

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 16 2020 02:59 p.m.

Elizabeth A. Brown
Clerk of Supreme Court

PETER and CHRISTIAN GARDNER, on behalf of minor child, LUCAS 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

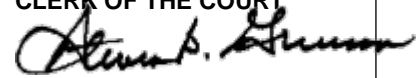
**PETITIONERS' SUPPLEMENTAL APPENDIX TO REPLY IN SUPPORT OF
PETITION FOR WRIT OF MANDAMUS**

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

Counsel for Plaintiffs-Petitioners

INDEX

	Page
Bliss Sequoia's and Huggins Insurance's Opposition to Plaintiffs' Motion for Determination on Standing.....	227
Notice of Entry of Order Denying Plaintiffs' Motion for Determination of Standing to Defend Counterclaims Against Henderson Water Park, LLC	237
Notice of Entry of Order Granting Plaintiffs' Motion to Stay Proceedings Pending Petition for Writ of Mandamus	245
Plaintiffs' Motion for Determination of Standing to Defend Counterclaims Against Henderson Water Park, LLC And Order Shortening Time	207



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

Attorneys for Plaintiffs

**DISTRICT COURT
 CLARK COUNTY, NEVADA**

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

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 Determination of Standing to Defend Counterclaims Against Henderson Water Park, LLC ("HWP") and Order Shortening Time. 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.

**DECLARATION OF PHILIP R. ERWIN
IN SUPPORT OF ORDER SHORTENING TIME PURSUANT TO EDCR 2.26**

I, PHILIP R. ERWIN, declare as follows:

1. I am a resident of Clark County, Nevada. I am over the age of eighteen and am competent to make this Declaration. This Declaration is based upon my personal knowledge unless otherwise so stated, and if called upon to testify, I would testify as set forth herein.

2. I am a licensed attorney in the State of Nevada, Bar Number 11563, a Partner in the law firm of Campbell & Williams, and am one of the attorneys representing Plaintiffs in the above-captioned matter. This Declaration is made pursuant to EDCR 2.26 and is in support of the instant Motion for Determination of Standing to Defend Counterclaims Against HWP.

4. This Motion concerns Plaintiffs' standing to conduct discovery and defend the counterclaims asserted by Third Party Defendants Bliss Sequoia Insurance & Risk Advisors, Inc. and Huggins Insurance Services, Inc. (the "Brokers") against HWP. Because this matter is subject to an expedited discovery schedule in advance of a firm trial setting on November 2, 2020, it is imperative that the Court resolve this dispute on an expedited basis particularly when Plaintiffs have already begun conducting discovery into the Brokers' counterclaims. In the absence of a definitive ruling from the Court, the parties will continue to have serial disputes concerning Plaintiffs' ability to conduct discovery and contest the Brokers' counterclaims against HWP. Thus, good cause exists to hear this Motion on order shortening time.

5. This Application is made in good faith and is not intended to vex or harass any party or its respective counsel. I declare under penalty of perjury of the laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge.

DATED: June 18, 2020.

/s/ Philip R. Erwin
PHILIP R. ERWIN, ESQ.


ORDER SHORTENING TIME

TO: ALL PARTIES and

TO: THEIR RESPECTIVE COUNSEL OF RECORD:

GOOD CAUSE APPEARING, it is hereby ordered that the **Plaintiffs' Motion for Determination of Standing to Defend Counterclaims Against Henderson Water Park, LLC and Order Shortening Time** shall be heard on shortened time on ~~June~~ ^{July 8} ~~____~~, 2020 at the hour of 9:00 ³⁰ a.m., in Department ~~XIII~~ of the above-entitled Court at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada, 89155.

DATED this 19th day of June, 2020.



DISTRICT COURT JUDGE

AM

CAMPBELL & WILLIAMS

By: **Philip R. Erwin**

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

Attorneys for Plaintiffs

I. INTRODUCTION

Plaintiffs bring this Motion to address their standing to defend the counterclaims advanced by the Brokers against HWP. Rather than sue HWP for damages in a separate proceeding, the Brokers chose to file their counterclaims in this action in the interest of potentially reducing their ultimate liability on the professional negligence claims assigned to Plaintiffs by HWP.¹ This, of course, is not remarkable as the law uniformly provides that an obligor (the Brokers) are entitled to assert counterclaims against an assignor (HWP) in an action brought by an assignee (Plaintiffs) for the purpose of obtaining a setoff. What is remarkable, however, is the Brokers' apparent position that Plaintiffs have no standing or right to defend the counterclaims against HWP even though the counterclaims directly affect the amount of damages Plaintiffs will recover in this proceeding.

The Brokers first raised the issue of standing when they opposed Plaintiffs' motion to dismiss the counterclaims against HWP on grounds that Plaintiffs were not a "party" entitled to seek dismissal under NRCP 12(b)(5).² Following the denial of their motion to dismiss, Plaintiffs sought to re-notice the depositions of certain key witnesses whose depositions were conducted the day before the Brokers filed their counterclaims. In response, the Brokers agreed to the depositions but repeatedly expressed their belief that Plaintiffs had no "interest" in defending the counterclaims because they were brought against HWP, which had recently been served as a fourth-party defendant.³

As a result, Plaintiffs asked the Brokers to confirm their position regarding Plaintiffs' standing to defend the counterclaims against HWP. The Brokers, however, inexplicably refused to clarify

¹ See Opp. to Mot. to Dismiss at 4:2-4 (dated 5/12/20) ("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.").

² See Opp. to Mot. to Dismiss at 3:1-4:7 (dated 5/12/20). In denying Plaintiffs' motion to dismiss, the Court assumed, but did not decide, that Plaintiffs had standing to seek dismissal of the Brokers' counterclaims against HWP. See Minute Order (dated 6/1/20).

³ Exhibit 1 (E-mail Correspondence between Counsel).

1 whether they are, in fact, objecting to Plaintiffs’ defense of the counterclaims against HWP on
2 grounds that expressing a definitive position would equate to “divulging legal strategy.”⁴
3 Nevertheless, based on the Brokers’ opposition to Plaintiffs’ motion to dismiss and representation
4 that they plan to raise standing “at the appropriate time in the litigation,”⁵ it is readily apparent that
5 the Brokers intend to argue that Plaintiffs lack standing to defend the counterclaims against HWP
6 whenever it is strategically expedient.
7

8 The Brokers’ bizarre refusal to take a definitive position raises the spectre of serial disputes
9 concerning Plaintiffs’ right to serve written discovery, conduct depositions, file dispositive motions,
10 and defend the counterclaims at trial in the unlikely event the counterclaims survive summary
11 judgment. Thus, Plaintiffs seek an immediate ruling from the Court confirming their standing to
12 defend the Brokers’ counterclaims against HWP in order to eliminate piecemeal disputes down the
13 road.
14

15 II. ARGUMENT

16 The fact that Plaintiffs were forced to file this Motion is particularly frustrating given that the
17 law addressing the interplay between assigned claims and counterclaims against the assignor is
18 straightforward and not in dispute. It is axiomatic that “an assignment operates to place the assignee in
19 the shoes of the assignor, and provides the assignee with the same legal rights as the assignor had before
20 assignment.” *First Fin. Bank v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014); *see also Stapleton*
21 *v. City of Victorville*, 2018 WL 6262830, *3 (C.D. Cal. June 7, 2018) (“When all the rights to a claim
22 have been assigned, courts generally have held that the assignor may no longer sue, and the assignee is
23 the real party in interest.”) (citing 6A C. Wright, et. al, *Federal Practice and Procedure* § 1545 (2d ed.
24 1990)).
25
26
27

28 ⁴ *Id.*

⁵ *Id.*

1 “The general rule is that an obligor may assert against an assignee all claims which he could have
2 asserted against the assignor. To put it another way, the assignee of a claim takes subject to all defenses,
3 setoffs, and counterclaims to which his assignor was subject.” *Walters v. Iowa Des-Moines Nat’l Bank*,
4 295 N.W.2d 430, 433 (Iowa 1980); *see also Collection Ctr., Inc. v. Bydal*, 795 N.W.2d 667, 673 (N.D.
5 2011) (“Therefore, because an assignee acquires no greater rights than were possessed by the assignor,
6 in an action on the claim assigned, the assignee of a chose in action is ordinarily subject to any setoff or
7 counterclaim available to the obligor against the assignor, and to all other defenses and equities that
8 could have been asserted against the assignor at the time of the assignment.”); Restatement (Second) of
9 Contracts § 336 (1981); 6 Am.Jur.2d Assignments § 116 (2008); 6A C.J.S. Assignments § 107 (2004).

10 The obligor “cannot assert its claim against the assignor offensively to recover damages from
11 the assignee, but only defensively as a setoff, to reduce the amount of the assignee’s recovery.”
12 *Express Recovery Servs. Inc. v. Olson*, 397 P.3d 792, 795 n. 1 (Utah Ct. App. 2017) (citing 5
13 supporting cases); *see also Walters*, 295 N.W.2d at 434 (“The counterclaim can be used against Central
14 only defensively to reduce the amount of its claims against Walters. It cannot result in a personal
15 judgment against Central.”); *Premier Capital, LLC v. Baker*, 972 N.E.2d 1125, 1136 (Ohio Ct. App.
16 2012) (“It is well settled that an assignment does not cast any affirmative liability upon the assignee of
17 the contract unless the assignee assumes those obligations.”).

18 To the extent the obligor seeks to recover damages in excess of the setoff, the obligor must
19 also sue the assignor. *See, e.g., Olson*, 397 P.3d at 795 (“Where the assignee of a claim sues the
20 obligor, the obligor’s claim against the assignor may offset the claim of the assignee only to the extent
21 of the assignee’s claim; the obligor must sue the assignor in a separate suit for the balance of the
22 counterclaim.”); *Walters*, 295 N.W.2d at 434 (instructing that obligor may seek damages in excess of
23 setoff by adding assignor to lawsuit brought by assignee); *Litton ABS v. Red-Yellow Cab Co.*, 411 N.E.2d
24 808, 810 (Ohio Ct. App. 1978) (“In an action between the obligor and the assignee the [counterclaims]
25
26
27
28

1 are available only defensively; if the obligor seeks damages or restitution he must go directly against the
2 assignor.”).

3 Based on the foregoing, Plaintiffs and HWP each have separate and identifiable interests in
4 defending the counterclaims advanced by the Brokers. Plaintiffs, as the assignees of HWP’s
5 professional negligence claims, have the fundamental right to defend the Brokers’ counterclaims and
6 prevent any setoff that reduces their ultimate recovery in this action. Now that the company has been
7 named as a fourth-party defendant, HWP likewise has the right to defend the Brokers’ counterclaims
8 and negate the possibility of an excess judgment. The Court should, therefore, confirm that Plaintiffs
9 have standing to defend the Brokers’ counterclaims against HWP to the extent they will function as
10 setoff to Plaintiffs’ recovery on the assigned claims.
11

12 DATED this 18th day of June, 2020.

13 CAMPBELL & WILLIAMS
14

15 By /s/ **Philip R. Erwin**

16 DONALD J. CAMPBELL, ESQ. (1216)
17 SAMUEL R. MIRKOVICH, ESQ. (11662)
18 PHILIP R. ERWIN, ESQ. (11563)
19 700 South Seventh Street
20 Las Vegas, Nevada 89101
21 Telephone: (702) 382-5222

22 *Attorneys for Plaintiffs*
23
24
25
26
27
28

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 June, 2020 I caused the foregoing document entitled **Plaintiffs' Motion for Determination of Standing to Defend Counterclaims Against Henderson Water Park, LLC and Order Shortening Time** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

/s/ John Y. Chong
An Employee of Campbell & Williams

EXHIBIT 1

Subject: Re: Gardner v. Bliss Sequoia et al.--Depositions

Date: Tuesday, June 16, 2020 at 4:12:17 PM Pacific Daylight Time

From: Phil Erwin <pre@cwlawlv.com>

To: Patricia Lee <PLee@hutchlegal.com>, Sam Mirkovich <srm@cwlawlv.com>

CC: jchong <jyc@cwlawlv.com>, Mark A. Hutchison <MHutchison@hutchlegal.com>

Patty,

Stating whether or not you object to our defense of the counterclaims against HWP is not divulging legal strategy. We will now be forced to file a motion on order shortening time to address this issue. Given that this is a wholly unnecessary dispute over a widely-accepted legal principle—which potentially benefits your clients through a damages setoff—I sincerely hope you reconsider your inexplicable refusal to take a definitive position as to whether my clients have standing to defend the counterclaims.

Philip R. Erwin, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
Tel: (702) 382-5222
Fax: (702) 382-0540
pre@campbellandwilliams.com

** This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this information in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank You.**

From: Patricia Lee <PLee@hutchlegal.com>

Date: Tuesday, June 16, 2020 at 3:37 PM

To: Phil Erwin <pre@cwlawlv.com>, Sam Mirkovich <srm@cwlawlv.com>

Cc: jchong <jyc@cwlawlv.com>, "Mark A. Hutchison" <MHutchison@hutchlegal.com>

Subject: RE: Gardner v. Bliss Sequoia et al.--Depositions

Phil: I respect your right to your beliefs, however, we maintain where there is no clear indication of the law on this issue in Nevada, we are not obligated to “take a position” one way or another. Indeed, what you are asking is for us to divulge legal strategy, for which we are still evaluating in light of your articulated position. I wish I had a more definitive answer for you.

Also, I spoke with Lance today and he will be emailing me some proposed dates this afternoon based on the assumption that the depositions will take place in Salem. If you intend to try to compel him or Molly to appear in Vegas, and you are successful in

those efforts, the dates may change due to the need to travel. I will let you know as soon as I hear back from him.

Finally, I assume that this second round of depositions will not seek to go back over any material already covered in the first depositions and will be limited strictly to the counterclaims. If that is not your intention, please let me know so that we can seek a protective order over duplicative deposition questioning.

Thanks again.

Best regards,

From: Phil Erwin [mailto:pre@cwlawlv.com]
Sent: Tuesday, June 16, 2020 2:26 PM
To: Patricia Lee <PLee@hutchlegal.com>; Sam Mirkovich <srm@cwlawlv.com>
Cc: jchong <jyc@cwlawlv.com>; Mark A. Hutchison <MHutchison@hutchlegal.com>
Subject: Re: Gardner v. Bliss Sequoia et al.--Depositions

Patty,

You have already taken the position that my clients did not have standing to file a motion to dismiss under NRCP 12. You have likewise indicated in the e-mail correspondence below that my clients have no interest in defending the counterclaims advanced against HWP. Based on this track record, I do not believe it is appropriate to "reserve your rights" on this issue so you can continue to raise it whenever it is convenient.

Accordingly, I will again ask that you confirm your position in response to my questions below regarding standing and setoff. If you are still disinclined to take a definitive position on these issues, then we will simply move the Court for a determination regarding the same.

Philip R. Erwin, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
Tel: (702) 382-5222
Fax: (702) 382-0540
pre@campbellandwilliams.com

** This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this information in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank You.**

From: Patricia Lee <PLee@hutchlegal.com>
Date: Tuesday, June 16, 2020 at 1:51 PM
To: Phil Erwin <pre@cwlawlv.com>, Sam Mirkovich <srm@cwlawlv.com>
Cc: jchong <jyc@cwlawlv.com>, "Mark A. Hutchison" <MHutchison@hutchlegal.com>
Subject: RE: Gardner v. Bliss Sequoia et al.--Depositions

Sam: Sorry I missed your call yesterday. I am scheduled to speak with Lance today 2:00 and will give you a call after that.

Phil: As for our legal position with respect to standing, we are disinclined to waive any of our clients' rights by taking a hard-lined position one way or another at this time, particularly where the Nevada Supreme Court apparently has not weighed in on this issue. If you have Nevada law that speaks directly to the issue, please do forward that along for our consideration. Otherwise, we reserve all rights with respect to our clients' legal position on standing and will assert it at the appropriate time in the litigation. Thank you.

Best regards,

From: Phil Erwin [<mailto:pre@cwlawlv.com>]
Sent: Monday, June 15, 2020 1:27 PM
To: Patricia Lee <PLee@hutchlegal.com>; Sam Mirkovich <srm@cwlawlv.com>
Cc: jchong <jyc@cwlawlv.com>; Mark A. Hutchison <MHutchison@hutchlegal.com>
Subject: Re: Gardner v. Bliss Sequoia et al.--Depositions

Patty,

You and Sam can discuss the cost-shifting issue in your meet-and-confer. I wrote separately to address your position that the Gardners lack standing to defend the counterclaims against HWP, which is a broader issue that needs to be promptly resolved. Accordingly, I will again ask that you please confirm your clients are taking the position that Plaintiffs lack standing to defend the counterclaims against HWP.

Additionally, the "non-binding Utah case" I cited merely restates a well-settled rule of law regarding the interplay between assigned claims and counterclaims against the assignor. Given your apparent resistance to this rule's application, I must also ask if your clients are contending that their counterclaims will *not* function as a setoff to Plaintiffs' recovery on the assigned claims? Put another way, is it your belief that your clients counterclaims will not affect Plaintiffs' damages in any fashion?

Thank you.

Philip R. Erwin, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
Tel: (702) 382-5222

Fax: (702) 382-0540
pre@campbellandwilliams.com

** This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this information in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank You.**

From: Patricia Lee <PLee@hutchlegal.com>
Date: Monday, June 15, 2020 at 12:45 PM
To: Phil Erwin <pre@cwlawlv.com>, Sam Mirkovich <srm@cwlawlv.com>
Cc: jchong <jyc@cwlawlv.com>, "Mark A. Hutchison" <MHutchison@hutchlegal.com>
Subject: RE: Gardner v. Bliss Sequoia et al.--Depositions

Phil: Whether or not we agree with the non-binding Utah case you cited below, is wholly separate and apart from whether we will agree to shoulder the financial burden of Plaintiff's decision to re-depose Plaintiffs. Our position remains firm that we will not be voluntarily paying the fees to re-take those depositions. Your amended complaint against our clients wasn't even filed until November of 2019, and then, once we dealt with the removal and remand, we had very little time thereafter, to contemplate and bring our counterclaims. Moreover, any attempt to force my clients to fly in from Oregon to personally appear at your firm here in Las Vegas, will be met with fierce opposition, particularly where Governor Brown of Oregon has just placed a statewide halt on reopening amid the Corona Virus surge. We can give you dates in August tomorrow, or wait until after your motion is heard. What's your pleasure?

Best regards,

From: Phil Erwin [<mailto:pre@cwlawlv.com>]
Sent: Monday, June 15, 2020 11:49 AM
To: Patricia Lee <PLee@hutchlegal.com>; Sam Mirkovich <srm@cwlawlv.com>
Cc: jchong <jyc@cwlawlv.com>; Mark A. Hutchison <MHutchison@hutchlegal.com>
Subject: Re: Gardner v. Bliss Sequoia et al.--Depositions

Patty,

Setting aside the cost-shifting issue for the moment, I want to address your position that our clients have no interest in defending the counterclaims asserted against HWP.

The law is clear that your clients would be entitled to a setoff against Plaintiffs' recovery on the assigned claims for professional negligence if they prevail on the counterclaims against HWP. *See Express Recovery Servs. Inc v. Olson*, 397 P.3d 792, 795-96 and n. 1 (Utah Ct. App. 2017) ("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 balance of the counterclaim.”). If your clients' recovery on the counterclaims exceeds Plaintiffs' recovery on the assigned claims, then your clients would be entitled to obtain the excess damages from HWP as the company is now a party to this litigation. *Id.* In other words, Plaintiffs and HWP each have a separate and identifiable interest in defending your clients' counterclaims.

Please confirm that your clients are taking the position that Plaintiffs lack standing to defend the counterclaims against HWP. If so, we will file a motion on order shortening time to resolve this dispute as it impacts all facets of this case going forward.

Thank you.

Philip R. Erwin, Esq.
Campbell & Williams
700 South Seventh Street
Las Vegas, Nevada 89101
Tel: (702) 382-5222
Fax: (702) 382-0540
pre@campbellandwilliams.com

** This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this information in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank You.**

From: Patricia Lee <PLee@hutchlegal.com>
Date: Monday, June 15, 2020 at 11:29 AM
To: Sam Mirkovich <srm@cwlawlv.com>
Cc: Phil Erwin <pre@cwlawlv.com>, jchong <jyc@cwlawlv.com>, "Mark A. Hutchison" <MHutchison@hutchlegal.com>
Subject: RE: Gardner v. Bliss Sequoia et al.--Depositions

Sam: I plan on speaking with Lance tomorrow and will get some dates then. As for footing the bill, again, we are unwilling to do so. I am happy to chat about it so that you can meet your 2.34 obligations, but we do not feel that punitive recourse is in order when we followed the substantially truncated deadlines promulgated by the Plaintiff. Moreover, the counterclaims are not against your clients and I fail to see how your client's interests are served by taking deposition to "defend" a lawsuit that does not even involve them. The counterclaims are against HWP. The same HWP that waited 3.5 years to bring my clients into the action, even when they absolutely and admittedly had all of the information they needed to sue earlier. The fact that HWP would therefore take umbrage with the timing of our counterclaims, rings hollow. I can be reached on my cell at any time (702) 423-1403.

Best regards,

From: Sam Mirkovich [<mailto:srm@cwlawlv.com>]
Sent: Monday, June 15, 2020 10:56 AM
To: Patricia Lee <PLee@hutchlegal.com>
Cc: Phil Erwin <pre@cwlawlv.com>; jchong <jyc@cwlawlv.com>; Mark A. Hutchison <MHutchison@hutchlegal.com>
Subject: Re: Gardner v. Bliss Sequoia et al.--Depositions

Patty,

It appears that while we disagree about the cost-shifting, the Brokers have agreed to present Mr. Barnwell and Ms. Morris for deposition. As such, and since our deposition calendar in August is starting to fill in, please provide us with their respective availability this week.

Regarding the cost of re-deposing Mr. Barnwell and Ms. Morris, it is our position that the Brokers should be held responsible for these costs because it would be patently unfair for the Gardners to pay to conduct these depositions again when—if the Brokers had simply asserted their counterclaims from the outset—we could have covered these issues in one deposition. This is especially true where, as here, the Counterclaims are not based on any new information and could have been asserted over a year ago. There is ample legal authority that supports cost shifting in such scenarios. Please let me know when you have a moment to discuss today as I am hopeful we can resolve this issue without the need for judicial intervention. Thank you.

Samuel R. Mirkovich, Esq.
Campbell & Williams
700 S. Seventh St.
Las Vegas, NV 89101
T: (702) 382-5222
F: (702) 382-0540
srm@cwlawlv.com | www.campbellandwilliams.com

** This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this information in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank You.**

From: Patricia Lee <PLee@hutchlegal.com>
Date: Friday, June 12, 2020 at 4:36 PM
To: Sam Mirkovich <srm@cwlawlv.com>
Cc: Phil Erwin <pre@cwlawlv.com>, jchong <jyc@cwlawlv.com>, "Mark A. Hutchison" <MHutchison@hutchlegal.com>
Subject: RE: Gardner v. Bliss Sequoia et al.--Depositions

Sam:

We strongly disagree that our client should be responsible in any way for any costs associated with your firm's decision to re-depose Lance and Molly, particularly when we fail to see how your clients even have an interest in the separately asserted counterclaims against a third-party, who you admittedly do not represent. HWP has been served separately with the counterclaim and, I assume, will retain its own counsel to defend the same. I struggle to understand the Gardners' interest in this separate law suit in which they are not named parties. I assume that, were my clients to prevail on their third party claims against HWP, the Gardners would not be held responsible for satisfying the same. I therefore find your statement, that you are representing the Gardners on our clients' third-party claims against HWP, to be odd.

In any event, seeking punitive recourse when we fully operated within the confines of the substantially truncated scheduling order (issued at the behest of Plaintiffs) and brought timely third and fourth party claims, is unreasonable. Moreover, the Court readily granted the Brokers this relief despite attempts to dismiss the same. Accordingly, my client will not be footing the bill with respect to any deposition costs associated with the re-deposition of either Molly or Lance. While we certainly do not begrudge you or HWP from re-deposing them, we will not be paying for the same absent a court-order to the contrary.

As for Lance and Molly traveling to Las Vegas, we cannot agree to that. With the state of the pandemic orders currently in flux, my clients understandably remain reluctant to travel. You may of course avail yourself of deposition via remote video as you are doing for both the Bostwick/Barlow depositions. As stated by in the latest Administrative Order issued by the Court, "Depositions by alternative means is the preferred method of handling depositions."

In sum, I am happy to explore some dates in August for the re-depositions of both Lance and Molly. However, you will either need to take those depositions remotely or travel to Oregon to accomplish the same. Finally, my firm will not in any way be financing the re-taking of these depositions absent a Court order to the contrary. Thanks Sam! Have a great weekend!

Best regards,

From: Sam Mirkovich [<mailto:srm@cwlawlv.com>]

Sent: Friday, June 12, 2020 1:43 PM

To: Patricia Lee <PLee@hutchlegal.com>

Cc: Phil Erwin <pre@cwlawlv.com>; jchong <jyc@cwlawlv.com>; Mark A. Hutchison <MHutchison@hutchlegal.com>
Subject: Re: Gardner v. Bliss Sequoia et al.--Depositions

Patty,

We do not represent HWP. We will be defending the Brokers' counterclaims on behalf of our clients, the Gardners. Thank you.

Samuel R. Mirkovich, Esq.
Campbell & Williams
700 S. Seventh St.
Las Vegas, NV 89101
T: (702) 382-5222
F: (702) 382-0540
srm@cwlawlv.com | www.campbellandwilliams.com

** This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this information in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank You.**

From: Patricia Lee <PLee@hutchlegal.com>
Date: Friday, June 12, 2020 at 12:36 PM
To: Sam Mirkovich <srm@cwlawlv.com>
Cc: Phil Erwin <pre@cwlawlv.com>, jchong <jyc@cwlawlv.com>, "Mark A. Hutchison" <MHutchison@hutchlegal.com>
Subject: Re: Gardner v. Bliss Sequoia et al.--Depositions

Sam: before I substantively respond to your request/demand, please confirm that your firm will be defending the counterclaims on behalf of HWP. Thank you.

Best regards,

Sent from my iPhone

On Jun 12, 2020, at 10:51 AM, Sam Mirkovich <srm@cwlawlv.com> wrote:

Patty,

In light of the Brokers' Counterclaims, would you please provide us with Lance Barnwell's and Molly Morris' availability for deposition in August? It is our position that because the Brokers were in possession of all of the information upon which their Counterclaims are based but inexplicably waited to assert them until after the Barnwell/Morris depositions, they should be required to pay for the costs associated with these second depositions (including our travel and lodging). That said, and in an effort to avoid an unnecessary discovery dispute, we are willing to

cover the costs of these depositions if Mr. Barnwell and Ms. Morris will agree to present for the same at our office. Please let me know. Thank you.

Samuel R. Mirkovich, Esq.

Campbell & Williams

700 S. Seventh St.

Las Vegas, NV 89101

T: (702) 382-5222

F: (702) 382-0540

srm@cwlawlv.com | www.campbellandwilliams.com

**** This message is intended for the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this information in error, please notify us immediately by telephone, and return the original message to us at the above address via U.S. Postal Service. Thank You.****

Patricia Lee

Partner



HUTCHISON & STEFFEN, PLLC

(702) 385-2500

hutchlegal.com

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

Patricia Lee

Partner



HUTCHISON & STEFFEN, PLLC

(702) 385-2500

hutchlegal.com

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

Patricia Lee
Partner




HUTCHISON & STEFFEN, PLLC
(702) 385-2500
hutchlegal.com

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

Patricia Lee
Partner




HUTCHISON & STEFFEN, PLLC
(702) 385-2500
hutchlegal.com

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

Patricia Lee
Partner




HUTCHISON & STEFFEN, PLLC
(702) 385-2500
hutchlegal.com

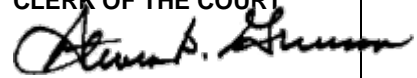
Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.

Patricia Lee
Partner



HUTCHISON & STEFFEN, PLLC
(702) 385-2500
hutchlegal.com

Notice of Confidentiality: The information transmitted is intended only for the person or entity to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking any action in reliance upon, this information by anyone other than the intended recipient is not authorized.



Mark A. Hutchison (4639)
Patricia Lee (8287)
Chad A. Harrison (13888)
HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Tel: (702) 385-2500
Fax: (702) 385-2086
mhutchison@hutchlegal.com
plee@hutchlegal.com
charrison@hutchlegal.com

*Attorneys 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

BLISS SEQUOIA AND HUGGINS'
OPPOSITION TO PLAINTIFFS'
MOTION FOR DETERMINATION
ON STANDING

(Hearing Requested)

1. Introduction

The Gardners' Motion for Determination on Standing is improper both procedurally and as a matter of law. Procedurally, the Court is constitutionally prohibited from issuing an advisory opinion as to the applicability of a potential legal argument Bliss Sequoia may or may not make at some future point throughout the instant litigation. *See Scott v. Eighth Judicial Dist. Ct. of*

1 *State, ex rel. County of Clark*, 373 P.3d 959 (2011) (holding that a court may not “render advisory
2 opinions on moot or abstract questions”). As a matter of law, the Gardners cannot file responsive
3 pleadings or dispositive motions regarding the counterclaims against Henderson Water Park,
4 LLC (“HWP”) simply because they have an interest in the claims asserted against HWP. No
5 authority they cite (in Nevada or otherwise) has sanctioned the relief they are asking the Court
6 to bless. Moreover, Nevada law establishes that the personal nature of fraud-based claims
7 precludes the assignment of such claims. Therefore, the Gardners’ motion must be denied.

8 **2. Factual and Procedural Background**

9 On March 11, 2020, Bliss Sequoia sought leave to amend their response to add
10 counterclaims against HWP. On March 23, 2020, the Court granted Bliss Sequoia Insurance &
11 Risk Advisors, Inc. and Huggins Insurance Services, Inc. (collectively, “Bliss Sequoia”) leave
12 to amend. On April 23, 2020, Bliss Sequoia filed its claims against HWP, alleging, *inter alia*,
13 claims for fraudulent representation and fraudulent concealment. On April 27, 2020, the
14 Gardners filed a motion to dismiss the counterclaims against HWP. In its opposition, Bliss
15 Sequoia argued, *inter alia*, that the Gardners could not file a responsive pleading or motion to
16 dismiss on behalf of HWP pursuant to NRCP 12. *See* Opp. to Mot. to Dismiss filed on May 12,
17 2020 at 3:8–22. On June 1, 2020, the Court denied the Gardners’ motion to dismiss and
18 “assume[d], at least for purposes of the Motion to Dismiss, that [the Gardners] have standing to
19 seek dismissal” of the counterclaim. June 1, 2020 Minute order at 3. On June 17, 2020, the
20 Gardners filed a motion for reconsideration of the order denying the Gardners’ motion to dismiss.
21

22 Through multiple emails, the Gardners demanded that Bliss Sequoia affirmatively adopt
23 a position on the issue of the Gardners’ standing. In response, Bliss Sequoia explained to the
24 Gardners that any arguments Bliss Sequoia may or may not present throughout the litigation are
25 akin to legal strategy and cannot be ascertained or divulged upon the Gardners’ whims. Ex. 1 to
26 the Gardners’ motion. Based on these communications, the Gardners filed their motion seeking
27 to pin Bliss Sequoia to a position on a potential legal argument that it may choose to bring at a
28 future point in the litigation.

Counsel for Bliss Sequoia also communicated with counsel for HWP regarding HWP's position on this issue. *See* Correspondence from Sarah K. Suter, Esq. dated June 30, 2020 attached as **Exhibit A**. Based on these conversations, it is HWP's position that the Gardners' Motion to Dismiss and subsequent Motion for Reconsideration pushed back HWP's independent obligation to file a responsive pleading to Bliss Sequoia's Counterclaims. *See id.*

3. Legal Argument

The Gardners' motion impermissibly seeks a determination from this Court as to a potential argument that may be presented by Bliss Sequoia. Thus, the Gardners' motion must be denied. Moreover, the Gardners' Motion does not establish that they may file responsive or dispositive pleadings regarding the counterclaim pending against HWP.

A. The Gardners' Motion is Procedurally Improper Because it Seeks Prejudgment by the Court as to an Abstract Legal Question.

"[A]dvisory opinions by [Nevada] court[s] are prohibited by the Nevada constitution." *See Whitacre Inv. Co. v. State Dep't of Transp.*, 113 Nev. 1101, 1105 (1997). This constitutional restriction imposed on the courts prevents them from prejudging issues or rendering opinions on abstract legal questions. *See id.*; *see also Scott v. Eighth Judicial Dist. Ct. of State, ex rel. County of Clark*, 373 P.3d 959 (2011) (refusing to address concerns which are speculative because a court may not "render advisory opinions on moot or abstract questions") (citation omitted); *Personhood Nevada v. Bristol*, 126 Nev. 599, 603 (2010) (refusing to rule on "future initiative" as it would be speculative and lead to an improper advisory opinion); *Matter of Hamlin's Landing Joint Venture*, 81 B.R. 651, 653 (Bankr. M.D. Fla. 1987) (holding that a motion seeking clarification as to the applicability of statutory provisions to certain parties sought an advisory opinion and noting that although the court may have to revisit the issue in the future, the motion for clarification was "an inappropriate vehicle to raise the questions presented").

A decision on whether the Gardners' have standing to defend the counterclaims against HWP would be advisory. This Court already determined, in its order denying the Gardners' motion to dismiss, that for the purposes of that motion it assumed that the Gardners have standing to seek dismissal of the counterclaims. By requesting that this Court make a legal determination

1 as to the Gardners' standing throughout the future of this action, which is not presently at dispute
2 as Bliss Sequoia has not made such an argument, the Gardners present the Court with a
3 hypothetical legal question which is improper for review at this time.¹ If Bliss Sequoia asserts a
4 standing argument at a future instance, the Court may be required to revisit the issue of standing
5 at that time. The Gardners' motion at this stage, however, puts the cart before the horse, by
6 seeking to address future legal arguments that may or may not be presented by Bliss Sequoia.
7 The Gardners' motion is an inappropriate vehicle to make such a legal determination.
8 Accordingly, the Gardners' motion must be denied as an improper request to seek prejudgment
9 from this Court on an abstract legal question. Even if the Court decides to address the merits of
10 the Gardners' motion, however, the Gardners' position is unsupported by the law.

11 **B. The Gardners' Interest in the Counterclaims Does Not Give It Standing To File**
12 **Responsive Pleadings and Dispositive Motions Regarding the Counterclaims.**

13 In their motion, the Gardners cite to several opinions that state that an assignee has an
14 interest in counterclaims against an assignor due to the potential impact of an offset on the
15 assignee's recoverable damages. *See* Mot. at 6. Bliss Sequoia recognizes that its claims against
16 HWP would serve as an offset against the damages sought by the Gardners and do not refute the
17 Gardners' interest in the counterclaims. However, this interest does not bestow on the Gardners
18 standing to file responsive pleadings or dispositive motions regarding the counterclaims against
19 HWP. None of the cases cited by the Gardners' support such an extraordinary position. Nothing
20 in the law allows HWP to circumvent its independent obligation to appear in this matter and
21 respond to the claims levied against it. *See Frank v. Amicale Yarns, Inc.*, 148 N.Y.S.2d 727, 728
22 (Sup. Ct. 1956) (holding that an assignor may be brought into a matter on a defendant's
23 counterclaim in a matter initiated by an assignee.). This position is further supported by the case
24 law cited by the Gardners.

25
26
27 ¹ Notably, in its opposition to the Gardners' motion to dismiss, Bliss Sequoia argued that pursuant to
28 NRCP 12, the Gardners did not have the authority to file a responsive pleading or motion to dismiss on
behalf of HWP. Bliss Sequoia did not address the broader issue of standing throughout the entirety of the
litigation which the Gardners now seek to determine through their Motion.

1 In their motion, the Gardners heavily rely on *Walters v. Iowa Des-Moines Nat'l Bank*, in
2 support of their position that “[t]he general rule is that an obligor may assert against an assignee
3 all claims which he could have asserted against the assignor.” *See* Mot. at 6:1–4. In *Walters*, the
4 court determined that, because the counterclaim could only be used against the assignee “to the
5 extent of offsetting its claim,” the assignor may also be brought in as an additional party so that
6 the defendant “could obtain personal judgment against the one personally liable on the
7 counterclaim.” *Walters v. Iowa-Des Moines Nat. Bank*, 295 N.W.2d 430, 434 (Iowa 1980).²
8 Notably, Bliss Sequoia’s counterclaim is against HWP, not the Gardners. Accordingly, in line
9 with the holding in *Walters*, Bliss Sequoia is seeking “personal judgement against the one
10 personably liable on the counterclaim”—HWP. *Id.* It would be axiomatic that the Gardners could
11 then defend and seek a dispositive ruling on this counterclaim simply because it has an interest in
12 it. Such a position would lead to an absurd result. For example, by the Gardners’ logic, a liability
13 insurer, who clearly has an interest in the claims asserted against its insured, would be able to file
14 responsive pleadings and dispositive motions in an action against its insured on its own behalf.
15 The Gardners do not provide any support for that kind of an outcome.

16 Therefore, Bliss Sequoia acknowledges the Gardners’ interest in the counterclaims against
17 HWP. However, the Gardners provide no law supporting the notion that they can file responsive
18 pleadings and other dispositive motions regarding the counterclaims against HWP. Neither the
19 Nevada Rules of Civil Procedure, nor do the cases cited by the Gardners allow them to file motion
20 papers on behalf of or in lieu of HWP.³ Therefore, the Gardners’ a position is meritless and
21 unsupported by any case law.

22
23
24 ² The Gardners emphasize the Utah Court of Appeals’ opinion in *Express Recovery Servs. Inc. v. Olson*.
25 *See* Mot. at 6:11–14. *Olson*, however, stands for the very same proposition as *Walters*. *See Express*
26 *Recovery Servs. Inc. v. Olson*, 397 P.3d 792, 795 (Utah Ct. App. 2017). Further, while in *Olson*, the Court
27 references the filing of a “separate suit,” it does so because, in the underlying case, trial on the assigned
claims concluded, and the matter was brought on appeal to address an award of attorneys’ fees. *See*
Express Recovery Servs. Inc. v. Olson, 397 P.3d 792, 794 (Utah Ct. App. 2017). Those circumstances are
not present here.

28 ³ As Bliss Sequoia highlighted in its opposition to the Gardners’ motion to dismiss, a plain reading of
NRCP 12(a) and NRCP 12 (b) definitively establishes that the party against whom a counterclaim is
served is the party that “must” serve a responsive pleading, or alternatively, a 12(b) motion to dismiss
within the time allotted for a response. The Gardners cite no law in contravention to this plain reading.

1 **C. Bliss Sequoia’s fraud-based claims are unassignable under Nevada Law**
2 **regardless of how the assignment was accomplished**

3 “Nevada is one of several jurisdictions that prohibits the assignability of certain causes of
4 action, regardless of how the assignment is accomplished.” *Reynolds v. Tufenkjian*, 136 Nev.
5 Adv. Op. 19 (2020). “For example, in *Prosky v. Clark*, [the Nevada Supreme] [C]ourt held
6 that fraud claims are not assignable because they “are personal to the one defrauded.” *Id.* (citing
7 *Prosky v. Clark* , 32 Nev. 441, 445, 109 P. 793, 794 (1910)); *see also Gruber v. Baker*, 20 Nev.
8 453, 469, 23 P. 858, 862 (1890) (voiding the assignment of a right to bring a claim in action for
9 fraud as being contrary to public policy because a fraud claim is personal to the one defrauded).

10 Applying these steadfast principals of Nevada law to the instant matter, it is apparent that
11 no interest in either asserting or defending Bliss Sequoia’s fraud-based claims could’ve legally
12 been assigned to the Gardners. Although the Gardners may have an interest in Bliss Sequoia’s
13 fraud-based claims due to the potential offset implications, such an interest does not overcome
14 Nevada’s staunch prohibition on the assignability of such claims. Accordingly, HWP must
15 respond to Bliss Sequoia’ fraud-based claims regardless of HWP’s assignment to the Gardners.

16 ///

18 ///

20 ///

22 ///

24 ///

26 ///

28 ///

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

DATED this 6th day of July, 2020.

Mark Hutchison (4639)
 Patricia Lee (8287)
 Chad A. Harrison (13888)

7 of 8

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC, and that on this 6th day of July, 2020, I caused the above and foregoing document entitled: **BLISS SEQUOIA AND HUGGINS' OPPOSITION TO PLAINTIFFS' MOTION FOR DETERMINATION ON STANDING** 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
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**; and/or
- ☒ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or
- ☐ to be hand-delivered;

to the attorneys/parties listed below:

ALL PARTIES ON THE E-SERVICE LIST

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

INTENTIONALLY LEFT BLANK
EXHIBIT PAGE ONLY

EXHIBIT A

HUTCHISON & STEFFEN
A PROFESSIONAL LLC

Chad A. Harrison

From: Sarah Suter <sarah@suterlawlv.com>
Sent: Tuesday, June 30, 2020 10:35 AM
To: Chad A. Harrison
Subject: Henderson Water Park LLC's Answer to Bliss Sequoia's Counter-Claims

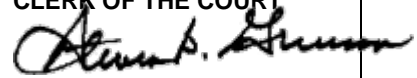
Hi Chad

Please allow this email to confirm our telephone conversation of today regarding your client's counter-claims against Henderson Water Park LLC in the Gardner case. As we discussed, there is currently a Motion for Reconsideration on the Order Denying the Motion to Dismiss Counter -Claims Against Henderson Water Park. Thus, it is Henderson Water Park's position that pursuant to NRCP 12(a)(3)(A), Henderson Water Parks' Answer to Sequoia's counter-claims is not due until 14 days after notice of the court's action on the Motion for Reconsideration. You indicated that you would have to talk to your partner regarding Henderson Water Park's position. Thank you. Sarah Suter

--

Sarah K. Suter, Esq.
Managing Attorney & Owner
Suter Law & Advocacy LLC
9205 W. Russell Road, Suite 240
Las Vegas, NV 89148
Email: sarah@suterlawlv.com
(702) 333-2406 phone
(702) 333-2968 fax
(612) 382-2411 cell phone

CONFIDENTIALITY NOTE: This communication contains information belonging to Suter Law & Advocacy LLC which is confidential and/or legally privileged. The information is intended only for the use of the individual or entity named above. If you are not the intended recipient, you are hereby notified that any disclosure, copying, distribution or the taking of any action in reliance on the contents of said information is strictly prohibited. If you have received this communication by error, please delete it from your computer and notify us immediately.



NEOJ

Mark A. Hutchison (4639)
Patricia Lee (8287)
Chad A. Harrison (13888)
HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Tel: (702) 385-2500
Fax: (702) 385-2086
mhutchison@hutchlegal.com
plee@hutchlegal.com
charrison@hutchlegal.com

*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

**NOTICE OF ENTRY OF ORDER
DENYING PLAINTIFFS'
MOTION FOR DETERMINATION
OF STANDING TO DEFEND
COUNTERCLAIMS AGAINST
HENDERSON WATER PARK, LLC**

///

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE IS HEREBY GIVEN that on July 22, 2020, an *Order Denying Plaintiffs’ Motion for Determination of Standing to Defend Counterclaims against Henderson Water Park, LLC* was entered in the above-captioned matter, a copy of which is attached hereto.

DATED this 22nd day of July, 2020.

HUTCHISON & STEFFEN, PLLC
/s/ Patricia Lee

Mark A. Hutchison (4639)
Patricia Lee (8287)
Chad A. Harrison (13888)
Peccole Professional Park
10080 W. Alta Drive, Suite 200
Las Vegas, NV 89145
Tel: (702) 385-2500
Fax: (702) 385-2086
mhutchison@hutchlegal.com
plee@hutchlegal.com
charrison@hutchlegal.com

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of HUTCHISON & STEFFEN, PLLC and that on this 22nd day of July, 2020, I caused the document entitled **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFFS’ MOTION FOR DETERMINATION OF STANDING TO DEFEND 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

ORDR

Mark A. Hutchison (4639)
Patricia Lee (8287)
Chad A. Harrison (13888)
HUTCHISON & STEFFEN, PLLC
Peccole Professional Park
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Tel: (702) 385-2500
Fax: (702) 385-2086
mhutchison@hutchlegal.com
plee@hutchlegal.com
charrison@hutchlegal.com

*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

**ORDER DENYING PLAINTIFFS'
MOTION FOR DETERMINATION
OF STANDING TO DEFEND
COUNTERCLAIMS AGAINST
HENDERSON WATER PARK, LLC**

Plaintiffs' Motion for Determination of Standing to Defend Counterclaims against
Henderson Water Park, LLC (the "Motion") was scheduled to be heard before this Court on July
8, 2020. Pursuant to Administrative Order 20-01, the Motion is deemed to be non-essential and,
at the discretion of the Court, may be denied 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

1 consequently, issued a minute order on July 7, 2020, after having considered the Motion (which
2 Motion was filed and heard on an order shortening time) and Bliss Sequoia Insurance & Risk
3 Advisors, Inc. and Huggins Insurance Services, Inc.’s (together, the “Brokers”) Opposition
4 thereto. The following Order memorializes this Court’s findings of fact, conclusions of law and
5 Order related to Plaintiffs’ Motion.

6 **FINDINGS OF FACT**

- 7 1. This case involves damages sustained by Leland Gardner, a minor child, while attending
8 Henderson Water Park, LLC’s (“HWP”) property.
- 9 2. Claims were brought by HWP against the Brokers, alleging that the opinions the latter
10 provided regarding the amount of insurance which would be appropriate, were
11 negligently offered.
- 12 3. Several mediations have occurred, resulting in resolution of many aspects of the case.
- 13 4. As part of one of the settlements, HWP’s claims against the Brokers were assigned to the
14 Plaintiffs.
- 15 5. Plaintiffs now bring the Motion to address their standing to conduct discovery and defend
16 the counterclaims advanced by the Brokers against HWP.
- 17 6. Plaintiffs anticipate discovery roadblocks and issues because of their belief that Brokers
18 do not believe the Plaintiffs have standing to defend the claims brought against HWP.
- 19 7. Plaintiffs cite to the Nevada Supreme Court decision, in which the Court stated that an
20 assignment operates to place the assignee in the shoes of the assignor, and provides the
21 assignee the same legal rights as the assignor had before assignment. *First Fin. Bank v.*
22 *Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014); *see also Stapleton v. City of*
23 *Victorville*, 2018 WL 6262830, *3 (C.D. Cal. June 7, 2018).
- 24 8. Plaintiffs argue that they and the water park each have separate and identifiable interests
25 in defending the counterclaims advanced by the Brokers.
- 26 9. The Brokers argue that the Motion must be denied because it seeks a determination
27 relating to a potential argument that may be made.
- 28

1 10. The Brokers argue that the Motion seeks pre-judgment by the court to an abstract legal
2 question.

3 11. The Brokers argue that a decision on whether the Plaintiffs have standing to defend the
4 counterclaims against the water park would be advisory in nature, and consequently, such
5 an opinion is prohibited.

6
7 **CONCLUSIONS OF LAW**

8 12. The Court agrees with the Brokers that presently, there is no justiciable issue for the
9 Court to decide and granting the Plaintiffs' Motion would be an advisory opinion which
10 is prohibited.

11 13. Advisory opinions by the Nevada Courts are prohibited by the Nevada Constitution. *See*
12 *Whitacre Inv. Co. v. State Dep't of Transp.*, 113 Nev. 1101, 1105 (1997).

13 14. This constitutional restriction imposed on the Courts prevents them from prejudging
14 issues or rendering opinions on abstract legal questions. *See id.* *See also Scott v. Eight*
15 *Judicial Distr. Ct. of State, ex rel. Count of Clark*, 373 P.3d 959 (2011).

16 15. A decision on whether the Plaintiffs have standing to defend the counterclaims against
17 HWP would be advisory in nature, and consequently, such an opinion is prohibited.

18 16. Although the parties do not seem to agree what the Plaintiffs' rights are relating to the
19 counterclaims against HWP, such disagreement has apparently not yet resulted in any
20 actual dispute in the case, and consequently, there is no dispute for the Court to decide.

21 17. The Court anticipates that such a dispute will eventually arise, and the Court will then be
22 asked to make a decision as to the Plaintiffs' ability to defend against the counterclaims
23 brought against HWP, but at this time, the Court finds that this issue is not yet ripe.

24
25 ///

26 ///

27 ///


28 ///

1 **ORDER**

2 IT IS THEREFORE HEREBY ORDERED, that Plaintiffs' Motion for Determination of
3 Standing to Defend Counterclaims against Henderson Water Park, LLC, is hereby DENIED,
4 without prejudice, as such an issue is not yet ripe for determination.

5 DATED this ____ day of July, 2020.

Dated this 22nd day of July, 2020

6 
7
8

DISTRICT COURT JUDGE

9 Respectfully submitted by:

10 HUTCHISON & STEFFEN, PLLC

11 /s/ Patricia Lee

12 _____
13 Mark A. Hutchison (4639)
14 Patricia Lee (8287)
15 Chad A. Harrison (13888)
16 10080 West Alta Drive, Suite 200
17 Las Vegas, Nevada 89145

18 *Attorneys for Defendant/Third-Party*
19 *Defendant Bliss Sequoia Insurance &*
20 *Risk Advisors, Inc. and Huggins*
21 *Insurance Services, Inc.*

3C8 293 41B1 7947
Jerry A. Wiese
District Court Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Approved as to form and content:

DATED this 17th day of July, 2020.

CAMPBELL & WILLIAMS

/s/ Phil Erwin

Donald J. Campbell (1216)
Samuel R. Mirkovich (11662)
Philip R. Erwin (11563)
700 South Seventh Street
Las Vegas, NV 89101

Attorney for Plaintiffs

DATED this 17th day of July, 2020.

LAXALT & NOMURA, LTD.

/s/ Steven Guinn

Steven E. Guinn (5341)
Ryan W. Leary (11630)
9790 Gateway Drive, Suite 200
Reno, NV 89521

*Attorney for Cross Claim Defendant
Haas & Wilkerson, Inc.*

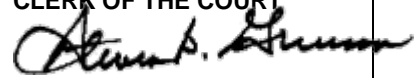
DATED this 17th day of July, 2020.

WOOD, SMITH, HENNING & BERMAN LLP

/s/ Janice Michaels

Janice M. Michaels (6062)
Marian L. Massey (14579)
2881 Business Park Court, Suite 200
Las Vegas, NV 89128

*Attorney for Cross Claim Defendant Fred A.
Moreton & Company d/b/a Moreton & Company*



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

Attorneys for Plaintiffs

DISTRICT COURT
CLARK COUNTY, NEVADA

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

**NOTICE OF ENTRY OF ORDER
GRANTING PLAINTIFFS' MOTION TO
STAY PROCEEDINGS PENDING
PETITION FOR WRIT OF MANDAMUS**

PLEASE TAKE NOTICE that an Order Granting Plaintiffs' Motion to Stay Proceedings Pending Petition for Writ of Mandamus was entered in the above-captioned matter on August 20, 2020, a true and correct copy of which is attached hereto.

DATED this 20th day of August, 2020.

CAMPBELL & WILLIAMS

/s/ Donald J. Campbell

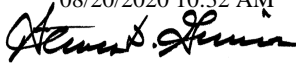
Donald J. Campbell (1216)
Samuel R. Mirkovich (11662)
Philip R. Erwin (11563)
700 South Seventh Street
Las Vegas, NV 89101
Tel: (702) 382-5222

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of Campbell & Williams, and that on the 20th day of August, 2020, I caused a true and correct copy of the foregoing document entitled **Notice Of Entry Of Order Granting Plaintiffs' Motion to Stay Proceedings Pending Petition for Writ of Mandamus** 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's electronic filing system in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.:

By: /s/ John Y. Chong
An Employee of Campbell & Williams


CLERK OF THE COURT

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

Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

**ORDER GRANTING PLAINTIFFS'
MOTION TO STAY PROCEEDINGS
PENDING PETITION FOR WRIT OF
MANDAMUS**

Third-Party Plaintiffs' Motion to Stay Proceedings Pending Petition for Writ of Mandamus came before this Court on August 18, 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 August 18, 2020.

I. FINDINGS

1. Plaintiffs argue that they will suffer “irreparable harm” if the counterclaims of the Brokers were to proceed without a stay because (1) it would force them to defend against counterclaims at trial to prevent a setoff against their own recovery from the brokers; and (2) the Brokers’ counterclaims against Henderson Water Park (“HWP”) greatly expand the scope of discovery in this action and effectively require the parties to relitigate Plaintiffs’ original claims related to the drowning of Leland Gardner.

2. Plaintiffs also argue that without a stay, this matter will proceed to trial in January 2021, before Plaintiffs’ Petition for Writ of Mandamus will likely be decided by the Nevada Supreme Court.

3. Plaintiffs argue that HWP has also been dragged back into this litigation as a party and will be required to defend itself for a second time even though Plaintiffs settled their claims with HWP last year.

4. Plaintiffs claim that they lack an adequate remedy at law absent a stay.

5. Plaintiffs suggest that as positioned, the case will take 5-7 weeks to try instead of 5-7 days, without the counterclaims.

6. Third Party Defendant Bliss Sequoia opposed Plaintiffs’ Motion on the grounds that should the jury award any sum for the counterclaims asserted by the Brokers, the appropriate party could then appeal this Court’s failure to dismiss the counterclaims in the first instance, at that time.

7. Third-Party Defendant Bliss Sequoia asserts that no stay of the proceedings is necessary or warranted since the only “harm” that would befall Plaintiffs absent a stay is the expected burden of defending against claims asserted.

1 8. A merits-based inquiry should only preclude a stay when the appeal or writ petition
2 “appears to be frivolous or the stay is sought purely for dilatory purposes.” *State v. Robles-Nieves*,
3 129 Nev. 537, 546, 306 P.3d 399, 406 (2013).

4 9. A party opposing such a stay request must make a “strong showing that appellate
5 relief is unattainable.” *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004).
6 However, “[j]udicial economy and sound judicial administration militate against the utilization of
7 mandamus petitions to review orders denying motions to dismiss and motions for summary
8 judgment.” *State ex. rel. Dept. of Transp. v. Thompson*, 99 Nev. 358, 362, 662 P.2d 1338, 1340
9 (1983).

10 10. When seeking a stay of the proceedings pending resolution of a petition to the
11 Supreme Court or Court of Appeals for an extraordinary writ, the Court “will generally consider
12 the following factors: (1) whether the object of the appeal or writ will be defeated if the stay or
13 injunction is denied; (2) whether appellant/petitioner will suffer irreparable or serious injury if the
14 stay or injunction is denied; (3) whether respondent/real party in interest will suffer irreparable or
15 serious injury if the stay or injunction is granted; and (4) whether appellant/petitioner is likely to
16 prevail on the merits in the appeal or writ petition.” *See* NRAP 8(c); *see also Hansen v. Eighth*
17 *Judicial Dist. Court ex. rel. County of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000).
18

19 11. The Court finds that the object of the appeal or writ would be defeated if the stay
20 was denied, because the parties would be compelled to conduct lots of duplicative discovery, and
21 the case could potentially proceed to trial before the Supreme Court decided this issue.
22

23 12. The Court further finds that, if in fact, the counterclaims would result in a 5-7 week
24 trial, instead of a 5-7 day trial, judicial economy requires the determination of this issue by the
25 Supreme Court before the District Court ventures into such an extended trial.
26
27
28

1 13. The Court does not find that the appellant/petitioner would suffer irreparable injury
2 or serious injury, except for the additional discovery which would be required, and the potential
3 that the Trial may proceed forward prior to the determination of this issue.

4 14. The Court does not find that the Respondent would suffer irreparable or serious
5 injury if the stay were granted.

6 15. As far as the likelihood of success on the merits, if this Court felt like the Petitioners
7 were likely to prevail on the writ, this Court would have decided the issue differently before.
8

9 16. While the Court does not believe that the Petitioners have a likelihood of success,
10 there is a possibility of success, and judicial economy weighs in favor of granting the stay.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

II. ORDER

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that the Plaintiffs' Motion to Stay Proceedings Pending Petition for Writ of Mandamus is hereby GRANTED, and the case shall be STAYED until resolved by the Nevada Supreme Court.

IT IS HEREBY FURTHER ORDERED that a status check re: Resolution of Petition for Writ of Mandamus is hereby set in Department 30, on November 18, 2020.

IT IS HEREBY FURTHER ORDERED that a bond will need to be posted by the Plaintiff, in the amount of \$5,000.00 before the Stay will be effective, but upon posting of the bond, the case will be stayed until resolved by the Nevada Supreme Court.

IT IS SO ORDERED this ____th day of August, 2020. Dated this 20th day of August, 2020

DISTRICT COURT JUDGE

738 E1F 4D16 0E5C
Jerry A. Wiese
District Court Judge

Respectfully submitted by:

CAMPBELL & WILLIAMS

/s/ Philip R. Erwin

Donald J. Campbell (1216)
Samuel R. Mirkovich (11662)
Philip R. Erwin (11563)
700 South Seventh Street
Las Vegas, NV 89101
Tel: (702) 382-5222

Attorneys for Plaintiffs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Approved as to form and content:

DATED this 19th of August, 2020.
HUTCHISON & STEFFEN, PLLC

/s/ Patricia Lee
Mark A. Hutchison (4639)
Patricia Lee (8287)
10080 W. Alta Drive, Suite 200
Las Vegas, Nevada 89145
Tel: (702) 385-2500

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

DATED this 19th of August, 2020.
LAXALT & NOMURA, LTD

/s/ Steven E. Guinn
Steven E. Guinn, Esq. (5341)
Ryan W. Leary, Esq. (11630)
9790 Gateway Drive, Suite 200
Reno, Nevada 89521
Tel: (775) 322-1170

*Attorney for Fourth Party Defendant Haas
& Wilkerson, Inc.*

DATED this 19th of August, 2020.
WOOD, SMITH, HENNING & BERMAN, LLP

/s/ Marian L. Massey
Janice M. Michaels (6062)
Marian L. Massey (14579)
2881 Business Park Court, Suite 200
Las Vegas, NV 89128
Tel: (702) 251-4100

*Attorneys for Fourth Party Defendant Fred A.
Moreton & Company d/b/a Moreton & Company*