program would go through the Housing Division. Rather than have the Housing Division run the entire program, a petition will be filed with the district court. There will be a

$25 filing fee. The matter will be assigned to a senior justice, judge, hearing master or other designee. It is anticipated that with funds left over from the program, an electronic system will be adopted so that all filings can be done electronically. That will save money because it eliminates the cost of staff and personnel to hand file and review all records. There will be an electronic Bate stamp when documents are exchanged in order to know of the exchange in real time. A district court judge will supervise the program. Another change is the mediation services costs will increase from $400 to $600. The money collected will only be expended for program purposes.

CHAIR SEGERBLOM:
How hard would it be to open this program to second and third mortgages?

SENATOR HARRIS:
There is a reluctance to deal with second mortgages because of the complexity of lien priorities. I think a process could be developed. It would have to address whether to mediate one or all mortgages, and what happens if there is a loan modification on the first mortgage but not on the second, but it is the second that is making the property unaffordable.

CHAIR SEGERBLOM:
I am thinking out loud. Many ten-year loans are resetting. The first mortgage is relatively low, but when the second resets, it can be dramatic.

SENATOR HARRIS:
I completely understand the concern and share it. I see people in my law practice with that problem. More thought needs to go into addressing that problem.

CHAIR SEGERBLOM:
I have been told that the mortgage crisis is over. Is it still a serious issue?

SENATOR HARRIS:
It is still a serious issue. Testimony has been presented this Session that Nevada is the fifth-highest state in terms of residential mortgage foreclosures. People are still struggling with housing stability. I will provide the number of foreclosures statewide.

CHAIR SEGERBLOM:
I was surprised by how few foreclosures the credit unions are experiencing. They are asking to be excluded from the program.

SENATOR HARRIS:
There are more foreclosures statewide than the credit unions are experiencing.

CHAIR SEGERBLOM:
Do credit unions have to pay to participate? Is there an annual fee?

SENATOR HARRIS:
If a homeowner elects mediation, the fee is $200 and the lender pays $200.

CHAIR SEGERBLOM:
Would the credit unions have to pay any sort of annual fee?

SENATOR HARRIS:
This bill changes the lender fee to $300.

CHAIR SEGERBLOM:
Do the credit unions pay only if called into court?

SENATOR HARRIS:

The credit union would pay only if the homeowner elects foreclosure mediation. While the program has been successful, we do not have even 50 percent participation of all homeowners that are in foreclosure. The last numbers I heard were around 18 percent. Not every homeowner who qualifies for foreclosure mediation is electing to participate in the program. Looking at this another way, banks and credit unions are not required to participate in foreclosure mediation for 80 percent of the foreclosures.

JON SASSER (Washoe Legal Services; Legal Aid Center of Southern Nevada):
Is the Foreclosure Mediation Program still needed? Yes. Is it needed at the same volume it was during the height of the housing crisis? No. There were some 80,000 notices of default in 2010. The number of defaults projected for 2017 is down to 6,305. Obviously, the volume is far less. On the other hand, the program ends on June 30. We are in the second half of the year of the program winding down. During the first half of the last year of the program, there were 662 mediations. That means that we have 600 or 700 homeowners electing mediation. The program remains valuable to them going forward.

Nevada is still No. 1 in terms of the percentage of underwater households. In addition, there are a number of loans scheduled to reset over the next four years. The question is whether the program is bringing in enough money to sustain itself. I think the answer is potentially yes. I assume that if you are interested in passing this bill, it would move on to the Senate Finance Committee for a detailed analysis of its financial feasibility. The program is financed by a couple of charges. Every notice of default issued—6,305 for 2017—pays a $45 Notice of Default fee. That goes to the administrative cost of the program. I understand that there is $500,018 left over that would revert to the State General Fund and could be reappropriated to restart the program and develop the portal.

SENATOR HARRIS:
There is transitional language in the bill to allow those funds to travel to the administrative agency that would oversee the program. The starting balance would be about $500,000.

MR. SASSER:
The rest of the financing is in the bill. There is a $25 district court filing fee. The district court would oversee the mediation. The state agency would oversee the administrative part of the program. The mediators would be paid with the $300 paid by the homeowner and the lender.

AARON D. MACDONALD (Consumer Rights Project, Legal Aid Center of Southern Nevada):
I have provided a letter of support (Exhibit O). Homeowners need the Foreclosure Mediation Program. In my experience as a staff attorney at Nevada Legal Services and at Legal Aid Center of Southern Nevada, I have personally represented hundreds of homeowners in the Foreclosure Mediation Program. I have observed firsthand the success the program had in bringing the lender and the homeowner to the bargaining table. This program was designed to help distressed homeowners by having a person with decision-making authority present at the mediation table. We are looking for alternatives to having the homeowner being foreclosed on and thrown out in the street. The mediation program has been successful in preventing that outcome.

In my experience, it is exceptionally difficult to discuss loan modification or foreclosure alternatives with the bank representatives when you call outside of mediation. Typically, bank representatives have no decision-making authority, they lose documents, they misstate available relief or even outright lie to the homeowner. The Foreclosure Mediation Program remedies these issues by requiring the lender to have someone with decision-making authority present at mediation. It requires good-faith negotiation. Without the Foreclosure Mediation Program, homeowners have no redress.

CHAIR SEGERBLOM:
Is there one district court judge who would be assigned to this program?

SENATOR HARRIS:
Based on conversations I have had with Justice Hardesty and Barbara Buckley, it is anticipated that it would be spread across all the judges' dockets. At most, each district court judge would have one or two cases at a time.

CHAIR SEGERBLOM:
If there is a mediation and the bank does not come with the documents, can the homeowner go to the judge?

SENATOR HARRIS:
Yes. That is the point of filing with the district court.

MALCOM DOCTORS:
I am a Senior Certified Mediator. I have provided written testimony (Exhibit P). I am not an attorney, which is probably a good thing. I have been with the Foreclosure Mediation Program since its inception. I was with it until its demise at the end of the year. I also served on the program's Advisory Committee since its inception.

CHAIR SEGERBLOM:
Do you support S.B. 490?

MR. DOCTORS:
Yes.

MICHAEL R. BROOKS (United Trustees Association):
The United Trustees Association is neutral on S.B. 490 and has provided written testimony (Exhibit Q).

GREG GEMIGNANI (Nevada Credit Union League):
The Nevada Credit Union League has provided a proposed amendment (Exhibit R). We oppose S.B. 490.

CHAIR SEGERBLOM:
I will close the hearing on S.B. 490 and open the hearing on S.B. 453.

SENATE BILL 453: Revises provisions relating to criminal procedure. (BDR 14-84)

JOHN J. PIRO (Deputy Public Defender, Office of the Public Defender, Clark County):
I will discuss the key provisions of the bill and the Nevada District Attorneys Association proposed amendments (Exhibit S).

CHAIR SEGERBLOM:
Do you agree with the proposed amendments?

MR. PIRO:
I imagine amending the bill would be the best way to get support.

Section 1, subsection 3 of S.B. 453 uses the term “dishonorable discharge.” This is a key provision that would make a huge difference in the sealing of records. Normally, when defendants are dishonorably discharged, even if 20 years have passed and they have totally changed their lives, they are unable to seal their records.

CHAIR SEGERBLOM:
Could a dishonorable discharge be the result of failing to pay a court fee or something like that?

MR. PIRO:
Yes. This is a big change that the district attorneys (DAs) support it. Section 3 of S.B. 453 declares that the public policy of this State is to favor the giving of second chances. Section 4, subsection 1 creates a presumption. On page 3 of Exhibit S, the DAs change the presumption to a rebuttable presumption. That language is the result of debates in the Assembly on a similar bill, A.B. 327, sponsored by Assemblyman William McCurdy II, Assembly District No. 6.

ASSEMBLY BILL 327: Revises provisions relating to records of criminal history. (BDR 14-658)

CHAIR SEGERBLOM:
Is there anything in S.B. 453 that is not in A.B. 327? What is the status of the Assembly bill?

MR. PIRO:

Assembly Bill 327 has not had a work session yet. I think it does have wide support. Much of the language in S.B. 453 mirrors A.B. 327. Language similar to that in sections 13 and 15 of S.B 453 was stripped from A.B. 327 because of the burden it would place on the Criminal History Repository. The language in sections 13 and 15 would put a fiscal note on S.B. 453. There are differences between S.B. 453 and A.B. 327; however, the DAs' proposals in Exhibit S mirror all of the accepted changes to A.B. 327.

CHAIR SEGERBLOM:
Ms. Butler, did you put a fiscal note on S.B. 453?

MS. BUTLER:
We put a fiscal note on A.B. 327. We did not put a fiscal note on S.B. 453. The fiscal note on A.B. 327 was $30,983. The concern was based on language identical to that in S.B. 453.

CHAIR SEGERBLOM:
Would S.B. 453 have the same impact?

MS. BUTLER:
Yes.

CHAIR SEGERBLOM:
How long would it take you to put a fiscal note on S.B. 453?

MS. BUTLER:
It has already been prepared.

Senator Harris:
Are the sealed record time frames in Exhibit S the same as those in S.B. 125?

SENATE BILL 125: Revises provisions governing the restoration of certain civil rights for ex-felons. (BDR 14-20)

JOHN T. JONES, JR. (Nevada District Attorneys Association):
Yes.

SENATOR HARRIS:
Do the felony penalty reduction from 5 years to 1 year and the misdemeanor reduction from 2 years to 1 year in section 7 mirror S.B. 125?

MR. JONES:
Yes. Exhibit S also includes the City of Henderson's amendment to S.B. 125. They are all combined into S.B. 453.

CHAIR SEGERBLOM:
I will ask for a motion to amend and re-refer to the Senate Committee on Finance.

SENATOR FORD MOVED TO AMEND AND RE-REFER AS AMENDED S.B.453 TO THE SENATE COMMITTEE ON FINANCE.

SENATOR CANNIZZARO SECONDED THE MOTION.

THE MOTION CARRIED. (SENATORS GUSTAVSON AND HARRIS VOTED NO.)

*****

CHAIR SEGERBLOM:
I will open the hearing on S.B. 203.

SENATE BILL 203: Revises provisions relating to domestic corporations. (BDR 7-71)

LORNE MALKIEWICH (U-Haul International Inc.):
U-Haul has been incorporated in Nevada since July 1990. Senate Bill 203 presents a unique drafting challenge. How does the Legislature say that it really means it? We seek to clarify the Nevada statutes and express the legislative intent that statutory law be followed. Nevada corporations should be governed by Nevada law. It is important that the businesses that have chosen to incorporate in Nevada be able to rely on Nevada law. We will be proposing an amendment to S.B. 203. We are working with interested parties to develop a consensus amendment.

CHAIR SEGERBLOM:
Friday is the deadline. The bill is quite simple. It raises some flags with me with regard to telling the Supreme Court what to do.

MR. MALKIEWICH:
The intent of S.B. 203 is to clarify the law to state that the laws of the State must govern the incorporation and internal affairs of a domestic corporation. We will work on the tone of the bill to make sure it is appropriate.

Section 2, subsections 1 to 6, of S.B. 203 is the declaration of legislative intent. The intent is that statutory law adopted by the Legislature should control over conflicting caselaw from other jurisdictions.

SENATOR FORD:
I have some heartburn about the legislative intent component. The general rule is that, if the Legislature puts something in a statute, it will be interpreted by our courts as the prevailing law. I would strongly encourage you to reconsider, especially with the strong language included in the bill. I am not comfortable with the way it is set up.

MR. MALKIEWICH:
Our dilemma is how to draft “and we really mean it” when you have the Legislature adopting statutes in response to cases but cannot rely on the court to apply the applicable law. Our intent is simply to clarify that Nevada law applies to Nevada corporations.

SENATOR HARRIS:
Is it the intent of S.B. 203 to supersede operating agreements, bylaws, etc., wherein companies validly contract to incorporate a different jurisdiction's laws or to be liable to suit in other jurisdictions?

MR. MALKIEWICH:
No, that is not the intent. There are two provisions in the bill that use the “except as otherwise provided in subsection 1 of NRS 78.139” language, which provides an exception for what is otherwise provided in the articles of incorporation. Our concern is with statutes that say this is the law with respect to the duties of an officer or director and litigation results in a reliance on a line of cases from another state that provide different duties.

SENATOR HARRIS:
Is it your intent to create a fallback framework, but parties are free to contract differently if that is what they want to do? If the bylaws, operating agreement, etc., are silent, is the default to Nevada law?

MR. MALKIEWICH:
That is my understanding. I am a bill drafter, not a corporate law expert. It is not the intent in the bill drafting to supersede any contracts.

SENATOR FORD:
Is there a case this bill is trying to overturn?

MR. MALKIEWICH:
There are a few cases that are examples. For example, there is a case concerning the constituency statute, *Hilton Hotels Corp. v. ITT Corp.*, 962 F.Supp. 1309 (D.Nev.1997). In 1999, the Legislature adopted S.B. No. 61 of the 70th Session adding what is now section 4, subsection 5 of NRS 78.138. That provision says directors and officers are not required to consider the effect

of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor. The *Hilton* case held that the interests of the stockholders needed to have priority even though our constituency statute allows various interests to be considered. Subsection 5 was adopted to try to make it clear that the directors and officers are not required to treat any particular interest as a dominant factor, but we still see language in cases that says the shareholders' best interest must be considered over the interests of anyone else.

We are trying to make the law clearer, and through the declaration, point to the statute and say the statute should control. The statute clearly allows directors and officers to consider other factors. Section 4, subsection 4 of NRS 78.138 says directors and officers are allowed to consider the economy of the State and the Nation, the interests of the community and society, the interests of the corporation's employees, suppliers and customers and the long-term and short-term interests of the corporation and its stockholders. The officers and directors are permitted to weigh these factors. There are a few other examples. The general idea is to emphasize that the statutes control. When the Nevada Legislature adopts a statute, that is the law. That seems like an obvious concept.

SENATOR FORD:
I hear what you are saying and you cited a 1997 case. Section 1, subsection 5 of S.B. 203 references cases out of Delaware that "have been, and are hereby, rejected by the Legislature." What is the most recent case in Nevada that you are attempting to address? What I have seen done, and I am not suggesting that I am amenable to doing this either, is a specific mention of a case that we want to overturn by legislation. If there is such a case, I would like to know what it is so that I can get a better understanding, as opposed to this roundabout way of declaring legislative intent in a way that does in fact poke the Supreme Court in the eye. If there is a case, I would like to know what it is, or if there are cases, let me know what they are, so we can give those consideration as you are considering amendments with the interested parties.

MR. MALKIEWICH:
There is no case we are seeking to overturn. These decisions are over and done. There is nothing pending. The interest is to ensure that Nevada corporations in the future can rely upon statutes. These cases from the past are just examples of why there is a concern. The language I was referring to was from a 2006 case. The statute was first changed in 1997. There are other more recent examples of cases, but the intent of S.B. 203 is not to undo a particular case. The intent is simply to say that the Nevada statutes be applied whatever decision results from that application. The concern is that if the Legislature has adopted a statute, such as NRS 78.139, that conflicts with the cases mentioned in section 1, subsection 5 of S.B. 203, NRS 78.139 should be applied by the court—not Delaware cases that reflect a different law.

SENATOR FORD:
I would still recommend getting that point across without the declaration in this bill. I am not too keen on it.

MR. MALKIEWICH:
Section 3 of S.B. 203 is a verification requiring that that people have actually read the laws. Section 4 amends NRS 78.138 and clarifies the business judgment rule that simple negligence is not enough to rebut a presumption that directors and officers acted in good faith for purposes of personal liability. Personal liability requires particular bad acts. The constituency statute is also clarified. The combination of the constituency statute and the personal liability statute allow directors and officers to act in the best interest of the corporation without concern that they are going to be personally liable because someone disagreed with their decision.

Section 5 amends the rules concerning change of control. Little is changed. Subsection 4 of section 5 refers back to the constituency statute and clarifies that the directors have flexibility to consider any of the listed factors in a change of control situation. *Nevada Revised Statutes* 78.139 is the change of control statute.

SENATOR HARRIS:
Section 3 requires the reading of particular statutes before commencing litigation. What is the reasoning behind this provision?

MR. MALKIEWICH:

Our concern is, if you have cases in which decisions are made, doctrines are adopted and there is no reference in the cases to the underlying controlling statute, perhaps it is because the statute was not brought to the court's attention. The court may be looking at a brief that says here is a case from another state that applies to this situation, and no one cites to the relevant Nevada law. Section 3 just says, if you are going to file a suit that involves NRS 78.138 and 78.139, each plaintiff must aver to having read these statutes and section 2 of S.B. 203.

SENATOR HARRIS:
Do you have an amendment?

MR. MALKIEWICH:
We are still working on a proposed amendment.

Remainder of page intentionally left blank; signature page to follow.

CHAIR SEGERBLOM:
I will close the hearing on S.B. 203. The hearing is adjourned at 3:31 p.m.

RESPECTFULLY SUBMITTED:

_____
Connie Westadt,
Committee Secretary

APPROVED BY:

_____
Senator Tick Segerblom, Chair

DATE:_____

EXHIBIT SUMMARY

Bill	Exhibit / # of pages		Witness / Entity	Description
	A	2		Agenda
	B	8		Attendance Roster
S.B. 376	C	49	John Cahill / Clark County	Written Testimony and Exhibits
S.B. 277 and S.B. 451	D	14	James W. Hardesty / Advisory Commission on the Administration of Justice	Presentation
S.B. 277 and S.B. 451	E	4	James W. Hardesty / Advisory Commission on the Administration of Justice	Summary of Recommendations
S.B. 451	F	10	James E. Dzurenda / Department of Corrections	Written Testimony
S.B. 10	G	2	Patrick Guinan	Work Session Document
S.B. 230	H	1	Patrick Guinan	Work Session Document

S.B. 255	I	2	Patrick Guinan	Work Session Document
S.B. 264	J	21	Patrick Guinan	Work Session Document
S.B. 267	K	2	Patrick Guinan	Work Session Document
S.B. 306	L	1	Patrick Guinan	Work Session Document
S.B. 398	M	5	Patrick Guinan	Work Session Document
S.B. 438	N	1	Patrick Guinan	Work Session Document
S.B. 490	O	3	Aaron D. MacDonald	Letter of Support
S.B. 490	P	2	Malcom Doctors	Written Testimony
S.B. 490	Q	17	Michael R. Brooks / United Trustees Association	Written Testimony
S.B. 490	R	3	Greg Gemignani / Nevada Credit Union League	Proposed Amendment
S.B. 453	S	17	John T. Jones, Jr. / Nevada District Attorneys Association	Proposed Amendment

NV S. Comm. Min., 4/10/2017

End of Document

Exhibit E

2017 Nevada Laws Ch. 559 (S.B. 203)

NEVADA 2017 SESSION LAWS

REGULAR SESSION OF THE 79TH LEGISLATURE (2017)

Additions are indicated by **Text**; deletions by
~~Text~~ .
Vetoes are indicated by ~~Text~~ ;
stricken material by ~~**Text**~~ .

Ch. 559
S.B. No. 203
CORPORATIONS—DIRECTORS—LIABILITIES

AN ACT relating to business associations; expressing the intent of the Legislature concerning the law of domestic corporations; revising the presumption against negligence for the actions of corporate directors and officers; clarifying the factors that may be considered by corporate directors and officers in the exercise of their respective powers; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, with certain exceptions, a director or officer of a domestic corporation is presumed not to be individually liable to the corporation or its stockholders or creditors for damages unless: (1) an act or failure to act of the director or officer was a breach of his or her fiduciary duties; and (2) such breach involved intentional misconduct, fraud or a knowing violation of law. (NRS 78.138)

Section 4 of this bill specifies that to establish liability on the part of a corporate director or officer requires: (1) a rebuttal of this presumption; and (2) a breach of a fiduciary duty accompanied by intentional misconduct, fraud or a knowing violation of law. **Sections 4 and 5** of this bill clarify the factors that a director or officer of a domestic corporation is entitled to consider in exercising his or her respective powers in certain circumstances, including, without limitation, resisting a change or potential change in the control of a corporation.

Section 2 of this bill expresses the intent of the Legislature regarding the law of domestic corporations, including that the laws of other jurisdictions must not supplant or modify Nevada law.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED
IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 78 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2.

<< NV ST 78. >>

The Legislature hereby finds and declares that:

1. It is important to the economy of this State, and to domestic corporations, their directors and officers, and their stockholders, employees, creditors and other constituencies, for the laws governing domestic corporations to be clear and comprehensible.

2. The laws of this State govern the incorporation and internal affairs of a domestic corporation and the rights, privileges, powers, duties and liabilities, if any, of its directors, officers and stockholders.

3. The plain meaning of the laws enacted by the Legislature in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in NRS 78.138 and 78.139, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.

4. The directors and officers of a domestic corporation, in exercising their duties under NRS 78.138 and 78.139, may be informed by the laws and judicial decisions of other jurisdictions and the practices observed by business entities in any such jurisdiction, but the failure or refusal of a director or officer to consider, or to conform the exercise of his or her powers to, the laws, judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of a fiduciary duty.

Sec. 3. (Deleted by amendment.)

Sec. 4. NRS 78.138 is hereby amended to read as follows:

<< NV ST 78.138 >>

1. ~~Directors~~ **The fiduciary duties of directors** and officers ~~shall~~ **are to** exercise their **respective** powers in good faith and with a view to the interests of the corporation.

2. In ~~performing~~ **exercising** their respective ~~duties,~~ **powers,** directors and officers **may, and** are entitled to **,** rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence,

but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. ~~Directors~~ **Except as otherwise provided in subsection 1 of NRS 78.139, directors** and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation. **A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.**

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may **:** ~~consider:~~

(a) **Consider all relevant facts, circumstances, contingencies or constituencies, including, without limitation:**

(1) The interests of the corporation's employees, suppliers, creditors ~~and~~ **or** customers;

~~(b)~~ **(2)** The economy of the State ~~and~~ **or** Nation;

~~(c)~~ **(3)** The interests of the community ~~and~~ **or** of society; ~~and~~

~~(d)~~ **(4)** The long-term ~~as well as~~ **or** short- term interests of the corporation ~~and its~~ **, including the possibility that these interests may be best served by the continued independence of the corporation; or**

(5) The long-term or short-term interests of the corporation's stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(b) Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.

5. Directors and officers are not required to consider **, as a dominant factor,** the effect of a proposed corporate action upon any particular group **or constituency** having an interest in the corporation **.** ~~as a dominant factor.~~

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless ~~it~~ **:**

(a) The trier of fact determines that the presumption established by subsection 3 has been rebutted; and

(b) It is proven that:

~~(a)~~ **(1)** The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and

~~(b) The~~

(2) Such breach ~~of those duties~~ involved intentional misconduct, fraud or a knowing violation of law.

8. This section applies to all cases, circumstances and matters unless otherwise provided in the articles of incorporation, or an amendment thereto, including, without limitation, any change or potential change in control of the corporation.

Sec. 5. NRS 78.139 is hereby amended to read as follows:

<< NV ST 78.139 >>

1. ~~Except as otherwise provided in subsection 2 or the articles of incorporation, directors and officers, in connection with a change or potential change in control of the corporation, have:~~

~~(a) The duties imposed upon them by subsection 1 of NRS 78.138;~~

~~(b) The benefit of the presumptions established by subsection 3 of NRS 78.138; and~~

~~(c) The prerogative to undertake and act upon consideration pursuant to subsections 2, 4 and 5 of NRS 78.138.~~

~~2.~~ If directors or officers take action to resist a change or potential change in control of a corporation, which action impedes the exercise of the right of stockholders to vote for or remove directors:

(a) The directors must have reasonable grounds to believe that a threat to corporate policy and effectiveness exists; and

(b) The action taken which impedes the exercise of the stockholders' rights must be reasonable in relation to that threat.

If those facts are found, the directors and officers have the benefit of the presumption established by subsection 3 of NRS 78.138.
~~3.~~ **2.** The provisions of subsection ~~2~~ **1** do not apply to:

(a) Actions that only affect the time of the exercise of stockholders' voting rights; or

(b) The adoption or signing of plans, arrangements or instruments that deny rights, privileges, power or authority to a holder of a specified number or fraction of shares or fraction of voting power.

~~4.~~ **3.** The provisions of subsections **1 and** 2 ~~and 3~~ do not permit directors or officers to abrogate any right conferred by ~~statute~~ **the laws of this State** or the articles of incorporation.

~~5. Directors~~

4. Without limiting the provisions of NRS 78.138, a director may resist a change or potential change in control of the corporation if the **board of** directors ~~by a majority vote of a quorum determine~~ **determines** that the change or potential change is opposed to or not in the best interest of the corporation ~~:~~

~~(a) Upon~~ **upon** consideration of ~~the interests of the corporation's stockholders or any of the matters set forth in~~ **any relevant facts, circumstances, contingencies or constituencies pursuant to** subsection 4 of NRS 78.138 ~~; or~~

~~(b) Because~~ **, including, without limitation,** the amount or nature of the indebtedness and other obligations to which the corporation or any successor to the property of either may become subject, in connection with the change or potential change, provides reasonable grounds to believe that, within a reasonable time:

~~(1)~~ **(a)** The assets of the corporation or any successor would be or become less than its liabilities;

~~(2)~~ **(b)** The corporation or any successor would be or become insolvent; or

~~(3)~~ **(c)** Any voluntary or involuntary proceeding concerning the corporation or any successor would be commenced by any person pursuant to the federal bankruptcy laws.

Secs. 6 and 7. (Deleted by amendment.)

Approved by the Governor June 12, 2017.

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