Case No. 81600

IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER and CHRISTIAN GARDNER, on behalf of minor child, LOLA 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 (District Court Case No. A-15-722259-C)

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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I. INTRODUCTION

It speaks volumes that the Brokers' response to the glaring legal errors raised by the Gardners' Petition is to urge this Court to ignore them.[1] The Brokers devote the majority of their Answer to a sky-is-falling narrative that the Court's consideration of the instant Petition will lead to a "flood of petitions" and the "death" of the Court's general policy of declining to entertain writ relief emanating from the denial of dispositive motions. By focusing on this (nonexistent) slippery slope, the Brokers neglect to address the Gardners' contention that the specific issues and circumstances presented by this Petition plainly require consideration under existing Nevada precedent governing writ relief arising from orders denying motions to dismiss.

In that regard, the Brokers concede their defective counterclaims will exponentially expand the scope of this litigation and require the parties to re-litigate Leland's drowning even though the Gardners settled their claims against HWP and the other defendants more than a year ago. The Brokers likewise do not dispute that their counterclaims will result in a trial spanning several weeks as opposed to the 5-7 days originally contemplated by the parties and the district court. Thus, there is no question that judicial economy requires the prompt resolution of the issues raised by the Gardners' Petition; a fact that the district court recognized when it ordered a complete stay of proceedings pending appellate review. PSA 250 ("judicial economy

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

requires the determination of this issue by the Supreme Court before the District Court ventures into such an extended trial.").

The Brokers' next procedural objection is to claim the Gardners somehow lack standing to seek dismissal or otherwise defend the Brokers' counterclaims. The Brokers, of course, disregard (or overlook) that they filed their counterclaims against the Gardners in this action—to which HWP was no longer a party—in the interest of obtaining a setoff to their liability on the claims assigned to the Gardners by HWP. In short, the Brokers ask the Court to handcuff the Gardners and prevent them from defending claims that, if successful, would reduce the Gardners' ultimate recovery. But, just as the Brokers have the right to assert (viable) counterclaims against the Gardners as the assignees of HWP, the Gardners have every right to defend those counterclaims and prevent a setoff.

When the Brokers finally reach the legal issues raised by the Gardners' Petition, they gloss over the multiple plain errors committed by the district court without any substantive analysis. Instead, the Brokers vaguely claim that the district court denied the Gardners' motion to dismiss due to so-called "factual disputes" even though these alleged "factual disputes" are neither identified nor found anywhere in the record. The Brokers likewise misrepresent their own allegations in this proceeding, misconstrue the grounds for the Court's ruling, and misstate the applicable law governing their counterclaims against HWP. Given these missteps, it is little wonder the Brokers chose to focus their attention on procedural objections rather than the merits.

The Gardners will first address the Brokers' arguments concerning the propriety of writ relief before turning to their objection that the Gardners lack standing to seek dismissal as the assignee of HWP's claims. The Gardners will then respond to the Brokers' superficial arguments related to district court's erroneous denial of the Gardners' motion to dismiss.[2]

II. ARGUMENT

A. The Gardners' Petition Raises Issues That Require Extraordinary Writ Relief.

Notwithstanding that the Court directed an answer just 15 days after the Gardners filed their Petition, the Brokers contend that entertaining this matter will lead the Court down a slippery slope, and cause an unmanageable flurry of writ petitions emanating from orders denying motions to dismiss. To drive this point home, the Brokers provide a lengthy dissertation regarding this Court's policies and practices on this issue, beginning with the *Dzack* decision in 1964, and ending with Justice Hardesty's comments (quoted from memory) at a recent CLE. Respectfully, the Court should disregard the history lesson.

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[2] The Gardners will not waste the Court's time with a point-by-point rebuttal of the myriad factual inaccuracies and mischaracterizations in the Brokers' depiction of the underlying litigation. Nor will the Gardners respond to the Brokers' transparent attempt to portray them as greedy (and, in turn, not worthy of the Court's consideration) by publicly disclosing the parties' confidential settlements in violation of the stipulated protective order entered below. These issues are not germane to the Court's resolution of the instant Petition, and are simply distractions.

The Gardners acknowledged in the first line of their Petition that the Court generally declines to entertain writ petitions challenging orders denying motion to dismiss. The Gardners likewise analyzed the applicable precedent where this Court has considered such writ petitions and applied those standards to the facts underlying their Petition. Pet. at 15-19. To that end, the Gardners drew a direct comparison between this case and *Smith v. Eighth Judicial District Court*, 113 Nev. 1343, 950 P.2d 280 (1997). *Id.* at 18-19. Tellingly, the Brokers did not address *Smith* except to cite its general holding. *See* Ans. at 17. They nowhere provided a substantive response to the Gardners' position that the *Smith* court's analysis of the availability of writ relief controls here.

Additionally, the Gardners explained that judicial economy warranted consideration of their Petition as the Brokers' counterclaims would drastically expand the scope of this narrow professional negligence action and exponentially lengthen the trial. Pet. at 17-19. Again, the Brokers did not dispute the impact of their counterclaims on judicial economy, and casually dismissed the Gardners' concern as sour grapes that the litigation will be more complex and difficult. The Brokers' refusal to meaningfully address the impact of their counterclaims on judicial economy amounts to a concession that this factor favors the Court's consideration of the Gardners' Petition.

The Brokers' only genuine argument related to the propriety of writ relief is that the Gardners' Petition does not present an important legal issue, and instead amounts

to "a factual dispute about whether claims have been pleaded sufficiently to withstand a motion to dismiss." Ans. at 1. This is wrong. To begin, the district court's finding that HWP owes a reciprocal fraud-based duty of disclosure to the Brokers plainly presents an important legal issue that is not "based on a plethora of factual disputes." *Id*. at 2. Indeed, the Brokers only proffered a single legal conclusion below to support the notion that HWP owed a duty to disclose while omitting any factual allegations related to the alleged existence of a special relationship with HWP. PA 120 ¶ 81; Pet. at 22. For its part, the district court relied solely on *Ainsworth v. Combined Ins. Co. of Am.*, 104 Nev. 587, 763 P.2d 673 (1988)—a case involving the insurer-insured relationship—when it conclusively determined that a special relationship existed between the Brokers and HWP as a matter of law. PA 166 (finding "the duty element is satisfied in this case").[3]

Though the Brokers minimize this aspect of the district court's ruling as a niche issue not worthy of the Court's consideration, the Gardners submit that the district court's decision to become the first court in the United States to recognize a reciprocal fraud-based duty of disclosure in the insurance broker-insured relationship requires this Court's prompt review. Besides the wide-ranging problems created by the district court's erroneous belief that duties owed in a fiduciary or special relationship are

[3] While the Brokers' now suggest that the duty "issue was not finally resolved by the district court [and] is dependent for final resolution on related factual issues," Ans. at 3, the district court's order speaks for itself.

reciprocal, the recognition of an inherent fraud-based duty of disclosure in the insurance broker-insured relationship would expose the countless insureds in this State to potential fraud claims any time information is not voluntarily disclosed to a broker during the procurement of an insurance policy.[4] The district court's decision would likewise expose insurance brokers in Nevada to fraud claims based on nondisclosure to insureds, which directly conflicts with the Court's existing precedent. *See 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).

The other issues raised in the Gardners' Petition also concern the straightforward application of law to undisputed facts. With respect to the misrepresentation claims based on the April 2015 statements attributed to HWP, the question presented is whether the district court is required to accept the Brokers' internally inconsistent, contradictory and sham allegations of reliance as true pursuant to NRCP 12(b)(5). In that regard, the Gardners have asked the Court to formally recognize the well-settled limitations on a district court's obligation to accept

[4] Typically, if an insured conceals or misrepresents information to its insurer in the course of obtaining insurance, the insurer has the contractual right to deny coverage, reserve rights, and/or rescind the policy. Of course, none of those occurred here as HWP's insurer paid the full $5 million policy limits in partial satisfaction of Plaintiffs' claims.

allegations as true when considering a motion to dismiss. Pet. at 14-15. There is no "factual dispute" concerning the Brokers' conflicting allegations of reliance that were plainly designed to avoid dismissal rather than advance a viable cause of action.

The Gardners' contentions regarding the Brokers' misrepresentation claims based on the Huishs' alleged statements that they considered safety to be a "priority" also raise questions of law. At the outset, the district court allowed the Brokers to proceed with these misrepresentation claims even though they did not plead their claims with particularity under NRCP 9(b) and failed to cure the deficiency after the district court instructed them to "provide more information." PA 95. The application of the NRCP 9(b) pleading standard is a legal matter and not a fact-finding dispute.

Similarly, the Gardners' argument that misrepresentation claims must be based on a definitive statement of ascertainable fact is a pure legal issue. By allowing the Brokers to proceed with their misrepresentation claims, the district court conclusively determined that the Huishs' alleged statements that safety was a "priority" were actionable as a matter of law. No amount of discovery will change that determination; nor will the district court's application of the law change at a later date. Writ review is appropriate here.[5]

[5] The Gardners submit that the Brokers' argument concerning their standing to seek dismissal and defend the counterclaims against HWP also raises an important issue of first impression that requires this Court's attention. *See infra,* Section II.B.

B. The Gardners Have Standing To Seek Dismissal Of The Brokers' Counterclaims Against HWP.

Before turning to the Brokers' argument that the Gardners lack standing to seek dismissal under NRCP 12(b)(5), it is first necessary to discuss the legal principles that govern counterclaims brought by an obligor following the assignment of claims—a legal issue that has yet to be addressed by this Court. It is axiomatic that "an 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." *First Fin. Bank v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014); *see also Stapleton v. City of Victorville*, 2018 WL 6262830, *3 (C.D. Cal. June 7, 2018) ("When all the rights to a claim have been assigned, courts generally have held that the assignor may no longer sue, and the assignee is the real party in interest.") (citing 6A C. Wright, et. al, *Federal Practice and Procedure* § 1545 (2d ed. 1990)).

"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." *Walters v. Iowa Des-Moines Nat'l Bank*, 295 N.W.2d 430, 433 (Iowa 1980);[6] *see also Collection Ctr., Inc. v. Bydal*, 795 N.W.2d 667, 673 (N.D. 2011) ("Therefore,

[6] In a bizarre attempt at a "gotcha" moment, the Brokers claim that the Gardners "neglected" to mention the second sentence in this excerpt from *Walters* even though the Gardners quoted it verbatim when they first cited this case in the district court. PA 156.

because an assignee acquires no greater rights than were possessed by the assignor, in an action on the claim assigned, the assignee of a chose in action is ordinarily subject to any setoff or counterclaim available to the obligor against the assignor, and to all other defenses and equities that could have been asserted against the assignor at the time of the assignment."); Restatement (Second) of Contracts § 336 (1981); 6 Am.Jur.2d Assignments § 116 (2008); 6A C.J.S. Assignments § 107 (2004).

The obligor "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." *Express Recovery Servs. Inc. v. Olson*, 397 P.3d 792, 795 n. 1 (Utah Ct. App. 2017) (citing 5 supporting cases); *see also Walters*, 295 N.W.2d at 434 ("The counterclaim can be used against Central only defensively to reduce the amount of its claims against Walters. It cannot result in a personal judgment against Central."); *Premier Capital, LLC v. Baker*, 972 N.E.2d 1125, 1136 (Ohio Ct. App. 2012) ("It is well settled that an assignment does not cast any affirmative liability upon the assignee of the contract unless the assignee assumes those obligations.").

To the extent the obligor seeks to recover damages in excess of the setoff, the obligor must also sue the assignor. *See, e.g.*, *Olson*, 397 P.3d at 795 ("Where the assignee of a claim sues the obligor, the obligor's claim against the assignor may offset the claim of the assignee only to the extent of the assignee's claim; the obligor must sue the assignor in a separate suit for the balance of the counterclaim."); *Walters*, 295 N.W.2d at 434 (instructing that obligor may seek damages in excess of setoff by adding

assignor to lawsuit brought by assignee); *Litton ABS v. Red-Yellow Cab Co.*, 411 N.E.2d 808, 810 (Ohio Ct. App. 1978) ("In an action between the obligor and the assignee the [counterclaims] are available only defensively; if the obligor seeks damages or restitution he must go directly against the assignor.").

Here, the Brokers brought their causes of action against HWP in this action as a "counterclaim" under NRCP 13, which allows a party to assert compulsory or permissive counterclaims against an "opposing party" in the same action. PA 17 (moving for leave to amend to assert a counterclaim under NRCP 13). While the Brokers repeatedly state that "HWP is the party the Brokers sued," *see* Ans. at 24, the Brokers fail to comprehend that HWP was no longer a party in this action following the entry of the Stipulated Judgment and HWP's assignment of claims against the Brokers. Rather, the Gardners had stepped into HWP's shoes by filing their amended complaint advancing the professional negligence claims assigned by HWP. PA 1-9. Thus, the Gardners were the "opposing party" under NRCP 13 against whom the Brokers brought their counterclaims—not HWP. *Walters*, 295 N.W.2d at 433-34 (finding that obligor's counterclaim against assignor was a compulsory counterclaim in action brought by the assignee and that the assignee was the "opposing party" under the equivalent of NRCP 13).[7]

[7] The Brokers had no problem with treating the Gardners as a "party" when they served the Gardners 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

The Brokers have likewise acknowledged on multiple occasions that their counterclaims, if successful, will result in a setoff to the Gardners' recovery on the claims assigned by HWP. Ans. at 21; PA 143; PSA 230.[8] The Brokers have also conceded that the Gardners have an "interest in the counterclaims against HWP" due to the potential setoff against the Gardners' recovery on the assigned claims. PSA 231. In light of these admissions, the notion that the Gardners have to sit on the sidelines while the Brokers pursue counterclaims in the hopes of obtaining a multi-million dollar setoff is specious and offends basic principles of due process.

Here, the Brokers had the right to assert (viable) counterclaims against HWP in the instant action brought by the Gardners for the purpose of obtaining a setoff. The

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obligations under the law as assignees, the Gardners responded to said requests without objecting on the basis that they should have been directed to HWP. *MAO-MSO Recovery II v. Mercury Gen. Corp.*, 2019 WL 2619637, *2 (C.D. Cal. May 10, 2019) (an "assignee stands in the 'assignor's shoes' and must respond to discovery requests [under NRCP 34] as if it were the assignor.") (citing 5 supporting cases).

[8] In response to the Brokers' arguments below, the district court declined to make a definitive ruling on the Gardners' standing to seek dismissal under NRCP 12(b)(5). PA 165 ("The Court assumes, at least for purposes of the Motion to Dismiss, that Plaintiffs have standing to seek dismissal of the Brokers' counterclaim."). Thereafter, the Brokers continued to object to the Gardners' right to mount a defense and conduct discovery on the basis that the Gardners had no "interest" in the counterclaims against HWP. PSA 220. As a result, the Gardners moved the district court for a determination of standing. PSA 207-226. But the district court again refused to decide the issue on grounds the parties' disagreement over standing had not resulted in an "actual dispute" even though the district court simultaneously acknowledged that "such a dispute will eventually arise." PSA 237-244. Given the district court's refusal to decide the issue of the Gardners' standing, and the Brokers' intent to raise this objection at every turn, it is almost certain that this dispute will result in further appellate proceedings unless it is resolved now.

Brokers similarly had the right to name HWP as a fourth-party defendant to those same counterclaims in the interest of obtaining an excess judgment. It necessarily follows, however, that both the Gardners and HWP have separate and identifiable interests in defending against the financial loss that could potentially result from the Brokers' counterclaims.[9] The Brokers cannot benefit from the Gardners' status as a "party" when it comes to taking discovery and the potential adverse effects of counterclaims directed against HWP while simultaneously disclaiming the Gardners' status as a "party" when they (*i.e.*, the Gardners) bring a meritorious motion to dismiss.

C. The District Court Committed Clear Error By Not Dismissing The Brokers' Counterclaims Against HWP.

1. HWP Did Not Owe A Fraud-Based Duty Of Disclosure To The Brokers.

Setting aside their unsupported assertions that HWP owed a duty to disclose, the Brokers' primary contention is that this Court "recognized a fiduciary relationship between a broker and it [sic] client" in *Davis v. Beling*, 128 Nev. 301, 318, 278 P.3d 501, 513 (2012). Ans. at 30. The Brokers, however, neglect to mention that the relationship at issue in *Davis* was between a *real estate* broker and client—not an insurance broker and insured. The fact that both professions have the word "broker" in their titles is not determinative and, unlike a real estate broker, this Court has expressly held that an

[9] If the Brokers truly wish to avoid the Gardners' defense in this action, then they are more than welcome to disclaim any right to a setoff and limit their recovery to a potential fourth-party judgment against HWP.

insurance broker does not owe a "de facto fiduciary duty" to its insured client. *O.P.H.*, 133 Nev. at 436-47, 401 P.3d at 223-24. Even if the Brokers owed a fiduciary duty to HWP—and they did not—no court in the United States has ever found that those duties are automatically reciprocal or that an insured client owes an inherent fraud-based duty of disclosure to its insurance broker.

The Brokers also argue that the existence of a special relationship imparting a duty of disclosure may be fact-specific. Ans. at 30-31. But the Brokers did not allege any facts that would demonstrate the existence of a special relationship, and merely alleged a single legal conclusion that HWP owed a fraud-based duty of disclosure. PA 120 ¶ 81. Moreover, the Brokers' fraudulent concealment claim is premised on their role in the procurement of HWP's insurance policy from its insurer, which is the epitome of a "straightforward commercial transaction" that does not give rise to a special relationship. *See Nevada Power Co. v. Monsanto Co.*, 891 F.Supp. 1406, 1416 (D. Nev. 1995); *see also Silver State Broad., LLC v. Crown Castle MU, LLC*, 2018 WL 6606064, *3 (D. Nev. Dec. 17, 2018) (citing *Weingartner v. Chase Home Fin.*, 702 F.Supp.2d 1276, 1288 (D. Nev. 2010)) (an "association characterized by 'routine arms-length dealings' will not suffice to establish a special relationship."); *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).

2. The Brokers' Misrepresentation Claims Are Subject To Dismissal.

a. The April 2015 e-mail concerning legal compliance and safety guidelines at Cowabunga Bay.

The Brokers do not dispute the Gardners' contention that they materially altered their chronologically impossible allegation of reliance on the April 2015 e-mail to evade dismissal. Ans. at 27.[10] Instead, the Brokers ignore the issue altogether and merely restate their revised allegation that reliance actually occurred during the renewal of HWP's insurance policy in Spring 2015. *Id.*[11] In short, the Brokers submit that this amended allegation must be accepted as true under Nevada law irrespective of whether it is internally inconsistent, contradictory or a sham allegation designed to avoid dismissal rather than plead a viable claim. That is not the law, and the Gardners have asked the Court to recognize the well-established principles governing motions to dismiss set forth in their Petition. Pet. at 14-15 (listing cases). Simply put, district courts

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[10] The Brokers also did not respond to the Gardners' argument that the April 2015 e-mail is incapable of supporting a misrepresentation claim because it was directed to a third party and not the Brokers. Pet. at 26 n. 7 (citing *Reed v. Allstate Ins. Co.*, 2016 WL 1558364, *4 n. 1 (D. Nev. Apr. 14, 2016) and *Epperson v. Roloff*, 102 Nev. 206, 210-11, 719 P.2d 799, 802 (1986)). The Brokers, thus, conceded the point. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious).

[11] The Brokers further represent (without citation) that their misrepresentation claims assert an "ongoing misrepresentation," and that the April 2015 e-mail is "one of several misrepresentations." Ans. at 27. This is attorney argument that is unsupported by the allegations in the Brokers' counterclaims and, regardless, the fact that the Brokers may have alleged other misrepresentations has nothing to do with their sham allegation of reliance on the April 2015 e-mail.

should not be required to wear blinders and accept factual allegations as true when such allegations are plainly fabricated and brought for an improper purpose.

b. The Huishs' alleged statements that safety was a "priority."

The Brokers concede that fraudulent and negligent misrepresentation claims are subject to the heightened pleading standard under NRCP 9(b), yet they claim their allegations are sufficient even though the Brokers indisputably (i) failed to allege the "who, what, when and where" regarding the Huishs' alleged statements, and (ii) did not cure the deficiencies after being directed to do so by the district court. Ans. at 27-28. The Brokers' misrepresentation claims are facially inadequate under NRCP 9(b). The district court should have dismissed them.

The Brokers likewise contend (without any legal support) that the alleged statements that safety was a "priority" are actionable despite the fact that numerous courts have dismissed misrepresentation claims premised on this exact language. *See, e.g.*, *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.*, 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 cannot be determined" and "[a]ssessing the veracity of those terms can only be characterized as a matter of opinion"); *Anderson v. Atlanta Comm. for Olympic Games, Inc.*, 584 S.E.2d 16, 21 (Ga. Ct. App. 2003) (the 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).

Again, without legal support, the Brokers dismiss this abundant case law as being limited to matters involving the "puffery doctrine," Pet. at 28-29, even though it is hornbook law that an actionable misrepresentation must be based on a definitive statement of objective fact that can be proven true or false. *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."); *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[.]").[12] The Brokers' misrepresentation claims based on the Huishs' alleged statements that safety was a "priority" are not actionable as a matter of law.

III. CONCLUSION

Based on the foregoing, the Gardners respectfully request that this Court grant their Petition for Writ of Mandamus forthwith.

DATED this 16th day of October, 2020

CAMPBELL & WILLIAMS

By: /s/ ***Donald J. Campbell***
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[12] 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 § 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.").

VERIFICATION

I, Donald J. Campbell, declare as follows:

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

2. I verify that I have read and compared the foregoing REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

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

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

DATED this 16th day of October, 2020

/s/ ***Donald J. Campbell***
Donald J. Campbell, Esq. (#1216)

CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) as this brief was prepared in a proportionally spaced typeface using Times New Roman 14 pt font. I also certify that this brief complies with the page or type volume limitations of NRAP 21(d) as it contains 4,604 words in a monospaced typeface.

DATED this 16th day of August, 2020

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that, in accordance therewith and on this 16th day of October 2020, I caused true and correct copies of the foregoing Reply In Support of Petition for Writ of Mandamus to be delivered to the following counsel and parties:

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