Case No.

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER and CHRISTIAN GARDNER, on behalf of minor child, LILLY GARDNER,
Plaintiffs-Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; and THE HONORABLE JERRY A. WIESE II, DISTRICT JUDGE

and

BLISS SEQUOIA INSURANCE & RISK ADVISORS, INC.; and HUGGINS INSURANCE SERVICES, INC.
Defendants-Real Parties in Interest,

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

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PETITIONERS' APPENDIX

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INDEX

Page

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Third-Party Plaintiffs, vs. BLISS SEQUOIA INSURANCE & RISK ADVISORS, INC., an Oregon corporation; HUGGINS INSURANCE SERVICES, INC., an Oregon corporation, Third-Party Defendants. AND ALL RELATED CLAIMS	Case No.: A-15-722259-C Dept. No.: XXX **AMENDED THIRD-PARTY COMPLAINT**

Plaintiffs Peter Gardner and Christian Gardner, individually and on behalf of their minor son, Leland Gardner ("Plaintiffs"), as the assignees of Henderson Water Park, LLC dba Cowabunga Bay Water Park, and through their undersigned counsel, hereby complain and allege against Defendants Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc. (the "Brokers") as follows:

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I. PARTIES

1. 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. HWP filed the instant Third-Party Complaint against the Brokers on November 28, 2018. Pursuant to that certain Settlement Agreement dated September 11, 2019, HWP assigned all causes of action asserted against the Brokers in this litigation to Plaintiffs.

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

3. Peter Gardner ("Mr. Gardner") is an individual and a Nevada resident. Mr. Gardner is married to Christian Gardner and is the father of Leland Gardner ("Leland"), a minor child.

4. Christian Gardner ("Mrs. Gardner") is an individual and a Nevada resident. Mrs. Gardner is married to Mr. Gardner and is Leland's mother.

5. Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. ("Bliss") is, on information and belief, a corporation organized under the laws of the state of Oregon, with a principal place of business located at 235 Front Street, Suite 100, Salem, OR, 97301, whose registered agent for service of process is Lance Barnwell at the same address.

6. Third-Party Defendant Huggins Insurance Services, Inc. ("Huggins") is, on information and belief, a corporation organized under the laws of the state of Oregon, with a principal place of business located at 235 Front Street, Suite 100, Salem, OR, 97301, whose registered agent for service of process is Garrett Hermann Robertson, P.C., 1101 Commercial St. NE., Salem, OR 97301.

II. JURISDICTION AND VENUE

7. This Court has jurisdiction over the instant controversy pursuant to NRS 14.065. The Brokers named in this action conducted business as an ostensible partnership within the State of Nevada by providing professional advice to an insurance consumer within Nevada and, acting as

insurance brokers caused to be issued for delivery in Henderson, Nevada, a policy of insurance covering liabilities at issue herein and related to the operation of a water park situated in Henderson, Nevada.

8. Venue for this action is proper pursuant to NRS 13.010 and 13.040.

III. FACTUAL ALLEGATIONS COMMON TO ALL CLAIMS

9. During the summer of 2014, various members of HWP communicated with Bliss to obtain on behalf of the water park professional risk management advice from Brokers in order to obtain a professional opinion from qualified and competent risk management and insurance specialists, regarding the kind and amount of insurance that would be sufficient and adequate to insure the water park and related entities, including the members. At that time, Brokers (through Molly Morris and Lance Barnwell) represented expressly and by implication to Slade Opheikens, Scott Huish, and other HWP members:

a. that they were qualified and competent to perform a detailed analysis of the risk profile of the water park in order to render professional advice regarding the coverage needed;

b. that Brokers had acquired adequate information to complete that analysis; and

c. that Brokers had completed that analysis competently and thoroughly.

10. On or about July 7, 2014, Brokers recommended an aggregate commercial general liability insurance coverage structure with limits of One Million Dollars ($1,000,000) in primary coverage and Four Million Dollars ($4,000,000) in excess follow-form coverage, opining that these policy limits would be adequate. At that time, a binder providing insurance with limits in those amounts was electronically transmitted to Slade Opheikens and other members.

11. Slade Opheikens responded three days later by electronic mail, clarifying that he was looking for "a loss control agent with waterpark experience to come walk the park and give us any input they may have to make sure we are doing all we can to keep persons safe," and that he "also

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want[ed] to check the coverage we have and make sure the limits are adequate for this size of park," and asking whether the current limits recommended by Brokers would meet industry standards.

12. Barnwell responded to Slade Opheikens' July 10, 2014, electronic inquiry on that same day, acknowledging the "risk management" nature of Slade Opheikens' inquiries, representing that the insurer had loss control resources that could be scheduled by Brokers to inspect and report, ostensibly referring to the need for a "loss control agent with water park experience to come walk the park and give us any input they may have to make sure we are doing all we can to keep persons safe." Barnwell added, "In my professional opinion I do believe that the limits of coverage are in line with the scope and size of the park," indicating that Brokers had taken into consideration the corporate structure and assets to be protected, adding that, "With your underlying policy tailored to water parks and the 4 million in excess we believe you are adequately insured," and that if Brokers felt otherwise they would strongly encourage an increase in coverage.

13. In reliance upon the representations and assurances given by Brokers, HWP purchased the coverage recommended by Brokers with limits Brokers represented would be sufficient for the size and scope of the water park operation. After expiration of the first year of that coverage, a renewal policy was issued with the same limits. More specifically, HWP purchased through Brokers a consecutive annual renewal of Policy Number OGLG24598913, underwritten by ACE American Insurance Company (referred to hereinafter as "Chubb") with primary limits for bodily injury liability in the amount of One Million Dollars ($1,000,000) in primary coverage and Four Million Dollars ($4,000,000) in excess follow-form coverage.

14. The aforementioned policies, in which HWP was the Named Insured shown on the Declarations, were the only liability insurance in place on the date of the occurrence alleged in Plaintiffs' Third Amended Complaint.

15. Subsequent to the commencement of Plaintiffs' civil action against HWP arising out of the near-drowning of Leland Gardner, Chubb offered the aggregate policy limits of $5 million for

bodily injury liability in an effort to settle the action against HWP and its members. That offer was rejected by Plaintiffs, who asserted through their counsel that the damages at issue in the instant litigation are tens of millions of dollars in excess of the policy limits offered by Chubb.

16. Plaintiffs' counsel indicated in a number of communications with various defense counsel that the amount of judgment expected by Plaintiffs in the instant matter was likely to exceed the sum of $50 million, based upon the severe and disabling injuries alleged to have been caused by a lack of adequate lifeguards at the water park at the time of the near-drowning of Leland Gardner.

17. As a result of the insufficient and substandard risk management and insurance brokerage advice and recommendations given by Brokers as mentioned herein, HWP and its members were unable to fund a settlement that would have brought the instant litigation to an end and protected them from exposure to financial calamity.

18. On September 11, 2019, Plaintiffs and HWP reached a settlement of the underlying litigation arising out of the near-drowning of Leland Gardner. Plaintiffs and HWP entered into a stipulated judgment in favor of Plaintiffs and against HWP in the amount of Forty-Nine Million Dollars ($49,000,000) (the "Stipulated Judgment"). Plaintiffs and HWP likewise entered into a covenant not to execute and/or record the Stipulated Judgment in favor of HWP. HWP, in turn, assigned to Plaintiffs all contractual, tort-based and equitable causes of action HWP asserted against the Brokers in this litigation arising out of the Brokers' professional opinion that an aggregate general liability insurance coverage structure of One Million Dollars ($1,000,000) in primary coverage and Four Million Dollars ($4,000,000) in excess follow-form coverage was adequate.

FIRST CLAIM FOR RELIEF – PROFESSIONAL NEGLIGENCE

19. Plaintiffs incorporate by reference all other averments contained herein reference as though stated verbatim.

20. The standard of care governing the provision of risk management and insurance brokerage advice requires brokers and risk managers, as licensed professionals with non-delegable

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duties of care, to exercise reasonable care in evaluating the insurance needs of a business. Under the circumstances detailed herein, such duty of care would, at a minimum, include:

a. understanding what kinds of injuries could foreseeably occur at the water park;

b. what kinds of litigation could ensue as a result, including the financial range of foreseeable damages could be asserted in a civil action against HWP;

c. what kinds of coverage are available to underwrite an insurance "tower" with limits adequate to protect against foreseeable worst-case injury claims arising out of the water park's operations; and

d. recommending excess and/or umbrella insurance that is sufficient in amount to protect the insureds from foreseeable levels of excess exposure.

21. Brokers failed to meet the standard of care owed by them as licensed professionals in failing to adequately perform the functions and steps outlined above, leaving HWP grossly underinsured in the circumstances.

22. As a result of Brokers' breach of the professional standards of care, HWP was damaged in an amount greater than $15,000.00.

SECOND CLAIM FOR RELIEF – NEGLIGENT MISREPRESENTATION

23. Plaintiffs incorporate by reference all other averments contained herein by reference as though stated verbatim.

24. Brokers had a duty to use reasonable care to ensure that the facts and implications communicated by them in connection with the risk management analysis of the water park and their recommendations regarding the adequacy of insurance limits were accurate and not misleading.

25. Brokers negligently failed to disclose that they had no performed the steps necessary to reasonably assess the risk profile of the water park, and on information and belief failed to disclose that they were not, in actuality, qualified to perform such an analysis. Rather, Brokers negligently allowed HWP to believe that they were adequately insured for risks of loss such as are at the issue in the instant litigation when in fact they were not.

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26. HWP reasonable relied upon misleading communications negligently made as set forth herein.

27. As a result of Brokers' negligence in relation to their communication of misleading and substandard professional advice relating to their purported industry knowledge, familiarity with water parks, proposed ongoing assessment and evaluation of the water park and its operations in light of its corporate structure and the assets to be protected, HWP was damaged in an amount greater than $15,000.00.

IV. PRAYER FOR RELIEF

28. Plaintiffs (as the assignees of HWP) pray for entry of judgment in their favor and against Brokers, jointly and severally, in an amount which will justly and adequately compensate HWP for its injuries, damages and losses, including indemnity for the Stipulated Judgment entered against it and any pre-judgment or post-judgment interest thereon, compensation for loss of time, loss of business opportunity and legal fees incurred due to the need to maintain an ongoing defense of a claim that may have been settled if adequate insurance coverage limits had been recommended, and such other and further relief as this Court may deem just and proper under the circumstances. Plaintiffs (as the assignees of HWP) further pray for an award of pre-judgment and post-judgment interest on any recovery they may be awarded against Brokers, together with the attorneys fees associated with the prosecution of this Third-Party Complaint and the defense and maintenance of other cross-claims and third-party claims associated with HWP's defense of the claims brought against it in the instant litigation.

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V. JURY DEMAND

29. HWP demands trial to a jury of all issues so triable.

DATED this 20th day of November, 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 20th day of November, 2019 I caused the foregoing document entitled **Amended Third-Party 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/ ***Matt Wagner***
An Employee of Campbell & Williams

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **THIRD PARTY DEFENDANTS BLISS SEQUOIA'S AND HUGGINS INSURANCE'S:** **1. MOTION TO AMEND PLEADINGS TO ADD PARTIES;** **2. MOTION TO SEVER** **3. ALTERNATIVELY** **A. MOTION TO CONTINUE TRIAL; (SECOND REQUEST)** **B. MOTION TO CONTINUE DISCOVERY; (SECOND REQUEST)** **4. REQUEST FOR AN ORDER SHORTENING TIME**

Third Party Defendants BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc. ("Bliss Sequoia") through their undersigned counsel, submit the instant motion. The motion is made based upon the attached memorandum of points and authorities, all attached exhibits, all pleadings and paper on file, and any oral argument the Court shall allow at the time of hearing.

/ / /

ORDER SHORTENING TIME

Upon Bliss Sequoia's *ex parte* motion, by and through their attorneys of record, and good cause appearing:

NOW, THEREFORE, IT IS HEREBY ORDERED that Bliss Sequoia's s above titled motion is hereby set for hearing on the 25TH day of MARCH, 2020 at the hour of 9:00 AM o'clock before the above-entitled Court.

OPPOSITION DUE BY 3/18/20
REPLY DUE BY 3/20/20
COURTESY COPIES TO DC30 BY 3/23/20 @ 9AM

DATED this 11 day of March, 2020.

DISTRICT COURT JUDGE

Submitted by:

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

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Bliss Sequoia Insurance & Risk Advisors, Inc.
And Huggins Insurance Services, Inc.

DECLARATION IN SUPPORT OF ORDER SHORTENING TIME

I, RAMEZ A. GHALLY, declare as follows:

1. I am a resident of Clark County, Nevada. I am over the age of eighteen (18) years and I am competent to make this Declaration. This Declaration is based upon my personal knowledge, and if called upon to testify, I would testify as set forth in this Declaration.

2. I am an attorney at the law firm of Hutchison & Steffen, PLLC, which represents the Third Party Defendants in this matter.

3. The instant motion seeks leave to amend the pleadings to add parties and severance of the third party claims against the Third Party Defendants from the instant action or in the alternative a continuation of the trial date and discovery deadlines.

4. To comply with the NRCP 41(e)(b)(2), the Court granted Plaintiffs' motion for a preferential trial setting and set trial for June 8, 2020.

5. Good cause exists under EDCR 2.26 for this Motion to be heard at the Court's earliest possible convenience because the discovery and dispositive motion deadlines are on an accelerated schedule as a result of the June 8, 2020, trial date. Any new parties must be brought in expeditiously to limit the potential prejudice against the added parties. Likewise, given the rapidly approaching trial date, Bliss Sequoia would be prejudiced if its motion for severance, or in the alternative, continuation, is heard after the parties conduct significant discovery and trial preparation on an expedited timeline.

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

DATED this 10th day of March, 2020.

HUTCHISON & STEFFEN, PLLC

Ramez A. Ghally, Esq.

I. Introduction

A. Motion to seek leave to amend pleading and add parties

On November 20, 2019, with Bliss Sequoia's consent, the Gardners, as assignees of Henderson Water Park ("HWP") filed an Amended Third-Party Complaint. Bliss Sequoia answered the Amended Third-Party Complaint on December 6, 2019. The Gardner's Amended Third-Party Complaint contains counts of professional negligence and negligent misrepresentation against Bliss Sequoia. The Gardners allege that based on Bliss Sequoia's advice, HWP purchased insufficient general liability coverage. To the extent Bliss Sequoia faces any liability to the Gardners as assignees of HWP, that liability arises as a result of Moreton's negligent professional advice to HWP, upon which HWP relied in choosing its policy limits, and Haas & Wilkerson's negligent affirmation to Bliss Sequoia regarding HWP's general liability limits. As such, Bliss Sequoia seeks to amend its pleadings and add both as parties.

The time to amend the pleadings and add additional parties under the recently accelerated scheduling order does not expire until April 1, 2020, and this motion, is therefore timely and leave to amend should be freely granted.

B. Motion to Sever

As a practical matter, it will be impossible to fully develop, vet and prosecute the anticipated cross claims against Haas & Wilkerson ("H & W") and Moreton in the limited time remaining from now, until the June 8, 2018 trial date. Presently, there are still active claims remaining in the underlying action such that severance is a practical and equitable solution to avoid the harsh impact of the five year rule (which is set to expire in July of 2020) and concurrently allow the remaining parties a fair amount of time to develop and defend the claims that have been belatedly asserted against them and to further allow Bliss Sequoia to prosecute their cross claims in light of the recent settlements reached. From an equitable standpoint, it is the quintessential "win-win" scenario, where the equities are judiciously considered and applied. Failure to sever the claims at this point would unfairly tether not only Bliss Sequoia, but the anticipated cross claim defendants, to an accelerated time frame unrealistically set to expire in mere months.

C. Alternatively, Motion to Continue Trial

The Gardner Plaintiffs initially brought the underlying action against HWP on July 27, 2015, alleging that HWP was negligent in the management and maintenance of Cowabunga Bay, and that such negligence directly caused injury to their minor son. After 3.5 years of litigation, HWP suddenly decided that it would drag Bliss Sequoia into the fray alleging that Bliss Sequoia, as HWP's insurance brokers, should have recommended higher policy limits. Recognizing the extreme prejudice it would face if it was forced to defend these claims in the limited amount of time left before the impending trial (then scheduled to occur on October 7, 2019) as well as the inherent inequities of being tethered to the highly emotional personal injury action, Bliss Sequoia filed a motion to sever, and a motion to extend discovery deadlines.

HWP vehemently opposed the motion to sever. The Court initially denied the motion to sever, but upon Bliss Sequoia's motion for reconsideration, the Court bifurcated the claims against Bliss Sequoia and provided for a separate trial date of October 2020.

Rather than letting a jury decide Plaintiffs' damages, HWP and Plaintiffs entered into a settlement agreement and a stipulated judgment in or around September 11, 2019, and, for the first time, firmly established the liability exposure being faced by Bliss Sequoia.

Recognizing that the settlements led to complete diversity between the parties, Bliss Sequoia removed the matter to federal court. Following a Motion to Remand filed by HWP, the Federal Court granted the same and this Court thereafter resumed jurisdiction. In doing so, the Court reinstated the last operative scheduling order with respect to the parties, setting the trial for October of 2020. Plaintiffs, apparently recognizing for the first time that such a late trial date would force the matter to be adjudicated beyond the 5-year rule, asked the Court for a preferential trial setting. Plaintiffs' Motion for Preferential Trial Setting was subsequently granted by the Court on February 20, 2020, setting this matter to be heard before a jury on June 8, 2020, a mere 3 months later. The sole basis for the Court's ruling was to avoid prejudicing Plaintiffs with the harsh result of dismissal for failure to bring the matter to trial within 5 years.

The harsh result, however, is now being imposed on Bliss Sequoia, and HWP - through the Gardners as assignees – has been able to effectively benefit from its own dilatory conduct. After inexplicably waiting for 3.5 years to sue Bliss Sequoia and then waiting for more than 4 years to definitively establish damages against Bliss Sequoia, HWP now gets the benefit of prejudicially accelerating and truncating Bliss Sequoia's preparation time.

The practical impact that this accelerated trial schedule has imposed on Bliss Sequoia, is that it cannot realistically amend the pleadings to add new parties. While the stipulated scheduling order entered into by and between HWP and Bliss Sequoia sets the deadline for doing so for April 1, 2020, without a concurrent order continuing the trial date, or severing the claims, Bliss Sequoia will be foreclosed from bringing in two additional cross claimants who are liable to HWP for any damages that may be awarded. In order to alleviate the Court's concerns regarding the harsh effects of the 5 year rule, Bliss Sequoia hereby waives its right to assert dismissal based on the same.

D. Alternatively, Motion to Continue Discovery

In the event the Court does not sever HWP's assigned claims and Bliss Sequoia's anticipated cross claims from the main action, then Bliss Sequoia's Motion to Continue Trial is hereby coupled with a concurrent Motion to Continue Discovery per EDCR 2.35. It is impractical to expect that Bliss Sequoia, having just recently learned that they now face a $17M liability exposure, and having just recently been confronted with an amended third party complaint, to finish the voluminous amount of discovery that remains to be done within a 3 month span of time. Moreover, it would be grossly inequitable to force the newly entering cross claimants to get fully up to speed and to fully defend the anticipated cross claims within a span of 3 months. Accordingly, any retention of this matter by the present Court, would necessarily need to be accompanied by a trial continuance and a generous extension of time in which to complete discovery.

II. DISCUSSION

A. Motion to Seek Leave to Amend Pleadings and Add Parties

1. Relevant Law

a. NRCP 15 and NRCP 14

NRCP 15 permits a party to amend its pleadings upon order of the Court, and further dictates that "the Court should freely grant leave when justice so requires." *See* NRCP 15(a)(2). Additionally, NRCP 14(a)(1) states "[a] defending party may, as third-party plaintiff, file a third-party complaint against a nonparty, the third-party defendant, who is or may be liable to it for all or part of the claim against it." *Id.* This rule also states, "[a] third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it." *Id.* at 14(a)(6).

Additionally, in *Reid v. Royal Ins. Co.*, 390 P.2d 45, 47 (Nev. 1964), the Nevada Supreme Court held that this rule permits an insured to "assert his right of indemnity against the party ultimately responsible for damages." *Id.*

2. Bliss Sequoia should be permitted to bring its contribution claims against cross-claimants

The Nevada Supreme Court has held that a claim for contribution may be brought against a non-party. *See e.g. Pack*, 277 P.3d at 1249 ("we have repeatedly recognized that a third-party plaintiff has the right to seek contribution in an original action prior to entry of judgment"); *ANSE, Inc. v. Eighth Judicial Dist. Ct. ex. Rel. County of Clark*, 192 P.3d 738, 742–43 (Nev. 2008) (noting that a third-party plaintiff could seek contribution from a third-party defendant in the original action prior to entry of judgment). Indeed, in *Mandalay*, 129 Nev. 1135, the court expressly stated, "NRCP 14 provides the procedural mechanism for impleading non-party tortfeasors for purposes of contribution and apportionment." *Id.* (citing *Pack*, 277 P.3d at 1249).

Bliss Sequoia's cross claims allege a cause of action for contribution. The Court should grant Bliss Sequoia's Motion as to its claim of contribution against H&W and Moreton because, as detailed in the proposed cross claim attached hereto as Exhibit A, Bliss Sequoia is entitled to contribution from Moreton and H&W to the extent that they share a common basis for liability with Bliss Sequoia. *See* Ex. A.

///

3. A Counterclaim for Negligent Misrepresentation Can Be Brought Under Rule 13

Under NRCP 13, a responsive pleading may include compulsory or permissive counterclaims. In addition to the counterclaims against H&W and Moreton, Bliss Sequoia also seeks to file a counterclaim against HWP for negligent misrepresentation. Bliss Sequoia has a cognizant claim against HWP. So, leave to amend should be freely granted.

The elements of claim for negligent misrepresentation under Nevada law are: (1) the defendant supplied information during the course of their business, profession, employment or any other transaction in which the defendant had a pecuniary interest, (2) the information provided was false, (3) the information must have been supplied for the guidance of the plaintiff in the plaintiff's transactions, (4) the defendant failed to exercise reasonable care or confidence in obtaining or communicating the information (5) the plaintiff justifiably relied on the information, and (6) damages. *See Bill Stremmel Motors, Inc. v. First Nat. Bank of Nevada*, 94 Nev. 131, 134 (1978).

Here, HWP's conduct meets every element of a negligent misrepresentation claim. HWP, in the course of operating Cowabunga Bay made multiple misrepresentations regarding the safety standards at the park. Most notably, HWP's communications falsely lead Bliss Sequoia to believe that the waterpark complied with all state lifeguard staffing laws, rules and regulations. Bliss Sequoia justifiably relied on these representations in procuring insurance coverage for HWP. As a result of HWP's misrepresentations, Bliss Sequoia suffered extensive damages. Beyond the damages incurred from litigating the claims by HWP and its individual owners; Bliss Sequoia suffered damage to its professional reputation and loss of business opportunity. Because all elements of the claim are present, the Court should allow Bliss Sequoia to amend the pleadings and bring a negligent misrepresentation claim against HWP.

B. The Court Should Sever the Amended Third-Party Claims Against Bliss Sequoia and Anticipated Cross- Claims and Counter-Claims.

NRCP 14(a) provides that "[a]ny party may move to strike the third-party claim, or for its severance or separate trial." N.R.C.P. 42(b) provides that "[t]he Court, in furtherance of

convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury." The Nevada Supreme Court has emphasized that district courts have broad discretion to order separate trials. *See C.S.A.A. v. District Court*, 106 Nev. 197, 199, 788 P.2d 1367, 1368 (1990).

Both NRCP 42(b) and NRCP 14 grant this Court broad discretion to sever third-party complaints to ensure that third-party and cross claim defendants are not unduly prejudiced. Such prejudice is particularly salient where, as here, the third-party plaintiff was aware of the potential third-party claim during the pendency of the main action. *See 17 Vista Fee Associates v. Teachers Ins. And Annuity Ass'n of Am.*, 226 A.D.2d 298 (S.C. 1st Dep't N.Y. 1996) (holding that severance was appropriate after third-party plaintiff tried to commence a third-party action three years after the main action and third-party plaintiff was aware of the third-party claims since the inception of the main action).

"[O]nce [] claims are severed, two separate actions exist." *Valdez v. Cox Commc'ns Las Vegas*, 130 Nev. 905, 908 (2014). As the Nevada Supreme Court explains, NRCP 41(e) specifically references actions, not claims. *See United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus. v. Manson*, 105 Nev. 816, 820 (1989). Thus, if the Court severs the ancillary actions from the underlying litigation, Bliss Sequoia, as well as the anticipated cross claimants would be afforded the full five years that should be available prior to trial. If the Gardners, as assignees of HWP, truly seek a fair trial on the merits, then severance provides a clear vehicle for doing so. Severance will allow the parties to conduct full uncondensed discovery and allow the matter to commence unburdened by the previous litigation and unburdened of any concerns pertaining to the five-year rule.

Accordingly, and given the tight turnaround that the June 8, 2020 trial date will impose on the anticipated cross-claimants, Bliss Sequoia requests that the Court sever the amended third party claims and the proposed cross claims from the original suit. While all parties to the

underlying action have purportedly settled, there still remains the individual Opheikens' third party complaint against Bliss Sequoia as well as defendants William Patrick Ray Jr.; Scott. Craig and Shane Huish; Orluff, Slade and Chet Opheikens; and Tom Welch, all of which have yet to be dismissed. Accordingly, there still remains an underlying action from which to sever the ancillary claims.

With a severance firmly in place, HWP's amended third party complaint (filed for the first time at the tail end of 2019) as well as the newly added cross claims against the newly added parties, can be brought to trial within five years of November 30, 2018, the date the Gardners' filed the Third-Party Complaint. This would give all of the parties sufficient time to conduct necessary discovery and investigate the claims against them, thereby relieving any undue prejudice that the cross-claim defendants may otherwise suffer. Moreover, the requested severance would cause no prejudice with respect to HWP's third-party claims against Bliss Sequoia because HWP knew of its claims against Bliss Sequoia since the inception of this suit but waited more than three years to implead Bliss Sequoia and assert its claims.

C. Alternatively, Bliss Sequoia has good cause for seeking a trial continuance within the existing action

1. Relevant Law

Motions to continue trial are governed by EDCR 7.30 which states, in relevant part, that "[a]ny party may, for good cause, move the court for an order continuing the day set for trial of any cause." *See* EDCR 7.30(a). Additionally, "[t]he party moving for the continuance of a trial may obtain an order shortening the time for the hearing of the motion for continuance." *See* EDCR 7.30(f).

When applying EDCR 7.30, the Nevada Supreme Court has made it clear that where good cause is shown pursuant to EDCR 7.30, it is an abuse of discretion to deny the motion to continue given the present facts. *See Castro v. Schomig*, 2008 WL 3582796 *2 (Nev. August 13, 2008) *citing to Banks v. State*, 101 Nev. 771, 710 P.2d 723 (1985). The Nevada Supreme

Court has also articulated a test to determine whether the trial court abused its discretion in such a denial. In *Zessman v. State*, 94 Nev. 28, 573 P.2d 1174 (1978), the Court stated, in part:

> The matter of continuance is traditionally within the discretion of the trial judge and not every denial of a request for additional time violates due process. *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 1L.Ed.2d 921 (1964); *Polito v. State*, 71 Nev. 135, 282 P.2d 801 (1955). Each case must turn on its own circumstances, with emphasis upon the reasons presented to the trial judge at the time the request was made. *See Nilva v. United States*, 352 U.S. 385, 77 S.Ct. 431, 1 L.Ed.2d 415 (1987). A myopic insistence upon expediency in the fact of a justifiable request for delay can make the right to defend with counsel of little value. *Chandler v. Fretag*, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954).

Zessman, 94 Nev. at 31, 573 P.2d 1174.

2. Bliss Sequoia will be substantially prejudiced if forced to go to trial on an accelerated basis

It is irrefutable that Bliss Sequoia will be substantially disadvantaged if forced to rush to trial in the span of 3 months, which haste was caused solely by the dilatory conduct of HWP. While the underlying claims were initiated against HWP in 2015, HWP inexplicably waited a full 3.5 years before bringing Bliss Sequoia in as parties. Even then, Bliss Sequoia was left in limbo while the underlying action was litigated around them. Bliss Sequoia did not know the full extent of its liability exposure until the underlying claims were fully adjudicated or resolved otherwise. Because the extent of HWP's damages against Bliss Sequoia were potentially based to the outcome of the underlying action, Bliss Sequoia could not even realistically begin to assess its litigation strategy until such time as there was finality in the underlying matter. That did not happen until all of the parties settled with the original plaintiffs, *i.e.* at the tail end of 2019. And crucially, during this period of limbo, all of the parties—including HWP—agreed to an October 2020 trial date relating to Bliss Sequoia's claims.

Over the past five years, HWP developed a nuanced and detailed knowledge of the matter, of the conducted discovery, and of the precedent of the case. Bliss Sequoia on the other hand, is expected to reach this same level of institutional knowledge in months. Doing so, while also preparing for an imminent trial is impractical and extremely prejudicial to Bliss Sequoia.

Additionally, Bliss Sequoia is all but precluded from bringing their own cross-claims because any cross claim defendant would be prejudiced by the shortened litigation schedule. Bliss Sequoia should be given the opportunity to assert its own cross claims before the eve of trial. It is extraordinarily unjust to force Bliss Sequoia to face a looming trial deadline which is caused solely by HWP's failure to timely prosecute the instant matter. Accordingly, there is more than good cause to continue the trial date.

3. Waiver of the Five Year Rule

The sole basis for the Court's prior ruling to accelerate the trial date was to avoid the harsh results of allowing the 5 years under the rule to lapse. However, forcing the matter to trial in a mere matter of months has the harsh result of unduly prejudicing Bliss Sequoia to the point of depriving them of due process. In order to balance this battle of inequities, Bliss Sequoia will agree that it will not seek dismissal based on the running of the 5-year rule. Absent this impediment, there should be no reason to not continue the trial to a more reasonable date in the future.

4. Tolling

In its Motion for Preferential Trial Setting, Plaintiff advanced an equitable tolling argument. During oral arguments, the Plaintiffs did not continue to advance this position and, instead, agreed to an earlier trial date. Accordingly, the tolling argument was not directly addressed by the Court. While Bliss Sequoia rightfully pointed out in a footnote that there is no authority in Nevada directly addressing tolling within the context of a removal and remand, Bliss Sequoia must now promote the position previously promoted by Plaintiff for equitable tolling in order to avoid the crippling effects of an unreasonably accelerated trial date.

In the event the Court determines that tolling is applicable, tolling should be extended beyond the sixty-one days originally suggested by HWP. Bliss Sequoia was brought into this matter three and half years after its inception and was forced to sit on the sidelines while the underlying litigation resolved and while the various settlements between the other parties were negotiated. Equity demands that Bliss Sequoia be given an opportunity to fully develop its

discovery and trial strategy over an extended period rather than the three-month schedule HWP now suggests.

If the Court does determine that equitable tolling should be applied here, the Court should take into consideration that Bliss Sequoia was not part of the underlying litigation for three and a half years. And then, when it was finally named a party, Bliss Sequoia was forced to wait while the parties resolved the underlying litigation. Indeed, after filing multiple motions that spanned six months, this Court bifurcated the two actions and awarded Bliss Sequoia a trial date in October 2020. In pushing pause on the litigation, Bliss Sequoia was forced to wait and see what would happen in the underlying trial to assess the extent of the damages claimed. Throughout, Bliss Sequoia continued to attend countless depositions, draft motions, and observe hearings to see what claims, if any, it would be facing in October 2020 (a date no party objected to, *including* HWP). After multiple settlement conferences and additional motions relating to good faith settlement, it was not until November 20, 2019, that Bliss Sequoia got final clarity as to the exposure it was facing—which was almost *a year* after it had been first named in the suit. Indeed, November 20, 2019, was when the Gardner Plaintiffs, as assignees of HWP's claims, filed their amended Complaint, which they were only able to do after the Court granted the various parties' motions for good faith settlement. Thus, when the Court considers tolling, it should account for all of the time that Bliss Sequoia was unable to fully litigate its claims, which includes, *at a minimum*, the five months in between the Court's bifurcation order in June of 2019 to the filing of the Gardner Plaintiffs' Amended Third Party Complaint in November 2019. It should also include the two months that Bliss Sequoia properly exercised its right to seek removal, given that any discovery was stayed during this time. Clearly, Bliss Sequoia was not able to fully and fairly litigate this action while it was tethered to the underlying suit, and this Court must reject any attempt on Plaintiff's part to fast track it.

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D. Motion to Continue Discovery

1. Relevant Law

EDCR 2.35 permits a party to seek an extension of the discovery deadlines upon a showing of good cause. *See* EDCR 2.35(a). Additionally, any motion seeking a discovery extension must include (1) A statement specifying the discovery completed; (2) A specific description of the discovery that remains to be completed (3) the reason why the discovery remaining was not completed within the time limits set by the discovery order; (4) a proposed schedule for completing all remaining discovery [and](5) the current trial date. See EDCR 2.35(b)(1-5).

2. A continuation of the discovery deadlines should be afforded, commensurate with the new trial date

Should the court be inclined to continue the trial date for all of the reasons set forth above, Bliss Sequoia respectfully requests that it also continue the current, accelerated discovery deadlines to comport with the new later trial date. So far in this matter, approximately forty-five depositions have been taken and HWP and Bliss Sequoia have exchanged written discovery requests/responses. Additionally, as of the date of filing this motion, HWP has noticed 4 depositions to occur in March, 2020 and Bliss Sequoia has noticed 1 deposition to occur in April of 2020. Bliss Sequoia has also issued 4 subpoenas deuces tecum. HWP has also submitted an expert report. Additionally, tens of thousands of documents have been produced by the various parties to this action, and it is anticipated that several thousands more will be produced in response to the issued subpoenas duces tecum.

Bliss Sequoia still needs to disclose its expert reports, issue a rebuttal report and take numerous depositions including of the individual owners of the water park (most of whom were deposed before they were brought into the litigation), take the depositions of key persons at Haas & Wilkerson and Moreton, propound written discovery on the newly added parties, take the deposition of Plaintiff's expert, review the thousands of documents anticipated to be produced in response to its subpoenas duces tecum, and follow up as needed. This discovery could not realistically be taken until now because Bliss Sequoia's liability exposure was clarified only after

the parties in the underlying matter settled and when the Gardners amended their complaint. With an accelerated trial date of June 8, 2020, this only leaves Bliss Sequoia with a total of 3-4 months in which to add parties, complete discovery and prepare for trial. This is woefully inadequate and rises to the level of a deprivation of due process in favor of the Gardners as subrogees of Hwp. Accordingly, Bliss Sequoia respectfully seeks an extension of the discovery period pursuant to the proposed schedule attached hereto as Exhibit B.

III. Conclusion

Bliss Sequoia has timely sought leave to amend its pleadings and add parties, and leave to amend should be freely granted when, as here, justice so requires. Bliss Sequoia previously sought to be severed from the underlying action because being tethered to an unrelated personal injury action would be substantially prejudicial for a litany of reasons. HWP vehemently opposed the request and insisted that Bliss Sequoia remain in the action, even though damages were uncertain and even though it cavalierly waited almost 4 years to bring Bliss Sequoia in as a party. Now, seizing on the advantages created by the continual tethering to the belatedly settled underlying action, the Gardners, as assignees of HWP, seek to force Bliss Sequoia to trial in a mere matter of months. It is unfathomable that HWP only recently amended its third party complaint and finally determined Bliss Sequoia's liability exposure at the end of 2019, and then is now capitalizing on the time crunch created by its own dilatory conduct.

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Faced with a $17M potential liability, it is imperative that Bliss Sequoia be afforded a full and fair opportunity to fully develop its defenses and to further implead other parties who would be liable to the Gardners as assignees of HWP should liability exist. The Gardners, as assignees of HWP, will not be prejudiced by this Court's granting of the severance or continuance. Indeed, it was the architect of its own circumstances and should not be able to unfairly benefit from its years of dilatory conduct.

Dated this 10th day of March, 2020.

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

Patricia Lee (8287)
Branden Kartchner (14221)
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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 11th day of March, 2020, I caused the document entitled **THIRD PARTY DEFENDANTS BLISS SEQUOIA'S AND HUGGINS INSURANCE'S: 1. MOTION TO AMEND PLEADINGSTO ADD PARTIES; 2. MOTION TO SEVER 3. ALTERNATIVELY A. MOTION TO CONTINUE TRIAL; (SECOND REQUEST) B. MOTION TO CONTINUE DISCOVERY; (SECOND REQUEST) 4. REQUEST FOR AN ORDER SHORTENING TIME** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[✓] to be electronically served through the Eighth Judicial District Court's electronic filing system pursuant to EDCR 8.02; and/or

[ ] to be hand-delivered;

to the attorneys/ parties listed below:

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Samuel R. Mirkovich, Esq.
Philip R. Erwin, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, NV 89101

Attorneys for Plaintiffs, Peter Gardner and Christian Garnder on behalf of minor child, Leland Gardner

Heather Bennett

An employee of Hutchison & Steffen, PLLC

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EXHIBIT PAGE ONLY

EXHIBIT A

HUTCHISON & STEFFEN

A PROFESSIONAL LLC

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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff HENDERSON WATER PARK, LLC dba Cowabunga Bay Water Park, Third-Party Plaintiff, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., and HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants.	CASE NO. A-15-722259-C DEPT. NO: XXX **BLISS SEQUOIA'S AND HUGGINS INSURANCE'S CROSS CLAIMS AND COUNTERCLAIMS**
BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Cross Claimants, v. HAAS &WILKERSON, INC., FRED A. MORETON & COMPANY d/b/a Moreton & Company, HENDERSON WATER PARK, LLC d/b/a Cowabunga Bay Water Park, and DOES I through X, inclusive; and ROES I through X, inclusive,	

Cross Claim Defendants.

Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc. ("Bliss Sequoia") complain against Haas & Wilkerson ("H&W"), Fred A. Moreton & Company d/b/a Moreton & Company ("Moreton"), and Henderson Water Park, LLC ("HWP") and allege:

JURISDICTIONAL ALLEGATIONS

1. Bliss Sequoia is and has been at all material times a corporation organized and existing under the laws of Oregon.

2. Huggins Insurance Services, Inc. is and has been at all material times a corporation organized and existing under the laws of Oregon.

3. H&W is and has been at all material times a corporation organized and existing under the laws of Missouri.

4. Moreton is and has been at all material times a corporation organized and existing under the laws of Utah.

5. HWP is and has been at all material times a limited liability company organized and existing under the laws of Nevada.

6. This Court has jurisdiction over the instant action pursuant to NRS 14.065. H&W knowingly and purposefully acted as the managing general agent and procured insurance coverage related to the operation of a waterpark located in Henderson, Nevada.

7. Venue is proper pursuant to NRS 13.010 and NRS 13.040.

FACTUAL BACKGROUND

Producer Agreement Between Bliss Sequoia and H&W

8. On March 10, 2009 Bliss Sequoia entered a producer agreement with H&W.

9. Under the producer agreement, H&W agreed to place risks and effect insurance coverage for Bliss Sequoia's clients.

10. Under the producer agreement, Bliss Sequoia acted as an insurance agent who would assist clients in procuring coverage.

11. Under the producer agreement, H&W acted as a wholesale broker who would place coverage with an insurance carrier for Bliss Sequoia's clients.

12. Upon information and belief, H&W operated and continues to operate in conjunction with the World Waterpark Association as a comprehensive specialized insurance program that provides expert claims and risk management services to waterparks across the United States.

HWP Sought Insurance for the Waterpark

13. Upon information and belief, in 2014 HWP sought general liability insurance for its Henderson waterpark.

14. Upon information and belief, HWP utilized the services of Moreton and Bliss Sequoia as insurance agents.

Moreton Advised HWP on Insurance Limits

15. Upon information and belief, in July 2014 Moreton conducted an inspection of HWP's Henderson waterpark and subsequently issued a report to HWP.

16. Upon information and belief, HWP asked Moreton for information when deciding on general liability coverage limits.

17. Upon information and belief, HWP obtained an opinion "from Moreton & Company to say where should [HWP's] limits be."

18. Upon information and belief, HWP "relied on [Moreton's] input as to how much is enough" insurance coverage for the waterpark.

Bliss Sequoia Relied on H&W's Specialized Waterpark Knowledge

19. HWP used Bliss Sequoia to submit its insurance application for the waterpark.

20. In or around July 2014, Lance Barnwell of Bliss Sequoia contacted Patrick Clark of H&W about placing coverage for HWP.

21. On July 29, 2014, H&W conducted an investigation of the waterpark and issued an insurance audit report.

22. In or around July 2014, Barnwell asked Clark to confirm that a $5,000,000 general liability coverage limit was sufficient for the waterpark.

23. Clark assured Barnwell that HWP's general liability coverage limits were "in the ballpark" of other similarly situated waterparks.

24. Based on Clark's assurance and H&W's specialized knowledge of the waterpark industry, Barnwell advised HWP that a $5,000,000 general liability limit was "in line with the scope and size of the park."

25. In making this statement, Bliss Sequoia relied on H&W's purported expertise and specialized knowledge of risks faced by waterparks and their insurance needs.

Bliss Sequoia Also Relied on HWP's Representations About Waterpark Safety

26. At all material times, Bliss Sequoia believed that HWP was complying with applicable safety codes and operating the waterpark in a safe manner.

27. In April 2015, HWP represented to Bliss Sequoia that the waterpark "follows the strictest of safety guidelines set forth by the City, State and Federal agencies" and that its "entire management team and staff is thoroughly trained in the proper protocol and procedure surrounding issues of guest safety."

28. Over a period of years, prior to placing coverage for the waterpark, Shane Huish and Scott Huish of HWP on multiple occasions expressed to Lance Barnwell of Bliss Sequoia that safety was a priority in how he operated his enterprises.

29. Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the scope and size of the park.

HWP's Representations About Waterpark Safety Were False

30. On May 27, 2015, Leland Gardner nearly drowned at the waterpark and sustained injuries.

31. As a result of this incident, Bliss Sequoia learned that HWP's representations about waterpark safety, on which Bliss Sequoia relied, were false.

32. After the incident, Bliss Sequoia learned that HWP was understaffing the waterpark in violation of Nevada Administrative Code lifeguard requirements.

33. While the Nevada Administrative Code required HWP to have 17 lifeguards staffing the pool that Leland Gardner almost drowned in, on the day of the incident, HWP had only 3 lifeguards staffing the pool.

HWP's Claim Against Bliss Sequoia

34. The Gardners sued HWP and subsequently entered a stipulated judgment against HWP in the amount of $49,000,000.

35. HWP alleges that, based on Bliss Sequoia's advice, it purchased insufficient general liability coverage. (Am. Third-Party Compl.) at ¶ ¶ 13, 15.

36. To the extent Bliss Sequoia faces any liability to HWP, that liability arises as a result of Moreton's negligent professional advice to HWP regarding HWP's general liability limits.

37. To the extent Bliss Sequoia faces any liability to HWP, that liability arises as a result of H&W's negligent affirmation to Bliss Sequoia regarding the adequacy of HWP's general liability limits.

38. As a result of Bliss Sequoia's reliance on the accuracy of HWP's representations regarding the waterpark's compliance with applicable safety codes, Bliss Sequoia has sustained damages.

39. As a result of the actions of HWP, H&W, and Moreton, Bliss Sequoia has been forced to incur attorneys' fees and costs to defend against HWP's suit.

FIRST CAUSE OF ACTION
Contribution
Against Moreton and H&W

40. Bliss Sequoia incorporates each and every allegation set forth in the preceding paragraphs as if they were fully set forth herein.

41. Bliss Sequoia faces potential liability arising from HWP's allegations that $5,000,000 in general liability insurance was insufficient to cover HWP.

42. If Bliss Sequoia pays a judgment or settlement to HWP in connection with this action, it is entitled to contribution from Moreton and H&W to the extent that they share a common basis for liability with Bliss Sequoia.

43. As a result of Moreton's and H&W's negligence, Bliss Sequoia has been damaged in an amount in excess of $15,000.

44. As a result of Moreton's and H&W's negligence, Bliss Sequoia has been forced to defend against HWP's claim and is entitled to its reasonable costs and attorneys' fees incurred as a result.

SECOND CAUSE OF ACTION
Negligent Misrepresentation
Against HWP

45. Bliss Sequoia incorporates each and every allegation set forth in the preceding paragraphs as if they were fully set forth herein.

46. In the course of its business of operating a waterpark, HWP supplied false information to Bliss Sequoia regarding the safety measures in place at the waterpark and its compliance with applicable safety codes.

47. The information supplied by HWP was supplied for the purpose of guiding Bliss Sequoia, in its professional role as an insurance agent, to procure adequate coverage for HWP.

48. HWP failed to exercise reasonable care or competence in communicating false information to Bliss Sequoia regarding the safety measures in place at the waterpark and its compliance with applicable safety codes.

49. Bliss Sequoia justifiably relied upon the information supplied by HWP by procuring general liability coverage in an amount that it determined to be sufficient based upon that information.

50. As a result of Bliss Sequoia's reliance upon the accuracy of the information provided by HWP, Bliss Sequoia has been damaged in an amount in excess of $15,000.

51. As a result of Bliss Sequoia's reliance upon the accuracy of the information provided by HWP, Bliss Sequoia has been forced to defend against HWP's claim and is entitled to its reasonable costs and attorneys' fees incurred as a result.

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PRAYER OF RELIEF

1. Bliss Sequoia prays for relief in the form of a judgment in an amount in excess of $15,000, which will justly compensate Bliss Sequoia for its injuries, damages, and losses including contribution or indemnity for any judgment entered against it, compensation for loss of time, loss of business opportunity, damage to Bliss Sequoia's reputation and legal fees incurred due to litigation of the instant action.

2. For pre and post judgment interest.

3. For reimbursement of attorneys' fees.

4. For costs of suit.

5. For such other and further relief the Court deems just and proper.

DATED this 10th day of March, 2020.

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

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Branden D. Kartchner (14221)
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Attorneys for Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this ____ day of March, 2020, I caused the document entitled **BLISS SEQUOIA'S AND HUGGINS INSURANCE'S CROSSCLAIMS AND COUNTERCLAIMS** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[ ] to be electronically served through the Eighth Judicial District Court's electronic filing system pursuant to NEFCR (9); and/or

[ ] to be hand-delivered;

to the attorneys/ parties listed below:

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Samuel R. Mirkovich, Esq.
Philip R. Erwin, Esq.
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EXHIBIT PAGE ONLY

EXHIBIT B

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **[PROPOSED] ORDER TO SET DISCOVERY DEADLINES**

This Court having considered Third Party Defendants' Motion to Continue Trial and Discovery, for good cause shown enters this [PROPOSED] COURT SCHEDULING ORDER AND ORDER SETTING CIVIL JURY TRIAL PRE-TRIAL AND CALANDER CALL (INSURANCE CASE). This Order may be amended or modified by the Court upon good cause shown.

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IT IS HEREBY ORDERED that the parties will comply with the following deadlines:

Private Mediation by:	**November 2021**
Initial Expert Disclosure Deadline	**June 12, 2021**
Final Date for Motions to Amend Pleadings and Add Parties	**June 12, 2021**
Rebuttal Expert Disclosure Deadline	**July 12, 2021**
Close of Discovery	**September 10, 2021**
Final Date for Dispositive Motions/Motions in Limine	**October 10, 2021**

ORDER

GOOD CAUSE SHOWN, IT IS SO ORDERED that the [PROPSED] ORDER TO SET DISCOVERY DEADLINES be entered.

DATED this _____ day of _____, 2020.

_____
DISTRICT COURT JUDGE

Respectfully Submitted by:
HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

_____
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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Third-Party Plaintiffs, vs. BLISS SEQUOIA INSURANCE & RISK ADVISORS, INC., an Oregon corporation; HUGGINS INSURANCE SERVICES, INC., an Oregon corporation, Third-Party Defendants. AND ALL RELATED CLAIMS	Case No.: A-15-722259-C Dept. No.: XXX **PLAINTIFFS' OPPOSITION TO THIRD-PARTY DEFENDANTS BLISS SEQUOIA'S AND HUGGINS INSURANCE'S (i) MOTION TO AMEND PLEADINGS TO ADD PARTIES; (ii) MOTION TO SEVER; (iii) ALTERNATIVELY, MOTION TO CONTINUE TRIAL AND DISCOVERY** Hearing Date: March 25, 2020 Hearing Time: 9:00 a.m.

Third-Party Plaintiffs Peter Gardner and Christian Gardner, individually and on behalf of their minor son, Leland Gardner ("Plaintiffs"), as the assignees of Henderson Water Park, LLC dba Cowabunga Bay Water Park ("HWP"), submit their Opposition to Third-Party Defendants Bliss Sequoia's and Huggins Insurance's (i) Motion to Amend Pleadings to Add Parties; (ii) Motion to Sever; and (iii) Alternatively, Motion to Continue Trial and Discovery. This Opposition is made and

based upon the attached memorandum of points and authorities, all exhibits attached hereto, all pleadings and papers on file herein, and any oral argument that the Court shall allow at the time of hearing.

I. INTRODUCTION

Third-Party Defendants Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc. (the "Brokers") are nothing if not persistent in their efforts to obstruct and delay trial in this proceeding. Here, in what can only be described as an "everything but the kitchen sink" approach, the Brokers seek leave to amend to assert cross-claims for contribution against two other insurance brokerages, Moreton & Company ("Moreton") and Haas & Wilkerson ("H&W"). The Brokers likewise seek leave to assert a counterclaim against HWP for negligent mispresentation. Using these new claims and parties as a platform, the Brokers then request that the Court sever the various third-party complaints from the original action brought by Plaintiffs. Lastly, if the Court denies the foregoing relief, the Brokers demand that discovery and trial be continued for an astounding 18 months. Each of the Brokers' motions are legally meritless and should be denied.

To begin, although the Brokers' motion is timely under the scheduling order, the Court should deny the Brokers leave to amend to plead cross-claims for contribution based on their undue delay and bad faith. The Brokers could have brought cross-claims for contribution against Moreton and H&W at any time since the Brokers were first named in this litigation yet chose to wait until there were less than three months before trial. Moreover, the Brokers are only raising these proposed cross-claims now because they serve a potential vehicle to delay trial, which has been their top priority since HWP assigned its claims to Plaintiffs in September 2019. The Court should not countenance such gamesmanship particularly when the Brokers are not required to bring contribution claims in this action and can instead file a separate lawsuit against Moreton and H&W that is not subject to the same five-year rule.

While the same arguments of undue delay and bad faith apply equally to the Brokers' proposed counterclaim against HWP, the Brokers' negligent misrepresentation claim is fatally

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defective and, therefore, subject to dismissal for futility. Notwithstanding that the Brokers' counterclaim is not pleaded with particularity as required by NRCP 9(b), the purported "misrepresentations" attributed to HWP cannot form the basis of cognizable claim for negligent misrepresentation as a matter of law. Accordingly, the Court should deny the Brokers' request for leave to amend in its entirety.

Next, as His Honor recognized during the hearing on Plaintiffs' motion for preferential trial setting, severance is not a viable mechanism in this case. Plaintiffs' third-party complaint is the sole remaining piece of active litigation and there is no other case from which it can be severed. Additionally, the Court cannot grant severance and create a new "action" simply because the Brokers wish to avoid the time constraints imposed by the five-year rule.

Lastly, the Brokers' request for a continuance of trial and discovery is a thinly disguised attempt to reargue motion for preferential trial setting. The Brokers plainly stated that there was "no basis for tolling" the five-year rule under Nevada law, which resulted in the Court scheduling trial to commence on June 8, 2020.[1] The Brokers cannot reverse course and advance a diametrically opposed position because it serves their interests of obtaining a continuance. The Brokers have repeatedly changed positions depending on which way the wind blows and Plaintiffs have no interest in playing games on an issue as serious as the five-year rule. This case should go to trial on the date set by the Court in advance of the expiration of the original five-year rule deadline.

II. ARGUMENT

A. The Court Should Deny The Brokers Leave To Amend Based On Undue Delay, Bad Faith And Futility.

1. Applicable Standards.

The Brokers' motion is premised on NRCP 15(a) and its general instruction that "the Court should freely grant leave when justice so requires." *See* Motion at 7:2-3. This does not mean,

[1] *See* Bliss Sequoia's Opp. to Mot. for Preferential Trial Setting at 4 n. 3 (on file).

however, that the "trial judge may not, in a proper case, deny a motion to amend. If that were the intent, leave of court would not be required." *See Stephens v. Southern Nevada Music Co.*, 89 Nev. 104, 105, 507 P.2d 138, 139 (1973). Indeed, the Nevada Supreme Court has routinely denied motions for leave to amend a pleading where there has been undue delay, bad faith, or dilatory motives on behalf of the movant. *Id.* at 105-06, 507 P.2d at 139 (denying leave to amend complaint after declaration of mistrial even though subsequent trial was not held until a year later); *see also Kantor v. Kantor*, 116 Nev. 886, 8 P.3d 825 (2000) (denying leave to amend answer where party waited until 11 months after complaint was filed before filing motion); *Ennes v. Mori*, 80 Nev. 237, 391 P.2d 737 (1964) (denying leave to amend answer to assert affirmative defense of fraud despite purported lack of prejudice to opposing party). Prejudice to an opposing party is another basis upon which to deny leave to amend. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 284, 357 P.3d 966, 970 (2015) (citing *Stephens*).

Additionally, "leave to amend, even if timely sought, need not be granted if the proposed amendment would be 'futile.'" *Id.* (citing *Allum v. Valley Bank of Nevada*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993)). "A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim, such as one which would not survive a motion to dismiss under NRCP 12(b)(5)." *Id.* (citing *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993)). Thus, the Court should deny leave to amend if "it appears to a certainty that the [Brokers are] not entitled to relief under any set of facts which could be proved to support [their] claim." *Hale v. Burkhardt*, 104 Nev. 632, 636, 764 P.2d 866, 868 (1988).

2. There Is No Legitimate Reason To Allow The Brokers To Bring Unnecessary Cross-Claims Against Moreton And H&W At This Late Stage.

The Brokers' belated attempt to implead Moreton and H&W is a transparent ploy to postpone trial. Plaintiffs, of course, acknowledge that a defendant is generally permitted to assert contribution claims against a third party in an original action prior to the entry of judgment. But that is by no means

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a requirement. To the contrary, NRS 17.285(1) expressly provides that "[w]hether or not judgment has been entered in an action against two or more tortfeasors for the same injury or wrongful death, contribution may be enforced by separate action." Thus, nothing prevents the Brokers from bringing a separate action against Moreton and H&W for contribution either before or after judgment is entered in this case.

With that in mind, there is no doubt that the Brokers engaged in undue delay and bad faith by waiting to bring their purported contribution claims when the facts and circumstances underlying such claims were known to them all along. HWP filed its third-party complaint against the Brokers on November 28, 2018. The Brokers answered HWP's third-party complaint on March 29, 2019 yet failed to assert cross-claims for contribution against Moreton or H&W. Following the assignment of HWP's claims, Plaintiffs filed their amended third-party complaint on November 20, 2019 and narrowed the claims and allegations against the Brokers. The Brokers answered Plaintiffs' amended third-party complaint on December 6, 2019, but again neglected to assert cross-claims against Moreton and H&W.

The Brokers' failure to bring their contribution claims at an earlier date is inexcusable. The Brokers plainly acknowledge that they were aware of the facts supporting their cross-claim against H&W in July 2014.[2] As such, the Brokers could have pleaded their cross-claim against H&W when they answered HWP's original complaint for the first time approximately one year ago. As to Moreton, the Brokers' counsel attended the deposition of Moreton's NRCP 30(b)(6) designees on April 8, 2019 and, in fact, questioned the witnesses about Moreton's role in HWP's operations including whether Moreton made recommendations to HWP concerning the adequacy of insurance.[3] Nevertheless, the Brokers waited more than 11 months to assert a contribution claim against Moreton.

[2] *See* Mot., Ex. A at ¶¶ 19-25.

[3] *See* Exhibit 1 (Dep. Tr. of Moreton NRCP 30(b)(6) Designees) at Cox 25:15-20, Walter 103:10-109:21, Norman 89:4-91:5.

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In light of these facts, the Brokers' mere compliance with the deadline to amend pleadings and add parties is not the panacea they would have the Court believe. *See AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.2d 946 (9th Cir. 2006). In *AmerisourceBergen* the party seeking leave, like the Brokers here, argued that its motion was timely because it had complied with the court-ordered deadline for filing motions to amend pleadings. *Id.* at 952-53. The Ninth Circuit rejected the notion that "the court must accept all 'timely' motions filed before the court-appointed deadline" and agreed with the district court that the effect of filing a motion to amend prior to court ordered deadlines is simply "that Rule 15(a) provides the standard of review, not the 'good cause' standard articulated in Rule 16." *Id.* at 952 and n.7.[4]

With respect to the the interplay between timeliness under the scheduling order and undue delay, the *AmerisourceBergen* court instructed as follows:

> In assessing timeliness, we do not merely ask whether a motion was filed within the period of time allotted by the district court in a Rule 16 scheduling order. Rather, in evaluating undue delay, we also inquire 'whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading.'

Id. at 953 (recognizing previous holding that an 8-month delay between the time of obtaining a relevant fact and seeking leave to amend is unreasonable) (quotations omitted). Because AmerisourceBergen had waited 15 months after discovery of the relevant information upon which its amended pleading was based, the Ninth Circuit upheld the district court's denial of leave to amend even though 8 months were left in the discovery period. *Id.*

Countless other courts are in accord. *See, e.g., Lorenz v. CSX Corporation*, 1 F.3d 1406, 1414 (3d Cir. 1993) (affirming denial of leave where most facts were available to plaintiff prior to filing original complaint and all facts were available by time of prior amendments thereto); *Matter of*

[4] The Nevada Court of Appeals addressed the relationship between NRCP 15(a) and NRCP 16(b) and reached a similar result. *See Nutton*, 357 P.3d at 972 ("Even where good cause has been shown under NRCP 16(b), the district court must still independently determine whether the amendment should be permitted under NRCP 15(a).").

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Southmark Corp., 88 F.3d 311, 315-16 (5th Cir. 1996) (affirming denial of leave motion even though it was not made on the "eve of trial" where party sought to add facts and claims it knew about prior to original complaint, but waited 13 months after original complaint was filed); *Johnson v. Hewlett-Packard Company*, 546 Fed. Appx. 613, 614 (9th Cir. 2013) (affirming denial of motion for leave where party knew or should have known original complaint was narrower than proposed amendment but waited 8 months before seeking leave and failed to cure deficiencies in three prior amendments); *Chodos v. West Publishing Co.*, 292 F.2d 992, 1003 (9th Cir. 2002) (affirming denial of leave to amend where "new" facts had been available to movant "even before his first amendment to complaint.").

The Brokers' failure to raise their cross-claims against Moreton and H&W for at least 11 months undoubtedly constitutes undue delay sufficient to deny leave to amend. Additionally, the Brokers' "[u]nexplained or unwarranted delay can, in itself, be evidence of bad faith sufficient to justify denial of leave to amend." *See McClellan v. Kern County Sheriff's Office*, 2015 WL 4368454, at *2 (E.D. Cal. July 14, 2015) *citing Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000) ("late amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action"). Seeking "leave to amend solely to gain a tactical advantage" is another example of the type of bad faith that warrants denial of a motion for leave. *See Oneida Indian Nation of New York State v. City of Oneida*, N.Y., 199 F.R.D. 61, 79-87 (N.D.N.Y. 2000)

Here, the Brokers do not even attempt to hide their motives for seeking leave to amend as their motion is plainly designed to delay trial. As stated previously, there was no need to assert cross-claims against Moreton and H&W in this case, but the Brokers did so anyway in the hopes the Court will relieve the pressure of an impending trial date to avoid prejudicing new parties to the litigation. This is the epitome of seeking leave to amend to gain a tactical advantage. Because the Brokers engaged in undue

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delay and bad faith, the Court should deny leave to amend under NRCP 15(a) especially where, as here, the Brokers can simply re-file their claims against Moreton and H&W in a separate action.

3. The Brokers' Negligent Misrepresentation Claim Against HWP Is Futile.

In order to plead a viable claim for negligent misrepresentation, the Brokers must allege that (i) HWP, in the course of an action in which it had a pecuniary interest, failed to exercise reasonable care or competence in obtaining or communicating information to the Brokers; (ii) the Brokers' justifiably relied on this information; and (iii) the Brokers suffered damages as a result. *See Barmettler v. Reno Air, Inc.* 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998). "In Nevada, negligent misrepresentation and fraudulent misrepresentation both require that the defendant supply 'false information' or make a 'false misrepresentation.'" *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 810, 335 P.3d 190, 197 (2014).

Because negligent misrepresentation is a fraud-based claim, the Brokers are required to plead their cause of action against HWP with particularity under NRCP 9(b)—*i.e.* the Brokers must "state precisely the time, place and nature of the misleading statements, misrepresentations and specific acts of fraud." *Weingartner v. Chase Home Fin.* 702 F.Supp.2d 1276, 1291 (D. Nev. 2010) (dismissing negligent misrepresentation claim for failure to plead with particularity where "Plaintiffs [made] no claims as to which Defendants made which particular fraudulent or negligent statements at what times or what was fraudulent or negligent about them."); *see also Pacchiega v. Fed. Home Loan Mortg. Corp.*, 2013 WL 3367576, at *3 (D. Nev. July 5, 2013) (dismissing negligent misrepresentation claim for failure to plead with particularity under the federal counterpart of NRCP 9(b)); *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc.*, 460 F.Supp.2d 1246, 1262 (2006) (same).

Here, the Brokers identify two purported "misrepresentations" by HWP in their counterclaim. First, the Brokers allege that "[i]n April 2015, HWP represented to Bliss Sequoia that the waterpark 'follows the strictest of safety guidelines set forth by the City, State and Federal agencies' and that its 'entire management team and staff is thoroughly trained in the proper protocol and procedure

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surrounding issues of guest safety.'"[5] Second, the Brokers allege that "[o]ver a period of years, prior to placing coverage for the waterpark, Shane Huish ("Shane") and Scott Huish ("Scott") of HWP on multiple occasions expressed to Lance Barnwell of Bliss Sequoia that safety was a priority in how he [sic] operated his enterprises."[6] As to justifiable reliance, the Brokers allege that Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and scope of the park" in July 2014.[7] Plaintiff will address whether each "misrepresentation" is actionable below.

a. The Brokers could not have justifiably relied on HWP's alleged statements in April 2015 concerning legal compliance and safety guidelines at Cowabunga Bay.

While the first "misrepresentation" alleged by the Brokers is arguably pleaded with particularity, HWP's statements in April 2015 are incapable of forming the basis of a negligent misrepresentation claim. Here, Lance Barnwell provided his "professional opinion [ ] that the limits of coverage are in line with the scope and size of the park" and informed HWP that Cowabunga Bay was "adequately insured" in ***July 2014***—*i.e.* approximately 9 months ***before*** the alleged statements concerning legal compliance and safety guidelines referenced in the Brokers' proposed counterclaim.[8] Thus, the Brokers did not—and, in fact, could not—rely on HWP's purported statements made in April 2015 when Lance Barnwell provided the "professional opinion" in July 2014 on which Plaintiffs' professional negligence claims are based. *See Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975) (the element of justifiable reliance requires a "causal connection" in that the misrepresentation must play "a material and substantial part in leading the plaintiff to adopt his particular course of conduct."). Thus, the Brokers' negligent

[5] *See* Mot., Ex. A at ¶ 27.

[6] *See* Mot., Ex. A at ¶ 28.

[7] *See* Mot., Ex. A at ¶¶ 29, 48-49.

[8] Amended Third-Party Complaint at ¶ 12 (on file).

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misrepresentation claim is futile to the extent it is based on statements that postdate the July 2014 "professional opinion" by Lance Barnwell.

b. Statements that safety is a "priority" cannot form the basis of a negligent misrepresentation claim as a matter of law.

At the outset, the Brokers' proposed counterclaim is clearly not pleaded with particularity under NRCP 9(b) as it relates to the alleged statements about safety made by Scott and Shane. The counterclaim does not identify when Scott and Shane made these alleged statements nor do the Brokers allege whether these representations about safety being a "priority" were made in connection with insurance coverage at Cowabunga Bay.[9] Notably, the counterclaim seems to allege that the statements attributed to Scott and Shane concerned "enterprises" associated with the Huishs' other businesses. Thus, even if these alleged statements could support a viable negligence misrepresentation claim—and they cannot—the Brokers' counterclaim would be subject to dismissal for failure to comply with NRCP 9(b).

The Brokers, however, are not entitled to replead their deficient negligent misrepresentation claim as any statement to the effect that safety is "priority" is not actionable. It is well settled that a negligent (or fraudulent) misrepresentation claim cannot be premised on "generalized, vague and unspecific assertions" like those attributed to Scott and Shane. *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1015 (9th Cir. 2003) (dismissing negligent misrepresentation claim based on general statements describing the "high priority" placed on product development by the defendant); *see also Cooke v. Allstate Mgmt. Corp.*m, 741 F.Supp. 1205, 1215-16 (D. S.C. 1990) (dismissing fraud claim based on representations concerning the "safety" of apartment complex because such statements are "opinion rather than fact" and "[s]afety is a vague term that would not be susceptible of exact

[9] Because the proposed counterclaim likewise lumps Scott and Shane together without differentiating who purportedly said what and when, it engages in impermissible group pleading. *See*, *e.g.*, *Hendi v. Nev. ex rel. Private Investigators Licensing Bd.*, 2017 WL 6270104, at * 3 (D. Nev. Dec. 7, 2017) ("Courts consistently conclude that undifferentiated pleading against multiple defendants is improper.") (quotation omitted).

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knowledge"); *In re Yum! Brands, Inc. Sec. Litig.*, 73 F.Supp.3d 846, 864-65 (W.D. Ky. 2014) ("[T]he objective truth or falsity of Defendants' statements concerning the quality of Yum!'s food safety program cannot be determined" and "[a]ssessing the veracity of those terms can only be characterized as a matter of opinion").[10]

Here, any alleged representation by Scott Huish and Shane Huish that safety is a "priority" in how they operate their business is a vague, generalized and subjective opinion rather than a definitive assertion of ascertainable fact. In other words, the alleged misrepresentations by the Huishs about how they prioritize "safety" cannot be proven true or false by any objective standards. Thus, the Court should find that the Brokers' negligent misrepresentation claim is fatally defective and, therefore, futile as it would not survive a motion to dismiss under NRCP 12(b)(5).

B. Severance Is Not An Option In This Case.

The Brokers' request for severance is a straightforward attempt to circumvent application of the five-year rule. The problem is that there is no pending case from which to sever Plaintiffs' amended third-party complaint. The original lawsuit filed by Plaintiffs against HWP and the various other defendants has been resolved; the only claims that are going to trial in this action are the professional negligence claims assigned to Plaintiffs by HWP.[11] As the Court aptly stated during the hearing on

[10] *See also Anderson v. Atlanta Comm. for Olympic Games, Inc.*, 584 S.E.2d 16, 21 (Ga. Ct. App. 2003) (defendant's representation that Atlanta would be "the safest place on the planet" during the Olympics is a mere expression of opinion and cannot form the basis of a negligent misrepresentation claim); *Repucci v. Lake Champagne Campground, Inc.*, 251 F.Supp.2d 1235 (D. Vt. 2002) (dismissing negligent misrepresentation claim because campground's statement that it was "well-maintained" was opinion, not fact).

[11] The Brokers try to use the ancillary third-party complaint filed by the Opheikens Defendants as a platform for severance. The Opheikens Defendants, however, clearly abandoned any remaining third-party claims following the settlement of Plaintiffs' original complaint and, in fact, informed the Brokers of their intention to voluntarily dismiss the same on March 17, 2020.

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Plaintiffs' motion for preferential trial setting, "there's nothing to sever anymore because the other case is gone."[12]

C. Plaintiffs' Amended Third-Party Complaint Should Proceed To Trial In June 2020 As Ordered By The Court.

The Brokers ask the Court to vacate the June 8, 2020 trial date and extend discovery for ***18 months*** until September 2021. In doing so, the Brokers essentially rehash their arguments in opposition to Plaintiffs' motion for preferential trial setting, *i.e.*, that HWP waited too long to file its claims against the Brokers, that the Brokers are prejudiced, and that discovery cannot be completed in a timely manner. And, after opposing tolling and asking the Court to dismiss Plaintiffs' claim rather than grant a preferential trial setting, the Brokers now urge the Court to toll the five-year rule for some indeterminate amount of time.[13]

The Court previously denied the Brokers' arguments and scheduled trial to commence on June 8, 2020. There is no reason to reconsider that ruling here. While the Brokers now claim that equitable tolling is appropriate, they repeatedly informed the Court that there is "no basis for tolling" the five-year rule under Nevada law.[14] The Brokers' doubletalk is hardly reassuring. Simply put, Plaintiffs must bring this action to trial before the five-year rule expires to avoid potential appellate issues that may arise when the Brokers inevitably change their position yet again.

Additionally, the Brokers' complaints about the time crunch in discovery created by the preferential trial setting are overblown. This is a narrow case and the majority of the discovery has already been completed. The parties have exchanged and responded to written discovery including the production of all relevant documents. Plaintiffs have conducted the depositions of the two primary

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[12] Exhibit 2 (2/19/20 Hr'g Tr.) at 13:11-16.

[13] The Brokers also represent that they will not seek dismissal of Plaintiffs' claims based on the five-year rule. Respectfully, the Brokers' commitment not to seek dismissal is, by this point, a hollow gesture.

[14] *See* Bliss Sequoia's Opp. to Mot. for Preferential Trial Setting at 4 n. 3 (on file); Ex. 2 at 8:11-24.

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witnesses for the Brokers (Lance Barnwell and Molly Morris), and the Brokers took the depositions of the two primary witnesses for HWP (Slade Opheikens and Scott Huish). The Brokers have likewise noticed the depositions of Shane Huish and Ned Leonard from Moreton in the coming weeks.[15] Additionally, HWP previously disclosed an expert witness on May 15, 2019 such that the Brokers have had 10 months to identify initial and rebuttal experts if they had so desired. Given the minimal amount of remaining tasks, the Brokers' request for 18 additional months of discovery is patently absurd.

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny Third Party Defendants Bliss Sequoia's and Huggins Insurance's (i) Motion to Amend Pleadings to Add Parties; (ii) Motion to Sever; and (iii) Alternatively, Motion to Continue Trial and Discovery in its entirety.

DATED this 18th day of March, 2020.

CAMPBELL & WILLIAMS

By /s/ ***Philip R. Erwin***
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[15] Again, the Brokers previously deposed Moreton's NRCP 30(b)(6) designees in the underlying litigation. Moreover, although the Brokers claim that they need to conduct the depositions of other individuals affiliated with HWP, the Brokers have not taken any steps to do so since discovery re-opened following remand.

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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 18th day of March, 2020 I caused the foregoing document entitled **Third Party Defendants Bliss Sequoia's and Huggins Insurance's (i) Motion to Amend Pleadings to Add Parties; (ii) Motion to Sever; and (iii) Alternatively, Motion to Continue Trial and Discovery** 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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EXHIBIT 1

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, Plaintiffs, vs. HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, a Nevada limited liability company; WEST COAST WATER PARKS, LLC, a Nevada limited liability company; DOUBLE OTT WATER HOLDINGS, LLC, a Utah limited liability company; ORLUFF OPHEIKENS, an individual; SLADE OPHEIKENS, an individual; CHET OPHEIKENS, an individual; SHANE HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an individual; R&O CONSTRUCTION COMPANY, INC., a Utah corporation; DOES I through X, inclusive; ROE Corporations I through X, inclusive, and ROE Limited Liability Company I through X, inclusive, Defendants. ---------- AND ALL RELATED CLAIMS	Videotaped telephone 30(b)(6) deposition of Moreton & Company by: CAROLYN COX Case No.: A-15-722259-C Dept. No.: XXX

April 8, 2019 * 1:37 p.m.

Location: Office of Moreton & Company
101 South 200 East, Suite 300
Salt Lake City, Utah 84111

Reporter: Kelly Fine-Jensen, RPR

Videographer: Ryan Reverman, CLVS

we also have the affidavit for this e-mail as well.
A. I -- believe me, I plan to do that. I'm -- I'm sure I can pull it up because it's post-2015.
Q. Uh-huh (affirmative).
A. Again, I just did not -- I used -- if he'd used the term "Cowabunga," my search would have pulled it up.
MR. MIRKOVICH: Okay. I will pass the witness.
MR. GRIMMER: I don't have any questions.
MR. PAYNE: I have no questions.
MR. KARTCHNER: Just one quick follow up.

EXAMINATION

BY MR. KARTCHNER:
Q. You say that you searched during the relevant years. Would that have encompassed 2014?
A. Yes.
MR. KARTCHNER: No further questions.
MS. PORTER: No questions.
MR. MIRKOVICH: That's it.
THE VIDEOGRAPHER: This marks the conclusion of the deposition.
Going off the record.

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Kelly Fine-Jensen, Registered Professional Reporter, do hereby certify:

That prior to being examined, the witness, CAROLYN COX, was by me duly sworn to tell the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in stenotype on April 8, 2019, at the place therein named, and was thereafter transcribed and that a true and correct transcription of said testimony is set forth in the preceding pages.

I further certify that a reading copy was sent to Ms. Cox for the witness to read and sign and then return to me for filing with Mr. Mirkovich.

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND this 22nd day of April, 2019.

Kelly Fine-Jensen

Kelly Fine-Jensen, RPR

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, Plaintiffs, vs. HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, a Nevada limited liability company; WEST COAST WATER PARKS, LLC, a Nevada limited liability company; DOUBLE OTT WATER HOLDINGS, LLC, a Utah limited liability company; ORLUFF OPHEIKENS, an individual; SLADE OPHEIKENS, an individual; CHET OPHEIKENS, an individual; SHANE HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an individual; R&O CONSTRUCTION COMPANY, INC., a Utah corporation; DOES I through X, inclusive; ROE Corporations I through X, inclusive, and ROE Limited Liability Company I through X, inclusive, Defendants. ---------- AND ALL RELATED CLAIMS	Videotaped telephone 30(b)(6) deposition of Moreton & Company by: PHILIP SCOTT WALTER and Deposition of: PHILIP SCOTT WALTER Case No.: A-15-722259-C Dept. No.: XXX

April 8, 2019 * 11:21 a.m.

Location: Office of Moreton & Company
101 South 200 East, Suite 300
Salt Lake City, Utah 84111

Reporter: Kelly Fine-Jensen, RPR

Videographer: Ryan Reverman, CLVS

don't recall this.

MR. MIRKOVICH: All right. I'll probably have some follow-up questions. But I'll go ahead and pass the witness now.

MR. GRIMMER: I don't have any questions for you.

MR. PAYNE: I have no questions.

EXAMINATION

BY MR. KARTCHNER:

Q. I introduced myself off the record. My name is Branden Kartchner. And I represent Bliss Sequoia and Huggins Insurance.

I have a few follow-up questions for you.

A. I -- I don't -- I don't even know who that is.

Q. That'll be one of my questions.

A. Oh, okay. Sorry.

Q. So you're not familiar with Bliss Sequoia Insurance?

A. No.

Q. Are you familiar with Huggins Insurance Services?

A. No.

Q. Are you familiar with Haas & Wilkerson?

A. No.
Q. Do you know what the amount of insurance coverage on any of Cowabunga Bay's insurance policies was in 2015?
A. No.
Q. Do you know which insurance company actually insured Cowabunga Bay in 2015?
A. No.
Q. Do you know the insurance broker that procured any policy that insured Cowabunga Bay in 2015?
A. I think over the last year or two, I think I might have heard the name K&K. K&K, I believe, is an insurance brokerage firm out of like Kansas City. But that's all I recall.
Q. And is it --
A. I don't know who the carrier is.
Q. And it's -- and it's your understanding that K&K insured Cowabunga Bay in some capacity in 2015?
A. I -- I assume so. Yes.
Q. Did Cowabunga Bay ever ask Moreton to do any assessment regarding the sufficiency of insurance coverage at Cowabunga Bay at any point in time?
A. No.

Q. Did Slade ask Moreton to do any assessment regarding the sufficiency of insurance coverage at Cowabunga Bay for 2015?

A. Possibly on this May of 2016 date. But I am not aware of anything other than that.

Q. So other than this May of 2016 date, you don't have any knowledge that any other petition regarding the sufficiency of insurance coverage was ever made by Slade to Moreton?

A. Not that I recall.

Q. So to put it another way, it's possible that prior to May of 2016 Slade asked Moreton to do an assessment of the sufficiency of insurance coverage at Cowabunga Bay in 2015?

A. That could be possible. But I'm not aware.

Q. So along that line of questioning, other than Ned Leonard's e-mail here in May of 2016, do you know if he himself did any sort of site inspection at Cowabunga Bay?

A. I know he -- I did -- I know he did not do a site inspection.

Q. Do you know if there are any other e-mails that he sent prior to May of 2016 regarding the sufficiency of -- of insurance coverage?

A. No.
Q. There aren't or you are not aware of?
A. I'm not aware.
Q. To your knowledge, has anyone at Moreton ever represented to Cowabunga Bay that its insurance coverage was sufficient at any point in time?
A. No.
Q. So in relation to Mr. Norman's site inspection -- is it fair to call it a "site inspection"?
A. Yes.
Q. It was his mandate to assess two water slides?
A. I thought it was one water slide.
Q. Anything else?
A. Not that I recall. No.
Q. And after his report was transmitted to Slade, you didn't have any other follow-up work that you made in relation to that project?
A. No.
Q. Has Slade ever tried to save on insurance premium costs in your interaction with him?
A. Yes.
Q. Tell me more about that.
A. That's -- happens with 100 percent of our

clients as they try to save money on their insurance.

Q. And do you recall any specific projects he asked you to help him save money on in relation to insurance premiums?

A. No.

Q. Do you know if he made any efforts to save costs on insurance premiums in relation to Cowabunga Bay?

A. No. No. Totally not aware.

Q. So if I understood your testimony correctly, you have no specific recollection of a specific project that Slade tried to save money on?

A. Oh, I'm sure there have been projects where we would give a quote for a builder's risk insurance and he would say, "Hey, can you guys sharpen your pencil a little bit?" But all of -- all of those requests would be -- I mean, none of them would have anything to do with Cowabunga Bay because we never wrote the insurance for Cowabunga Bay.

Q. And in order to save costs, did he ever request that you lower the amount of coverage?

A. No. No. It was always, "Hey, is there a way you can get the underwriter to lower the rate a little bit?"

Q. And were you ever successful in any

cost-saving ventures?

A. Sure. That's our job.

Q. Do you know when Mr. Leonard started work here at Moreton?

A. I believe it's 15 to 20 years ago.

Q. And do you know in what capacity he's worked since starting here at Moreton?

A. I believe he's always been in risk management and assisting producers, as we discussed earlier. I think that position has always been the same for him.

Q. And in that position, does he ever provide opinions as to the sufficiency of insurance coverage?

A. He'll -- he'll offer his thoughts about here's a range to the customer. And then, ultimately, the customer is the one that decides how much insurance they want to buy.

Q. So in looking at the May 9, 2016 exhibit, I believe it was marked as 142, is it fair to characterize this e-mail that Ned sent to Slade as approving or at least representing that $5 million was a sufficient amount of coverage?

MS. PORTER: Object to form.

THE WITNESS: Do I answer that? I don't know.

MS. COX: Yes.
THE WITNESS: Okay. Thank you.
Could you please restate that question? I'm sorry.
MR. KARTCHNER: Could you read it back?
(Record read as follows:
"So in looking at the May 9th 2016 exhibit, I believe we marked the exhibit as 142, is it fair to characterize this e-mail Ned sent to Slade as approving or at least representing that $5 million was sufficient -- was a sufficient amount of coverage?")
THE WITNESS: No. This would be providing information to Slade so that he can make that determination on his own.
MR. KARTCHNER: Very good. I don't have any other questions.
THE WITNESS: Okay.
MS. PORTER: I have no questions.
MR. MIRKOVICH: I have a little follow up.
THE WITNESS: Okay.

FURTHER EXAMINATION

BY MR. MIRKOVICH:

Q. Mr. Walter, in any of your meetings,

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Kelly Fine-Jensen, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

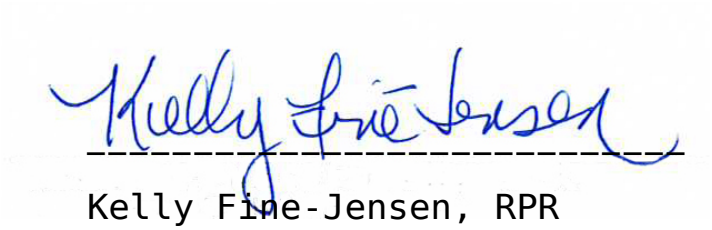
That prior to being examined, the witness, PHILIP SCOTT WALTER, was by me duly sworn to tell the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in stenotype on April 8, 2019, at the place therein named, and was thereafter transcribed and that a true and correct transcription of said testimony is set forth in the preceding pages.

I further certify that a reading copy was sent to Ms. Cox for the witness to read and sign and then return to me for filing with Mr. Mirkovich.

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND this 24th day of April, 2019.



Kelly Fine-Jensen, RPR

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, Plaintiffs, vs. HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, a Nevada limited liability company; WEST COAST WATER PARKS, LLC, a Nevada limited liability company; DOUBLE OTT WATER HOLDINGS, LLC, a Utah limited liability company; ORLUFF OPHEIKENS, an individual; SLADE OPHEIKENS, an individual; CHET OPHEIKENS, an individual; SHANE HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an individual; R&O CONSTRUCTION COMPANY, INC., a Utah corporation; DOES I through X, inclusive; ROE Corporations I through X, inclusive, and ROE Limited Liability Company I through X, inclusive, Defendants. ---------- AND ALL RELATED CLAIMS	Videotaped telephone 30(b)(6) deposition of Moreton & Company by: RUSSELL SCOTT NORMAN and Deposition of: RUSSELL SCOTT NORMAN Case No.: A-15-722259-C Dept. No.: XXX

April 8, 2019 * 9:05 a.m.

Location: Office of Moreton & Company
101 South 200 East, Suite 300
Salt Lake City, Utah 84111

Reporter: Kelly Fine-Jensen, RPR

Videographer: Ryan Reverman, CLVS

MR. KARTCHNER: I have a couple.
MR. PAYNE: I have no questions.

EXAMINATION

BY MR. KARTCHNER:

Q. Mr. Norman, my name is Branden Kartchner. I represent Bliss Sequoia and Huggins Insurance Services.

Are you familiar with Bliss Sequoia Insurance?

A. No.

Q. Are you familiar with Huggins Insurance Services?

A. No.

Q. Are you familiar with Haas & Wilkerson?

A. No.

Q. Now, you testified before that in assessing the water park, you were given the specific assignment of assessing two particular slides; correct?

A. Yes.

Q. And in addition to that, you did a general observation of the park; right?

A. Now, let's -- let's back up. I was tasked with observing the enforcement of the rules on those

two slides.

Q. Okay. And in addition to assessing the enforcement of the rules on the respective slides, you did a general observation as well; correct?

A. Yes.

Q. And those two mandates were given to you by Phil Walter --

A. Yes.

Q. -- correct? Was there anything else that he directed you to do other than those two directives?

A. No.

Q. And what did you take it to mean when he asked you to do general observations?

A. What did I think about the park as a member of the public.

Q. And in relation to deficiency of lifeguard staffing, that was something that you never were tasked to do, in your opinion?

A. That's correct.

Q. And if I understood your previous testimony, you have no role in determining the sufficiency of insurance coverage as it relates to Cowabunga Bay?

A. That's correct.

Q. And do you know who does?
A. No.
MR. KARTCHNER: I don't have any other questions.
MS. PORTER: I have just a few.

EXAMINATION

BY MS. PORTER:
Q. Mr. Norman, my name is Karen Porter. And I represent R&O Construction and also the Opheikens in this particular lawsuit.
When you were tasked with going to Cowabunga Bay to inspect the two slides in relation to the engineering changes, do you know who constructed those two slides?
A. I do not.
Q. Were you told what the engineering changes were that occurred that caused the need for you to perform this inspection?
A. It was related to their angle of drop or something related to that. But I don't remember the details. There was -- there may have been more discussion about that, but I -- I just don't remember.
Q. Do you recall whether there were any

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Kelly Fine-Jensen, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

That prior to being examined, the witness, RUSSELL SCOTT NORMAN, was by me duly sworn to tell the truth, the whole truth, and nothing but the truth;

That said deposition was taken down by me in stenotype on April 8, 2019, at the place therein named, and was thereafter transcribed and that a true and correct transcription of said testimony is set forth in the preceding pages.

I further certify that a reading copy was sent to Ms. Cox for the witness to read and sign and then return to me for filing with Mr. Mirkovich.

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND this 22nd day of April, 2019.

Kelly Fine-Jensen, RPR

EXHIBIT 2

Electronically Filed
3/5/2020 9:37 AM
Steven D. Grierson
CLERK OF THE COURT

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER, ET AL., Plaintiffs, vs. HENDERSON WATER PARK, LLC, ET AL., Defendants.	CASE#: A-15-722259-C DEPT. XXX

BEFORE THE HONORABLE JERRY A. WIESE
DISTRICT COURT JUDGE
WEDNESDAY, FEBRUARY 19, 2020

RECORDER'S TRANSCRIPT OF PENDING MOTION

APPEARANCES:

For the Plaintiffs:	PHILIP R. ERWIN, ESQ. SAMUEL R. MIRKOVICH, ESQ.
For the Defendants:	KEVIN S. SMITH, ESQ.
For Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc:	PATRICIA LEE, ESQ. BRANDEN D. KARTCHNER, ESQ.

RECORDED BY: VANESSA MEDINA, COURT RECORDER

of the lack of diligence, they don't meet the factors that have been articulated in the *Carstarphen* case. So with that, Your Honor --

THE COURT: So the problem is you know that there's a five-year rule coming, so --

MS. LEE: There is --

THE COURT: -- you would just have me not set the trial date within the five-year rule and just let the case be dismissed?

MS. LEE: I think they have to live with the things that they did, Your Honor. And if it's dismissed --

THE COURT: Well, you know that's not going to happen.

MS. LEE: Well, if it's dismissed, Your Honor, also, it would be dismissed without prejudice. They can just bring the case again, and then we get that five-year rule started again. So it's not a dismissal with prejudice. So it's not a life-ending dismissal. They can just refile. So -- you know, so it's not -- but to force us to go to trial before July, or in July, or even September if you accept their tolling argument -- and I just know if there's any case law that supports that.

I think we're taking liberties here in saying that it probably would apply, but there's no direct Nevada case law on point that talks about tolling, you know, for the five-year rule -- I mean for the -- I'm sorry, the -- you know, while we're up in federal court --

THE COURT: In federal court.

MS. LEE: -- there's no rule on that. So, yeah, that's our opposition, Your Honor. That's what we're asking. We think that they have to live with the sins of their predecessor who waited 90 percent

MR. ERWIN: Okay. Plaintiffs agree with that, Your Honor.

MS. LEE: Well, obviously, we have an issue with, Your Honor, but we'll probably be engaging in additional motion practice after this to address that. It's just too soon, Your Honor. Like I said, they have all -- the reason why they're ready to go in June is because they've lived with this case for three and a half years, and they have reviewed all of the documents, they have been at all of the depositions --

THE COURT: I understand.

MS. LEE: -- and we haven't --

THE COURT: Tell me another way to resolve it.

MS. LEE: Well, I mean, we may bring a motion to sever or go back on the tolling to --

MR. ERWIN: Sever what? There's nothing to sever.

THE COURT: I thought about doing the severance because that could potentially start you over, but there's nothing to sever anymore because the other case is gone.

MR. ERWIN: Right.

MS. LEE: Well, we'll look at that, Your Honor. But, I mean, obviously, we're going to be extremely prejudiced by this June 8th trial date. So we'll deal with it. Let me give it some thought here and figure out how we're going to --

THE COURT: Okay.

MS. LEE: -- try to get this pushed out, because realistically -- I mean, even now as we're trying to set depositions, we're having scheduling conflicts. My understanding is that counsel is in trial coming

THE COURT: That's fine. I mean, you're going to have to give abbreviated dates on everything.

MS. LEE: Yeah, no kidding. Yeah.

MR. ERWIN: Yeah, of course.

MR. MIRKOVICH: Right.

THE COURT: All right. Yeah, let's plan on June 8th.

MR. ERWIN: Okay.

THE COURT: I'm going to put you guys as a firm date.

THE CLERK: Pretrial conference of April 27th, 9:00 a.m. Calendar call May 18th, 9:00 a.m.

THE COURT: Okay.

MS. LEE: Okay. Thank you, Your Honor.

MR. ERWIN: Thank you, Your Honor.

MR. MIRKOVICH: Thank you, Your Honor.

THE COURT: Thanks, guys.

[Proceedings concluded at 9:22 a.m.]

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-visual recording of the proceeding in the above entitled case to the best of my ability.

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

RIS

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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN LIBERTY GARDNER, individually, and on behalf of minor child LELAND GARDNER, Plaintiffs, vs. HENDERSON WATER PARK, LLC dba COWABUNGA BAY WATER PARK, a Nevada limited liability company; WEST COAST WATER PARKS, LLC, a Nevada limited liability company; DOUBLE OTT WATER HOLDINGS, LLC, a Utah limited liability company; ORLUFF OPHEIKENS, an individual; SLADE OPHEIKENS, an individual; CHET OPHEIKENS, an individual; SHANE HUISH, an individual; SCOTT HUISH, an individual; CRAIG HUISH, an individual; TOM WELCH, an individual; and DOES I through X, inclusive; ROE CORPORATIONS I through X, inclusive, and ROE LIMITED LIABILITY COMPANY I through X, inclusive, Defendants.	CASE NO. A-15-722259-C DEPT NO. XXX **THIRD PARTY DEFENDANTS' REPLY IN SUPPORT OF THEIR 1.MOTION TO AMEND PLEADINGS TO ADD PARTIES; 2. MOTION TO SEVER 3. ALTERNATIVELY A. MOTION TO CONTINUE TRIAL; (SECOND REQUEST) B. MOTION TO CONTINUE DISCOVERY; (SECOND REQUEST) 4. REQUEST FOR AN ORDER SHORTENING TIME**

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

Third-Party Plaintiff,

vs.

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

Third-Party Defendants.

ORLUFF OPHEIKENS, an individual; SLADE OPHEIKENS, an individual; CHET OPHEIKENS, an individual; and TOM WELCH, an individual,

Third-Party Plaintiff,

vs.

BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc.,

Defendants.

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

Third-Party Plaintiff,

vs.

BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc.,

Third-Party Defendants.

Third Party Defendants Bliss Sequoia Insurance & Risk Advisors, Inc., and Huggins Insurance Services, Inc. ("Bliss Sequoia" or "Brokers") by and through their undersigned counsel submit their reply in support of their Motion to Amend Pleadings And to Add Parties; Motion to Sever or Alternatively Motion To continue Trial, Motion to Continue Discovery and Request for an Order Shortening Time.

Preliminarily, it should be noted that the Parties have reached an agreement to stipulate around the 5-year rule up to October 1, 2020 and to continue all extant discovery deadlines commensurately. It is anticipated that a stipulation and order regarding the same will be submitted to the Court in due course. The stipulation negates the need to further pursue Bliss Sequoia's (1) Motion to Continue Trial; (2) Motion to Continue Discovery; and (3) Motion to Sever. The following reply therefore focuses solely on the remaining request to seek leave to amend the pleadings and add parties.

MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction/Facts

HWP's feigned indignation and audacious criticism of the Brokers' actions in this litigation is the height of hubris and completely ignores the fact that HWP, not the Brokers, is the *sole* architect of this tactical time crunch. HWP's failure to mention or even address the fact that it inexplicably waited approximately 3.5 years into the litigation before suing the Brokers, only underscores the egregiousness of this conduct[1]. HWP now would like to use its own dilatory conduct as a basis for crippling the Brokers' ability to seek full and fair relief from third parties which may be found contributorily liable to HWP in assessing the claims at issue.

To bring the equities into sharp focus, the historical timeline of the underlying action cannot be ignored. HWP was first sued by the Gardners in July of 2015. While HWP now sharply criticizes the Brokers for waiting until now to bring its fourth party cross-claims, it completely ignores and fails to explain at all why it waited three and half years to bring claims against the Brokers. Once the claims were finally asserted against the Brokers on November 28, 2018, the Brokers sought to be severed from the underlying action which would have had the practical effect of (1) allowing the underlying claims to be fully adjudicated; (2) solidifying the liability

[1] While both the Court and opposing counsel mentioned during the hearing on Plaintiffs' Motion for Preferential Trial Setting that HWP's dilatory conduct is a statute of limitations issue (which is true) the Brokers posit that it should also be considered when balancing the equities of the relief sough. In other words, the impact of HWP's dilatory conduct is not mutually exclusive. HWP should not be given the tactical advantage of precluding the bringing of fourth party claims, when it was its own procrastination in bringing the lawsuit against the Brokers, that has led to these circumstances.

exposure to the Brokers; (3) detaching the Brokers from the onerous burden of the 5 year rule, where more than 70% of that time had already been exhausted by the active litigants and (4) allowed the claims to be finally pleaded to fit within the circumstances of the ultimate disposition of the underlying claim.

Notwithstanding the equities supporting severance at that time, HWP insisted that the Brokers stay tethered to the action and argued vociferously for bifurcation, which the Court ultimately granted on June 6, 2019. Consequently, the Court set phase 2 of the trial to occur in October of 2020, which trial setting was not opposed *by any party*, including HWP. The last day to seek leave to amend the pleadings and add parties was then scheduled to occur on March 13, 2020.

While the Brokers stayed diligently involved in the litigation, they could not realistically assess or develop a full litigation strategy until the underlying claims ultimately resolved, which did not occur until **November 6, 2019**. Prior to that date, the parties contended with a global massive settlement involving all parties, save and except for the Brokers, and spent months navigating through the multiple motions for good faith settlement, to seal the record, and ultimately, to enter into a stipulated judgment coupled with an assignment and covenant not to execute. It was only after this flurry of protracted settlement and case-ending motion practice, that HWP finally amend its third party complaint against the Brokers on November 20, 2019.

The Brokers then immediately sought to remove the remaining claims to Federal Court, and, after approximately two months of motion practice, the matter was remanded back to District Court on January 21, 2020, wherein HWP, *for the first time ever*, sought an accelerated trial schedule due to the looming 5 year rule.

In sum, HWP was able to successfully drag its feet on bringing in the Brokers, prejudicially tether them to the now substantially truncated trial schedule, and ultimately benefit from its own dilatory conduct. It is a brilliant litigation strategy with all of the benefit inuring to HWP and all of the prejudice being unfairly placed on the Brokers. This type of gamesmanship and chicanery should be soundly rejected by the Court, particularly where the Brokers are facing liability upwards of $17M, which amount would effectively put two brokers out of business

and, consequently, leave a host of people unemployed. It is beyond audacious to wag the finger at the Brokers for not bringing their fourth party cross claims against other potentially liable parties a mere four months after HWP amended its own pleading to clarify and solidify its claims, post-judgment.

2. Legal Argument

A. Bliss Sequoia' Leave to Amend to add Parties not Based on Undue Delay, Bad Faith or Dilatory Motive

HWP readily admits that NRCP 15(a) instructs that courts should "freely grant leave [to amend] when justice so requires." The Nevada Supreme Court has further emphatically stated that "in the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant – the leave sought should be freely given." *Stephens v. S. Nev. Music Co.,* 89 Nev. 104, 105-106, 507 P.2d 138 (1973). It is hard to envision a more worthy scenario where justice would absolutely so require the allowance to seek leave to amend.

B. There was no Undue Delay Practiced by Bliss Sequoia in bringing their Fourth-Party Cross-Claims against Moreton and H & W

Bliss Sequoia absolutely did not engage in undue delay in bringing its legitimate claims against contemplated fourth parties, H & W and Moreton as is clearly evidenced by the fact that (1) leave to amend was sought more than 12 weeks before the substantially accelerated trial date; (2) leave to amend was sough 6 months before the original trial date; (3) leave to amend was sought only 4 months *after* HWP amended its *own* pleadings, two months of which were spent in Federal Court wrangling with jurisdictional issues and which amended pleadings "narrowed the claims and allegations against the Brokers" (*See* Opp. Mot. at 5); (4) leave to amend was promptly sough after the trial date was substantially accelerated from October 2020

to June 2020; and (5) as admitted by HWP, leave to amend was made within the allowable time to amend pleadings and add parties, *as stipulated to by the parties*[2].

It is evident that Bliss Sequoia did not simply bide its time or sit on its hands idly waiting for an inopportune time to identify and bring in cross-claimants. The underlying personal injury action remained shrouded in uncertainty for the vast majority of the time Bliss Sequoia has been a party to this Action. Bliss Sequoia could not have realistically asserted its claims against Moreton and H & W earlier, which claims are derivative of the claims asserted against them, because it did not know exactly what these were until a mere four months ago, *not* eleven months ago as HWP now contends.

Once the liability exposure was solidified and HWP amended its claims against Bliss Sequoia, the Brokers timely sought leave to amend to bring in fourth party cross claims, and, absent a showing of undue delay, bad faith or dilatory motive, leave should be freely given. Incidentally, all of the cases relied upon by HWP for the proposition that undue delay is present, are not only distinguishable since, here, HWP is the architect of the time crunch, but they are also not binding on this Court as they are all extra-judicial in nature.

Again, any "delay" in bringing claims against the now-contemplated cross-claimants, was a direct result of remaining tethered to an action, 3.5 years in the making, which needed to be fully resolved prior to Bliss Sequoia's assessment of fourth party liability. See *TC Tech. LLC v. Sprint Corp*., 2019 WL 529678, where a motion to amend was granted three months before trial began. The Court found no inherent prejudice by amending after the deadline and that there were unique circumstances that were willful caused by the non-moving party, thus legitimizing the amendment.

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[2] The amended scheduling order was co-authored and jointly stipulated to by the Parties, which amended scheduling order included an amended date on which to amend pleadings and add parties.

C. There is no Bad Faith or Dilatory Motives Associated with Bliss Sequoia's Request to Seek Leave to Amend

HWP conveniently ignores NRCP 14, which allows a defending party to file a third or fourth party complaint against a nonparty who is or may be liable to it for all or part of the claims against it." *See* NRCP 14(a). In Nevada, "[a] defendant is permitted to defend the case and at the same time assert his right of indemnity against the party ultimately responsible for the damages." *Reid v. Royal Ins. Co.*, 390 P.2d 45, 46-47 (Nev. 1964).

A review of the proposed amended pleading demonstrates that Bliss Sequoia has legitimate cross claims and counterclaims, the validity of which underscores the good-faith nature of its claims. In sum, Bliss Sequoia relied on the representations of H & W when conveying certain insurance information to HWP, and Moreton also gave insurance advice which was concurrently relied upon by HWP in securing policy limits. Bliss Sequoia has every right under the law, to seek indemnification and/or contribution from these potential fourth party cross-claimants and seeking leave to do so, within the time allocated, can in no way be deemed "bad faith."

Incidentally, HWP has not articulated any prejudice it would suffer by allowing these claims to concurrently be brought within the existing action. In *Smith v. Argyle*, the District Court granted leave to amend, adding 23 causes of action rather than just one, "a little more than two months before trial." 2012 WL 5330981. The District Court there granted leave to amend because of the liberal pleading standard and that "defendants [did] not make a convincing showing that they will be prejudiced by [ ] filing of the amended [pleading]." *Id*. It does not appear this case was appealed.

While it could conceivably result in a continued trial date in order to accommodate the on-boarding parties, HWP fails to articulate how such a trial date would in any way prejudice their case, particularly where an agreement to stipulate around the 5-year rule is imminent. As a practical matter, the newly added parties may seek relief in their own right, including seeking bifurcation or severance. However, allowing all of the directly related claims to proceed under one litigation umbrella would serve the best interest of judicial economy. Forcing Bliss Sequoia to re-file its claims against Moreton and H & W in a separation action would result in

duplication of efforts and require all of the same witnesses to appear twice, and re-litigate virtually identical claims.

D. HWP Has Not Established That Bliss Sequoia's Negligent Misrepresentation Is Futile

HWP asserts that the negligent misrepresentation claim is futile because (1) Bliss Sequoia could not have justifiably relied on HWP's statements and (2) statements regarding safety being a priority cannot form the basis of a negligent misrepresentation claim. *See* Opp. Mot. p. 8-11. The Court should reject both arguments.

1. Bliss Sequoia's Cross Claims and Counterclaims Satisfy Nevada's Futility Standard.

Under Nevada law, only the face of a proposed amendment is considered when determining if a proposed amendment is futile. *See Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 357 P.3d 966 (Nev. App. 2015) (holding that court erred in determining that amendment was futile but such error was harmless because amendment was untimely as it was sought after the deadline in the scheduling order). An amendment is not futile if could potentially entitle the amending party to relief. See *7963 Laurena Ave. Tr. v. Bank of New York Mellon*, 132 Nev. 937, 385 P.3d 581 (Nev. 2016) ("Because these amendments could potentially entitle appellant to relief vis-à-vis respondent, we conclude that the district court abused its discretion in denying leave to amend based on futility.").

Here, Bliss Sequoia's proposed amendment regarding HWP's misrepresentations are not futile as it, at a minimum, potentially entitles Bliss Sequoia to relief as it alleges that HWP's conduct meets every element of negligent misrepresentation. *See* Bliss Sequoia's and Huggins Insurance's Cross Claims and Counterclaims at ¶¶45-51. Further, as discussed below, the facts of this case support the conclusion that Bliss Sequoia's negligent misrepresentation claim is not futile.

2. Bliss Sequoia Justifiably Relied on HWP's Statements.

HWP erroneously asserts that Bliss Sequoia could not have justifiably relied on HWP's statements in April 2015 concerning legal compliance and safety guidelines at Cowabunga Bay because Mr. Barnwell's opinion regarding coverage limits was issued in July 2014. That misses the point entirely. Plaintiffs' negligent misrepresentation claim against Bliss Sequoia is not premised exclusively on Mr. Barnwell's July 2014 statement. Instead, HWP asserts that Bliss Sequoia "negligently allowed HWP to believe that they were adequately insured for risk of loss such as are at the issue in the instant litigation when in fact they were not." Am. Third Party Complaint, at ¶ 25. Under HWP's theory, it was because of this alleged conduct – well after July 2014 – that HWP allegedly did not have sufficient insurance in place to cover the Gardners' claim.[3] As a result, Bliss Sequoia's allegation that it relied on HWP's statements is fatal to HWP's argument.

3. Bliss Sequoia Justifiably Relied on Scott Huish's and Shane Huish's Statements Regarding Safety Being a Priority.

HWP argues that Bliss Sequoia's negligent misrepresentation claim based on Scott Huish's and Shane Huish's statements regarding safety are futile because they are not pled with particularity and because such statements cannot be the basis of a negligent misrepresentation claim.[4] They are wrong on both counts.

The Court should reject HWP's argument about pleading with particularity. That requirement applies to intentional fraud but not a claim for *negligent* misrepresentation. *See Harmony Homes, Inc. v. ID Interior Design, LLC,* 2012 WL 12948019, at *1 (Nev. Dist. Ct. May 30, 2012) (Denton, J.) ("The Court determines that, as the making of a negligent misrepresentation is not an act of intentional fraud, particularity in pleading such claim is not required and that what Plaintiff has pleaded does not fail to state a claim upon which relief can

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[3] Therefore, in accordance with the case law cited in HWP's opposition, there is a causal connection and HWP misrepresentation did play "a material and substantial part" in leading Bliss Sequoia to recommend $5 million in coverage limits. *Lubbe v. Barba*, 91 Nev. 596, 599 (Nev. 1975).

[4] In footnote 9 of their opposition, HWP asserts that the counterclaim lumps Scott Huish and Shane Huish together without differentiating who purportedly said what. However, because Scott Huish and Shane Huish were speaking on behalf of HWP, all statements made by either individual was made by HWP, the only party Bliss Sequoia's negligent misrepresentation claim is asserted against.

be granted."). That is why courts have specifically ruled that "a claim for negligent misrepresentation need not be pleaded with Rule 9(b) particularity…." *See, e.g.*, *Brigade Leveraged Captial Structures Fund, Ltd. v. Fountainbleau Resorts, LLC*, 2012 WL 3260813 (Nev. Dist. Ct. Jan. 6, 2012) (Denton, J.); *Three Angels, LLC v. Bryant*, 2012 WL 12301991 (Nev. Dist. Ct. Mar. 12, 2012) (Johnson, J.) (court noting that "it disagrees with Defendant BRYANT'S assessment the negligent misrepresentation claim must be stated with particularity under NRCP 9(b)"). HWP inexplicably ignores all of this authority and cites to federal court cases applying federal rules, which are irrelevant here.

Likewise, the Court should reject HWP's argument that the representations about safety being a "priority" is "not actionable" because the statements are allegedly "vague, generalized and subjective opinions rather than definitive fact."[5] Opp. Mot. at 11. The statements were relied on by Bliss Sequoia because the same individuals were involved in other businesses and the water park at issue. The anticipated safety of the water park's operations of course are relevant to HWP's insurance needs and the amounts of limits that would be appropriate. HWP's argument suggesting otherwise has no support under Nevada law. Tellingly, HWP fails to cite any **Nevada** authority to support its position.

In addition to being irrelevant, the case law from the other jurisdictions do not apply for additional reasons. For instance, in *Glenn Holly Entm't, Inc. v Tektronix, Inc*., 343 F.3d 1000, 1015 (9th Cir. 2003), the court held that a customer could not justifiably rely on general statements describing the high priority placed on product development in deciding which film company to use because these statements were "puffery." *Id*. That ruling was based on the "puffery doctrine" which has been described as "making generalized or exaggerated statements such that a reasonable consumer would not interpret the statement as a factual claim upon which he or she could rely." *See* Appellees Brief, *Glenn Holly Entm't, Inv. v. Tekrronix, Inc*., 2002 WL 32171587, at *39 (Nev., filed May 10, 2002); *see Burns v. Shaikin*, 2014 WL 7685018

[5] HWP also asserts that these representations cannot be proven true or false by any objective standard. First, HWP cites no law to support the assertion that a statement must be proven true or false under an objective standard. Nonetheless, expert testimony can be used to determine that the representation that the Huishs prioritized safety is false.

(Nev. Dist. Ct. Nov. 3, 2015) (finding that statements were false representations because "Puffery is defined as 'seller's talk'" and "these statements went far beyond puffery/seller's talk"). The "puffery doctrine" does not apply here because Bliss Sequoia was not Scott Huish's or Shane Huish's customer.[6]

E. Bliss Sequoia's Contribution Claim is Properly Brought As A Fourth Party Claim.

HWP asserts that Bliss Sequoia's contribution claim against H&W and Moreton can be brought in a separate action. However, they ignore NRCP 14, which allows a defending party to file a third or fourth party complaint against a nonparty "who is or may be liable to it for all of party of the claim against it." *See* NRCP 14(a). Further, under a Nevada law "[a] defendant is permitted to defend the case and at the same time assert his right of indemnity against the party ultimately responsible for the damage." *Reid v. Royal Ins. Co.*, 390 P.2d 45, 46-47 (Nev. 1964). More recently, the Nevada Supreme Court has recognized that **"**NRCP 14(a) allows a third-party plaintiff to implead a third-party defendant 'who is or may be liable to the third-party plaintiff for all or part of the plaintiffs claim' at '**any time after [the] commencement of the action**.'" *Pack v. LaTourette*, 277 P.3d 1246, 1249 (Nev. 2012) (emphasis added) (citation omitted). Therefore, Bliss Sequoia is entitled to exercise the rights it has under NRCP and Nevada law and assert its contribution claim in this suit "at any time after the commencement of the action." *Id.*

Further, bringing the contribution claim in this suit promotes judicial economy. First, it will not cause any undue delay, particularly because the parties have stipulated to a trial date of October 1, 2020. Second, if Bliss Sequoia brought its contribution claim against Moreton and H&W in a separate action, judicial resources will be wasted as many overlapping issues will have to be litigated twice, likely in front of this Court. These efficiency considerations are a critical benefit for allowing claims against third parties in the same action. *See, e.g., Lund v. Eight Judicial Dist. Ct. of State, Ex Rel. County of Clark*¸255 P.3d 280, 282 (Nev. 2011)

[6] Likewise, the other cases relied on by HWP are also inapposite because they rely on law of other jurisdictions and do not deal with a claim of negligent misrepresentation. *See Cooke v. Allstate Mgmt. Corp.*, 741 F. Supp. 1205, 1215-16 (dismissing fraud claim); *see also In re Yum! Brands, Inc. Sec. Litig.*, 73 F. Supp.3d 846, 864-65 (W.D. Ky. 2014) (dismissing securities fraud claim).

(holding that rule 13h, which permits nonparties to be made parties to original action in a counterclaim or cross-claim, is construed liberally "in an effort to avoid multiplicity of litigation, minimize the circuity of actions, and foster judicial economy"); *Behroozi v. New Albertsons, Inc.*, 2014 WL 1765248, at *2 (D. Nev. Apr. 30, 2014) ("adding these third-party defendants will advance the interest of judicial economy, as the court will be able to resolve all disputes revolving around plaintiff's claims in a single action."); *Daou v. Abelson*, 2012 WL 1292475, at *3 (D. Nev. Apr. 13, 2012) ("judicial economy supports that Abelson's counterclaims [and third-party complaint] be tried at the same time as the Defendants' other claims"). Allowing the contribution claim to proceed in this action avoids all of those inefficiencies for the Court and others.

3. Conclusion

For all of the reasons set forth both in its Motion to Seek Leave, and as further supplemented herein, Bliss Sequoia respectfully requests that this Court grant its Motion to Seek Leave to Amend to (1) assert counterclaims against HWP and (2) assert fourth-party cross claims against H & W and Moreton.

DATED this 20th day of March, 2020.

HUTCHISON & STEFFEN, PLLC

/s/Patricia Lee
Patricia Lee (8287)
Branden D. Kartchner (14221)
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Las Vegas, Nevada 89145

Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 20th day of March, 2020, I caused the above and foregoing document entitled: **THIRD PARTY DEFENDANTS' REPLY IN SUPPORT OF THEIR 1.MOTION TO AMEND PLEADINGS TO ADD PARTIES; 2. MOTION TO SEVER 3. ALTERNATIVELY A. MOTION TO CONTINUE TRIAL; (SECOND REQUEST) B. MOTION TO CONTINUE DISCOVERY; (SECOND REQUEST) 4. REQUEST FOR AN ORDER SHORTENING TIME** to be served on the following by Electronic Service to:

ALL PARTIES ON THE E-SERVICE LIST

/s/Danielle Kelley
An employee of Hutchison & Steffen, PLLC

ORDR

Patricia Lee (8287)
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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER REGARDING BLISS SEQUOIA INSURANCE & RISK ADVISORS, INC.'S AND HUGGINS INSURANCE SERVICES, INC.'S MOTION TO:** **(1) SEEK LEAVE TO AMEND** **(2) SEVER** **(3) CONTINUE TRIAL** **CONTINUE DISCOVERY**

Bliss Sequoia Insurance & Risk Advisors, Inc.'s and Huggins Insurance Services, Inc.'s (together "Bliss Sequoia") Motion to (1) Seek Leave to Amend Pleading and Add Parties; (2) Sever; or alternatively to (3) Continue Trial (2nd Request) and (4) Continue Discovery (Collectively, the "Motions") was fully submitted and ultimately considered by the Court on March 23, 2020. After reviewing all of the moving papers submitted by Bliss Sequoia, the

opposition thereto filed by Henderson Water Park, LLC ("HWP") and the Reply submitted by Bliss Sequoia, the Court makes the following Findings of Fact, Conclusions of Law and Order:

FINDING OF FACTS

1. HWP previously moved for and obtained a Preferential Trial Setting, which Preferential Trial Setting was scheduled to occur on June 8, 2020.
2. Bliss Sequoia, by way of its Motions, seeks to amend its answer to include fourth party cross-claims against Moreton & Company and Haas & Wilkerson for negligence/contribution.
3. Bliss Sequoia also seeks leave to amend its answer to include a counterclaim against HWP for negligent misrepresentation.
4. Bliss Sequoia also seeks to sever HWP's claims, and the anticipated fourth party cross claims and counterclaim, from the underlying action.
5. Bliss Sequoia's prior request for severance was previously considered and denied by this Court.
6. Bliss Sequoia, in the alternative, seeks a trial continuance based on the argument that they have had inadequate time to prepare for trial based on the Court's preferential trial setting.
7. Bliss Sequoia has represented that it will agree to waive its right to seek dismissal of the action under the 5-year rule articulated in NRCP 41.
8. The Complaint in this matter was filed on 7/28/2015, and consequently, without any stay or tolling, the 5-year rule pursuant to NRCP 41 would expire on 7/28/2020.

CONCLUSIONS OF LAW

9. NRCP 15 permits a party to amend its pleadings upon order of the Court, and further dictates that "the Court should freely grant leave when justice so requires." *See* NRCP 15(a)(2).
10. As the underlying claims asserted by the Gardner Plaintiffs against HWP have already been resolved, and the only remaining claims are those assigned by HWP to the Gardners against Bliss Sequoia, there is nothing to sever these claims from.

11. A.O. 20-01 indicates, in part, "This Order shall operate to stay trial in civil cases for purposes of NRCP 41(e). The time period of any continuance entered as a result of this order shall be excluded [] for purposes of calculating speedy trial under NRS 178.556(1) and NRS 174.511 as the Court finds that the ends of justice served by taking that action outweigh the interests of the parties and the public in a speedy trial. Absent further order of the Court or any individual judge, the period of exclusion shall be from March 16, 2020 through April 17, 2020."

12. With the 30-day extension provided by A.O. 20-01, the 5-year rule would expire on 8/28/2020.

13. A.O. 20-09 reads, in pertinent part "A complete stay of any civil case will be considered on a case-by-case basis. A stay of any case should be liberally granted at this time based on any COVID-19 related issues."

14. Bliss Sequoia's Motions do not raise any "COVID-19 related issues," and consequently, a stay is not warranted.

15. However, because of the extraordinary circumstances, pursuant to A.O. 20-01, the 5-year rule pursuant to NRCP 41(e) must be extended in this case, to allow for the world to recover from the COVID-19 pandemic, before requiring the parties to go to Trial.

ORDER

IT IS THEREFORE ORDERED, that Bliss Sequoia's Motion to Continue Trial is hereby GRANTED and the Court hereby extends the 5-year rule as set forth in NRCP 41(e) to November 13, 2020.

IT IS FURTHER ORDERED that the firm trial in this matter is hereby continued to November 2, 2020 and will take place on November 2, 3, 4, 5, 9, 10, 12, and 13 of 2020.

IT IS FURTHER ORDERED that Bliss Sequoia's Motion to Continue Discovery is hereby GRANTED and the following amended scheduling order shall apply going forward:

Initial Expert Disclosures	July 31, 2020
Rebuttal Expert Disclosures	August 28, 2020
Discovery Deadline	September 25, 2020

Dispositive Motion and Motions in limine Deadline	October 25, 2020 (must be set on OST)
Last date to add parties and amend pleadings	April 1, 2020

IT IS FURTHER ORDERED that Bliss Sequoia's Motion to Seek Leave to Amend and Add Additional Parties is hereby GRANTED; however, Bliss Sequoia is ordered to amend its proposed counterclaims against HWP to provide more detailed information as it pertains to its claim of misrepresentation against HWP;

IT IS FURTHER ORDERED that Bliss Sequoia's Motion to Sever is hereby DENIED;

IT IS FINALLY ORDERED that the hearing regarding the Motions previously scheduled to be heard on March 25, 2020, is hereby VACATED.

IT IS SO ORDERED this 3rd day of April, 2020.

DISTRICT COURT JUDGE

A M

Respectfully submitted by:

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

Patricia Lee (8287)
Branden Kartchner (14221)
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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

Approved as to form and content:

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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

DISTRICT COURT

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PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	CASE NO. A-15-722259-C DEPT. NO: XXX **NOTICE OF ENTRY OF ORDER**

/ / /

/ / /

NOTICE IS HEREBY GIVEN that on April 4, 2020, an *Order Regarding Bliss Sequoia Insurance & Risk Advisors, Inc.'s and Huggins Insurance Services, Inc.'s Motion to: (1) Seek Leave to Amend (2) Sever (3) Continue Trial Continue Discovery* was entered in the above-captioned matter, a copy of which is attached hereto.

DATED this 7th day of April, 2020.

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

_____

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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 7th day of April, 2020, I caused the document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[✓] to be electronically served through the Eighth Judicial District Court's electronic filing system pursuant to EDCR 8.02; and/or

[ ] to be hand-delivered;

to the attorneys/ parties listed below:

Donald J. Campbell, Esq.
Samuel R. Mirkovich, Esq.
Philip R. Erwin, Esq.
CAMPBELL & WILLIAMS
700 South Seventh Street
Las Vegas, NV 89101

Attorneys for Plaintiffs, Peter Gardner and Christian Garnder on behalf of minor child, Leland Gardner

/s/ Heather Bennett

An employee of Hutchison & Steffen, PLLC

ORDR

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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

DISTRICT COURT

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opposition thereto filed by Henderson Water Park, LLC ("HWP") and the Reply submitted by Bliss Sequoia, the Court makes the following Findings of Fact, Conclusions of Law and Order:

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3. Bliss Sequoia also seeks leave to amend its answer to include a counterclaim against HWP for negligent misrepresentation.
4. Bliss Sequoia also seeks to sever HWP's claims, and the anticipated fourth party cross claims and counterclaim, from the underlying action.
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6. Bliss Sequoia, in the alternative, seeks a trial continuance based on the argument that they have had inadequate time to prepare for trial based on the Court's preferential trial setting.
7. Bliss Sequoia has represented that it will agree to waive its right to seek dismissal of the action under the 5-year rule articulated in NRCP 41.
8. The Complaint in this matter was filed on 7/28/2015, and consequently, without any stay or tolling, the 5-year rule pursuant to NRCP 41 would expire on 7/28/2020.

CONCLUSIONS OF LAW

9. NRCP 15 permits a party to amend its pleadings upon order of the Court, and further dictates that "the Court should freely grant leave when justice so requires." *See* NRCP 15(a)(2).
10. As the underlying claims asserted by the Gardner Plaintiffs against HWP have already been resolved, and the only remaining claims are those assigned by HWP to the Gardners against Bliss Sequoia, there is nothing to sever these claims from.

11. A.O. 20-01 indicates, in part, "This Order shall operate to stay trial in civil cases for purposes of NRCP 41(e). The time period of any continuance entered as a result of this order shall be excluded [] for purposes of calculating speedy trial under NRS 178.556(1) and NRS 174.511 as the Court finds that the ends of justice served by taking that action outweigh the interests of the parties and the public in a speedy trial. Absent further order of the Court or any individual judge, the period of exclusion shall be from March 16, 2020 through April 17, 2020."

12. With the 30-day extension provided by A.O. 20-01, the 5-year rule would expire on 8/28/2020.

13. A.O. 20-09 reads, in pertinent part "A complete stay of any civil case will be considered on a case-by-case basis. A stay of any case should be liberally granted at this time based on any COVID-19 related issues."

14. Bliss Sequoia's Motions do not raise any "COVID-19 related issues," and consequently, a stay is not warranted.

15. However, because of the extraordinary circumstances, pursuant to A.O. 20-01, the 5-year rule pursuant to NRCP 41(e) must be extended in this case, to allow for the world to recover from the COVID-19 pandemic, before requiring the parties to go to Trial.

ORDER

IT IS THEREFORE ORDERED, that Bliss Sequoia's Motion to Continue Trial is hereby GRANTED and the Court hereby extends the 5-year rule as set forth in NRCP 41(e) to November 13, 2020.

IT IS FURTHER ORDERED that the firm trial in this matter is hereby continued to November 2, 2020 and will take place on November 2, 3, 4, 5, 9, 10, 12, and 13 of 2020.

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IT IS FINALLY ORDERED that the hearing regarding the Motions previously scheduled to be heard on March 25, 2020, is hereby VACATED.

IT IS SO ORDERED this 3rd day of April, 2020.

DISTRICT COURT JUDGE

A M

Respectfully submitted by:

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/s/ Patricia Lee

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Approved as to form and content:

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff HENDERSON WATER PARK, LLC dba Cowabunga Bay Water Park, Third-Party Plaintiff, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., and HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants.	CASE NO. A-15-722259-C DEPT. NO: XXX **BLISS SEQUOIA'S AND HUGGINS INSURANCE'S CROSS CLAIMS AND COUNTERCLAIMS**
BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Cross Claimants, v. HAAS &WILKERSON, INC., FRED A. MORETON & COMPANY d/b/a Moreton & Company, HENDERSON WATER PARK, LLC d/b/a Cowabunga Bay Water Park, and DOES I through X, inclusive; and ROES I through X, inclusive, Cross Claim Defendants.	

Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc. ("Bliss Sequoia") complain against Haas & Wilkerson ("H&W"), Fred A. Moreton & Company d/b/a Moreton & Company ("Moreton"), and Henderson Water Park, LLC ("HWP") and allege:

JURISDICTIONAL ALLEGATIONS

1. Bliss Sequoia is and has been at all material times a corporation organized and existing under the laws of Oregon.

2. Huggins Insurance Services, Inc. is and has been at all material times a corporation organized and existing under the laws of Oregon.

3. H&W is and has been at all material times a corporation organized and existing under the laws of Missouri.

4. Moreton is and has been at all material times a corporation organized and existing under the laws of Utah.

5. HWP is and has been at all material times a limited liability company organized and existing under the laws of Nevada.

6. This Court has jurisdiction over the instant action pursuant to NRS 14.065. H&W knowingly and purposefully acted as the managing general agent and procured insurance coverage related to the operation of a waterpark located in Henderson, Nevada.

7. Venue is proper pursuant to NRS 13.010 and NRS 13.040.

FACTUAL BACKGROUND

Producer Agreement Between Bliss Sequoia and H&W

8. On March 10, 2009 Bliss Sequoia entered a producer agreement with H&W.

9. Under the producer agreement, H&W agreed to place risks and effect insurance coverage for Bliss Sequoia's clients.

10. Under the producer agreement, Bliss Sequoia acted as an insurance agent who would assist clients in procuring coverage.

11. Under the producer agreement, H&W acted as a wholesale broker who would place coverage with an insurance carrier for Bliss Sequoia's clients.

12. Upon information and belief, H&W operated and continues to operate in conjunction with the World Waterpark Association as a comprehensive specialized insurance program that provides expert claims and risk management services to waterparks across the United States.

HWP Sought Insurance for the Waterpark

13. Upon information and belief, in 2014 HWP sought general liability insurance for its Henderson waterpark.

14. Upon information and belief, HWP utilized the services of Moreton and Bliss Sequoia as insurance agents.

Moreton Advised HWP on Insurance Limits

15. Upon information and belief, in July 2014 Moreton conducted an inspection of HWP's Henderson waterpark and subsequently issued a report to HWP.

16. Upon information and belief, HWP asked Moreton for information when deciding on general liability coverage limits.

17. Upon information and belief, HWP obtained an opinion "from Moreton & Company to say where should [HWP's] limits be."

18. Upon information and belief, HWP "relied on [Moreton's] input as to how much is enough" insurance coverage for the waterpark.

Bliss Sequoia Relied on H&W's Specialized Waterpark Knowledge

19. HWP used Bliss Sequoia to submit its insurance application for the waterpark.

20. In or around July 2014, Lance Barnwell of Bliss Sequoia contacted Patrick Clark of H&W about placing coverage for HWP.

21. On July 29, 2014, H&W conducted an investigation of the waterpark and issued an insurance audit report.

22. In or around July 2014, Barnwell asked Clark to confirm that a $5,000,000 general liability coverage limit was sufficient for the waterpark.

23. Clark assured Barnwell that HWP's general liability coverage limits were "in the ballpark" of other similarly situated waterparks.

24. Based on Clark's assurance and H&W's specialized knowledge of the waterpark industry, Barnwell advised HWP that a $5,000,000 general liability limit was "in line with the scope and size of the park."

25. In making this statement, Bliss Sequoia relied on H&W's purported expertise and specialized knowledge of risks faced by waterparks and their insurance needs.

Bliss Sequoia Also Relied on HWP's Representations About Waterpark Safety

26. At all material times, Bliss Sequoia believed that HWP was complying with applicable safety codes and operating the waterpark in a safe manner.

27. In April 2015, HWP represented to Bliss Sequoia that the waterpark "follows the strictest of safety guidelines set forth by the City, State and Federal agencies" and that its "entire management team and staff is thoroughly trained in the proper protocol and procedure surrounding issues of guest safety."

28. Over a period of years, prior to placing coverage for the waterpark, Shane Huish and Scott Huish of HWP on multiple occasions expressed to Lance Barnwell of Bliss Sequoia that safety was a priority in how he operated his enterprises.

29. During the renewal of HWP's policy, Bliss Sequoia relied on HWP's prior representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the scope and size of the park.

HWP's Representations About Waterpark Safety Were False

30. On May 27, 2015, Leland Gardner nearly drowned at the waterpark and sustained injuries.

31. As a result of this incident, Bliss Sequoia learned that HWP's representations about waterpark safety, on which Bliss Sequoia relied, were false.

32. After the incident, Bliss Sequoia learned that HWP was understaffing the waterpark in violation of Nevada Administrative Code lifeguard requirements.

33. While the Nevada Administrative Code required HWP to have 17 lifeguards staffing the pool that Leland Gardner almost drowned in, on the day of the incident, HWP had only 3 lifeguards staffing the pool.

HWP's Claim Against Bliss Sequoia

34. The Gardners sued HWP and subsequently entered a stipulated judgment against HWP in the amount of $49,000,000.

35. HWP alleges that, based on Bliss Sequoia's advice, it purchased insufficient general liability coverage. (Am. Third-Party Compl.) at ¶ ¶ 13, 15.

36. To the extent Bliss Sequoia faces any liability to HWP, that liability arises as a result of Moreton's negligent professional advice to HWP regarding HWP's general liability limits.

37. To the extent Bliss Sequoia faces any liability to HWP, that liability arises as a result of H&W's negligent affirmation to Bliss Sequoia regarding the adequacy of HWP's general liability limits.

38. As a result of Bliss Sequoia's reliance on the accuracy of HWP's representations regarding the waterpark's compliance with applicable safety codes, Bliss Sequoia has sustained damages.

39. As a result of the actions of HWP, H&W, and Moreton, Bliss Sequoia has been forced to incur attorneys' fees and costs to defend against HWP's suit.

FIRST CAUSE OF ACTION
Contribution
Against Moreton and H&W

40. Bliss Sequoia incorporates each and every allegation set forth in the preceding paragraphs as if they were fully set forth herein.

41. Bliss Sequoia faces potential liability arising from HWP's allegations that $5,000,000 in general liability insurance was insufficient to cover HWP.

42. If Bliss Sequoia pays a judgment or settlement to HWP in connection with this action, it is entitled to contribution from Moreton and H&W to the extent that they share a common basis for liability with Bliss Sequoia.

43. As a result of Moreton's and H&W's negligence, Bliss Sequoia has been damaged in an amount in excess of $15,000.

44. As a result of Moreton's and H&W's negligence, Bliss Sequoia has been forced to defend against HWP's claim and is entitled to its reasonable costs and attorneys' fees incurred as a result.

SECOND CAUSE OF ACTION
Negligent Misrepresentation
Against HWP

45. Bliss Sequoia incorporates each and every allegation set forth in the preceding paragraphs as if they were fully set forth herein.

46. In the course of its business of operating a waterpark, HWP supplied false information to Bliss Sequoia regarding the safety measures in place at the waterpark and its compliance with applicable safety codes.

47. The information supplied by HWP was supplied for the purpose of guiding Bliss Sequoia, in its professional role as an insurance agent, to procure adequate coverage for HWP.

48. HWP failed to exercise reasonable care or competence in communicating false information to Bliss Sequoia regarding the safety measures in place at the waterpark and its compliance with applicable safety codes.

49. Bliss Sequoia justifiably relied upon the information supplied by HWP when it renewed HWP's general liability coverage in an amount that it determined to be sufficient based upon the information that had been provided before that renewal.

50. As a result of Bliss Sequoia's reliance upon the accuracy of the information provided by HWP, Bliss Sequoia has been damaged in an amount in excess of $15,000.

51. As a result of Bliss Sequoia's reliance upon the accuracy of the information provided by HWP, Bliss Sequoia has been forced to defend against HWP's claim and is entitled to its reasonable costs and attorneys' fees incurred as a result.

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/ / /

PRAYER OF RELIEF

1. Bliss Sequoia prays for relief in the form of a judgment in an amount in excess of $15,000, which will justly compensate Bliss Sequoia for its injuries, damages, and losses including contribution or indemnity for any judgment entered against it, compensation for loss of time, loss of business opportunity, damage to Bliss Sequoia's reputation and legal fees incurred due to litigation of the instant action.

2. For pre and post judgment interest.

3. For reimbursement of attorneys' fees.

4. For costs of suit.

5. For such other and further relief the Court deems just and proper.

DATED this 10th day of April, 2020.

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

_____

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Attorneys for Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 10th day of April, 2020, I caused the document entitled **BLISS SEQUOIA'S AND HUGGINS INSURANCE'S CROSSCLAIMS AND COUNTERCLAIMS** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

X to be electronically served through the Eighth Judicial District Court's electronic filing system pursuant to EDCR 8.02; and/or

[ ] to be hand-delivered;

to the attorneys/ parties listed below:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Heather Bennett

An employee of Hutchison & Steffen, PLLC

Mark A. Hutchison (4639)
Patricia Lee (8287)
Branden D. Kartchner (14221)
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Attorney for Defendants Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff HENDERSON WATER PARK, LLC dba Cowabunga Bay Water Park, Third-Party Plaintiff, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., and HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants.	CASE NO. A-15-722259-C DEPT. NO: XXX **BLISS SEQUOIA'S AND HUGGINS INSURANCE'S AMENDED CROSS CLAIMS AND COUNTERCLAIMS**
BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Cross Claimants, v. HAAS &WILKERSON, INC., FRED A. MORETON & COMPANY d/b/a Moreton & Company, HENDERSON WATER PARK, LLC d/b/a Cowabunga Bay Water Park, and DOES I through X, inclusive; and ROES I through X, inclusive, Cross Claim Defendants.	

Bliss Sequoia Insurance & Risk Advisors, Inc., and Huggins Insurance Services, Inc. ("Bliss Sequoia"), complain against Haas & Wilkerson ("H&W"), Fred A. Moreton & Company d/b/a Moreton & Company ("Moreton"), and Henderson Water Park, LLC ("HWP") and allege:

JURISDICTIONAL ALLEGATIONS

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2. Huggins Insurance Services, Inc. is and has been at all material times a corporation organized and existing under the laws of Oregon.

3. H&W is and has been at all material times a corporation organized and existing under the laws of Missouri.

4. Moreton is and has been at all material times a corporation organized and existing under the laws of Utah.

5. HWP is and has been at all material times a limited liability company organized and existing under the laws of Nevada.

6. This Court has jurisdiction over the instant action pursuant to NRS 14.065. H&W knowingly and purposefully acted as the managing general agent and procured insurance coverage related to the operation of a waterpark located in Henderson, Nevada.

7. Venue is proper pursuant to NRS 13.010 and NRS 13.040.

FACTUAL BACKGROUND

Producer Agreement Between Bliss Sequoia and H&W

8. On March 10, 2009 Bliss Sequoia entered a producer agreement with H&W.

9. Under the producer agreement, H&W agreed to place risks and effect insurance coverage for Bliss Sequoia's clients.

10. Under the producer agreement, Bliss Sequoia acted as an insurance broker who would assist clients in procuring coverage.

11. Under the producer agreement, H&W acted as a wholesale broker who would place coverage with an insurance carrier for Bliss Sequoia's clients.

12. Upon information and belief, H&W operated and continues to operate in conjunction with the World Waterpark Association as a comprehensive specialized insurance program that provides expert claims and risk management services to waterparks across the United States.

HWP Sought Insurance for the Waterpark

13. Upon information and belief, in 2014 HWP sought general liability insurance for its Henderson waterpark.

14. Upon information and belief, in 2015, HWP renewed it general liability insurance for its Henderson waterpark.

15. Upon information and belief, HWP utilized the services of Moreton and Bliss Sequoia as insurance brokers.

Moreton Advised HWP on Insurance Limits

16. Upon information and belief, in July 2014 Moreton conducted an inspection of HWP's Henderson waterpark and subsequently issued a report to HWP.

17. Upon information and belief, HWP asked Moreton for information when deciding on general liability coverage limits.

18. Upon information and belief, HWP obtained an opinion "from Moreton & Company to say where should [HWP's] limits be."

19. Upon information and belief, HWP "relied on [Moreton's] input as to how much is enough" insurance coverage for the waterpark.

Bliss Sequoia Relied on H&W's Specialized Waterpark Knowledge

20. HWP used Bliss Sequoia to submit its insurance application for the waterpark.

21. In or around July 2014, Lance Barnwell of Bliss Sequoia contacted Patrick Clark of H&W about placing coverage for HWP.

22. On July 29, 2014, H&W investigated the waterpark and issued an insurance audit report.

23. In or around July 2014, Barnwell asked Clark to confirm that a $5,000,000 general liability coverage limit was sufficient for the waterpark.

24. Clark assured Barnwell that HWP's general liability coverage limits were "in the ballpark" of other similarly situated waterparks.

25. Based on Clark's assurance and H&W's specialized knowledge of the waterpark industry, Barnwell advised HWP that a $5,000,000 general liability limit was "in line with the scope and size of the park."

26. In making this statement, Bliss Sequoia relied on H&W's purported expertise and specialized knowledge of risks faced by waterparks and their insurance needs.

Bliss Sequoia Also Relied on HWP's Representations About Waterpark Safety

27. At all material times, Bliss Sequoia believed that HWP was complying with applicable safety codes and operating the waterpark in a safe manner.

28. On April 8, 2015, in an email from Shane Huish to Lance Barnwell, HWP represented to Bliss Sequoia that the waterpark "follows the strictest of safety guidelines set forth by the City, State and Federal agencies" and that its "entire management team and staff is thoroughly trained in the proper protocol and procedure surrounding issues of guest safety."

29. Over a period of years, prior to placing coverage for the waterpark, Shane Huish and Scott Huish of HWP on multiple occasions expressed to Lance Barnwell of Bliss Sequoia that safety was a priority in how they operated their enterprises.

30. During the renewal of HWP's policy, Bliss Sequoia relied on HWP's prior representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the scope and size of the park.

HWP's False Representations About Waterpark Safety

31. On May 27, 2015, Leland Gardner nearly drowned at the waterpark and sustained injuries.

32. As a result of this incident, Bliss Sequoia learned that HWP made intentionally false representations about waterpark safety, on which Bliss Sequoia relied.

33. Shane Huish was appointed to manage the waterpark, which included the duty to ensure that the park complied with all necessary safety requirements. Nonetheless, Shane

Huish admitted that he had "major concerns" about his ability to oversee the Risk Management department of the waterpark. Ex. 1.

34. In 2014, HWP financially underperformed and was therefore subject to mounting financial pressure. Indeed, by the end of 2014, HWP only had $19,839 in cash on hand with limited revenue expected to be achieved before late spring of 2015. Ex. 2.

35. On September 30, 2014, Scott Huish communicated to HWP's lender that labor at the waterpark was "heavy at start-up -- wanted to make good first impression w/ new guests," and that in advance of the 2015 season, the waterpark's management was "now cutting employees-now cross training" and would have "less supervision." Ex. 3.

36. On October 30-31, 2014, HWP's Management Committee had a meeting where the primary focus was HWP's financial performance and how costs could be reduced for the upcoming 2015 season. Ex. 4.

37. Thereafter, in December 2014, Scott and Shane Huish began exchanging the waterpark's employee schedule for the 2015 season such that the number of lifeguards at the wave pool where Leland Gardner nearly drowned was reduced from 17 to 11. Ex. 5. Subsequently, the number of lifeguards at the wave pool was even further reduced from 11 to 7. Ex. 6.

38. On January 29, 2015, Shane Huish 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 Southern Nevada Health District ("SNHD"). Ex. 7. 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." *Id*. Shane Huish forwarded Ohki's e-mail to Scott Huish and stated "[l]ooks like we need to file a variance." *Id*.

39. The staffing cuts were not limited to lifeguards at the wave pool. Ex. 8. Indeed, lifeguards at the tube slides and lazy river were cut, as were parking lot attendants, kitchen staff, and other non-aquatics personnel. *Id*.

40. The waterpark opened for business on March 21, 2015, and HWP implemented the significantly reduced lifeguard staffing scheme set forth in the revised December 2014 employee schedule.

41. During the 2015 season, lifeguard supervisors repeatedly raised concerns with management regarding the inadequate number of lifeguards on duty at the wave pool.

42. The chronic understaffing of lifeguards at the wave pool was particularly concerning because the wave pool was the most dangerous attraction at the waterpark. Indeed, all 12 lifeguard rescues at the waterpark during the 2014 season occurred at the wave pool. Ex. 9.

43. The dangers posed by the lifeguards and lack thereof was known to HWP. For example, at the same time HWP was reducing lifeguard staffing levels at the wave pool, Shane Huish texted his brother, Dave Huish, that "[s]ome of our new lifeguards can't even swim half way across the wave pool…lame." Ex. 10.

44. During the 2015 season, HWP also began pulling maintenance workers and kitchen staff with no prior training in water safety to monitor attractions at the waterpark. SNHD did not amend the NAC provisions governing lifeguard staffing in 2015; nor did HWP request a variance to its permit, which permit required that 17 lifeguards be posted to the wave pool at all times.

45. HWP was warned not to reduce the lifeguard numbers at the waterpark until after SNHD officially changed the legal requirement. Ex 11 at 245:11-249:25.

46. HWP chose to intentionally violate Nevada law by staffing the wave pool with significantly less than the required 17 lifeguards.

47. Before the April 2015 Management Committee meeting, Shane Huish responded to a proposal from HWP's public relations consultant concerning potential promotions for water safety and stated, "[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." Ex. 12.

48. On May 27, 2015 -- the day of Leland's drowning -- *HWP assigned only 3 lifeguards to monitor the 35,000 square foot wave pool*. Ex. 13.

49. Lifeguard supervisor, Sierra Beggs has testified under oath that the lifeguards "would have caught [Leland's drowning] sooner [] if we had more lifeguards on stand[.]" Ex. 14 at 67:24-69:11.

50. The other lifeguard supervisors have also testified under oath that due to the lack of lifeguards on the day of Leland Gardner's drowning, the wave pool was unsafe and should have been closed to prevent serious injuries. *See e.g.* Ex. 15.

51. In April 2015, notwithstanding the reckless staffing scheme orchestrated by HWP as described above, HWP represented to Bliss Sequoia that HWP "follows the strictest of safety guidelines set forth by the City, State and Federal agencies" and that its "entire management team and staff is thoroughly trained in the proper protocol and procedure surrounding issues of guest safety."

52. It was not until after the incident that Bliss Sequoia learned that HWP was understaffing the waterpark in violation of Nevada Administrative Code lifeguard requirements and its permit.

53. On the day Leland Gardner almost drowned, the Nevada Administrative Code required HWP to have 17 lifeguards staffing the wave pool, yet HWP had only 3 lifeguards staffing it.

HWP's Claim Against Bliss Sequoia

54. The Gardners sued HWP and subsequently entered a stipulated judgment against HWP in the amount of $49,000,000.

55. HWP alleges that, based on Bliss Sequoia's advice, it purchased insufficient general liability coverage. (Am. Third-Party Compl.) at ¶ ¶ 13, 15.

56. To the extent Bliss Sequoia faces any liability to HWP, that liability arises as a result of Moreton's negligent professional advice to HWP regarding HWP's general liability limits.

57. To the extent Bliss Sequoia faces any liability to HWP, that liability arises as a result of H&W's negligent affirmation to Bliss Sequoia regarding the adequacy of HWP's general liability limits.

58. As a result of Bliss Sequoia's reliance on the accuracy of HWP's representations regarding the waterpark's compliance with applicable safety codes, Bliss Sequoia has sustained damages.

59. As a result of the actions of HWP, H&W, and Moreton, Bliss Sequoia has been forced to incur attorneys' fees and costs to defend against HWP's suit.

FIRST CAUSE OF ACTION
Contribution
Against Moreton and H&W

60. Bliss Sequoia incorporates each and every allegation set forth in the preceding paragraphs as if they were fully set forth herein.

61. Bliss Sequoia faces potential liability arising from HWP's allegations that $5,000,000 in general liability insurance was insufficient to cover HWP.

62. If Bliss Sequoia pays a judgment or settlement to HWP in connection with this action, it is entitled to contribution from Moreton and H&W to the extent that they share a common basis for liability with Bliss Sequoia.

63. As a result of Moreton's and H&W's negligence, Bliss Sequoia has been damaged in an amount in excess of $15,000.

64. As a result of Moreton's and H&W's negligence, Bliss Sequoia has been forced to defend against HWP's claim and is entitled to its reasonable costs and attorneys' fees incurred as a result.

SECOND CAUSE OF ACTION
Negligent Misrepresentation
Against HWP

65. Bliss Sequoia incorporates each and every allegation set forth in the preceding paragraphs as if they were fully set forth herein.

66. During its operation of the waterpark, HWP supplied false information to Bliss Sequoia regarding the safety measures in place at the waterpark and its compliance with applicable safety codes.

67. The information supplied by HWP was supplied for the purpose of guiding Bliss Sequoia, in its professional role as an insurance broker, to procure adequate coverage for HWP.

68. HWP failed to exercise reasonable care or competence in communicating false information to Bliss Sequoia regarding the safety measures in place at the waterpark and its compliance with applicable safety codes.

69. Bliss Sequoia justifiably relied upon the information supplied by HWP when it renewed HWP's general liability coverage in an amount that it determined to be sufficient based upon the information that had been provided before that renewal.

70. As a result of Bliss Sequoia's reliance upon the accuracy of the information provided by HWP, Bliss Sequoia has been damaged in an amount in excess of $15,000.

71. As a result of Bliss Sequoia's reliance upon the accuracy of the information provided by HWP, Bliss Sequoia has been forced to defend against HWP's claim and is entitled to its reasonable costs and attorneys' fees incurred as a result.

THIRD CAUSE OF ACTION
Fraudulent Representation
Against HWP

72. Bliss Sequoia incorporates each and every allegation set forth in the preceding paragraphs as if they were fully set forth herein.

73. During its operation of the waterpark, HWP supplied knowingly false information to Bliss Sequoia regarding the safety measures in place at the waterpark and its compliance with applicable safety codes.

74. When HWP supplied this false information to Bliss Sequoia, HWP had knowledge and believed the information was false.

75. HWP intended for Bliss Sequoia to rely on this information in renewing HWP's general liability insurance.

76. Bliss Sequoia justifiably relied upon the information supplied by HWP when it renewed HWP's general liability coverage in an amount that it determined to be sufficient based upon that information.

77. As a result of Bliss Sequoia's reliance upon the accuracy of the information provided by HWP, Bliss Sequoia has been damaged in an amount in excess of $15,000.

78. As a result of Bliss Sequoia's reliance upon the accuracy of the information provided by HWP, Bliss Sequoia has been forced to defend against HWP's claim and is entitled to its reasonable costs and attorneys' fees incurred as a result.

FOURTH CAUSE OF ACTION
Fraudulent Concealment
Against HWP

79. Bliss Sequoia incorporates each and every allegation set forth in the preceding paragraphs as if they were fully set forth herein.

80. HWP concealed and suppressed information from Bliss Sequoia regarding HWP's intentional lack of adequate safety measures and its noncompliance with applicable safety codes at the waterpark.

81. HWP had a duty to disclose to Bliss Sequoia information regarding its intentional lack of adequate safety measures and its noncompliance with applicable safety codes at the waterpark.

82. Because HWP was under financial strain, HWP intentionally and knowingly concealed and suppressed information regarding the lack of adequate safety measures in place at the waterpark and its noncompliance with applicable safety codes so that Bliss Sequoia would renew HWP's general liability insurance in a manner consistent with HWP's budgetary restrictions.

83. Bliss Sequoia was unaware of HWP's intentional lack of adequate safety measures and noncompliance with applicable safety codes when it renewed HWP's general liability insurance.

84. If Bliss Sequoia had been aware of HWP's intentional lack of adequate safety measures and noncompliance with applicable safety codes, it would have either not worked to renew HWP's general liability insurance or could have recommended different coverage in the form of insurance providing more robust general liability insurance and with additional limits.

85. As a result of HWP's concealment and suppression of information regarding its intentional lack of adequate safety measures and noncompliance with applicable safety codes, Bliss Sequoia has been damaged in an amount in excess of $15,000.

86. As a result of HWP's concealment and suppression of information regarding its intentional lack of adequate safety measures and noncompliance with applicable safety codes, Bliss Sequoia has been forced to defend against HWP's claims and is therefore entitled to its reasonable costs and attorneys' fees incurred as a result.

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PRAYER OF RELIEF

1. Bliss Sequoia prays for relief in the form of a judgment in an amount in excess of $15,000, which will justly compensate Bliss Sequoia for its injuries, damages, and losses including contribution or indemnity for any judgment entered against it, compensation for loss of time, loss of business opportunity, damage to Bliss Sequoia's reputation, and legal fees incurred due to litigation of the instant action.

2. Bliss Sequoia prays for punitive damages.

3. Bliss Sequoia prays for pre and post judgment interest.

4. Bliss Sequoia prays for reimbursement of attorneys' fees.

5. Bliss Sequoia prays for costs of suit.

6. Bliss Sequoia prays for such other and further relief the Court deems just and proper.

DATED this 23rd day of April, 2020.

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

_____

Mark A. Hutchison (4639)
Patricia Lee (8287)
Branden D. Kartchner (14221)
10080 West Alta Drive, Suite 200
Las Vegas, Nevada 89145

Attorneys for Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 23rd day of April, 2020, I caused the document entitled **BLISS SEQUOIA'S AND HUGGINS INSURANCE'S AMENDED CROSSCLAIMS AND COUNTERCLAIMS** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[**X**] to be electronically served through the Eighth Judicial District Court's electronic filing system pursuant to EDCR 8.02; and/or

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to the attorneys/ parties listed below:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Heather Bennett

An employee of Hutchison & Steffen, PLLC

CAMPBELL & WILLIAMS
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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Third-Party Plaintiffs, vs. BLISS SEQUOIA INSURANCE & RISK ADVISORS, INC., an Oregon corporation; HUGGINS INSURANCE SERVICES, INC., an Oregon corporation, Third-Party Defendants. AND ALL RELATED CLAIMS	Case No.: A-15-722259-C Dept. No.: XXX **MOTION TO DISMISS COUNTERCLAIMS AGAINST HENDERSON WATER PARK, LLC** **HEARING REQUESTED**

Third-Party Plaintiffs Peter Gardner and Christian Gardner, individually and on behalf of their minor son, Leland Gardner ("Plaintiffs"), as the assignees of Henderson Water Park, LLC dba Cowabunga Bay Water Park, submit their Motion to Dismiss Counterclaims Against Henderson Water Park, LLC ("HWP"). This Motion is made and based upon the attached memorandum of points and authorities, all exhibits attached hereto, all pleadings and papers on file herein, and any oral argument the Court shall allow at the time of hearing.

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I. INTRODUCTION

Third-Party Defendants Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc. (collectively the "Brokers") have apparently decided that they would rather tell the jury how Leland Gardner drowned than defend the malpractice that forced his family to litigate against HWP for nearly five years. Under the pretense of "counterclaims" for negligent misrepresentation and fraud against HWP, the Brokers seek to transform this narrow action arising out of their negligent advisement of insurance limits for Cowabunga Bay into a full-blown rehash of Plaintiffs' original lawsuit. The Brokers, in fact, even went so far as to plagiarize Plaintiffs' summary judgment briefing from the underlying case in drafting their counterclaims.[1] The Brokers, however, cannot convert the facts underlying Plaintiffs' settled claims into viable causes of action against HWP.[2]

The Brokers initially sought to plead a single claim for negligent misrepresentation on the theory that HWP's alleged misrepresentations about safety caused the Brokers to provide the negligent recommendation of $5 million in insurance coverage for Cowabunga Bay.[3] In response, Plaintiffs pointed out that the alleged statements attributed to HWP either postdated the Brokers' so-called reliance or were incapable of forming the basis of a misrepresentation claim.[4] The Court

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[1] *Compare* Plaintiffs' Opposition to the Individual Defendants' Motions for Summary Judgment on the Issues of Duty and Breach (on file) *with* Bliss Sequoia's and Huggins Insurance's Cross Claims and Counterclaims (on file).

[2] The Brokers' counterclaims against HWP would serve as a setoff to their own liability on the professional negligence claims assigned to Plaintiffs. *See Express Recovery Servs. Inc v. Olson*, 397 P.3d 792, 795-96 and n. 1 (Utah Ct. App. 2017) (citing numerous cases for the principle that a "defendant cannot assert its claim against the assignor offensively to recover damages from the assignee, but only defensively, as a setoff, to reduce the amount of the assignee's recovery"). Thus, Plaintiffs defend the Brokers' counterclaims against HWP in that capacity only, and do not represent HWP or the company's interests.

[3] *See* Third-Party Defendants' (i) Mot. to Amend Pleadings and Add Parties; (ii) Mot. to Sever; and (iii) Alternatively, Mot. to Continue Trial and Discovery (dated 3/11/20) at Ex. A ¶¶ 26-29 (on file).

[4] *See* Plaintiffs' Opp'n (dated 3/18/20) at pp. 8-11 (on file).

granted leave to amend but directed the Brokers to re-plead their negligent misrepresentation claim with more factual detail.[5]

The Brokers' amended counterclaim effectively concedes that their original cause of action was deficient by failing to allege any new facts concerning the purported misrepresentations. Instead, the Brokers try to move the goalposts by now claiming that their detrimental reliance actually occurred during the renewal of HWP's insurance policy in April 2015 rather than at the time of the negligent advisement of insurance limits in July 2014. Additionally, with knowledge of the inherent flaws in their negligent representation claim, the Brokers seek to increase their odds of pleading a viable counterclaim against HWP by alleging two new causes of action for fraudulent misrepresentation and fraudulent concealment.

No amount of gamesmanship, creative pleading, and hindsight can save the Brokers' baseless causes of action against HWP. The statements attributed to HWP still do not give rise to a viable cause of action for negligent misrepresentation or fraudulent misrepresentation. Moreover, the Brokers did not—and cannot—allege that HWP owed a duty to disclose as required to support their cause of action for fraudulent concealment. Accordingly, the Court should summarily dismiss the Brokers' counterclaims and prevent this straightforward case from devolving into a do-over of Plaintiffs' original lawsuit which settled months ago.

II. ARGUMENT

A. Legal Standard.

This Court is well versed in the standards governing a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to NRCP 12(b)(5). Though the Court accepts the allegations in the complaint as true and draws all inferences in favor of the non-movant, a complaint must nonetheless be dismissed where "it appears to a certainty that the plaintiff is not entitled to relief

[5] *See* Findings of Fact, Conclusions of Law and Order (dated 4/4/20) at 4:4-8 (on file).

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under any set of facts which could be proved to support his claim." *Hale v. Burkhardt*, 104 Nev. 632, 636, 764 P.2d 866, 868 (1988). Moreover, the Court is not required to accept as true legal conclusions or "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *G.K. Las Vegas Ltd. P'Ship v. Simon Property Group, Inc.*, 460 F.Supp.2d 1222, 1234 (D. Nev. 2006) (interpreting federal counterpart to NRCP 12(b)(5) before *Iqbal* and *Twombly*) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001)). In other words, "conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim." *Id.* at 1235 (quoting *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988)).

B. The Brokers' Claims For Negligent Misrepresentation And Fraudulent Misrepresentation Fail To Allege An Actionable Misreprentation of Fact.[6]

In order to plead a viable claim for negligent misrepresentation, the Brokers must allege that (i) HWP, in the course of an action in which it had a pecuniary interest, failed to exercise reasonable care or competence in obtaining or communicating information to the Brokers; (ii) the Brokers' justifiably relied on this information; and (iii) the Brokers suffered damages as a result. *See Barmettler v. Reno Air, Inc.* 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998). Similarly, to bring a claim for fraudulent misrepresentation, the Brokers must allege that (i) HWP made a false representation; (ii) HWP either knew or believed that its representation was false or that HWP had an insufficient basis of information for making the representation; (iii) HWP intended to induce the Brokers to act or refrain from acting upon the misrepresentation; and (iv) damage to the Brokers as a result of relying on the misrepresentation. *Id.* at 446-47, 956 P.2d at 1386. "In Nevada, negligent misrepresentation and fraudulent misrepresentation both require that the defendant supply 'false information' or make a 'false misrepresentation.'" *Guilfoyle v. Olde Monmouth Stock Transfer Co.*, 130 Nev. 801, 810, 335 P.3d 190, 197 (2014).

[6] Because the Brokers' causes of action are based on the same purported misrepresentations and suffer from the same defects, Plaintiffs will address these claims together.

Fraudulent misrepresentation must be pleaded with particularity under NRCP 9(b). *Roundy v. Bank of Am., N.A.*, 2013 WL 559486, at *5 (D. Nev. Feb. 12, 2013) ("A plaintiff asserting fraud against a corporate entity must state the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written."). Additionally, because negligent misrepresentation is a fraud-based claim, the Brokers are required to plead their cause of action against HWP with particularity under NRCP 9(b)—*i.e.* the Brokers must "state precisely the time, place and nature of the misleading statements, misrepresentations and specific acts of fraud." *Weingartner v. Chase Home Fin.* 702 F.Supp.2d 1276, 1291 (D. Nev. 2010) (dismissing negligent misrepresentation claim for failure to plead with particularity where "Plaintiffs [made] no claims as to which Defendants made which particular fraudulent or negligent statements at what times or what was fraudulent or negligent about them."); *see also Pacchiega v. Fed. Home Loan Mortg. Corp.*, 2013 WL 3367576, at *3 (D. Nev. July 5, 2013) (dismissing negligent misrepresentation claim for failure to plead with particularity under the federal counterpart of NRCP 9(b)); *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc.*, 460 F.Supp.2d 1246, 1262 (2006) (same).[7]

Here, the Brokers identify two purported "misrepresentations" by HWP in their counterclaim. First, the Brokers allege that "[i]n April 2015, HWP represented to Bliss Sequoia that the waterpark 'follows the strictest of safety guidelines set forth by the City, State and Federal agencies' and that its 'entire management team and staff is thoroughly trained in the proper protocol and procedure

[7] In the briefing on their motion for leave to amend, the Brokers chastised Plaintiffs for "ignoring" a handful of unpublished orders where state district courts found that a claim for negligent misrepresentation did not need to be pleaded with particularity under NRCP 9(b). It should go without saying that unpublished district court orders are not precedent and may not be cited in this Court. *C.f.* NRAP 36(c)(3). It is likewise well-settled that "[f]ederal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002). Plaintiffs respectfully submit that the Court should rely on "strong persuasive authority" and not the unpublished orders cited by the Brokers.

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surrounding issues of guest safety.'"[8] Second, the Brokers allege that "[o]ver a period of years, prior to placing coverage for the waterpark, Shane Huish ("Shane") and Scott Huish ("Scott") of HWP on multiple occasions expressed to Lance Barnwell of Bliss Sequoia that safety was a priority in how he [sic] operated his enterprises."[9] Plaintiff will address whether each "misrepresentation" is actionable below.

1. HWP's alleged statements in April 2015 concerning legal compliance and safety guidelines at Cowabunga Bay.

The Brokers originally alleged that "Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and scope of the park" in July 2014.[10] After Plaintiffs pointed out that the Brokers could not base their claim on a representation that occurred approximately 9 months after the supposed reliance, the Brokers changed their allegation to state that "***[d]uring the renewal of HWP's policy***, Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and scope of the park."[11]

To begin, the fact that the Brokers casually changed a substantive factual allegation in their counterclaim to avoid dismissal is indicative of the baseless nature of their claims. Plaintiffs' assigned claims are not premised on the allegation that Lance Barnwell gave his "professional opinion [ ] that the limits of coverage are in line with the scope and size of the park" and that Cowabunga Bay was "adequately insured" when HWP renewed its insurance for the 2015 season. Rather, Plaintiffs' assigned

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[8] *See* Bliss Sequoia's and Huggins Insurance's Cross Claims and Counterclaims ¶¶ 28.

[9] *Id.* at ¶ 29.

[10] *See* Mot. (dated 3/11/20), at Ex. A ¶¶ 29, 48-49.

[11] *See* Bliss Sequoia's and Huggins Insurance's Cross Claims and Counterclaims ¶ 30 (new language emphasized).

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claims are based on Mr. Barnwell's recommendation of insurance coverage limits in ***July 2014***—*i.e.* approximately 9 months ***before*** the alleged statements concerning legal compliance and safety guidelines referenced in the Brokers' proposed counterclaim.[12] Simply put, the Brokers' new allegation concerning the element of reliance is internally inconsistent and demonstrably false. *See Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (the Court is not required "accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged"); *G.K. Las Vegas Ltd. P'Ship*, 460 F.Supp.2d at 1234.

Regardless, the addition of the prefatory language "during the renewal of HWP's policy" does not change the Brokers' claim of reliance in any material way. The Brokers' central allegation on the element of reliance continues to be that Lance Barnwell supposedly relied on these statements when he provided his "professional opinion" on the adequacy of Cowabunga Bay's insurance coverage limits.[13] Because Mr. Barnwell made the recommendation of $5 million in insurance coverage limits for Cowabunga Bay in July 2014, the Brokers cannot maintain claims for negligent misrepresentation and fraudulent misrepresentation based on statements that were made 9 months later in April 2015. *See Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975) (the element of justifiable reliance requires a "causal connection" in that the misrepresentation must play "a material and substantial part in leading the plaintiff to adopt his particular course of conduct.").

In addition, the representations attributed to HWP in April 2015 were not even directed to Mr. Barnwell. Indeed, it is no coincidence that the Brokers attached 15 exhibits to their counterclaim but neglected to include the e-mail containing the primary misrepresention on which they rely. Contrary to the Brokers' allegation that Shane made a representation to Mr. Barnwell concerning Cowabunga Bay's legal compliance and safety guidelines, Shane merely forwarded an e-mail in which "someone from

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[12] Amended Third-Party Complaint at ¶ 12 (on file).

[13] *See* Bliss Sequoia's and Huggins Insurance's Cross Claims and Counterclaims ¶ 30.

corporate" responded to an injured guest named Joanne Soof and made the following statement: "First, I must assure ***you [i.e. Ms. Soof]*** that Cowabunga Bay follows the strictest of safety guidelines set forth by City, State, and Federal agencies, as well as the slide manufacturer and our Aquatics & Safety Company. Our entire management team and staff is thoroughly trained in the proper protocol and procedure surrounding issues of guest safety."[14]

Suffice it to say, the Brokers cannot credibly allege that HWP intended to induce Mr. Barnwell to rely on these statements or that this e-mail to Ms. Soof was designed to guide the Brokers in any business transaction. *See Barmettler, supra* (identifying elements of negligent misrepresentation and fraudulent misrepresentation claims). Rather, Shane Huish simply passed along HWP's response to an allegedly injured guest. Even if the Brokers adequately alleged the element of reliance—and they did not—this third-party communication from "someone at corporate" cannot form the basis of a cognizable misrepresentation claim.

2. Statements that safety is a "priority" are not actionable as a matter of law.

In opposing the Brokers' request for leave to amend, Plaintiffs contended that the Brokers failed to plead their claim with particularity as it related to the alleged statements about safety made by Scott and Shane. Specifically, the Brokers failed to allege when Scott and Shane made these alleged statements; nor did the Brokers allege that these representations about safety being a "priority" were made in connection with insurance coverage at Cowabunga Bay.[15] Moreover, the Brokers seemed to

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[14] Exhibit 1 (April 8, 2015 E-mail Correspondence) (emphasis added). "A court may consider a document outside the pleadings if (1) the complaint refers to the document, (2) the document is central to the complainant's claim, and (3) no party questions the authenticity of the document." *Baxter v. Dignity Health*, 131 Nev. 759, 764, 357 P.3d 927, 930 (2015). Here, the Brokers (i) expressly refer to the e-mail in their amended counterclaim; (ii) the statements contained therein are the foundation of their claims for negligent misrepresentation and fraudulent misrepresentation, and (iii) Bliss Sequoia produced the e-mail thereby authenticating the same. *See* Bliss Sequoia's and Huggins Insurance's Cross Claims and Counterclaims ¶ 28.

[15] The Brokers likewise lumped Scott and Shane together without differentiating who purportedly said what and when, which is impermissible group pleading. *See Roundy*, 2013 WL 559486, at *5; *Hendi v. Nev. ex rel. Private Investigators Licensing Bd.*, 2017 WL 6270104, at * 3 (D. Nev. Dec. 7,

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allege that the statements attributed to Scott and Shane concerned "enterprises" associated with the Huishs' other businesses.

In their amended counterclaim, the Brokers left this allegation unchanged despite the Court's instruction to provide more detail and did not add any factual information concerning the alleged misrepresentations by Shane and Scott about safety being a "priority."[16] The Brokers' repeated failure to plead with particularity and identify the "who, what, when, where and how" related to these alleged misrepresentations is grounds for dismissal with prejudice. *See, e.g.*, *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) (affirming dismissal of fraud claim where plaintiffs failed to plead with particularity despite having multiple opportunities); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1108 (9th Cir. 2003) (same).

Although the Court's inquiry could end there, the Brokers cannot allege a viable misrepresentation claim based on alleged statements by Shane and Scott that safety is a "priority." It is well settled that a negligent or fraudulent misrepresentation claim cannot be premised on "generalized, vague and unspecific assertions" like those attributed to Scott and Shane. *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1015 (9th Cir. 2003) (dismissing negligent misrepresentation claim based on general statements describing the "high priority" placed on product development by the defendant); *see also Cooke v. Allstate Mgmt. Corp.*m, 741 F.Supp. 1205, 1215-16 (D. S.C. 1990) (dismissing fraud claim based on representations concerning the "safety" of apartment complex because such statements are "opinion rather than fact" and "[s]afety is a vague term that would not be susceptible of exact knowledge"); *In re Yum! Brands, Inc. Sec. Litig.*, 73 F.Supp.3d 846, 864-65 (W.D. Ky. 2014) ("[T]he objective truth or falsity of Defendants' statements concerning the quality of Yum!'s food safety program

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2017) ("Courts consistently conclude that undifferentiated pleading against multiple defendants is improper.") (quotation omitted).

[16] *See* Bliss Sequoia's and Huggins Insurance's Cross Claims and Counterclaims ¶¶ 29.

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cannot be determined" and "[a]ssessing the veracity of those terms can only be characterized as a matter of opinion").[17]

Any alleged representation by Scott Huish and Shane Huish that safety is a "priority" in how they operate their business is a vague, generalized and subjective opinion rather than a definitive assertion of ascertainable fact. In other words, the alleged misrepresentations by the Huishs about how they prioritize "safety" cannot be proven true or false by any objective standards. Thus, the Court should dismiss the Brokers' claims for negligent misrepresentation and fraudulent misrepresentation in their entirety.

C. The Brokers Did Not Allege A Viable Claim For Fraudulent Concealment Because HWP Did Not Owe A Duty To Disclose.

"Under Nevada law, the general rule is that an action in deceit will not lie for nondisclosure." *Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 (D. Nev. 1995). Nevertheless, Nevada has recognized a cause of action for fraudulent concealment where the defendant had a duty to disclose. *Id.* at 1415-16. "A duty to disclose arises where there is a fiduciary relationship or where there is a 'special relationship,' such that the complaining party imparts special confidence in the defendant and the defendant reasonably knows of that confidence." *Peri & Sons Farms, Inc. v. Jain Irrigation, Inc.*, 933 F.Supp.2d 1279, 1292 (D. Nev. 2013). "The Nevada Supreme Court has recognized such a 'special relationship' between real estate agents/buyers, insurers/insureds, trustees/beneficiaries, and attorneys/clients, such that nondisclosure becomes the equivalent of fraudulent concealment." *Id.*[18]

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[17] *See also Anderson v. Atlanta Comm. for Olympic Games, Inc.*, 584 S.E.2d 16, 21 (Ga. Ct. App. 2003) (defendant's representation that Atlanta would be "the safest place on the planet" during the Olympics is a mere expression of opinion and cannot form the basis of a negligent misrepresentation claim); *Repucci v. Lake Champagne Campground, Inc.*, 251 F.Supp.2d 1235 (D. Vt. 2002) (dismissing negligent misrepresentation claim because campground's statement that it was "well-maintained" was opinion, not fact).

[18] To be clear, the special relationship between an insurer and insured imposes additional duties on the insurer, not the insured. *See Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988) ("[T]he relationship of an insured to an insurer is one of special confidence" where the insurer owes a duty of good faith and fair dealing to the insured).

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"The existence of duty presents a question of law" for the Court. *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 133 Nev. 430, 436-37, 401 P.3d 218, 223-24 (2017) (finding insurance broker did not owe de facto fiduciary duty or special duty to monitor its insured client's premium payments and alert client to potential cancellation); *CBC Fin., Inc. v. Apex Ins. Managers, LLC*, 2008 WL 3992330, *32 (9th Cir. Aug. 14, 2008) (affirming dismissal of breach of fiduciary duty claim brought by insured against insurance broker because "no Nevada court has imposed on insurance brokers a fiduciary duty toward insureds.") (interpreting Nevada law).[19]

Here, the Brokers proffer the conclusory allegation that "HWP had a duty to disclose to Bliss Sequoia information regarding its intentional lack of adequate safety measures and its noncompliance with applicable safety codes."[20] But HWP—as the insured client—obviously did not owe a fiduciary duty to the Brokers. The Brokers likewise fail to allege facts establishing any other type of special relationship that would impose a duty to disclose on HWP. In that regard, while "an insurance broker may assume additional duties to its insured client in special circumstances," *O.P.H.*, 133 Nev. at 436, 401 P.3d at 223-24, no court in any jurisdiction has ever found that an insured client owed a duty to disclose to an insurance broker.[21] Because there is absolutely no legal support for the Brokers'

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[19] HWP originally brought a claim for breach of fiduciary duty against the Brokers. Although the Brokers moved to dismiss HWP's breach of fiduciary duty claim, they neglected to cite the Nevada Supreme Court's decision in *O.P.H.* for the principle that an insurance broker does not owe a fiduciary duty to an insured client. Had they done so, the Court likely would have dismissed HWP's cause of action for breach of fiduciary duty. In any event, Plaintiffs did not take an assignment of HWP's claim for breach of fiduciary duty as it would not be viable under Nevada law.

[20] *See* Bliss Sequoia's and Huggins Insurance's Cross Claims and Counterclaims ¶¶ 81.

[21] This absence of legal authority is explained by the fact that any special duties in an insurance broker/insured relationship flow to the insured client and not the other direction. In this case, the Brokers and, more specifically, Mr. Barnwell assumed a special duty to advise HWP on the adequacy of Cowabunga Bay's liability insurance limits by holding themselves out as experts in the field of water park insurance and responding to Slade Opheikens' direct inquiry on the topic. *See, e.g.*, *Voss v. Netherlands Ins. Co.*, 8 N.E.3d 823 (N.Y. 2014) (one "exceptional circumstance" giving rise to a special duty of advisement is "some interaction regarding a question of coverage, with the insured relying on the expertise of the agent"); *Zaremba Equip., Inc. v. Harco Nat'l Ins. Co.*, 761 N.W.2d 151, 159 (Mich. Ct. App. 2008) (an insurance broker will owe a special duty of advisement where

contention that HWP owed a duty to disclose in connection with the straightforward commercial transaction of renewing Cowabunga Bay's commercial general liability policy for the 2015 season, the Court should dismiss the Brokers' claim for fraudulent concealment with prejudice.

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their Motion to Dismiss Counterclaims Against Henderson Water Park, LLC in its entirety.

DATED this 27th day of April, 2020.

CAMPBELL & WILLIAMS

By /s/ ***Philip R. Erwin***
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"an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate").

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Campbell & Williams, and that on this 27th day of April, 2020 I caused the foregoing document entitled **Motion to Dismiss Counterclaims Against Henderson Water Park, LLC** 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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EXHIBIT 1

Message

From: Shane [shane@cowabungabay.com]
Sent: 4/8/2015 8:51:42 AM
To: Lance Barnwell [Lance@blissinsurance.com]
Subject: Re: FW:

Hi lance. I had someone from "corporate" respond to her:

Hello Joanne Soof,

Thank you for your email. I am happy to clarify our position regarding your claim as outlined by our General Manager, who spoke with you on two occasions, by phone, on Monday, April 6th and again on Tuesday, April 7th. I have been fully apprised of your situation and have reviewed your complaint in depth. I also spoke directly with our insurance company.

First, I must assure you that Cowabunga Bay follows the strictest of safety guidelines set forth by City, State and Federal agencies, as well as the slide manufacturer and our Aquatics & Safety Company. Our entire management team and staff is throughly trained in the proper protocol and procedure surrounding issues of guest safety.

I have reviewed your accusations throughly and I have personally spoken with each and every lifeguard, supervisor, manager and EMT on duty regarding the day of your visit to Cowabunga Bay. All of our EMT's, and First Aid Attendants, are trained to document serious injuries that take place at the park. With no record of your incident on file I am left without recourse; it is impossible for me at this late point to validate your claim.

The General Manager handled your issue according to our required guidelines set forth by our Insurance Carrier as well as our Corporate Attorneys.

I have already authorized, and processed today a complete refund of the payment plan you purchased on 3/30/15. Your 5 Season Passes have been deactivated and voided in our system. You will find the amount of $191.61 refunded back to your account within 5-7 business days.

Shane Huish
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On Apr 7, 2015, at 4:18 PM, Lance Barnwell <Lance@blissinsurance.com> wrote:

From: Joanne Soof [mailto:joannesoofduran@gmail.com]
Sent: Tuesday, April 07, 2015 3:24 PM
To: Lance Barnwell
Subject:

hello I was wondering if someone could please contact me at 702-4060 36 for this concern incident that Cowabunga bay Las Vegas

OPPM
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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **BLISS SEQUOIA AND HUGGINS INSURANCES' OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS**

1. Introduction

The Court should deny the Gardners' motion to dismiss the claims brought by Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc. ("Bliss Sequoia")

against Henderson Water Park, LLC dba Cowabunga Bay Water Park ("HWP"). At the outset, there is a significant threshold problem with the motion. The claims the Gardners seek to dismiss are asserted against HWP, not the Gardners. Therefore, the Gardners cannot move to dismiss them.

Putting that fatal flaw to the side, the Court should deny the motion for multiple additional reasons. As the Court is aware, a motion to dismiss is subject to a stringent legal standard, given that courts are reluctant to dismiss claims at the pleadings stage. In advancing their arguments, the Gardners ignore the motion to dismiss standard. The Court should not.

Under the applicable standard, the Gardners' arguments lack any merit. First, the Gardners are incorrect that Bliss Sequoia could not have relied on statements made in April 2015 because Bliss Sequoia's claims are based on a representation that was made during the renewal of HWP's policy. That is what Bliss Sequoia has factually alleged in the pleadings, and a defendant's disagreement with factual allegations is surely not a basis to dismiss a claim at this stage.

Second, statements regarding whether safety was a priority to HWP are actionable here. These statements were made against risks that are inherently impacted by HWP's safety procedures. Tellingly, the Gardners do not cite any cases analyzing circumstances remotely close to the facts here.

Third, Bliss Sequoia has properly alleged a fraudulent concealment claim. HWP had a duty to disclose information regarding safety at the waterpark, particularly given the representations it made regarding safety. Given the allegations, which must be accepted as true at this pleading stage of the case, any dispute about the duty at most presents a question of fact that the Court cannot resolve at this preliminary stage.

Finally, the Court should deny the motion because, contrary to the Gardners' contention, Bliss Sequoia has plead its claims with particularity. None of the cases the Gardners cite have dismissed a claim like the ones at issue here.

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2. Legal Argument

A. The Gardners Cannot Move To Dismiss Claims That Are Not Made Against Them.

It is elementary that a motion to dismiss a claim can be brought by the party against whom the claim is made, not some third party. There is no dispute that the claims the Gardners seek to dismiss are made against HWP, not the Gardners. As a result, the Court should deny the Gardners' motion because only HWP can move to dismiss the claims.

The Gardners' motion is ostensibly based on NRCP12(b)(5). But that rule does not authorize third parties to file a motion to dismiss a claim against another party. NRCP 12(a) addresses responsive pleadings. It provides that a "party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading…." NRCP 12(a)(B). Because the "party" referenced in the rule "must" serve an answer by the deadline, the "party" has to be one that is required to serve an answer (*i.e.*, a party against whom a counterclaim or crossclaim is asserted). The rules about asserting defenses are similar. They provide that "[e]very defense to a claim … must be asserted in the responsive pleading if one is required." NRCP 12(b). Again, the responsive pleading is filed by the "party" against whom the claim is asserted.

It is in this context that the rules allow a motion to dismiss instead of a responsive pleading in certain circumstances: "*But* a party may assert the following defenses by motion … (5) failure to state a claim upon which relief can be granted…." NRCP 12(b)(5) (emphasis added). Because the motion to dismiss is permitted as an alternative to a responsive pleading (like an Answer), it follows that the motion to dismiss can be filed by the "party" against whom the claim is directed, not third parties.

The Gardners ignore all of this and even make clear that they "do not represent HWP or the company's interests." Motion at 2, n.2. The Gardners' admission is critical because the claims at issue are asserted against HWP. A party or counsel representing HWP or HWP's interests could move to dismiss. The Gardners cannot. Accordingly, the Court should reject the Gardners' arguments and deny the Motion outright.

Unable to support their motion under the rules, the Gardners bury in a footnote a meritless argument related to setoff. Specifically, the Gardners recognize that Bliss Sequoia's claims against HWP "would serve as a setoff to their own liability" as to the Gardners' claims against Bliss Sequoia. Motion at 2, n.2. From that premise, the Gardners assert that they are "defend[ing] the Brokers' counterclaims against HPW *in that capacity only*…." *Id.* However, the only case they cite about setoff – from Utah – does not grant any authority for a party to file a motion to dismiss, much less under the Nevada Rules of Civil Procedure. The setoff is irrelevant.

B. Even if the Gardners could move to dismiss these claims, they have not satisfied the motion to dismiss standard.

"[A] complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought." *Hall v. SSF, Inc.*, 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996). Additionally, Nevada is a notice pleading jurisdiction and courts liberally construe pleadings to place matters at issue which are fairly noticed to the adverse party. *Id.* When evaluating a motion to dismiss, the Court must "recognize all factual allegations made by [plaintiff] as true and draw all inferences in its favor." *Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008); *Squires By Squires v. Sierra Nevada Educ. Found. Inc.*, 107 Nev. 902, 904–05, 823 P.2d 256, 257 (Nev. 1991) (reversing trial court's dismissal of several claims, including intentional and negligent misrepresentation). A "complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew*, 124 Nev. at 228.

(1) Bliss Sequoia has alleged an actionable negligent and fraudulent misrepresentation claim.

The Gardners have moved to dismiss Bliss Sequoia's negligent misrepresentation and fraudulent misrepresentation claims because Bliss Sequoia supposedly could not have relied on HWP's statement and because statements regarding safety are not actionable. The Gardners are simply incorrect.

Nevada has adopted section 552 of the Second Restatement of Torts, which provides:

> One who, in the course of his business, profession or employment, or in any other [trans]action in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Halcrow, Inc. v. Eighth Jud. Dist. Ct., 129 Nev. 394, 400, 302 P.3d 1148, 1153 (Nev. 2013), *as corrected* (Aug. 14, 2013) (*quoting* Restatement (Second) of Torts § 552 (1977)). Further, "[l]iability is only imposed on a party who has supplied false information, where that information is for the guidance of others and where the party knows that the information will be relied upon by a foreseeable class of persons." *Halcrow*, 129 Nev. at 400 (citing Restatement (Second) of Torts § 552 cmt. b.). In *Sonoma Springs Ltd. P'ship v. Fid. & Deposit Co. of Maryland*, 409 F. Supp. 3d 946, 961 (D. Nev. 2019), the court summarized these points and concluded,

> to succeed on a claim for negligent misrepresentation, the plaintiff must prove "(1) a false representation made by defendant; (2) the representation was made in the course of the defendant's business; (3) the representation was for the guidance of others in their business transactions; (4) plaintiff's justifiable reliance upon the misrepresentation; (5) the reliance resulted in pecuniary loss to plaintiff; and (6) defendant failed to exercise reasonable care or competence in obtaining or communicating the information.

Id. (citation omitted).

Further, the elements of fraudulent or intentional misrepresentation are "a false representation made with knowledge or belief that it is false or without a sufficient basis of information, intent to induce reliance, and damage resulting from the reliance. *See Collins v. Burns*, 741 P.2d 819, 821 (Nev. 1987) (reversing the lower court because it "erred in concluding that appellants failed to prove fraud because they could not show justifiable reliance or damage").

As acknowledged by the Gardners, HWP made two misrepresentations that are the basis of Bliss Sequoia's claim. First, in April 2015, during the renewal of HWP's policy, HWP represented to Bliss Sequoia that the waterpark "follows the strictest of safety guidelines set forth by the City, State and Federal agencies and that its 'entire management team and staff is thoroughly trained in the proper protocol and procedure." Second, HWP represented "over a period of years, prior to placing coverage for the waterpark . . . to Lance Barnwell of Bliss Sequoia

that safety was a priority in how" HWP operated its business. As shown below, these misstatements satisfy the requirements for the claims at issue.

(a) Bliss Sequoia has sufficiently alleged that HWP's April 2015 statement is a negligent and Fraudulent misrepresentation.

With regard to the first statement, by not addressing it in their motion, the Gardners concede that this statement is (1) a false representation made by HWP, (2) the representation was made in the course of HWP's business, (3) the representation was for the guidance of others in HWP's business transaction; and (4) HWP failed to exercise reasonable care or competence in communicating this information to Bliss Sequoia. Likewise, the Gardners seemingly concede that this statement was made with knowledge or belief that it was false and that Bliss Sequoia was damaged by the statement. However, the Gardners incorrectly assert Mr. Barnwell could not have relied on this statement when he made the recommendation of $5 million in insurance coverage limits for the waterpark in July 2014, nine months before the statement was made. The Gardners are incorrect for several reasons.

First, the Gardners erroneously assert that because their assigned claims are premised on Mr. Barnwell's recommendation of insurance coverage limits in July 2014, Bliss Sequoia's claims cannot be premised on the renewal of HWP's policy for the 2015 season. Bliss Sequoia's claims are independent of the Gardners' claim and Bliss Sequoia is not required to bring only claims that are premised on the Gardners' theories. Accordingly, the fact that Gardners' claims are premised on an alleged misrepresentation in July 2014 has no bearing on Bliss Sequoia's claims, which are based on another misrepresentation later in time. Ultimately, Bliss Sequoia's allegation that it relied on HWP's April 15, 2015 statement during the renewal of HWP's policy must be accepted as true, like all other factual allegations, when the Court considers a Motion to Dismiss.

Second, the Gardners incorrectly assert that the April 2015 representation was not directed to Mr. Barnwell even though the representation at issue was forwarded to him. This argument is as silly as it sounds. It is irrelevant that the email containing this information was originally sent

to another person. Mr. Huish forwarded the email to Mr. Barnwell, and at that point in time, the representation was directed to Mr. Barnwell.

Likewise, the Gardners contention that the statement was merely "from someone at corporate" is irrelevant. As the Gardners are well aware, HWP is a family run business that Mr. Scott Huish and Mr. Shane Huish were heavily involved with. Indeed, a statement from Mr. Scott Huish or Mr. Shane Huish would have been considered a statement from "corporate" since they were HWP's agents. Nonetheless, Bliss Sequoia's claim is not against an individual but rather HWP, therefore a statement from "corporate," regardless of which individual said it, is one made by HWP. Therefore, the false representation that Bliss Sequoia relied on was made by HWP.

HWP is free to raise the distinctions the Gardners advance and can do so at the appropriate time – for instance, during the trial. But at this stage, the factual allegations in the pleadings must be accepted as true, and the Gardners cannot show "beyond a doubt that [HWP] could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew*, 124 Nev. at 228.

(b) HWP's statements that safety is a priority are actionable.

The Gardners argue that statements regarding safety being a priority are not actionable and thus Bliss Sequoia's claims against HWP must fail. However, this is once again, wrong. The case law cited by the Gardners does not involve similar circumstances and, in any event, does not control here. Moreover, the statements were made while HWP was seeking to insure risks related to the waterpark, which are greatly increased or decreased due to safety procedures.

The Gardners contend that HWP's statements that safety is a priority are not actionable because they are "generalized, vague and unspecific assertions." Motion at 9. This issue was addressed in the Gardners' opposition to Bliss Sequoia's motion for leave to amend pleadings and Bliss Sequoia's reply in support of its motion to amend pleadings. Although the Court did not

specifically address this issue, the Court presumably agreed with Bliss Sequoia's argument when it granted Bliss Sequoia leave to amend its pleadings.[1]

Nonetheless, Bliss Sequoia will repeat its argument. The cases that the Gardners rely on to support this argument concern the "puffery doctrine." For instance, in *Glenn Holly Entm't, Inc. v Tektronix, Inc*., 343 F.3d 1000, 1015 (9th Cir. 2003), the court held that a customer could not justifiably rely on general statements describing the high priority placed on product development in deciding which film company to use because these statements were "puffery." *Id*. "Puffing has been described as making generalized or exaggerated statements such that a reasonable consumer would not interpret the statement as a factual claim upon which he or she could rely." *In re All Terrain Vehicle Litig.*, 771 F. Supp. 1057, 1061 (C.D. Cal. 1991) (citing *Cook, Perkiss, Liehe v. Northern California Collection Service, Inc.*, 911 F.2d 242, 246 (9th Cir.1990)).

The "puffery doctrine" does not apply here because Bliss Sequoia was not Scott Huish's or Shane Huish's customer. In contrast, HWP was Bliss Sequoia's customer.

Further, the other cases cited by the Gardners' regarding safety being an opinion are likewise inapposite. The factual scenario of those cases do not involve the procurement of insurance for risks impacted by safety procedures. For example, *Cooke v. Allstate Mgmt. Corp*., 741 F. Supp. 1205, 1215-1216 (D. S.C. 1990) is distinguishable because facts regarding safety were stated by a real estate agent trying to sell a customer on an apartment complex. In contrast, here, the statements were made by an HWP representative for the purpose of procuring insurance for HWP's risks, which inherently include safety risks.

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[1] Contrary to the Gardners' baseless assertion, Bliss Sequoia did not "casually change[]" a substantive factual allegation in its counterclaim to avoid dismissal. In the Court's March 23, 2020 Minute Order, the Court granted Bliss Sequoia's motion for leave to amend and asked Bliss Sequoia "to provide more detailed information as it relates to the alleged Counterclaim against [HWP] for misrepresentation." Bliss Sequoia interpreted the Court's order as seeking clarification as to the timing of HWP misrepresentations, an issue that was briefed by Bliss Sequoia and the Gardners. Bliss Sequoia's claim has always been premised on the misrepresentations made during the renewal of HWP's policies for the 2015 season, the season involving the underlying incident. Likewise, the Court did not instruct Bliss Sequoia to provide more detail regarding whether statements regarding safety being a priority are actionable.

Therefore, HWP's statements regarding safety being a priority are actionable and Bliss Sequoia's claims based on these statements are viable.

(2) With respect to Bliss Sequoia's claim of fraudulent concealment, HWP had a duty to disclose the inadequate safety measures taken at the waterpark.

The Gardners assert that Bliss Sequoia has not alleged a viable claim for fraudulent concealment because HWP did not have a duty to disclose information regarding inadequate safety measures. The Gardners are simply wrong again given HWP's representations regarding safety, HWP had a duty to honestly and fully disclose safety information related to the waterpark. Bliss Sequoia's factual allegations must be accepted as true, and any dispute about duty at most presents a question of fact that cannot be resolved at this preliminary stage of the case.

The elements of fraudulent concealment are: (1) the defendant must have concealed or suppressed a material fact; (2) the defendant must have been under a duty to disclose the fact to the plaintiff; (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, that is, he must have concealed or suppressed the fact for the purpose of inducing the plaintiff to act differently than he would if he knew the fact; (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damages. *See* Nevada Jury Instruction 9.03. The Gardners only contest the second element of fraudulent concealment—that the defendant must have been under a duty to disclose to the plaintiff.

The Gardners contend that there is no law specifically addressing an insured client's duty to its broker and therefore no such a duty exists. Motion at 11. However, under Nevada law, the duty to disclose required for a valid claim of fraudulent concealment "requires at a minimum, some form of relationship between the parties." *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1487 (1998), *abrogated on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265 (2001) (citing *Villalon v. Bowen*, 70 Nev. 456, 467–68 (1954)). "[E]ven in absence of a fiduciary or

confidential relationship and where the parties are dealing at arm's length, an obligation to speak can arise from the existence of material facts peculiarly within the knowledge of the party sought to be charged and not within the fair and reasonable reach of the other party." 70 Nev. at 467–68. "Under such circumstances the general rule is that a deliberate failure to correct an apparent misapprehension or delusion may constitute fraud. *Id*. at 468. This would appear to be particularly so where the false impression deliberately has been created by the party sought to be charged. *Id*.

The Gardners also assert that whether HWP had a duty to disclose is a question of law. Motion at 11. However, as the Gardners point out, a duty to disclose arises where there is a special relationship such that the complaining party imports special confidence in the defendant and the defendant knows of that confidence. Motion at 10. Whether a special relationship exists depends on the facts of the case. *See Mackintosh v. Jack Matthews & Co*., 109 Nev. 628, 629 (Nev. 1993) ("facts may establish a special relationship"); *Central Tel. Co. v. Fixtures Mfg. Corp.,* 103 Nev. 298, 300 (Nev. 1987) (holding that there was "a material factual dispute as to whether a special relationship exists.").

This is especially true where, as here, there are circumstances particular to a relationship that inform whether there should be a duty or special relationship between the parties. Indeed, in this case there will be expert testimony regarding whether HWP had a duty to disclose the actual safety measure being taken at the park.

Therefore, Bliss Sequoia's allegation that "HWP had duty to disclose to Bliss Sequoia information regarding its intentional lack of adequate safety measures and its noncompliance with applicable safety codes" (*See* ¶81 of proposed amended pleading) is a factual statement that must be accepted as true in considering this motion. Accordingly, Bliss Sequoia has sufficiently alleged a claim for fraudulent concealment.

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(3) Bliss Sequoia has pleaded its claims with sufficient particularity.

The Gardners assert that all of Bliss Sequoia's claims must be plead with particularity. This is not true. As discussed in Bliss Sequoia's motion for leave to amend, that requirement applies to intentional fraud and fraudulent concealment claims, but not a claim for *negligent* misrepresentation. *See Harmony Homes, Inc. v. ID Interior Design, LLC,* 2012 WL 12948019, at *1 (Nev. Dist. Ct. May 30, 2012) (Denton, J.) ("The Court determines that, as the making of a negligent misrepresentation is not an act of intentional fraud, particularity in pleading such claim is not required and that what Plaintiff has pleaded does not fail to state a claim upon which relief can be granted."). That is why courts have specifically ruled that "a claim for negligent misrepresentation need not be pleaded with Rule 9(b) particularity…." *See, e.g.*, *Brigade Leveraged Capital Structures Fund, Ltd. v. Fountainbleau Resorts, LLC,* 2012 WL 3260813 (Nev. Dist. Ct. Jan. 6, 2012) (Denton, J.); *Three Angels, LLC v. Bryant*, 2012 WL 12301991 (Nev. Dist. Ct. Mar. 12, 2012) (Johnson, J.) (court noting that "it disagrees with Defendant BRYANT'S assessment the negligent misrepresentation claim must be stated with particularity under NRCP 9(b)"). Unpublished district court opinions are considered persuasive authority. *See, e.g.*, *Maserati Drive Trust v. Green Tree Servicing LLC,* No. 17-A-750319, 2019 WL 1877670, at *3 (Nev. Dist. Ct. Feb. 28, 2019) (recognizing that unpublished court opinions were not cited "as precedential authority but rather, consistent with Nev. R. App. P. 36(c)(3), cite[d] … for their persuasive value")[2].

In any event, even if this Court did not follow multiple other district court opinions on this issue, the motion should still be denied because Bliss Sequoia has plead all its claims with particularity. The case law cited in the Gardners' motion states, "[a] plaintiff asserting fraud against a corporate entity must state the names of the persons who made the allegedly fraudulent

[2] The Gardners' citation to NRAP 36(c) for the proposition that District Court opinons cannot be relied upon as persuasive authority is misplaced. NRAP 36(C)(3) is a rule of appellate procedure, and as NRAP 1(a) states, "[t]hese Rules govern procedure in the Supreme Court of Nevada and the Nevada Court of Appeals." Moreover, the rule only bars citing to "unpublished dispositions *issued by the Court of Appeals*" and does not have any limitation for unpublished rulings from district courts. NRAP 36(C)(3) (emphasis added).

representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." *Roundy v. Bank of Am., N.A.*, 2013 WL 559486, at *5 (D. Nev. Feb. 12, 2013). Contrary to the Gardners' contention that this standard has not been met, Bliss Sequoia's amended pleading satisfies those requirements.

With regard to the representation made in April 2015 during the renewal of HWP's policy, this representation was made by Shane Huish, on behalf of HWP, to Lance Barnwell when he sent Mr. Barnwell an April 2015 email stating the waterpark follows the strictest of safety guidelines set forth by City, State and Federal agencies. *See* Amended Cross Claims and Counterclaims, ¶ 28. Similarly, regarding the statement that safety was a priority to HWP the Amended Cross Claims and Counterclaims state that Shane Huish and Scott Huish, on behalf of HWP, made statements to Lance Barnwell of Bliss Sequoia that safety was a priority in how they ran their businesses, including HWP. These statements were made over a period of years, prior to placing coverage for HWP. Amended Cross Claims and Counterclaims, ¶ 30. [3]

3. Conclusion

Bliss Sequoia respectfully requests that this Court deny the Gardners' Motion to Dismiss because the Gardners cannot move to dismiss claims against HWP and because the Gardners have not satisfied the rigorous legal standard applied to motions to dismiss. Bliss Sequoia has sufficiently alleged in its pleadings claims of negligent and intentional misrepresentation against HWP. Bliss Sequoia has alleged that it personally relied on HWP's April 2015 statements during the renewal of HWP's policy. Further, contrary to the Gardners' assertion, HWP's statements regarding safety being a priority are legally actionable.

Moreover, Bliss Sequoia's pleadings properly allege a claim of fraudulent concealment. HWP had a legal duty to disclose information regarding safety to Bliss Sequoia and, in any event, the existence of a duty is a question of fact.

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[3] The Gardners' Motion contends that Bliss Sequoia lump Shane and Scott together without differentiating who said what and that this is an impermissible group pleading. However, Shane and Scott are not third-party defendants and Bliss Sequoia's claim is against HWP. Scott Huish and Shane Huish both represent HWP. As such this is not impermissible group pleading.

Lastly, the Court should deny the Gardners' motion because Bliss Sequoia has plead all of its claims with sufficient particularity. If HWP wants to parrot the Gardners' arguments, it can do so at the appropriate time, but the Gardners have not satisfied the rigorous legal standard for dismissal at this early pleading stage.

DATED this 12th day of May, 2020.

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 12th day of May, 2020, I caused the document entitled **BLISS SEQUOIA AND HUGGINS INSURANCES' OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[✓] to be electronically served through the Eighth Judicial District Court's electronic filing system pursuant to EDCR 8.02; and/or

[ ] to be hand-delivered;

to the attorneys/ parties listed below:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Heather Bennett

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Third-Party Plaintiffs, vs. BLISS SEQUOIA INSURANCE & RISK ADVISORS, INC., an Oregon corporation; HUGGINS INSURANCE SERVICES, INC., an Oregon corporation, Third-Party Defendants. AND ALL RELATED CLAIMS	Case No.: A-15-722259-C Dept. No.: XXX **REPLY IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIMS AGAINST HENDERSON WATER PARK, LLC** Hearing Date: June 3, 2020 Hearing Time: 9:00 a.m.

Third-Party Plaintiffs Peter Gardner and Christian Gardner, individually and on behalf of their minor son, Leland Gardner ("Plaintiffs"), as the assignees of Henderson Water Park, LLC dba Cowabunga Bay Water Park, submit their Reply in Support of Motion to Dismiss Counterclaims Against Henderson Water Park, LLC ("HWP"). This Reply is made and based upon the attached memorandum of points and authorities, all exhibits attached hereto, all pleadings and papers on file herein, and any oral argument the Court shall allow at the time of hearing.

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I. INTRODUCTION

In opposing Plaintiffs' motion to dismiss, Third-Party Defendants Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc. (collectively the "Brokers") essentially contend the NRCP 12(b)(5) standard requires the Court to put on blinders and leave all common sense at the door. Indeed, the Brokers suggest the Court must accept all allegations in their counterclaim as true even if the averments are (i) internally inconsistent, (ii) unsupported legal conclusions, or (iii) contradicted by earlier allegations and judicially noticeable facts. That is not law. The Brokers' counterclaim should be dismissed with prejudice as it does not come close to pleading a cognizable claim against HWP.

II. ARGUMENT

A. Plaintiffs Have Standing To Seek Dismissal Of The Brokers' Counterclaim.

Perhaps aware that their counterclaims stand on shaky ground, the Brokers argue that Plaintiffs are procedurally barred from filing a motion to dismiss under NRCP 12(b)(5) because HWP is the only "party" that can seek dismissal of claims asserted against the company. In short, the Brokers ask the Court to handcuff Plaintiffs and prevent them from defending against claims that could conceivably function as a setoff to Plaintiffs' recovery. The Brokers' myopic view of the Rules of Civil Procedure is contrary to law and ignores their own actions in this litigation.

In point of fact, the Brokers brought their causes of action against HWP as a "counterclaim" pursuant to NRCP 13, which allows a party to assert compulsory or permissive counterclaims against an "opposing party" in the same action. *Id.* (emphasis added). HWP is no longer an "opposing party" in this action following the entry of the Stipulated Judgment and HWP's assignment of claims against the Brokers. Rather, Plaintiffs are the "opposing party" under NRCP 13 against whom the counterclaims have been brought.

In that regard, courts have repeatedly held that an assignee of claims is an "opposing party" under Rule 13 with respect to counterclaims that would otherwise be advanced against the assignor. *See, e.g.*,

Walters v. Iowa-Des Moines Nat'l Bank, 295 N.W.2d 430, 433-34 (Iowa 1980) ("The general rule is that an obligor may assert against an assignee all claims which he could have asserted against the assignor. To put it another way, the assignee of a claim takes subject to all defenses, setoffs, and counterclaims to which his assignor was subject.") (listing cases); *Transamerica Occidental Life Ins. v. Aviation Office of Am., Inc.*, 292 F.3d 384, 392-93 (3d Cir. 2001) (holding defendant was required to bring counterclaims against assignee as opposed to assignor because "the rights that are at stake [ ] are actually [the assignee's] rights, not [the assignors]"); *c.f. First Fin. Bank v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014) ("[A]n assignment operates to place the assignee in the shoes of the assignor, and provides the assignee with the same legal rights as the assignor had before assignment."). Thus, for the same reason the Brokers are permitted to file counterclaims in this action against Plaintiffs as an "opposing party" under NRCP 13, Plaintiffs are entitled to file a motion to dismiss as a "party" under NRCP 12(b)(5).

The Brokers' own actions in this litigation confirm as much given that they had no qualms treating Plaintiffs as HWP's proxy when they served Plaintiffs with voluminous interrogatories and requests for production directed to HWP under NRCP 33 and 34 (providing, respectively, that a party may serve interrogatories and requests for production on another "party"). Recognizing their obligations under the law as assignees, Plaintiffs responded to said requests without objecting on the basis that they should have been directed to HWP.[1] The Brokers, thus, cannot benefit from Plaintiffs' status as a "party" when it comes to the potential adverse effects of a counterclaim directed against HWP and obtaining discovery from HWP while simultaneously disclaiming Plaintiffs' status as a "party" when they (*i.e.*, Plaintiffs) bring a meritorious motion to dismiss. The Brokers' desperate attempt to capitalize on a misperceived technicality speaks volumes about the substance of their other arguments.

[1] An "assignee stands in the 'assignor's shoes' and must respond to discovery requests [under NRCP 34] as if it were the assignor." *MAO-MSO Recovery II v. Mercury Gen. Corp.*, 2019 WL 2619637, *2 (C.D. Cal. May 10, 2019) (citing 5 supporting cases).

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B. The Brokers' Claims For Negligent And Fraudulent Misrepresentation Must Be Dismissed As A Matter Of Law.

1. The April 2015 e-mail to an injured guest.

On a motion to dismiss, this Court is not required to "accept as true [ ] allegations that (1) contradict matters properly subject to judicial notice; (2) are conclusory allegations of law, mere legal conclusions, unwarranted deductions of fact, or unreasonable inferences; (3) are contradicted by documents referred to in the complaint; or (4) are internally inconsistent." *Western Lands Project v. United States Bureau of Land Mgmt.*, 2007 WL 9734511, *3 (D. Nev. Sept. 25, 2007) (interpreting federal counterpart to NRCP 12(b)(5) prior to *Twombly* and *Iqbal*) (listing cases); *Hamilton v. Aubrey*, 2008 WL 1774469, *1 (D. Nev. Apr. 15, 2008) (same).[2] "Nor need the court accept as true allegations in an amended complaint that, without any explanation, contradict an earlier complaint." *Western Lands Project*, 2007 WL 9734511 at *3; *see also Ellingson v. Burlington N., Inc.*, 653 F.2d 1327, 1329-30 (9th Cir. 1981) (court may strike challenged allegations as "false or sham" and dismiss the complaint for failure to state a claim). The Brokers' allegations of reliance on the April 2015 e-mail to an injured guest suffer from almost all of the foregoing defects.

The Brokers' ever-evolving misrepresentation claims premised on the April 2015 e-mail still fail to state a claim. The Court will recall that the Brokers originally alleged that Mr. Barnwell relied on the subject e-mail's statements concerning safety when he "advised HWP that its general liability limits were in line with the size and scope of the park."[3] That advisement, however, actually occurred in July

[2] "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

[3] *See* Third-Party Defendants' (i) Mot. to Amend Pleadings and Add Parties; (ii) Mot. to Sever; and (iii) Alternatively, Mot. to Continue Trial and Discovery (dated 3/11/20) (dated 3/11/20), at Ex. A ¶¶ 29, 48-49.

2014, and is the event on which Plaintiffs' assigned claims against the Brokers are based.[4] After Plaintiffs pointed out in prior briefing that the April 2015 e-mail postdates Mr. Barnwell's advisement by approximately 9 months, the Brokers conveniently altered the allegation to insert the phrase "during the renewal of HWP's policy" (*i.e.*, in Spring 2015) while continuing to maintain that Mr. Barnwell relied on the April 2015 e-mail when he provided the negligent advisement of insurance coverage for HWP nearly one year earlier.[5]

The problems with the Brokers' increasingly strained effort to plead reliance on the April 2015 e-mail are manifest. The allegation in the Brokers' amended counterclaim is contradictory and internally inconsistent because there is no allegation anywhere that Mr. Barnwell "advised HWP that its general liability limits were in line with the size and scope of the park" when Cowabunga Bay renewed its insurance policy in 2015. Rather, it is undisputed that Mr. Barnwell gave the negligent advisement of policy limits for Cowabunga Bay in July 2014—*not* during the renewal of HWP's insurance policy for the 2015 season.[6] The Court is not required to accept as true the Brokers' sham allegation of reliance on the April 2015 e-mail when the averment is demonstrably false, contradictory, and plainly designed to evade dismissal.

Dismissal is also required because the alleged misrepresentations from "someone at corporate" were directed to an injured guest named Joanne Soof, not Mr. Barnwell. The Brokers claim this fact is "irrelevant," but fail to cite a single case in support of their conclusory position. That is because, "under

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[4] *See generally* Amended Third-Party Complaint (dated 11/20/20). "Every court takes judicial notice of its own records in the same action." *Fernandez v. State of Nevada*, 2011 WL 146555, *2 (D. Nev. Jan. 18, 2011); *see also Mack v. Estate of Mack*, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009) (court may take judicial notice of records in another closely-related case).

[5] *See* Bliss Sequoia's and Huggins Insurance's Amended Cross Clams and Counterclaims ¶ 30 (dated 4/23/20).

[6] *See* Amended Third-Party Complaint ¶ 12 (dated 11/20/20); Exhibit 1 (Answer to Amended Third-Party Complaint) ¶ 12 (admitting that Mr. Barnwell drafted the July 10, 2014 e-mail containing the statement "In my professional opinion I do believe that the limits of coverage are in line with the scope and size of the park").

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Nevada law, misrepresentations must be made to the plaintiff, not a third-party, to be actionable." *Reed v. Allstate Ins. Co.*, 2016 WL 1558364, *4 n. 1 (D. Nev. Apr. 14, 2016) (citing *Epperson v. Roloff*, 102 Nev. 206, 210-11, 719 P.2d 799, 802 (1986)). Given that Shane Huish's only representation to Mr. Barnwell in the April 2015 e-mail is that "[he] had someone from 'corporate' respond to her," the absence of an actionable misrepresentation in the April 2015 e-mail is another reason to grant dismissal.[7]

2. The Huishs' alleged representations that safety was a "priority."

According to the Brokers, the fundamental tenet that misrepresentation claims must be based on an objective statement of ascertainable fact only applies in salesmanship or consumer cases. *See* Opp'n at 7-8. The Brokers, once again, do not cite any supporting case law for this novel proposition. Simply put, the hornbook principle that misrepresentation claims must be premised on a false statement of fact applies in all factual settings in which the purported misrepresentation took place.

Legal commentators across the spectrum have recognized that a misrepresentation claim must be premised on an objective statement of fact that can be proven true or false. *See, e.g.*, 37 Am. Jur. 2d *Fraud and Deceit* § 245 ("A statement that is vague and indefinite in its nature and terms, or is merely a loose conjectural or exaggerated statement, is not sufficient to support either a fraud or negligent misrepresentation action."); 26 Williston on Contracts § 69:5 (4th ed.) ("It is thus axiomatic that a false representation made by a defendant, to be actionable, must relate to an existing fact or past event, and that statements of opinion will not support a claim for fraud."); Restatement (Second) of Torts § 538A (1977) ("A representation is one of opinion if it expresses only [the speaker's] judgment as to quality, value, authenticity, or other matters of judgment."); *see also* Law of Commercial Agents and Brokers §

[7] Suffice it to say, Plaintiffs disagree with the Brokers' amateurish suggestion that they "conceded" the other elements of the Brokers' misrepresentation claims by not contesting them on a motion to dismiss. *See* Opp'n at 6. It is, however, unnecessary to address the other elements of the Brokers' misrepresentation claims because "[w]here an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial[.]" *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992).

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3:1 ("Vague or general assurances about coverage will seldom support a fraud claim [because] it will seldom be clear if the vague representation was false.").

The Nevada Supreme Court and other courts around the country have likewise held that vague and indefinite statements of opinion will not support a cause of action for negligent or fraudulent misrepresentation. *See, e.g.*, *Clark Sanitation, Inc. v. Sun Valley Disposal Co.*, 87 Nev. 338, 342, 487 P.2d 337, 339 (1971) ("Nevada has recognized that expressions of opinion as distinguished from representations of fact, may not be the predicate for a charge of fraud."); *Bulbman*, 108 Nev. at 111, 825 at 592 (1992) ("estimates and opinions based on past experience [ ] are not actionable in fraud."); *Spartan Leasing Inc. v. Pollard*, 400 S.E.2d 476, 478-79 (N.C. Ct. App. 1991) ("[T]he fraudulent misrepresentation must be of a subsisting or ascertainable fact [and] must be definite and specific."); *Cadle Co. v. Davis*, 2010 WL 5545389, at *8 (Tex. Ct. App. Dec. 29, 2010) ("Vague representations cannot constitute a material representation actionable under our laws.") (listing cases); *Goldstein v. Miles*, 859 A.2d 313, 332 (Md. Ct. App. 2004) ("A statement that is vague and indefinite in its nature and terms, or is merely a loose conjectural or exaggerated statement, is not sufficient to support either a fraud or negligent misrepresentation action[.]"). The list goes on.

Here, the alleged statements by Scott and Shane Huish that safety was a "priority" in how they operated their businesses cannot be evaluated by any objective measure. It is a vague, generalized and entirely subjective opinion that will have a different meaning to any listener. There is simply no empirical yardstick by which to assess whether the Huishs' purported opinion that safety was a "priority" is true or false. For that reason, courts have frequently dismissed fraudulent and negligent misrepresentation claims based on statements concerning safety and whether something is a "priority."

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See Mot. at 9-10 and n. 17 (listing cases). The Huishs' alleged statements that safety was a "priority" are not actionable as a matter of law.[8]

C. HWP Did Not Owe A Duty To Disclose As A Matter Of Law.

This Court is not required "to accept legal conclusions cast in the form of factual allegations as true if those conclusions cannot reasonably be drawn from the facts alleged." *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004); *see also Blanck v. Hager*, 360 F.Supp.2d 1137, 1147 (D. Nev. 2005) ("[T]he Court does not necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations in Plaintiff's Complaint."). Here, the Brokers contend the existence of a special relationship and fraud-based duty to disclose "depends on the facts of the case," *see* Opp'n at 10, but their counterclaim is utterly devoid of any factual allegations that would establish such a relationship. Instead, the Brokers merely allege "HWP had a duty to disclose to Bliss Sequoia information regarding its intentional lack of adequate safety measures and its noncompliance with applicable safety codes."[9]

The Brokers' conclusory allegation that a duty to disclose existed is the epitome of a legal conclusion that need not be taken as true, particularly when the Brokers did not cite a single case to support their claim that an insured client owes a duty to disclose to an insurance broker.[10] The Brokers' failure to submit any supporting legal authority is no coincidence as Nevada law is clear that an "association characterized by 'routine arms-length dealings' will not suffice to establish a special relationship." *Silver State Broad., LLC v. Crown Castle MU, LLC*, 2018 WL 6606064, *3 (D. Nev. Dec.

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[8] Again, the Brokers have failed to identify when these statements were made, exactly who made the statements, through what medium the statements were made, and to whom the statements were made despite having multiple chances to do so. Dismissal is appropriate on this basis as well.

[9] *See* Bliss Sequoia's and Huggins Insurance's Cross Claims and Counterclaims ¶¶ 81.

[10] The Brokers failed to address Plaintiffs' argument that HWP did not owe a fiduciary duty to the Brokers and, thus, conceded the point. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) ("such lack of challenge cannot be regarded as unwitting and in our view constitutes a clear concession by appellants that there is merit in respondents' position").

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17, 2018) (citing *Weingartner v. Chase Home Fin.*, 702 F.Supp.2d 1276, 1288 (D. Nev. 2010)); *see also Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 (D. Nev. 1995) (surveying Nevada law and finding no special relationship exists in a "straightforward commercial transaction"); *Peri & Sons Farms, Inc. v. Jain Irrigation, Inc.*, 933 F.Supp.2d 1279, 1292-93 (D. Nev. 2013) (holding that "a straightforward vendor-vendee relationship, [ ] as a matter of law, creates no fraud-based duty to disclose" and rejecting argument that a jury could find otherwise).[11]

The Court should decline the Brokers' invitation to become the first court in any jurisdiction to find that the straightforward commercial relationship between an insurance broker and insured client somehow imparts a fraud-based duty to disclose on the insured client.

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their Motion to Dismiss Counterclaims Against Henderson Water Park, LLC in its entirety.

DATED this 27th day of May, 2020.

CAMPBELL & WILLIAMS

By /s/ ***Philip R. Erwin***
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[11] The Brokers apparently believe they can call an expert witness to instruct the Court that HWP owed a duty to disclose as a matter of law. This is wrong. "Each courtroom comes equipped with a 'legal expert,' called a judge." *Burkhardt v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C.Cir. 1997) (citing *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d. Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188 (1977)). For that reason, "every circuit [court] has explicitly held that experts may not invade the court's province by testifying on issues of law." *In re Initial Public Offering Secs. Litig.*, 174 F.Supp.2d 61, 64 (S.D.N.Y. 2001) (citing cases from every circuit court of appeals). "The rule prohibiting experts from providing their legal opinions and conclusions is so well-established that it is often deemed a basic premise or assumption of evidence law—a kind of axiomatic principle." *Id*.

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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 27th day of May, 2020 I caused the foregoing document entitled **Reply in Support of Motion to Dismiss Counterclaims Against Henderson Water Park, LLC** 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, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **ORDER DENYING PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS AND FOURTH PARTY DEFENDANT FRED A. MORETON & COMPANY (DBA MORETON & COMPANY'S) MOTIONS TO DISMISS, TO STRIKE DEFENDANTS' FOURTH PARTY CROSS-CLAIMS AND FOR THE ALTERNATIVE RELIEF OF SUMMARY JUDGMENT**

Plaintiff's Motion to Dismiss Bliss Sequoia Insurance & Risk Advisors, Inc.'s and Huggins Insurance Service's (together, the "Brokers") counter claims against Henderson Water Park, LLC ("HWP") and newly appearing Fourth Party Defendant, Fred A. Moreton & Co.'s ("Moreton") Motions to Dismiss and/or to strike, and alternatively, for summary judgment, came before this Court on June 1, 2020. Pursuant to A.O. 20-01 and subsequent Administrative Orders, this matter is deemed "non-essential" and may be decided after a hearing (held by alternative

means,) decided on the papers, or continued. The Court has determined that it would be appropriate to decide this matter on the pleadings, and consequently, decided this matter on the papers and issued a minute Order memorializing its decision on June 1, 2020.

PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS ASSERTED BY THE BROKERS AGAINST HWP
(Findings of Fact and Conclusions of Law)

1. The Court has indicated that when evaluating a motion to dismiss, the Court must "recognize all factual allegations made by [plaintiff] as true and draw all inferences in its favor." *Buzz Stew, Ltd. Liabl. Co. v City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008); *Squires By Squires v. Sierra Nevada Educ. Found. Inc.*, 107 Nev. 902, 904, 823 P.2d 256, 257 (Nev. 1991).
2. A "complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts which, if true, would entitle it to relief." *Buzz Stew*, 124 Nev. at 228.
3. The Court assumes, at least for purposes of the Motion to Dismiss, that Plaintiffs have standing to seek dismissal of the Brokers' counterclaim.
4. With respect to their misrepresentation claims, the Brokers are now claiming that their detrimental reliance actually occurred during the renewal of the insurance policy in April 2015, instead of in July 2014. Specifically, the Brokers originally alleged that "Bliss Sequoia relied on HWP's misrepresentations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and scope of the park" in July 2014. After the 3/23/20 Order, the Brokers changed their allegation to state that "[d]uring the renewal of HWP's policy, Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and scope of the park." The Court acknowledges the change, but if there was reliance by the Brokers on representations made, the change in dates does not appear to be case dispositive.

5. Plaintiffs allege that the Brokers cannot allege a viable claim for fraudulent concealment because HWP did not have a "duty" to disclose. The Court finds and concludes that with regard to the "duty" element for a fraudulent concealment claim, it appears that in Nevada, a claim for nondisclosure generally is not accepted, but when the Courts do recognize a claim for fraudulent concealment claim, the Court requires a "special relationship." *Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 (D. Nev. 1995); *Peri & Sons Farms, Inc., v. Jain Irrigation, Inc.*, 933 F.Supp.2d 1279, 1292 (D.Nev. 2013).
6. Although *Ainsworth* indicates that there are additional duties on the insurer, not the insured, it does acknowledge the insurer/insured special relationship. *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988).
7. This Court is not convinced that the Court in *Ainsworth* intended to impose a duty to act truthfully and honestly only to one side of the special relationship.
8. When a special relationship exists between two parties, this Court believes that both parties have equal and corresponding duties to act truthfully and honestly with one another, and consequently, the Court finds that the duty element is satisfied in this case.
9. Based on the foregoing, this Court views all factual allegations made by the Brokers as true and draws all reasonable inferences in the Brokers' favor.
10. In doing so, the Court cannot conclude beyond a doubt that Brokers could prove no set of facts, which, if true, would entitle them to relief.

FOURTH PARTY DEFENDANT MORETON'S MOTION TO DISMISS, MOTION TO STRIKE AND, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT ON THE BROKERS' FOURTH PARTY CLAIMS
(Finding of Fact and Conclusions of Law)

1. With regard to Moreton's Motion to Strike and Motion to Dismiss, Moreton argues that it was inappropriate and procedurally improper for the Brokers to assert a "crossclaim" against Moreton, because Moreton wasn't a party to the case, and it

should have been a 3rd or 4th party Complaint. Moreton is correct, but as the Brokers indicated in response, in Nevada, Courts will adjudicate matters based on the substantive issues addressed in the papers, regardless of how they are titled. *Berry v. Feil*, 131 Nev. 339, 341 (Nev. App. 2015).

2. Moreton argues that Brokers' Cross-Claim fails to allege any relationship between Moreton and the Brokers, and consequently, they cannot assert a claim for contribution against Moreton.
3. Moreton cites to *Piroozi*, in support of the argument that where the Defendants are severally liable for the harm to Plaintiff, there will not be a contribution claim. *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1010 n. 4, 363 P.3d 1168, 1172 n. 4 (2015).
4. This Court notes, however, that *Piroozi* dealt with a claim for medical malpractice/professional negligence, and in that type of case, NRS 41A has abrogated joint liability between tortfeasors.
5. Accordingly, the Court finds that *Piroozi* does not control the facts in the present case. The Court additionally notes that Nevada Courts have interpreted NRS 17.225 in harmony with NRCP 14 in recognizing that "a third-party plaintiff has the right to contribution in an original action prior to entry of judgment." *Pack v. LaTourette*, 128 Nev. 264, 269 (2012).
6. Moreton has moved to strike or dismiss the Brokers' claims against it or, in the alternative, for summary judgment. *Lumberman's Underwriting Alliance v. RCR Plumbing*, 114 Nev. 1231, 969 P.2d 301 (1998) (if a motion to dismiss cites documents outside the pleadings or affidavits, then the district court may review the motion as one for summary judgment).
7. Moreton argues that it cannot be held liable under contribution because it didn't assume any duties to the Henderson Water Park, and never entered into any contract with the Brokers. Moreton argues that it provided a benchmark comparing insurance

coverage for amusement parks to Opheiken upon his request in May of 2016, a year after the Plaintiff's incident. Moreton argues that all facts giving rise to Moreton's alleged liability occurred after the Brokers recommended general liability limits and issued a binder for the insurance in July, 2014. Moreton argues that its limited inspection, to evaluate the safety and risks associated with the slides on the property, did not occur until the days after H&W's inspection, and Moreton was not asked to provide any advice or recommendation regarding the adequacy of the water park's insurance. Moreton argues that it did not discuss insurance for the waterpark until May 9, 2016, over a year after the Plaintiff's incident. Based upon these allegations, Moreton argues that it cannot possibly be held liable for contributing to the Brokers' professional negligence and misrepresentations prior to Plaintiff's incident. Moreton further argues that for misrepresentation claims, liability is only imposed on a party who has supplied false information. *Halcrow, Inc. v. Eighth Jud.Dist.* Ct., 129Nev. 394, 400, 302 P.3d 1148, 1153 (2013). Here, Moreton argues that the Brokers have failed to plead sufficient facts demonstrating that Moreton supplied false information to Henderson Water Park for guidance in their business transactions, nor is there any allegation that the Brokers or HWP relied on the information obtained from Moreton.

8. In response, the Brokers allege that Moreton is jointly responsible for any injuries suffered by HWP, because HWP also relied on Moreton's insurance advice when deciding on the appropriate amount of insurance coverage. The Brokers note that Moreton's arguments are based on the *Reid v. Royal* case, 390 P.2d 45, 47, 80 Nev. 137, 141 (1964), but contribution claims were not even recognized in Nevada until after that case was decided. Since then, the Nevada Court has since interpreted NRS 17.225 in harmony with NRCP 14 in recognizing that "a third-party plaintiff has the right to seek contribution in an original action prior to entry of judgment." *Pack v. LaTourette*, 128 Nev. 264, 269 (2012).

9. The Court finds that the fact that Orluff Opheikens indicated that HWP relied on Moreton's advice when deciding whether it had enough insurance, appears to defeat the argument that there was no reliance on Moreton's opinions, or that there were no recommendations.

10. Even if Orluff Opheikens is incorrect, in viewing the evidence in the light most favorable to the nonmoving party, the Court must conclude that there at least exists a genuine issue of material fact in that regard.

ORDER

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that the Plaintiff's Motion to Dismiss Counterclaims against Henderson Water Park, is hereby DENIED without prejudice.

IT IS HEREBY FURTHER ORDERED that Moreton's Motion to Strike and Motion to Dismiss, are hereby DENIED without prejudice

IT IS HEREBY FURTHER ORDERED that Moreton's alternative Motion for Summary Judgment, is hereby DENIED without prejudice.

IT IS SO ORDERED this 15th day of June, 2020.

DISTRICT COURT JUDGE

AM

Respectfully submitted by:

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Approved as to form and content:

DATED this 11th of June, 2020.

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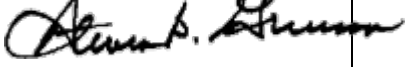

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS AND FOURTH PARTY DEFENDANT FRED A. MORETON & COMPANY (DBA MORETON & COMPANY'S) MOTIONS TO DISMISS, TO STRIKE DEFENDANTS' FOURTH PARTY CROSS-CLAIMS AND FOR THE ALTERNATIVE RELIEF OF SUMMARY JUDGMENT**

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NOTICE IS HEREBY GIVEN that on June 15, 2020, an O*rder Denying Plaintiff's Motion to Dismiss Defendants' Counterclaims and Fourth Party Defendant Fred A. Moreton & Company (dba Moreton & Company's) Motions to Dismiss, to Strike Defendants' Fourth Party Cross-Claims and for the Alternative Relief of Summary Judgment* was entered in the above-captioned matter, a copy of which is attached hereto.

DATED this 16th day of June, 2020.

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

_____

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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 16th day of June, 2020, I caused the document entitled **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS AND FOURTH PARTY DEFENDANT FRED A. MORETON & COMPANY (DBA MORETON & COMPANY'S) MOTIONS TO DISMISS, TO STRIKE DEFENDANTS' FOURTH PARTY CROSS-CLAIMS AND FOR THE ALTERNATIVE RELIEF OF SUMMARY JUDGMENT** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[✓] to be electronically served through the Eighth Judicial District Court's electronic filing system pursuant to EDCR 8.02; and/or

[ ] to be hand-delivered;

to the attorneys/ parties listed below:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Heather Bennett

An employee of Hutchison & Steffen, PLLC

ORDR

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **ORDER DENYING PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS AND FOURTH PARTY DEFENDANT FRED A. MORETON & COMPANY (DBA MORETON & COMPANY'S) MOTIONS TO DISMISS, TO STRIKE DEFENDANTS' FOURTH PARTY CROSS-CLAIMS AND FOR THE ALTERNATIVE RELIEF OF SUMMARY JUDGMENT**

Plaintiff's Motion to Dismiss Bliss Sequoia Insurance & Risk Advisors, Inc.'s and Huggins Insurance Service's (together, the "Brokers") counter claims against Henderson Water Park, LLC ("HWP") and newly appearing Fourth Party Defendant, Fred A. Moreton & Co.'s ("Moreton") Motions to Dismiss and/or to strike, and alternatively, for summary judgment, came before this Court on June 1, 2020. Pursuant to A.O. 20-01 and subsequent Administrative Orders, this matter is deemed "non-essential" and may be decided after a hearing (held by alternative

means,) decided on the papers, or continued. The Court has determined that it would be appropriate to decide this matter on the pleadings, and consequently, decided this matter on the papers and issued a minute Order memorializing its decision on June 1, 2020.

PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIMS ASSERTED BY THE BROKERS AGAINST HWP
(Findings of Fact and Conclusions of Law)

1. The Court has indicated that when evaluating a motion to dismiss, the Court must "recognize all factual allegations made by [plaintiff] as true and draw all inferences in its favor." *Buzz Stew, Ltd. Liabl. Co. v City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (Nev. 2008); *Squires By Squires v. Sierra Nevada Educ. Found. Inc.*, 107 Nev. 902, 904, 823 P.2d 256, 257 (Nev. 1991).
2. A "complaint should be dismissed only if it appears beyond a doubt that it could prove no set of facts which, if true, would entitle it to relief." *Buzz Stew*, 124 Nev. at 228.
3. The Court assumes, at least for purposes of the Motion to Dismiss, that Plaintiffs have standing to seek dismissal of the Brokers' counterclaim.
4. With respect to their misrepresentation claims, the Brokers are now claiming that their detrimental reliance actually occurred during the renewal of the insurance policy in April 2015, instead of in July 2014. Specifically, the Brokers originally alleged that "Bliss Sequoia relied on HWP's misrepresentations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and scope of the park" in July 2014. After the 3/23/20 Order, the Brokers changed their allegation to state that "[d]uring the renewal of HWP's policy, Bliss Sequoia relied on HWP's representations that the waterpark was in compliance with applicable safety codes when it advised HWP that its general liability limits were in line with the size and scope of the park." The Court acknowledges the change, but if there was reliance by the Brokers on representations made, the change in dates does not appear to be case dispositive.

5. Plaintiffs allege that the Brokers cannot allege a viable claim for fraudulent concealment because HWP did not have a "duty" to disclose. The Court finds and concludes that with regard to the "duty" element for a fraudulent concealment claim, it appears that in Nevada, a claim for nondisclosure generally is not accepted, but when the Courts do recognize a claim for fraudulent concealment claim, the Court requires a "special relationship." *Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 (D. Nev. 1995); *Peri & Sons Farms, Inc., v. Jain Irrigation, Inc.*, 933 F.Supp.2d 1279, 1292 (D.Nev. 2013).
6. Although *Ainsworth* indicates that there are additional duties on the insurer, not the insured, it does acknowledge the insurer/insured special relationship. *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 592, 763 P.2d 673, 676 (1988).
7. This Court is not convinced that the Court in *Ainsworth* intended to impose a duty to act truthfully and honestly only to one side of the special relationship.
8. When a special relationship exists between two parties, this Court believes that both parties have equal and corresponding duties to act truthfully and honestly with one another, and consequently, the Court finds that the duty element is satisfied in this case.
9. Based on the foregoing, this Court views all factual allegations made by the Brokers as true and draws all reasonable inferences in the Brokers' favor.
10. In doing so, the Court cannot conclude beyond a doubt that Brokers could prove no set of facts, which, if true, would entitle them to relief.

FOURTH PARTY DEFENDANT MORETON'S MOTION TO DISMISS, MOTION TO STRIKE AND, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT ON THE BROKERS' FOURTH PARTY CLAIMS
(Finding of Fact and Conclusions of Law)

1. With regard to Moreton's Motion to Strike and Motion to Dismiss, Moreton argues that it was inappropriate and procedurally improper for the Brokers to assert a "crossclaim" against Moreton, because Moreton wasn't a party to the case, and it

should have been a 3rd or 4th party Complaint. Moreton is correct, but as the Brokers indicated in response, in Nevada, Courts will adjudicate matters based on the substantive issues addressed in the papers, regardless of how they are titled. *Berry v. Feil*, 131 Nev. 339, 341 (Nev. App. 2015).

2. Moreton argues that Brokers' Cross-Claim fails to allege any relationship between Moreton and the Brokers, and consequently, they cannot assert a claim for contribution against Moreton.
3. Moreton cites to *Piroozi*, in support of the argument that where the Defendants are severally liable for the harm to Plaintiff, there will not be a contribution claim. *Piroozi v. Eighth Jud. Dist. Ct.*, 131 Nev. 1004, 1010 n. 4, 363 P.3d 1168, 1172 n. 4 (2015).
4. This Court notes, however, that *Piroozi* dealt with a claim for medical malpractice/professional negligence, and in that type of case, NRS 41A has abrogated joint liability between tortfeasors.
5. Accordingly, the Court finds that *Piroozi* does not control the facts in the present case. The Court additionally notes that Nevada Courts have interpreted NRS 17.225 in harmony with NRCP 14 in recognizing that "a third-party plaintiff has the right to contribution in an original action prior to entry of judgment." *Pack v. LaTourette*, 128 Nev. 264, 269 (2012).
6. Moreton has moved to strike or dismiss the Brokers' claims against it or, in the alternative, for summary judgment. *Lumberman's Underwriting Alliance v. RCR Plumbing*, 114 Nev. 1231, 969 P.2d 301 (1998) (if a motion to dismiss cites documents outside the pleadings or affidavits, then the district court may review the motion as one for summary judgment).
7. Moreton argues that it cannot be held liable under contribution because it didn't assume any duties to the Henderson Water Park, and never entered into any contract with the Brokers. Moreton argues that it provided a benchmark comparing insurance

coverage for amusement parks to Opheiken upon his request in May of 2016, a year after the Plaintiff's incident. Moreton argues that all facts giving rise to Moreton's alleged liability occurred after the Brokers recommended general liability limits and issued a binder for the insurance in July, 2014. Moreton argues that its limited inspection, to evaluate the safety and risks associated with the slides on the property, did not occur until the days after H&W's inspection, and Moreton was not asked to provide any advice or recommendation regarding the adequacy of the water park's insurance. Moreton argues that it did not discuss insurance for the waterpark until May 9, 2016, over a year after the Plaintiff's incident. Based upon these allegations, Moreton argues that it cannot possibly be held liable for contributing to the Brokers' professional negligence and misrepresentations prior to Plaintiff's incident. Moreton further argues that for misrepresentation claims, liability is only imposed on a party who has supplied false information. *Halcrow, Inc. v. Eighth Jud.Dist.* Ct., 129Nev. 394, 400, 302 P.3d 1148, 1153 (2013). Here, Moreton argues that the Brokers have failed to plead sufficient facts demonstrating that Moreton supplied false information to Henderson Water Park for guidance in their business transactions, nor is there any allegation that the Brokers or HWP relied on the information obtained from Moreton.

8. In response, the Brokers allege that Moreton is jointly responsible for any injuries suffered by HWP, because HWP also relied on Moreton's insurance advice when deciding on the appropriate amount of insurance coverage. The Brokers note that Moreton's arguments are based on the *Reid v. Royal* case, 390 P.2d 45, 47, 80 Nev. 137, 141 (1964), but contribution claims were not even recognized in Nevada until after that case was decided. Since then, the Nevada Court has since interpreted NRS 17.225 in harmony with NRCP 14 in recognizing that "a third-party plaintiff has the right to seek contribution in an original action prior to entry of judgment." *Pack v. LaTourette*, 128 Nev. 264, 269 (2012).

9. The Court finds that the fact that Orluff Opheikens indicated that HWP relied on Moreton's advice when deciding whether it had enough insurance, appears to defeat the argument that there was no reliance on Moreton's opinions, or that there were no recommendations.

10. Even if Orluff Opheikens is incorrect, in viewing the evidence in the light most favorable to the nonmoving party, the Court must conclude that there at least exists a genuine issue of material fact in that regard.

ORDER

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that the Plaintiff's Motion to Dismiss Counterclaims against Henderson Water Park, is hereby DENIED without prejudice.

IT IS HEREBY FURTHER ORDERED that Moreton's Motion to Strike and Motion to Dismiss, are hereby DENIED without prejudice

IT IS HEREBY FURTHER ORDERED that Moreton's alternative Motion for Summary Judgment, is hereby DENIED without prejudice.

IT IS SO ORDERED this 15th day of June, 2020.

DISTRICT COURT JUDGE

AM

Respectfully submitted by:

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

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Approved as to form and content:

DATED this 11th of June, 2020.

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DATED this 11th of June, 2020.

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Cc: Heather Bennett
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This looks fine to us. You have my authorization to e-sign.

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Third-Party Plaintiffs, vs. BLISS SEQUOIA INSURANCE & RISK ADVISORS, INC., an Oregon corporation; HUGGINS INSURANCE SERVICES, INC., an Oregon corporation, Third-Party Defendants. AND ALL RELATED CLAIMS	Case No.: A-15-722259-C Dept. No.: XXX **MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS COUNTERCLAIMS AGAINST HENDERSON WATER PARK, LLC** **IN-PERSON OR VIDEO HEARING REQUESTED**

Third-Party Plaintiffs Peter Gardner and Christian Gardner, individually and on behalf of their minor son, Leland Gardner ("Plaintiffs"), as the assignees of Henderson Water Park, LLC dba Cowabunga Bay Water Park, submit their Motion for Reconsideration of Order Denying Motion to Dismiss Counterclaims Against Henderson Water Park, LLC ("HWP"). This Motion is made and based upon the attached memorandum of points and authorities, all pleadings and papers on file herein, and any oral argument the Court shall allow at the time of hearing.

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I. INTRODUCTION

The Court has repeatedly indicated that it is open to reconsideration in the interest of reaching the correct decision. Plaintiffs appreciate his Honor's approach to such matters, and respectfully submit this is an instance where reconsideration is required. Specifically, the Court's finding that the Brokers satisfied the duty element of their cause of action for fraudulent concealment is clearly erroneous.[1] That is because the Court relied on *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 763 P.2d 673 (1988) in determining that a special relationship existed between the Brokers and HWP as a matter of law. But the Nevada Supreme Court's decision in *Ainsworth* addressed the special relationship between an *insurer* and insured, not an *insurance broker* and insured. Here, the Brokers were not HWP's insurer, and there is no legal support whatsoever for the principle that a special relationship exists between insurance broker and insured such that the latter automatically owes a duty of disclosure to the former.

II. ARGUMENT

A. Legal Standard.

Eighth Judicial District Court Rule 2.24 authorizes a party to seek reconsideration of a district court's ruling. EDCR 2.24(b). While EDCR 2.24 does not set forth any specific standards, "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry and Title v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997) (citing *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976)).

[1] To be clear, Plaintiffs submit that the Court also committed error by denying their motion to dismiss the Brokers' misrepresentation claims. Nevertheless, because the issues related to the Brokers' misrepresentation claims do not present straightforward questions of law for the Court and are easily addressed in a motion for summary judgment, Plaintiffs have limited this Motion to the Court's finding that HWP owed a duty of disclosure as a matter of law.

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A ruling "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Unionamerica Mortgage and Equity Trust v. McDonald*, 97 Nev. 210, 211-212, 626 P.2d 1272, 1273 (1981) (quotation omitted). The Nevada Supreme Court has likewise recognized that reconsideration may be proper even though "the facts and law were unchanged," but where the judge "was more familiar with the case by the time the second motion was heard[.]" *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 217, 217-18, 606 P.2d 1095, 1097 (1980) (finding no abuse of discretion where district court reheard and granted motion for partial summary judgment after originally denying the same).

B. The Brokers Did Not—And Cannot—Establish The Existence Of A Special Relationship With HWP.

The Court incorrectly applied Nevada precedent addressing the special relationship between an insurer and insured when it determined as a matter of law that HWP owed a duty of disclosure to the Brokers. Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc.—*i.e.* the Brokers—are insurance brokers and HWP was their client. It is undisputed that the Brokers did not insure HWP. Rather, the Brokers assisted HWP in procuring commercial general liability insurance from Ace American Insurance Company for the 2015 season and, on one occasion in July 2014, provided a recommendation to HWP regarding the appropriate amount of insurance coverage for Cowabunga Bay. Because the Brokers did not insure HWP, neither party contended that legal authority addressing the insurer-insured relationship had any direct application to the instant dispute.[2] Thus, the Nevada

[2] Plaintiffs merely cited *Ainsworth* in a footnote to clarify that the Nevada Supreme Court only recognized duties flowing from the insurer to the insured, *i.e.*, "a duty to negotiate with its insureds in good faith and to deal with them fairly." 104 Nev. at 592, 763 P.2d at 676. In denying the motion to dismiss, the Court indicated its belief that "both parties have equal and corresponding duties to act truthfully and honestly with one another." *See* Order Denying Mot. to Dismiss (dated 6/15/20). While Plaintiffs disagree that the Nevada Supreme Court imposed reciprocal duties in *Ainsworth* or that reciprocal duties exist in any fidiciuary/special relationship, there is no question that an insured should be truthful and honest with its insurer. Indeed, if an insured conceals or misrepresents information to its insurer in the course of obtaining insurance, the insurer has the contractual right to

Supreme Court's decision in *Ainsworth* is inapposite and does not support the Court's finding that HWP owed the Brokers a duty to disclose.

Turning to the insurance broker-insured relationship, the Nevada Supreme Court has flatly rejected the suggestion that an insurance broker owes a "de facto fiduciary duty" to its insured client. *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 133 Nev. 430, 436-47, 401 P.3d 218, 223-24 (2017); *see also CBC Fin., Inc. v. Apex Ins. Managers, LLC*, 2008 WL 3992330, *32 (9th Cir. Aug. 14, 2008) (affirming dismissal of breach of fiduciary duty claim brought by insured against insurance broker because "no Nevada court has imposed on insurance brokers a fiduciary duty toward insureds.") (interpreting Nevada law). The Nevada Supreme Court advised that "[t]he duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by its client[,]" and "the usual relationship between an insurance broker and its client is not the kind which would logically give rise to" heightened duties on the part of the insurance broker. *O.P.H.*, 133 Nev. at 436-47, 401 P.3d at 223.

In short, the Nevada Supreme Court in *O.P.H.* had the opportunity to recognize the existence of a fiduciary duty or "special relationship" between an insurance broker and insured client. It declined to do so.[3] Moreover, no court in any other jurisdiction has ever recognized the existence of a de facto special relationship such that an insured client owes a general duty of disclosure to its insurance broker.

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deny coverage or rescind the policy. That, of course, did not occur here as HWP's insurer paid the full $5 million policy limits in partial satisfaction of Plaintiffs' claims.

[3] The Nevada Supreme Court did, however, find that "an insurance broker may assume additional duties ***to its insured client*** in special circumstances." *O.P.H.*, 133 Nev. at 437, 401 P.3d at 223 (emphasis added). Here, the Brokers and, more specifically, Mr. Barnwell assumed a discrete special duty to advise HWP on the adequacy of Cowabunga Bay's liability insurance limits by holding themselves out as experts in the field of water park insurance and responding to Slade Opheikens' direct inquiry on the topic. *See, e.g.*, *Voss v. Netherlands Ins. Co.*, 8 N.E.3d 823 (N.Y. 2014) (one "exceptional circumstance" giving rise to a special duty of advisement is "some interaction regarding a question of coverage, with the insured relying on the expertise of the agent"); *Zaremba Equip., Inc. v. Harco Nat'l Ins. Co.*, 761 N.W.2d 151, 159 (Mich. Ct. App. 2008) (an insurance broker will owe a special duty of advisement where "an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate").

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The Court should reconsider its ruling and refrain from creating new law that an insured client owes a duty of disclosure to its insurance broker, particularly when the Brokers did not plead a single factual allegation that would actually support the existence of a "special relationship."

III. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their Motion to Dismiss Counterclaims Against Henderson Water Park, LLC in its entirety.

DATED this 16th day of June, 2020.

CAMPBELL & WILLIAMS

By /s/ ***Philip R. Erwin***
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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 16th day of June, 2020 I caused the foregoing document entitled **Motion for Reconsideration of Order Denying Motion to Dismiss Counterclaims Against Henderson Water Park, LLC** 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

OPPS

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **THIRD-PARTY DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS COUNTERCLAIMS AGAINST HENDERSON WATER PARK, LLC**

Defendants Bliss Sequoia Insurance & Risk Advisors, Inc., and Huggins Insurance Services, Inc., (collectively "Bliss Sequoia") through their counsel, HUTCHISON AND STEFFEN, PLLC, file their Opposition Plaintiffs' Motion for Reconsideration of Order Denying Motion to Dismiss Counterclaims against Henderson Water Park, LLC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

The Gardners' motion is frivolous. The Court may reconsider an earlier ruling "*[o]nly in very rare instances* in which new issues of fact or law are raised" or "if the decision was *clearly* erroneous*." North Main, LLC v. Eighth Judicial Dist. Court of State ex rel. County of Clark*, 128 Nev. 922 (Nev. 2012) (emphasis added). The Gardners do not allege any new fact or law. Instead, they raise the same arguments the Court has already rejected. June 15, 2020 Order, ¶ 10 (holding that because there is a special relationship between HWP and Bliss Sequoia, "the Court cannot conclude beyond a doubt that [Bliss Sequoia] could prove no set of facts, which, if true, would entitle them to relief"). The Gardners' motion is an example of the typical motions to reconsider – litigants wanting a second bite at the apple – and does not involve the "very rare instances" requiring this Court to reverse itself.

II. The Courts ruling was not clearly erroneous.

A. The Court's reliance on *Ainsworth* is correct.

In denying the Gardners' motion to dismiss, the court recognized that a broker has a duty "to act truthfully and honestly" toward an insured. Order, at ¶ 7. The Court rightfully relied on *Ainsworth v. Combined Ins. Co. of Am.,* 104 Nev. 587, 592 (Nev. 1988) in coming to this conclusion. In *Ainsworth,* the court held that an insurer had a duty toward its insured. *Id*. Here, the Court recognized this duty and held that a broker has a similar duty toward its insured. Additionally, the Court found that this duty could not be one-sided. Order at ¶¶ 7-8.

Ainsworth held that an insurer has a duty to its insured because the "relationship of an insured to an insurer is one of special confidence. A consumer buys insurance for security, protection, and peace of mind. . . .The insurer is under a duty to negotiate with its insureds in good faith and to deal with them fairly." *Id*. The relationship between an insured and its broker therefore must also be "one of special confidence" because the consumer is purchasing insurance through its broker.

The Gardners actually agree with the reasoning in *Ainsworth* that this Court relied on, but bury this concession in a footnote stating, "there is no question that an insured should be

truthful and honest with its insurer." Mot. at 3, n. 2. It would be nonsensical for an insured to not be "truthful and honest" with its broker since it communicates with its insurer via its broker. Thus, as this Court recognized, any duty an insured has to be truthful and honest with its insurer must also exist toward its broker.

B. The Court's ruling is not clearly erroneous because a fiduciary duty is not equivalent to a special relationship.

The Gardners argue that the Court's ruling was "clearly erroneous" because there is no fiduciary relationship between an insured and a broker. This argument misses the point altogether. The Court did not hold that there was a fiduciary relationship between the insured and a broker. Instead, as noted above, the Court found that an insurance broker and insured each have a duty "to act truthfully."

Nonetheless, the Gardners maintain that because the Nevada Supreme Court has held that an insurance broker has no fiduciary duty, there is no special relationship that would give HWP a duty to disclose, making the Court's ruling clearly erroneous. This position contradicts Nevada law. The duty to disclose required for a valid claim of fraudulent concealment does not require a fiduciary relationship, but merely "some form of relationship between the parties." Opp, to Motion to Dismiss, at 9 (citing *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1487 (1998), abrogated on other grounds by *GES, Inc. v. Corbitt*, 117 Nev. 265 (2001)). The Gardners recognize "some form of relationship" between HWP and Bliss Sequoia when they contend that "Mr. Barnwell assumed a discrete special duty to advise HWP on the adequacy of Cowabunga Bay's liability insurance limits by holding themselves out as experts in the field of water park insurance and responding to Slade Opheikens' direct inquiry on the topic." Mot. at 4, n.3.

Further, the Nevada Supreme Court has held that, "even in the absence of a fiduciary or confidential relationship . . . an obligation to speak can arise from the existence of material facts peculiarly within the knowledge of the party sought to be charged and not within the reasonable reach of the other party." Opp. to Motion to Dismiss, at 9-10 (quoting *Villalon v. Bowen*, 70 Nev. 456, 467–68 (1954)). Here, the "special relationship" between HWP and Bliss

Sequoia did not arise out of a fiduciary duty, but HWP's knowledge of "material facts" that were "not within the reasonable reach" of Bliss Sequoia.

The cases cited by the Gardners support the position that a special relationship exists between a broker and an insured. As the Gardners point out, "The Nevada Supreme Court advised that '[t]he duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by its client.'" Mot. at 4 (quoting *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 133 Nev. 430, 436-47 (Nev. 2017)). This necessarily includes a duty to act truthfully. Moreover, this duty, just as the duty between the insured and insurer, cannot be one-sided and must also apply to the insured.

Additionally, the Gardners' argument that the Nevada Supreme Court in *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 133 Nev. 430, 436-47 (Nev. 2017) had an opportunity to recognize the existence of a "special relationship" between an insurance broker and insured client, is flawed. As discussed above a fiduciary duty and "special relationship" are not equivalent and in *O.P.H.*, the insured asserted a claim for breach of fiduciary duty against its broker. *See* Mot. at 4; *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 133 Nev. 430, 436-47 (Nev. 2017) (affirming summary judgment order in favor of broker on insured's breach of fiduciary duty claim).[1]

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[1] The Gardners' motion was without merit for an additional reason. The claims the Gardners sought to dismiss were asserted against HWP, not against the Gardners. Therefore, as shown in Bliss Sequoia's opposition, the Gardners could not move to dismiss the claims. Opp'n 3-4.

III. Conclusion

The Gardners' request for this Court to change its ruling is based on the same theories the Court already rejected and demonstrates why motions to reconsider are disfavored. The Court correctly denied the motion to dismiss because Bliss Sequoia's claims are consistent with Nevada law and because the Gardners' arguments were not. Just raising the same issues again does not make this one of the "very rare instances" requiring a reversal.

DATED this 30th day of June, 2020.

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

_____

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 30th day of June, 2020, I caused the document entitled **THIRD-PARTY DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS COUNTERCLAIMS AGAINST HENDERSON WATER PARK, LLC** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[✓] to be electronically served through the Eighth Judicial District Court's electronic filing system pursuant to EDCR 8.02; and/or

[ ] to be hand-delivered;

to the attorneys/ parties listed below:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Heather Bennett

An employee of Hutchison & Steffen, PLLC

ELECTRONICALLY SERVED
7/31/2020 12:45 PM

Electronically Filed
07/31/2020 12:45 PM
CLERK OF THE COURT

ORDR

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THIS COURT'S DENIAL OF PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS**

Plaintiffs' Motion for Reconsideration of this Court's denial of their Motion to Dismiss Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc.'s (together, the "Brokers") counterclaims against Henderson Water Park, LLC ("HWP") (the "Motion") was scheduled for hearing on July 22, 2020. Pursuant to A.O. 20-01 and subsequent administrative orders, this matter is deemed "non-essential," and may be decided after a

hearing, decided on the papers, or continued. This Court has determined that it would be appropriate to decide this matter on the papers and consequently, issued a minute order. The following findings of fact, conclusions of law and order memorializes the Court's decision with respect to the Motion.

FINDINGS OF FACT

1. Plaintiffs argue that pursuant to EDCR 2.24, the Court should reconsider its prior decision because it was "clearly erroneous," *Masonry and Title v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997), and/or because the Court has more information now. *Harvey's Wagon Wheel, Inc., v. MacSween*, 96 Nev. 217, 217-18, 606 P.2d 1095, 1097 (1980).

2. Plaintiffs argue that the Court's finding that the Brokers satisfied the duty element of their cause of action for fraudulent concealment is erroneous because the Court incorrectly relied on *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 763 P.2d 673 (1988), in determining that a special relationship existed between the Brokers and HWP as a matter of law.

3. Plaintiffs contend that the Nevada Supreme Court in *Ainsworth* addressed the special relationship between an insurer and the insured, not an insurance broker and the insured, and here, the Brokers were not HWP's insurer.

4. Plaintiffs cite heavily to the case of *O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.*, 133 Nev. 430, 436-47, 401 P.3d 218, 223-24 (2017), arguing that the Nevada Supreme Court has flatly rejected the suggestion that an insurance broker owes a "de facto duty" to its insured client.

5. Brokers emphasize that the Court's finding of a "special relationship" is not equivalent to a "fiduciary relationship."

6. Further, Brokers argue that this Court did not hold that there was a fiduciary relationship, but only that an insurance broker and an insured have a duty to act truthfully.

CONCLUSIONS OF LAW

7. The Nevada Supreme Court in *O.P.H.* stated:

> In Nevada, an agent or broker has a duty to use reasonable diligence to place the insurance and seasonably to notify the client if he is unable to do so. *Keddie v. Benefidial Ins., Inc.*, 94 Nev. 418, 420, 580 P.2d 955, 956 (1978); *see Havas v. Carter*, 89 Nev. 497, 499, 500, 515 P.2d 397, 398, 99 (1973). O.P.H. cites no case holding that an insurance broker owes a duty to monitor its insured client's premium payments and to alert the client when the policy is about to be canceled for non-payment of premiums. "The duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by its client." *Kotlar v. Hartford Fire Ins., Co.,* 83 Cal.App.4th 1116, 100 Cal.Rptr.2d 246, 250 (2000). As even O.P.H. recognizes, the usual "relationship between an insurance broker and its client is not the kind which would logically give rise to a duty to monitor and remind the client about overdue premium payments." *Id.*
>
> 133 Nev. at 436-47, 401 P.3d at 223.

8. Although the Court in *O.P.H.* indicated that there was no "de facto duty," the Court was talking about a duty to monitor and notify the insured of cancellation.

9. The *O.P.H.* Court did acknowledge that a broker has a duty to use reasonable care, diligence, and judgment in procuring the insurance requested by its client.

10. Based upon the foregoing, this Court is not convinced that its prior decision was "clearly erroneous," and based upon the additional arguments, and reference to additional case law, the Court is not convinced that its prior decision was inappropriate.

ORDER

IT IS THEREFORE HEREBY ordered that Plaintiffs' Motion for Reconsideration is hereby DENIED.

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IT IS FURTHER ORDERED that, because the Court has decided this matter on the papers, the hearing scheduled for July 22, 2020 will be taken off calendar and there is no need for any parties or attorneys to appear on that date.

Dated this 31st day of July, 2020

IT IS SO ORDERED this _____ day of _____, 2020.

_____

HONORABLE DISTRICT COURT JUDGE JERRY A. WIESE

639 379 2C9B 8E40
Jerry A. Wiese
District Court Judge

Respectfully submitted by:

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

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Attorneys for Haas & Wilkerson, Inc

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Sent: Thursday, July 30, 2020 9:00 AM
To: Sam Mirkovich; Ryan Leary; Patricia Lee; Steve Guinn; Phil Erwin; Janice M. Michaels
Cc: Heather Bennett
Subject: RE: Proposed Order re Motion for Reconsideration on Plf MTD (SRM Edits and RWL Edits).docx

You are also welcome to affix my e-signature to this as well.

Thank you,

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Same.

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Subject: RE: Proposed Order re Motion for Reconsideration on Plf MTD (SRM Edits and RWL Edits).docx

Patty,

I am fine with this version. You may include my e-signature and submit it to the Court.

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Cc: Heather Bennett
Subject: Proposed Order re Motion for Reconsideration on Plf MTD (SRM Edits and RWL Edits).docx

All: I apologize for being a bit behind in my emails today. Ryan, I have further incorporated your changes and am attaching the latest version of the Order regarding Plaintiff's Motion for Reconsideration hereto for everyone's consideration. Let me know if I can affix your respective electronic signatures hereon. Thanks again!

Best regards,

Patricia Lee
Partner

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Peter Gardner, Plaintiff(s) vs. Henderson Water Park, LLC, Defendant(s)	CASE NO: A-15-722259-C DEPT. NO. Department 30

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

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DISTRICT COURT

CLARK COUNTY, NEVADA

PETER GARDNER and CHRISTIAN GARDNER, individually and on behalf of minor child, LELAND GARDNER, as assignees of Third-Party Plaintiff Henderson Water Park, LLC dba Cowabunga Bay Water Park, Plaintiffs, v. BLISS SEQUOIA INSURANCE & RISK ADVISORS, Inc., AND HUGGINS INSURANCE SERVICES, Inc., Third-Party Defendants. AND ALL RELATED CLAIMS	**CASE NO. A-15-722259-C** **DEPT. NO: XXX** **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THIS COURT'S DENIAL OF PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS**

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/ / /

NOTICE IS HEREBY GIVEN that on July 31, 2020, an O*rder Denying Plaintiffs' Motion for Reconsideration of this Court's Denial of Plaintiffs' Motion to Dismiss Counterclaims* was entered in the above-captioned matter, a copy of which is attached hereto.

DATED this 31st day of July, 2020.

HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee

_____

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Attorney for Defendant/Third-Party Defendant Bliss Sequoia Insurance & Risk Advisors, Inc. And Huggins Insurance Services, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 31st day of July, 2020, I caused the document entitled **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THIS COURT'S DENIAL OF PLAINTIFFS' MOTION TO DISMISS COUNTERCLAIMS** to be served as follows:

[ ] by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or

[✓] to be electronically served through the Eighth Judicial District Court's electronic filing system pursuant to EDCR 8.02; and/or

[ ] to be hand-delivered;

to the attorneys/ parties listed below:

ALL PARTIES ON THE E-SERVICE LIST

/s/ Heather Bennett

An employee of Hutchison & Steffen, PLLC