

Case No. _____

In the Supreme Court of Nevada

FELICE J. FIORE and SPEEDVEGAS, LLC,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State
of Nevada, in and for the County of Clark; and THE
HONORABLE NANCY L. ALLF, District Judge,

Respondents,

and

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY,
the duly appointed representative of the Estate and
as the widow and heir of Decedent GIL BEN-KELY;
SHON BEN-KELY, son and heir of decedent GIL BEN-
KELY; NATHALIE BEN-KELY-SCOTT, daughter and
heir of the decedent GIL BEN-KELY, GWENDOLYN
WARD, as Personal Representative of the ESTATE OF
CRAIG SHERWOOD, deceased; GWENDOLYN WARD,
Individually, and as surviving spouse of CRAIG
SHERWOOD, deceased; GWENDOLYN WARD, as Mother
and Natural Guardian of ZANE SHERWOOD,
surviving minor child of CRAIG SHERWOOD, decease,

Real Parties in Interest.

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Elizabeth A. Brown
Clerk of Supreme Court

**PETITIONERS' APPENDIX
VOLUME 6
PAGES 1251-1500**

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CERTIFICATE OF SERVICE

I certify that on October 7, 2021, I submitted the foregoing
“Petitioners’ Appendix” for filing *via* the Court’s eFlex electronic filing
system. Electronic notification will be sent to the following:

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Jennifer R. Andreevski
Ryan D. Krametbauer
BRENSKE ANDREEVSKI & KRAMETBBAUER
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Las Vegas, Nevada 89169

*Attorneys for Real Parties in Interest
Estate of Gil Ben-Kely by Antonella Ben-
Kely, the duly appointed representative
of the Estate and as the widow and heir
of Decedent Gil Ben-Kely; Shon Ben-
Kely, son and heir of decedent Gil Ben-
Kely; Nathalie Ben-Kely-Scott, daughter
and heir of the decedent Gil Ben-Kely*

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Interest Gwendolyn Ward, as
Personal Representative of the
Estate of Craig Sherwood,
deceased; Gwendolyn Ward,
individually, and as surviving
spouse of Craig Sherwood,
deceased; Gwendolyn Ward, as
Mother and Natural Guardian of
Zane Sherwood, surviving minor
child of Craig Sherwood, deceased*

I further certify that I served a copy of this document by mailing a
true and correct copy thereof, postage prepaid, at Las Vegas, Nevada,
addressed as follows:

The Honorable Nancy L. Allf
DISTRICT COURT JUDGE – DEPT. 27
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT 1

COMMERCIAL VEHICLE LEASE AGREEMENT

This Vehicle Lease (the "Agreement" or "Lease Agreement") is entered into on January __, 2017, by and between Phil Fiore (the "LESSOR" or "Owner") and Speed Vegas, LLC (hereinafter referred to as the "LESSEE") (collectively, the "Parties").

In consideration of the mutual covenants, promises and representations herein, the Parties agree as follows:

1. LESSOR hereby agrees to Lease to the LESSEE the following described motor vehicle (the "Vehicle") with all accessories incorporated therein or affixed thereto:

Lamborghini Aventador
(Id#) Vehicle description VIN: vehicle id number

2. TERM. The term of this Agreement shall be for a period of fifteen (15) months commencing on January 15 2017 and ending April 14, 2018. After the initial fifteen-month term, the Agreement shall continue indefinitely, unless and until such time as either Party gives sixty (60) days' written notice to the other.

3. RENT & OPTION TO PURCHASE. As Rent for the use of the vehicle the LESSEE agrees to pay to the LESSOR an amount determined as follows:

- A. Fifty percent (50%) of the total sales earned by Lessee from the rental of the Vehicle at the Speed Vegas facility (the "Track") each month, after deducting the cost of tires, repairs, and maintenance expense incurred by the Lessee in operation of the Vehicle at the Track;
- B. Plus an additional Three thousand dollars and no cents (\$3,000.00) per month. Notwithstanding the foregoing the minimum payment due to the Lessor shall be six thousand dollars and no cents (\$6,000.00) per month for each and every month the Vehicle is leased by the LESSEE.
- C. The LESSEE shall be granted an option to purchase the Vehicle for the greater of fair market value or the outstanding balance due to Putnam Leasing at anytime between April 14, 2018 and lease termination.

Rent is due on the 7th of each month by wire transfer to LESSOR. LESSEE shall provide a monthly statement reflecting revenue activity and expenses.

4. MAINTENANCE AND REPAIRS. The LESSEE shall pay for and furnish all maintenance and repairs to keep the Vehicle in good working order and condition for use at the Track. LESSEE agrees to wrap the vehicle, and to protect the original seats from wear and tear.

PS

At the expiration or termination of this Lease, the Vehicle and all equipment in the Vehicle will be returned to the LESSOR in good condition (including but not limited to tires, clutch and transmission), reasonable wear and tear excepted.

5. REGISTRATION, LICENSE, TAXES, INSPECTION, FEES, EXPENSES. The Vehicle shall not be registered for on-road use by LESSEE or LESSEE agents.

6. USE AND OPERATION. The LESSEE acknowledges receipt of the Vehicle, and that the same is in condition satisfactory to LESSEE'S intended purposes. Vehicle shall not be altered, marked or additional equipment installed without the prior written consent of the LESSOR unless otherwise required by law and in which case the LESSEE will bear the expense thereof as well as the restoration expenses.

7. INDEMNIFICATION AND INSURANCE. The LESSEE agrees and will protect, indemnify and hold harmless the Lessor and its assignees and agents from and against any and all losses, damages, injuries, claims, demands and expenses occasioned by, or arising out of the use, the operation, the condition, maintenance of the Vehicle including any accident or other occurrence causing or inflicting injury and/or damage to any person or property, happening or done, in, upon, or about the Vehicle, or due directly or indirectly to this Lease, the use and operation by of the Vehicle by any patron of Speed Vegas and or the Lessee or the condition, maintenance, use or operation of the vehicle by the LESSEE or any person claiming through or under the LESSEE.

In the event the Vehicle is involved in an accident, damaged, stolen or destroyed by fire, the LESSEE shall promptly notify the LESSOR in writing within twenty-four (24) hours. The LESSEE agrees to cooperate with the LESSOR, and the insurance companies in defending and indemnifying the LESSOR against any claims or actions resulting from the LESSEE'S operation or use of the Vehicle.

8. DAMAGE TO VEHICLE. Should the Vehicle or any part thereof be so damaged as to preclude usage for the purpose intended, the LESSEE will repair or replace the Vehicle or the damaged part thereof.

9. TITLE. The Parties acknowledge that this is a Lease Agreement for the Vehicle which shall be used exclusively as a Track vehicle at the SPEEDVEGAS recreational racing facility in Las Vegas Nevada only, and that the LESSEE does not in any way acquire title to the Vehicle unless the Vehicle is purchased as provided above at the expiration of the term of the Lease Agreement. LESSEE agrees not to do any act to encumber, convert, pledge, sell, assign, rehire, lease, lend, conceal, abandon, give up possession of, or otherwise encumber title to the Vehicle.

10. WARRANTIES AND WAIVER. The LESSEE agrees to make use of the Vehicle herein described in "as is" condition and that the Vehicle is in good working order fit to be used as a commercial vehicle at the SPEEDVEGAS recreational racing facility without the need for further modification or repair by the LESSEE aside from ongoing maintenance and repairs otherwise contemplated under the Lease Agreement.

11. CONSTRUCTION. This Lease Agreement shall be construed and determined in accordance with the laws of the State of Nevada in the Clark County District Courts. Any provision herein prohibited by

law shall be ineffective to the extent of such prohibition without invalidating the remaining provisions of the Agreement. This Agreement shall not be construed more strictly against one party than the other merely by virtue of the fact that it has been prepared initially by counsel for one of the Parties, it being recognized that both Parties have had a full and fair opportunity to negotiate and review the terms and provisions of this Agreement and to contribute to its substance and form.

12. ENTIRE AGREEMENT. This Agreement contains the whole agreement of the parties. None of the covenants, provisions, terms or conditions of this Agreement shall be in any manner modified, waived, abandoned or amended except by a written instrument duly signed by the Parties.

13. BINDING. Each and every covenant and agreement herein contained shall extend to and be binding upon the respective officers, directors, agents, successors, heirs, administrators, executors and assigns of the parties hereto except as may be modified in writing by the Parties to the Agreement.

IN WITNESS WHEREOF, the Parties have duly executed this Agreement on the day and year first written above.

LESSOR
PHIL FIORE

By: 

Date: 1/11/12

LESSEE
SPEEDVEGAS, LLC

By: 

Its Aaron Fesler

(Print Name and Title)

Date: 1/12/12

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SpeedVegas 00500

EXHIBIT 2

In the Matter Of:
A-17-757614-C
ESTATE OF BEN-KELY
VS
SPEED VEGAS, LLC, et al.

Videotaped Deposition Of:

PHIL FIORE

March 10, 2021



702-805-4800
scheduling@envision.legal

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by)
 ANTONELLA BEN-KELY as the)
 duly appointed representative)
 of the Estate and as the)
 widow and heir of Decedent)
 GIL BEN-KELY; SHON BEN-KELY,)
 son and heir of Decedent GIL) Case No.:
 BEN-KELY; NATHALIE BEN-KELY) A-17-757614-C
 SCOTT, daughter and heir of)
 the Decedent GIL BEN-KELY,)
 GWENDOLYN WARD, as Personal)
 Representative of the ESTATE) Dept. No.:
 OF CRAIG SHERWOOD, deceased;)
 GWENDOLYN WARD, individually) XXVII
 and as surviving spouse of)
 CRAIG SHERWOOD; GWENDOLYN)
 WARD, as mother and natural)
 guardian of ZANE SHERWOOD,)
 surviving minor child of)
 CRAIG SHERWOOD,)
)
)
 Plaintiffs,)
)
)

VIDEOTAPED VIDEOCONFERENCE DEPOSITION

OF PHIL FIORE

WEDNESDAY, MARCH 10, 2021

Reported by: Monice K. Campbell, NV CCR No. 312

Job No.: 5221

1 vs.)
2)
3 SPEEDVEGAS, LLC, a foreign-)
4 limited liability company;)
5 VULCAN MOTOR CLUB, LLC dba)
6 WORLD CLASS DRIVING, a New)
7 Jersey limited liability)
8 company; SLOAN VENTURES 90,)
9 LLC, a Nevada limited)
10 liability company; MOTORSPORT)
11 SERVICES INTERNATIONAL, LLC,)
12 a North Carolina limited)
13 liability company; AARON)
14 FESSLER, an individual; the)
15 ESTATE OF CRAIG SHERWOOD and)
16 AUTOMOBILI LAMBORGHINI)
17 AMERICA, LLC, a foreign)
18 limited liability company;)
19 TOM MIZZONE, an individual)
20 SCOTT GRAGSON, an)
21 individual; PHIL FIORE aka)
22 FELICE FIORE, an individual;)
23 DOES I-X; and ROE ENTITIES)
24 I-X, inclusive,)
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27 Defendants.)
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1 VIDEOTAPED VIDEOCONFERENCE DEPOSITION OF PHIL
2 FIORE, held on Wednesday, March 10, 2021, at 8:01
3 a.m., before Monice K. Campbell, Certified Court
4 Reporter, in and for the State of Nevada.

5
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10 Also Present:

11 NATHALIE BEN-KELY

12 KORTNEY DRAGOO, EXHIBIT TECH

I N D E X

PHIL FIORE	PAGE
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Exhibit 2	11/9/2020 Confidential Settlement Communication	82

Phil Fiore

March 10, 2021

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* * * * *

WEDNESDAY, MARCH 10, 2021

8:01 A.M.

* * * * *

THE VIDEOGRAPHER: Good morning. Today is Wednesday, March 10th, 2020, and the time is approximately 8:01 a.m. This is the videotaped deposition of Phil Fiore in the matter of Estate of Ben-Kely v. SpeedVegas, LLC, et al.

This case is venued in District Court, Clark County, Nevada. The case number is A-17-757614-C.

My name is Jared Marez. I am the videographer for Envision Legal Solutions. The court reporter is Monice Campbell.

At this time I will ask counsel to identify yourselves, state whom you represent, and agree on the record that there is no objection to the deposition officer administering a binding oath to the witness via remote videoconferencing.

We will start with the noticing attorney.

MR. TRAINA: Good morning. My name is Paul Traina, and I'm here on behalf of the Sherwood plaintiffs, and I have no objection.

MR. ESCHWEILER: Corey Eschweiler on

1 behalf of the Sherwood plaintiffs. No objection.

2 MS. VARGAS: Susan Vargas on behalf of
3 Automobili Lamborghini America, LLC. No objection.

4 MR. PETERSEN: Ryan Petersen on behalf of
5 Automobili Lamborghini America, LLC. No
6 objections.

7 MR. ANDERSON: Brent Anderson on behalf
8 of Mr. Fiore, SpeedVegas, and Mr. Mizzone. No
9 objections.

10 MR. MERRITT: This is Michael Merritt on
11 behalf of Sloan Ventures 90 and Scott Gragson. I
12 have no objections.

13 MR. GUELKER: This is Gary Guelker,
14 defense counsel for the Estate of Ben-Kely. No
15 objections.

16 MS. ANDREEVSKI: Jennifer Andreevski on
17 behalf of the Ben-Kelys as plaintiffs. No
18 objections.

19 Whereupon,

20 PHIL FIORE,
21 having been sworn to testify to the truth, the whole
22 truth, and nothing but the truth, was examined and
23 testified under oath as follows:

24
25 / / /

1 EXAMINATION

2 BY MR. TRAINA:

3 Q. Good morning, Mr. Fiore. My name is
4 Paul Traina, and I represent the Sherwood
5 plaintiffs.

6 Can you please state and spell your name
7 for the record.

8 A. Phil, P-h-i-l, Fiore, F-i-o-r-e.

9 Q. Mr. Fiore, have you ever had your
10 deposition taken before?

11 A. I have.

12 Q. How many times have you had it taken?

13 A. A couple.

14 Q. When was the last time it was taken?

15 A. I don't remember exactly.

16 Q. Can you give an estimate whether it's
17 been two years, five years, something in that
18 range?

19 A. Probably eight to ten years ago.

20 Q. Oh, okay. And, briefly, just give me
21 an idea. What kind of action was your
22 deposition taken in? What did it involve?

23 A. I was a plaintiff in a case.

24 Q. In a personal injury case?

25 A. It was not.

1 Q. Give me just an idea. Just a brief
2 overview of what kind of case it was.

3 A. A corporate contract case.

4 Q. And I believe you also said you may
5 have been involved in a deposition other than in
6 that case.

7 Was there another one that you were
8 involved in?

9 A. I'm not sure it's actually referred to as
10 a deposition. It's referred to in the securities
11 business as an OTR, which is very similar to a
12 deposition.

13 Q. Right. And in those actions a court
14 reporter is there and you're sworn in and you're
15 giving testimony; is that fair?

16 A. That's fair.

17 Q. And with regard to that -- we'll call
18 that a "deposition" -- when was that taken?

19 A. Nine, ten years ago, I guess.

20 Q. Okay. Just briefly, give me an idea
21 of the type of action it was where you were
22 providing sworn testimony.

23 A. It was a FINRA action with respect to
24 failure to disclose an outside business interest.

25 Q. And that was an action in which you

1 were a defendant in the case?

2 A. Yes.

3 Q. An action in which you were
4 terminated?

5 A. No. No, that's not accurate.

6 Q. What did it involve or what
7 accusations were made against you in that FINRA
8 case?

9 A. I had, through a family friend back in
10 2007, '8, when the financial world was falling
11 apart -- I was -- a family friend had introduced me
12 to a utility resaler here in Connecticut, the
13 purpose of which is that he knew I was in finance,
14 and he was very, very concerned because he had --
15 he had gotten a lot of his friends and family, who
16 weren't necessarily affluent, to invest in this
17 private company. And he was concerned about the
18 direction of that private company.

19 Q. And that was when you were working
20 with Merrill?

21 A. That is correct.

22 Q. Since your deposition hasn't been
23 taken, for a little while anyway, I want to go
24 over some of the ground rules with you so it
25 will make it go a little more smoothly today.

1 Okay?

2 A. Sure.

3 Q. First of all, we have a court
4 reporter. She is taking down everything that
5 you say and everything that I say. At the end
6 of the deposition, all of the testimony will be
7 put into a booklet, and that booklet will be
8 sent to you. You'll have an opportunity to
9 review the booklet and make any changes that you
10 want.

11 Do you understand that?

12 A. I do.

13 Q. If you make any changes to the
14 deposition, I want you to know that either
15 myself or another lawyer, at the time of trial,
16 can comment on those changes, and our comments
17 may affect your credibility as a witness or
18 serve to embarrass you at that time.

19 Do you understand that?

20 A. I didn't understand what you just said.
21 Can you repeat that?

22 Q. Yes, I can.

23 I want you to know that if you make
24 changes to the deposition transcript after it's
25 sent to you, that I or another lawyer can make

1 comments on those changes at the time of trial.

2 Do you understand that?

3 A. That, I understand.

4 Q. Okay. And our comments at the time of
5 trial regarding those changes could affect your
6 credibility as a witness or serve to embarrass
7 you at that time.

8 Do you understand that?

9 A. I suppose they could, yes.

10 Q. And the only reason I'm telling you
11 that here today is because I want your best
12 testimony as we're sitting here. Okay?

13 A. Of course.

14 Q. During the deposition, I may ask you
15 for an estimate, and if I do, I'm entitled to
16 your best estimate.

17 Do you understand that?

18 A. I do.

19 Q. For example, if I ask you when you
20 became one of the board of directors at
21 SpeedVegas, you may not know the exact date, but
22 you may be able to give me an estimate. And I'm
23 entitled to that estimate. All right?

24 A. I'll certainly attempt to, yes.

25 Q. But I don't want you to guess. And

1 the difference between an estimate and a guess
2 is if I ask you what time I got up this morning,
3 you wouldn't be able to tell me because you
4 would have no basis for that.

5 Do you understand that?

6 A. I do.

7 Q. During the deposition there's lots of
8 lawyers on the Zoom. Some of them may have
9 objections to some of my questions. If they do,
10 you're allowed to answer my questions unless
11 you're instructed not to answer.

12 Do you understand that?

13 A. I do.

14 Q. And the purpose that lawyers make
15 objections, for the most part, is just to make a
16 record, and those objections will be ruled on by
17 the court at a later time.

18 Do you understand that?

19 A. I do.

20 Q. If there's any questions that I have
21 that you don't understand, just tell me, and
22 I'll rephrase it and we can go from there. All
23 right?

24 A. Yes, sir.

25 Q. Probably the most important rule in

1 the deposition, just to make sure that you
2 understand, that when you raised your right
3 hand, you're under oath and you have sworn to
4 tell the truth.

5 You understand that, right?

6 A. I do.

7 Q. And just because we're kind of in an
8 informal setting, as we are via Zoom because of
9 COVID, your testimony has the same force and
10 effect as if we were in a court of law.

11 Do you understand that?

12 A. I do.

13 Q. In preparation for your deposition
14 today, did you review any documents?

15 A. No, not that I recall.

16 Q. And did you have an opportunity to
17 speak with your lawyer prior to the time of
18 today's depo?

19 A. I'm sorry?

20 Q. Did you have an opportunity to speak
21 with your lawyer prior to today's deposition?

22 A. Yes.

23 Q. And how long of a conversation did you
24 have with your lawyers regarding today's
25 deposition?

1 A. I think we had three to four sessions, if
2 you will, and those ranged from anywhere between an
3 hour and 90 minutes.

4 Q. And during the deposition preparation,
5 were you shown any documents?

6 A. Not that I recall.

7 Q. Other than speaking with your lawyers
8 regarding the deposition, have you had a
9 conversation with anybody else regarding today's
10 deposition?

11 A. Outside of my wife? No.

12 Q. Okay. For example, have you had any
13 conversations with Mr. Fiore regarding your
14 deposition today?

15 A. Regarding my deposition, no.

16 Q. I want to get a little bit of
17 background on you, Mr. Fiore, because I don't
18 have a lot.

19 Tell me a little bit -- where did you go
20 to college?

21 A. University of Hartford, here in
22 Connecticut.

23 Q. Tell me the year that you started and
24 the year that you finished there.

25 A. Started in 1985, graduated in 1989.

1 Q. And did you receive a degree from the
2 University of Hartford?

3 A. I did.

4 Q. And what was the degree that you
5 received?

6 A. Bachelor of Arts.

7 Q. After attending the University of
8 Hartford, did you go and pursue education at
9 another level or another school?

10 A. Not a master's or anything like that. I
11 did pursue an investment management designation out
12 of Wharton back in 1999.

13 Q. And how long were you at Wharton?

14 A. It was an executive type of study
15 program. I was actually on campus there for, I
16 think, a week to ten days, but it was a ten-month,
17 or maybe even longer, type of course. You did it
18 while -- you did it while you were working.

19 Q. And at the end of this ten-month
20 course or so, do you receive some type of
21 certificate or diploma?

22 A. Exactly. And the designation. And the
23 designation behind that is -- the acronym is CIMA,
24 which refers to certified investment management
25 analyst.

1 Q. What did that allow you to do,
2 receiving that type of certificate?

3 A. So in my business at the time, I was
4 consultant -- I still am to some degree -- a
5 consultant for large institutions with respect to
6 how they manage their money. And the CIMA
7 designation just provides a -- somewhat of an
8 academic undertone as to the way you think about
9 the markets and asset allocation, those types of
10 things.

11 It's not analogous to a CPA, but it's
12 kind of along the same lines relative to the work
13 that we do. It kind of denotes a certain level of
14 credibility in the marketplace.

15 Q. Fair enough.

16 Other than that certificate -- I will
17 call it "certificate/degree" -- have you received
18 any other education?

19 A. Along the same lines, I had had, through
20 the College of Financial Planning, I received what
21 they call the "CRPC," certified retirement plan
22 consultant. And I also received, although I no
23 longer have it -- I also received the AIF,
24 accredited investment fiduciary.

25 Q. And when did you receive the CRPC?

1 A. At Merrill, I remember that, but I don't
2 know exactly when. Certainly prior to my leaving.

3 Q. That was a program that Merrill put on
4 or was it through Merrill?

5 A. No, it wasn't -- it wasn't necessarily a
6 program that Merrill put on. It was put on by the
7 College of Financial Planning, but it was certainly
8 a program that Merrill encouraged its FAs to take
9 on, especially those that focused on the retirement
10 world like I did.

11 Q. Just give me an idea how long the
12 program was.

13 A. It wasn't as arduous as the -- as the
14 CIMA. So I think it all happened within a few
15 months to a year.

16 Q. And is that a program that you take
17 certain courses and at the end you receive a
18 certificate?

19 A. With exams.

20 Q. But at the end you receive some type
21 of certificate, right?

22 A. I believe that's right, yes.

23 Q. You mentioned also the AIF?

24 A. That's right.

25 Q. Tell me again because it went by me.

1 What does AIF stand for?

2 A. Accredited investment fiduciary.

3 Q. When did you receive that certificate?

4 A. Certainly post the CRPC. I don't recall
5 exactly when, but toward the latter end of my
6 Merrill days. I would -- that would be a pretty
7 good guess there.

8 Q. Give me an idea, like, how long did
9 that course take?

10 A. That course was a little different in
11 that I actually remember having to travel to a
12 location. I'm not sure if it was the University of
13 Chicago. I forgot where it was exactly. But it
14 was one of those designations that they -- you're
15 there for two or three days, and then at the end of
16 which, you go through an exam and you pass. And if
17 you pass, you're an AIF; if you don't pass, you're
18 not.

19 Q. So you mentioned that you received
20 these during the time you were working at
21 Merrill?

22 A. Not the CIMA. The latter two, yes, but
23 the CIMA happened in 1999, when I was with, at the
24 time, Prudential Securities.

25 Q. And then the CRPC and the AIF when you

1 were at Merrill sometime at the end of
2 2008/2009?

3 A. CRPC prior to that. I would think in the
4 earlier stages of my Merrill Lynch days, and
5 potentially even earlier at Wachovia, but I kind of
6 remember distinctly at Merrill Lynch. So that
7 seems to make sense to me, and the AIF toward the
8 latter part.

9 It wouldn't have been in 2007 or 2008.
10 The world was falling apart back then. It would
11 have been prior to that. Call it 2005, but again,
12 that's speculation.

13 Q. Right. But in any event, the last
14 two, the CRPC and the AIF, were during the time
15 that you were at Merrill?

16 A. That's right.

17 Q. Other than those -- I'll call them
18 "certificates" -- are there any other
19 certificates that you obtained?

20 A. No. There was -- it was an internal
21 leadership certificate through Merrill Lynch.
22 Nothing that was on a business card, like the other
23 three I represented, but there was some leadership
24 certificate out of Merrill Lynch I remember
25 getting. But, again, that was an internal -- it

1 was outside.

2 I think it might have been even held at
3 Wharton or West Point. I forget which. But it was
4 an internal Merrill thing.

5 Q. So have I covered at this point all of
6 your education, at least from college going
7 forward?

8 A. I think you have, yes.

9 Q. Tell me a little bit -- I note that
10 when you were in college, you said, I think,
11 that you were also working at the time; is that
12 right?

13 A. I have been working since I was pretty
14 much 13. So, yes, I was working.

15 Q. I don't want to know all your jobs
16 since you were 13. I do want to get a little
17 bit of a sense of what I'll call the "more
18 important, significant jobs" as you've moved up
19 through life.

20 What was your first job during college or
21 after college?

22 A. Well, like every teenager, as I started
23 college, I was certainly waitering and bartending,
24 which were pretty commonplace, right? However,
25 during college, my brother-in-law at the time owned

1 a roofing company. The name of the company was
2 BL Roofing. And I would help him, on the weekends,
3 roof.

4 The great part about that job is that I
5 decided very quickly what I didn't want to do with
6 my life. So that was actually a pretty important
7 job for me.

8 Q. It's good for about two or three days,
9 being outside. After that it's little bit
10 tough, right?

11 A. You're not kidding. You're not kidding.

12 Q. I got you beat. I worked in the
13 cement factory, and that was the worst.

14 But after that job I want to focus on the
15 next significant job that you had that are based
16 upon your qualifications and certificates that you
17 had at that point?

18 A. So all I had at the time was my B.A.,
19 right with a prelaw major. And now we're talking
20 about the late '80s and a very different time
21 period than, certainly, today. And the job that I
22 ended up getting, if you will, or starting, was a
23 real estate investment firm called
24 "Elite Investing."

25 Q. When did you start with

1 Elite Investing?

2 A. My partner and I -- his name was Ron
3 Cook -- we started it, I believe, our senior year.

4 Q. And how long were you involved in
5 Elite Investing?

6 A. I think we shut her down in 1992 or
7 thereabouts.

8 Q. And after that what did you do next?

9 A. I got a job with the property and
10 casualty insurance firm that insured all the
11 properties that we had owned at the time -- or,
12 prior to, I should say.

13 Q. And what was that property casualty
14 insurance?

15 A. Essentially, I sold property and casualty
16 insurance, commercial insurance, if you will, to
17 restaurants, hotels, and real estate owners, those
18 types of things.

19 Q. Okay. And how long did you do that
20 for?

21 A. I did that until I was finally employed
22 at Prudential Securities in the late summer of
23 1994.

24 Q. And when you started at
25 Prudential Securities, what was your position

1 there?

2 A. Training. I just started as, you know, a
3 pure rookie.

4 Q. Yeah. And how long did you work at
5 Prudential Securities?

6 A. I was there all the way through the
7 Wachovia merger, which was early 2001 and '2, if my
8 memory serves. And I believe we left Wachovia --
9 when I say "we," my team and I -- left Wachovia for
10 Merrill Lynch in -- I believe it was October '05.
11 I believe.

12 Q. What did you do when you were at
13 Prudential Securities?

14 I know you started out and you were
15 training, but tell me what the job duties were as
16 they changed during the time you were there.

17 A. I'm not sure the job duties changed
18 necessarily. The job of a FA, broadly, is to go
19 out and get clients to trust you to manage their
20 money, right?

21 I think the interesting part about what
22 my career suggested was that I was able to do it
23 not only on the private wealth side, where
24 individual or individual families would give me
25 their assets to manage, right, or my team, but we

1 were also very fortunate to get some large
2 institutions to give us their money to manage. And
3 we still do that today.

4 Q. And give me just the timeline so that
5 I have it here. How long were you at
6 Prudential?

7 A. Well, I started in August of '94. I kind
8 of remember that date very well because it was
9 around my birthday. And I believe I left in
10 October of '05. That date is a little more fuzzy
11 for me, but it was around that time period. I
12 certainly remember it was post the Wachovia merger.
13 That is for sure.

14 Q. And just so that you know too, when
15 I'm talking about dates, it's fine if you give
16 me an estimate. I get that.

17 And after 2005, then, is when you left
18 and you went to Merrill; is that right?

19 A. That's right.

20 Q. Why did you leave Prudential
21 Securities?

22 A. Quite frankly, I loved Prudential
23 Securities. It was an incredible place to work at
24 the time. The unfortunate part is, in early 2001
25 or '2, thereabouts, it was bought by a very large

1 bank. And that bank at the time was called
2 "Wachovia."

3 And although I tried really, really hard,
4 it was a difficult place to work in the investment
5 management world, especially on the institutional
6 investment management world, with a bank
7 philosophy.

8 And so, you know, it was very disruptive
9 to how we did business, you know, account fees, and
10 the various nickel-and-diming that banks tend to do
11 to their clients. It just wasn't our philosophy.

12 Q. But it was your decision to leave
13 there, right?

14 A. It was, yes.

15 Q. And you started at Merrill -- give me
16 the timeline when you were at Merrill.

17 A. Again, I gotta think it was around
18 October '05.

19 Q. And you left when?

20 A. I left where when?

21 Q. Merrill.

22 A. I left Merrill in April of '09.

23 Q. Okay. Give me an idea -- I have an
24 idea -- but what did you do when you were at
25 Merrill?

1 A. Same thing, just at a larger scale. Our
2 business continued to get quite large. My team was
3 one of 60 -- I, in particular, representing my
4 team, was one of 60 people in the entire country
5 that were able to handle certain size accounts at
6 Merrill on the institutional side. I was part of
7 their institutional consulting advisory team.

8 So we had a very substantive business at
9 the time. We had a private wealth business and an
10 institutional consulting business at the time.

11 Q. And what was your -- what was your job
12 title at the time you were at Merrill?

13 A. First VP, I think, maybe senior VP, and
14 then institutional consultant.

15 Q. And as an institutional consultant,
16 did you have people that were under you, that
17 worked for you?

18 A. Yes. That's exactly -- I was just going
19 to say, exactly right. We had a team, right? So
20 some of those people were partners of that team,
21 but we had staff as well. That's right.

22 Q. And I have down here you left in about
23 approximately 2009 from Merrill.

24 Why did you leave Merrill?

25 A. Very much along the lines of what

1 happened at Prudential. Merrill Lynch -- you've
2 got to remember, this is post-2008, right? Lehman
3 is gone. Bear Stearns is gone. The financial
4 crisis had hit us pretty hard. And Merrill, quite
5 frankly, was in the throws of being gone. It was
6 purchased, as you may know, by Bank of America in a
7 12th-hour deal.

8 I forget exactly when that happened, but
9 I think it was the late summer of '08. And that,
10 to me, was ultimately worse than a Wachovia owner.
11 So there was no way we were going to stay there.

12 Q. And you made the decision on your own
13 to leave there, right?

14 A. My team and I.

15 Q. In other words, you weren't asked to
16 leave there?

17 A. That's correct.

18 Q. And then in 2009 or so is when you
19 started at -- where? USB [sic]?

20 A. UBS.

21 Q. UBS. And how long were you there?

22 A. I was there until November 30th, I
23 believe, of 2016.

24 Q. And during -- during the time that you
25 were there, what was your position? What were

1 you doing?

2 A. The business mushroomed at UBS. We had a
3 very, very substantive business managing billions
4 upon billions of dollars, but mostly on the
5 institutional side, across the country. We were
6 one of the main specialists for the consulting work
7 that we were doing on the institutional side of the
8 business. I was senior VP. I was senior
9 institutional consultant. I was cochair of the
10 retirement advisory board. I was cochair of the
11 corporate strategy board for the firm. I did a lot
12 for the firm.

13 And I managed quite a large team. I
14 think we had around 15 people at the end,
15 thereabouts, which, in the wirehouse world, which
16 is what, you know, the big firms like Merrill Lynch
17 and Morgan Stanley and Wells Fargo and UBS are kind
18 of called -- they're called "wirehouses," right? --
19 in that world, managing a team of that size is not
20 unheard of, but it's very rare.

21 Q. I may have lost you, but how big was
22 your team?

23 A. When?

24 Q. I think you said at the end, before
25 you left, you had a team of -- and I heard 15;

1 is that what you said?

2 A. That's right.

3 Q. And this was considered your team?

4 A. That's right. Technically, just to be
5 very clear, W-2 employees of UBS very much like me,
6 but operating under the moniker of my team name.

7 Q. And who did you report to when you
8 were at UBS?

9 A. Well, when?

10 Q. Good question. At the end, before you
11 left.

12 A. A gentleman named Frank Minerva.

13 Q. And what was his position at UBS?

14 A. Branch manager.

15 Q. And why did you leave UBS?

16 A. Merrill -- UBS ultimately decided to
17 terminate my employment at the end of
18 November of '16.

19 Q. Do you have an understanding why they
20 decided to terminate your employment?

21 A. I know why they did. I don't quite
22 understand it, but I know why they did.

23 Q. And what was your understanding of why
24 they did it?

25 A. The things that they were representing

1 that I didn't have proper approval for.

2 Q. And what is it you didn't have proper
3 approval for as alleged by UBS?

4 A. One thing in particular, which was
5 interesting for me, we hosted a charity golf
6 tournament for several years at UBS for the benefit
7 of our veterans, of which senior management at UBS
8 played in the event.

9 They -- they told me on this November day
10 that I didn't have the proper approval for those --
11 for that tournament, but yet, again, senior
12 management played in it. So I found that a bit
13 odd.

14 Q. What other reasons were given by UBS
15 for your termination?

16 A. Another reason was I didn't have approval
17 of a directorship that I had for a local
18 hospital -- by the way, nonpaid directorship for a
19 local community hospital. And that was somewhat
20 disingenuous as well because my approval was,
21 indeed, for a hospital. It just merged with
22 another. So there was a name change, and it was
23 now two hospitals versus one and, ultimately, ended
24 up being three hospitals, by the way.

25 And they determined that I didn't get

1 revised approval for the new name, which, again, is
2 a little bit suspect in my opinion.

3 Q. What other reasons did UBS give for
4 your termination other than the two that you've
5 told me about?

6 A. Two more, if you want them all.

7 So another one was -- I don't know
8 exactly the reasoning, but they essentially said
9 that I didn't have approval for my best
10 friend/personal attorney to make an investment in
11 SpeedVegas, an approved investment for me. Okay?

12 And, again, just to be very clear, I find
13 that a bit odd because that investment was made
14 through what they call a "private placement IRA" at
15 UBS, okay, which, by default, needs approval. So,
16 again, I find -- I scratch my head with some of
17 this stuff.

18 Q. Tell me a little bit more about that,
19 if you would. The investment in SpeedVegas was
20 made by who?

21 A. Mr. Biraglia.

22 Q. And what is your relationship with
23 him?

24 A. Godfather to my kids, best friend,
25 personal attorney, lifelong friend.

1 Q. And how much was the investment?

2 A. I don't remember exactly, but maybe
3 100,000. Maybe less.

4 Q. And the investment, was that made
5 using his money, your money, or both, or a
6 combination?

7 A. That was his investment through his IRA.

8 Q. And you were the one that helped him
9 make that investment or advised him to make that
10 investment?

11 A. Not advised him, necessarily. I mean,
12 we're best friends. He knew what was going on with
13 SpeedVegas and the building of this amazing
14 racetrack at the time, and I introduced him to
15 Aaron, and, I think, Tom at the time. And
16 Mr. Biraglia made his own decision accordingly.

17 Q. When you say you introduced him to
18 Aaron, you mean Aaron Fessler?

19 A. That's right.

20 Q. And Tom, is it Mizzone?

21 A. That's right.

22 Q. And at that point in time, what was
23 Aaron Fessler's position at SpeedVegas?

24 A. I believe he was CEO.

25 Q. And you knew him prior to that time,

1 right?

2 A. Yes, I have.

3 Q. All right. And Mr. Mizzone, was he an
4 investor also?

5 A. I believe both Aaron and Tom were
6 investors and officers of SpeedVegas.

7 Q. We'll get into your relationship with
8 Mr. Fessler a little bit. I kind of want to
9 stay on track regarding the reasons that you're
10 aware of that UBS terminated you.

11 And, again, this is in November of 2016,
12 right?

13 A. That's right.

14 Q. And with regard to this investment
15 that was made in SpeedVegas, what's your
16 understanding of when that investment was made
17 by your friend?

18 A. Again, if I'm going to give you an
19 estimate, which I can clearly do, it's somewhere
20 around 2015ish, maybe '14, but thereabouts.

21 Q. Fair enough.

22 And it's my understanding there was
23 probably at least one other reason that UBS gave
24 you for terminating you.

25 What was that?

1 A. Violation of their social media --
2 internal social media policy, which, again, we were
3 posting that we like country music and golf. And
4 it is clearly not a violation of their social media
5 policy.

6 Q. Any other reasons that you're aware
7 of?

8 A. Those were the four stated in my U5 at
9 the time.

10 Q. And when you say those were in the U5,
11 what is the "U5"?

12 A. Well, what happens when you're hired
13 and/or terminated from a -- from a registered firm,
14 your U5 is effectively the management document
15 regarding your license, right? So it's like your
16 license from a management perspective, right? On a
17 personal level, it's called a "U4"; from a
18 management perspective, it's called a "U5."

19 So when they ultimately terminated me,
20 they had to update my U5 relative to these various
21 things that they terminated me on.

22 Q. And what were the effects on any
23 licenses you held as a result of that
24 termination?

25 A. No effects at the time. I mean, I held

1 my 7 for an additional two years, and I could have
2 reinstated my 7, which is the license we're talking
3 okay, to be very clear.

4 Q. Right. Right.

5 A. But in the business I'm in, I don't need
6 to maintain a 7. As a matter of fact, in the world
7 that we live in today, which is called the "RIA
8 world," registered investment advisory world, my
9 license of 65 is more appropriate because we don't
10 do any commissionable business at all.

11 Q. Who oversees that license?

12 A. Which one?

13 Q. FINRA?

14 A. Which one?

15 Q. Your UB5 [sic].

16 A. Your U5.

17 So a U5 speaks to what they call a
18 "registered person." And A registered person is
19 registered with FINRA; that is correct.

20 Q. Was there any action that FINRA took
21 regarding your termination from UBS?

22 A. No. It took no action at all.

23 Q. Were you ever suspended by FINRA?

24 A. Yes, but prior to my termination.

25 Q. And why were you suspended by FINRA?

1 A. This goes back to a nondisclosure issue
2 back in 2008 with respect to the utility company
3 that I was helping a family friend with.

4 Q. And what was the suspension that was
5 issued by FINRA?

6 A. Technically, failure to disclose.

7 Q. And was it for a period of days that
8 you were suspended?

9 A. That's right.

10 Q. And when was that suspension in
11 effect?

12 A. June, I believe, of '16.

13 Q. So it's your understanding that FINRA
14 was looking back to the time period of 2008 and
15 what happened there with that transaction, and
16 that's why you were suspended?

17 A. 100 percent.

18 Q. Did FINRA issue any fines against you?

19 A. Yes. It was I think 5,000 or 2,500, but
20 thereabouts.

21 Q. I think you may have said it.

22 Did you say FINRA suspended you for 30
23 days?

24 A. Correct. Important to note, though, just
25 to be very clear, it was 30 consecutive days; it

1 wasn't -- normally, when FINRA says you're
2 suspended for 30 days, it's beyond four weeks
3 because they only count Monday through Friday,
4 right? And so I had essentially the month of June
5 to account for my 30 days, if that makes sense.

6 Q. And it's my understanding that UBS
7 also brought an injunction against you at some
8 point in time; is that right?

9 A. I'm sorry?

10 Q. It was my understanding that UBS
11 brought an injunction against you after you
12 left?

13 A. Well, I'm not sure what you're referring
14 to, but did they try to come after the firm that we
15 opened? Try to -- what's the word? -- make us
16 stop, you know, what we were doing? They tried,
17 but we won that.

18 Q. It was my understanding that UBS at
19 least alleged -- and you can tell me if I'm
20 wrong -- that you and your team, when you left
21 there, were stealing clients?

22 A. They alleged that, but, again, we won in
23 court. So I would suggest that our facts were more
24 prevalent than theirs.

25 Q. And after you left UBS, where did you

1 go then?

2 A. We opened up our own firm.

3 Q. And when you say that "we opened it
4 up," it was you and -- what? -- three or four
5 other guys?

6 A. I had four additional partners and, I
7 think, a staff of seven at the time that followed
8 us.

9 Q. When you say they followed you, they
10 came from UBS, right?

11 A. That's right.

12 Q. And the new firm you opened is what?

13 A. Procyon Partners.

14 Q. And tell me a little bit about what
15 Procyon Partners does.

16 A. It does the same work that we had done
17 for the last 24 years, investment management, both
18 on the institutional side of the ledger and also on
19 the private wealth side of the ledger but now in an
20 independent capacity. So we are no longer beholden
21 to a wirehouse or a bank or otherwise, right?

22 Q. Fair enough.

23 And are you still operating that now?

24 A. Yes, sir.

25 Q. Tell me, when is the first time you

1 met Mr. Fessler?

2 A. Mr. Fessler and Mr. Mizzone had an exotic
3 car membership business out of New Jersey called
4 "Vulcan." And I was a member of that. Timing-wise
5 it was early in my days at UBS. So I would tell
6 you around 2006 or '7, thereabouts.

7 Q. When you say you had a membership
8 interest in that, that was a type of LLC
9 company?

10 A. That's right. I was -- think about a
11 club, right?

12 Q. Yes.

13 A. I had rights to -- it's an exotic car
14 club. And so, by being a member of that club, no
15 different than a golf club. At a golf club you
16 have privileges to go play golf, right? You're not
17 necessarily an owner, right? This is the same
18 thing. I had privileges to drive cars.

19 Q. Was your wife also a member in Vulcan
20 at that time?

21 A. No. She doesn't drive -- she doesn't
22 drive exotic cars.

23 Q. Did she ever have a membership
24 interest in Vulcan?

25 A. No, not that I recall.

1 Q. And this interest -- that's when you
2 first met Mr. Fessler and Mr. Mizzzone?

3 A. Yes.

4 Q. And how long were you a member of
5 Vulcan?

6 A. It actually wasn't that long, believe it
7 or not. It was only just a few months because it
8 was very -- I live in Connecticut, and they live --
9 the business was operated somewhere out of the
10 central part of New Jersey -- I forget where -- and
11 it was very costly for them to tow me cars, because
12 I was getting cars almost, you know, weekly or
13 every other week.

14 So Aaron actually ended up calling me and
15 terminating my club membership, actually, because
16 it wasn't efficient for them.

17 Q. Can you explain that to me a little
18 bit more?

19 When you say "getting cars every week,"
20 what are you talking about?

21 A. So think about a business that owns a
22 garage full -- and not just one garage, but several
23 garages -- full of varying exotic cars, from
24 Lamborghinis, to Ferraris to Porsches to Audis; you
25 name it, right? And for a lot of people that don't

1 want to necessarily spend the kind of money it
2 takes to buy just one of those cars, it's an
3 awesome opportunity to experience a bunch of those
4 cars without a huge outlay of money to own one of
5 those cars.

6 Q. Fair enough.

7 So you didn't own the cars. You would go
8 there so that you could have the experience of
9 driving the cars; is that fair to say?

10 A. Yes, that's exactly right. But I
11 wouldn't go there. To be clear, they would flatbed
12 me the cars to my home or business.

13 Q. Oh, I see.

14 So they would bring you the cars, and you
15 would be able to use them for a specific period of
16 time?

17 A. That's right.

18 Q. And in order to be -- to use these
19 cars, you had to be a member of Vulcan, right?

20 A. I'm not sure that it was that formal,
21 like a country club would be, but you certainly had
22 to give, or commit to, a certain amount of money,
23 whatever that money might be, right?

24 So I'm not sure I actually got a
25 membership form or what have you, but I certainly

1 made a commitment that I was willing to spend X
2 dollars for this many weeks of cars, type of thing.

3 Q. Did you ever supply at that period of
4 time -- and I think we're talking about 2006,
5 right?

6 A. Somewhere around there, yeah.

7 Q. Did you ever supply or provide or
8 lease Vulcan any exotic cars?

9 A. At that time, no.

10 Q. At what point in time -- it sounds
11 like -- well, I'll ask you the question.

12 Did you ever, at any time, provide, lease
13 exotic cars to Vulcan?

14 A. No.

15 Q. So it sounds like at that point in
16 time, that you met Aaron, you met Tom, and you
17 at least knew them for a little bit of time in
18 2006; is that fair?

19 A. Again, that date is --

20 Q. Flexible?

21 A. -- wishy-washy at best in my mind. But
22 yes, that's right.

23 Q. And after that did your interest in
24 Vulcan cease to exist?

25 A. Yeah. I was no longer a member of the

1 club, so to speak.

2 Q. And are we talking that -- we'll say
3 the "membership" -- ended within a year or two
4 years or how long?

5 A. It wasn't two; that's for sure. You
6 know, I think it lasted just several months. So it
7 wasn't -- it might have even been within a year,
8 quite frankly.

9 Q. And they notified you that because you
10 weren't using the vehicles enough that you were
11 no longer going to be a member, or how did that
12 relationship end, at least with Vulcan?

13 A. It's just the opposite. I was.

14 Q. You were using them too much?

15 A. Right. Because, again, they had to
16 transport those cars to me in Connecticut, right?
17 And so it got very costly for them. And so they
18 decided that the economics were not working out.

19 Q. So at that point in time, what
20 happened with your relationship with Aaron?

21 A. Nothing. You know, it was -- I remember
22 taking that phone call. I was -- you know, I was
23 kind of smirking, like, I can't believe you're
24 firing me from the club. That's insane, right,
25 type of thing.

1 But it was what it was. I mean, it's not
2 my business, and it's their business. And it was
3 what it was. What are you going to do?

4 Q. When is the next time that you heard
5 from either Aaron or Tom Mizzzone?

6 A. I remember this too. I don't know the
7 timing, by the way, but I do remember being in
8 White Plains, a local airport here, flying
9 someplace. And I get a phone call from
10 Aaron Fessler out of nowhere, asking me if I'd like
11 to invest because they're going to do something
12 national now.

13 Kind of -- again, I'm paraphrasing that
14 discussion, right? I'm kind of giving you a very
15 high level as to what I remember of that
16 discussion.

17 Q. And I appreciate that.

18 Give me just a time period, a general
19 time period, from the point in time that you
20 were -- you're done at Vulcan, to the point in time
21 that you received this phone call from Mr. Fessler?

22 A. I really -- I don't remember at all. It
23 wasn't two years from me ending my membership,
24 right? It was -- I kind of remember it within a
25 few quarters or a year type of thing. Like, it

1 wasn't as if it was a stranger calling me, right,
2 that I haven't spoken to for two years, right? It
3 was -- so it wasn't two or three years away. I
4 remember it kind of being a little shorter term.

5 You know, call it a year, but, again, I
6 really don't remember that at all.

7 Q. Best estimate, so sometime about 2007,
8 sometime in that timeframe?

9 A. Maybe.

10 Q. And you mentioned that he said to you
11 something along the lines that he wanted to go
12 national?

13 A. Yes. Something like that.

14 Q. And what did you understand that to
15 mean?

16 A. Well, I understood it to mean zero until
17 such time that he explained to me that they wanted
18 to take what Vulcan was doing in Jersey and move it
19 around the country to more climate-friendly places
20 throughout the year, which to me actually made a
21 lot of sense, because you're not driving a lot of
22 Lamborghinis or Ferraris here in the Northeast in
23 January and February.

24 Q. And I take it that conversation --
25 that lasted for how long?

1 A. Well, I was catching a plane, so that
2 conversation lasted but for a few minutes. But we
3 picked it up when I got back. So we kind of got
4 into what he was thinking about.

5 Q. And other than what you told me about
6 what he was thinking about, was there anything
7 else after that conversation? And "after that
8 conversation," just so the record's clear, we
9 have the first conversation when you were
10 boarding the plane and then you picked it up
11 after with him.

12 What happened after?

13 A. He kind of explained to me what they were
14 thinking about.

15 Q. And what was your -- was he seeking
16 you as an investor?

17 A. He was.

18 Q. And did you ever -- what happened at
19 that point?

20 A. He explained to me what they were
21 thinking about.

22 Q. What did you do?

23 A. I listened.

24 Q. And other than listening, how did --
25 what is the next development that happened, if

1 anything?

2 A. Ultimately what they wanted to do was buy
3 a concern out there called "World Class Driving."
4 And it necessitated them coming up with a certain
5 amount of dollars, some of which Aaron and Tom were
6 going to come up with, other of which they were
7 going to try to raise.

8 Q. And what was -- what was your part, if
9 anything, that they told you was going to be in
10 World Class Driving?

11 A. I don't understand the question.

12 Q. Yeah. What was going to be -- were
13 they looking for you to put money into World
14 Class Driving?

15 A. They were.

16 Q. And how much money were they looking
17 for you to put into World Class Driving?

18 A. I don't remember how much they were
19 asking for. I think I ultimately committed 100,000
20 or thereabouts, maybe a little bit more. I forget
21 at the time.

22 Q. And at that point in time or after
23 that point in time, what happened with World
24 Class Driving?

25 A. Nothing. It was -- they bought it. It

1 was an ongoing concern. They were moving around
2 the country pretty successfully, I think. I don't
3 think as successfully as Aaron and Tom would have
4 wanted, but it was -- it appeared to be working.
5 But it was very, very expensive to move these cars
6 around in these large tractor-trailers all the
7 time.

8 So you set up your shop for a couple
9 months, two or three months, you're just getting
10 going, and then you've got to move, right? So it
11 got to be relatively costly operationally for them,
12 I think.

13 Q. Was that the same time -- well, I
14 would imagine your investment was -- was World
15 Class Driving an LLC?

16 A. I don't remember what World Class Driving
17 was. I remember Vulcan still kind of still being a
18 name there, but I don't recall.

19 Q. Did you obtain, then, a membership
20 interest in World Class Driving?

21 A. Whatever interest owned that entity, I
22 had a membership interest in, yes.

23 Q. Other than the \$100,000 in investment,
24 was there any other investment that you made in
25 World Class Driving?

1 A. There could have been other investments
2 there, but, again, if that number is 150 -- might
3 have even been 200 -- but I don't remember at the
4 time. And I'm not sure if it came in stages,
5 right? Like maybe 100 initially and then another
6 100 type of thing. That seems possible, but that's
7 kind of all I remember.

8 MR. ANDERSON: And this is Brent. We've
9 been going for about an hour. So whenever you get
10 to a chance for a five-minute break, it would be
11 appreciated.

12 MR. TRAINA: Sure.

13 (To the witness) I probably forgot to
14 tell you, Mr. Fiore. You can take a break whenever
15 you want.

16 Actually, right now is fine. How about
17 if we go for -- we come back in five, ten minutes.

18 Mo, is that good?

19 THE COURT REPORTER: Yes.

20 THE VIDEOGRAPHER: We are off the record.
21 The time is approximately 8:59 a.m.

22 (Recess had.)

23 THE VIDEOGRAPHER: We are back on the
24 record -- excuse me.

25 We are back on the record. The time is

1 approximately 9:10 a.m.

2 BY MR. TRAINA:

3 Q. Mr. Fiore, you understand you're still
4 under oath, right?

5 A. Yes, sir.

6 Q. To my understanding with regard to
7 World Class Driving, your sole interest in that
8 was as an investor in that company; isn't that
9 right?

10 A. I believe so. I'm not sure if they had
11 an official board of directors at the time of World
12 Class Driving. But, yes, that's -- certainly, an
13 investor.

14 Q. And you weren't one of the individuals
15 that supplied World Class Driving with cars,
16 right?

17 A. No, I was not.

18 Q. And you mentioned before to one of my
19 questions, when I asked that about supplying
20 cars, you did supply the Lamborghini Aventador
21 to SpeedVegas, right?

22 A. I did.

23 Q. Are there any other cars, exotic cars,
24 that you provided, supplied, or leased to
25 SpeedVegas or World Class Driving?

1 A. No.

2 Q. What happened to World Class Driving?

3 A. I think -- and, again, I'm going with
4 memory here, so bear with the non-definitiveness of
5 the answer, but I believe Aaron and Tom thought
6 they'd be better served if they just set up shop
7 someplace that was climate ready, meaning more
8 reasonable climate year-round versus the Northeast.
9 So as opposed to moving the cars around all the
10 time to various locations, to kind of set up shop
11 someplace and make it happen.

12 Q. And what's your understanding of where
13 they set up shop?

14 A. Ultimately, Las Vegas, but I know they
15 considered Florida. I know they considered Texas.
16 They were looking at other locations. But they
17 ultimately, obviously, set up shop in Las Vegas.

18 Q. Other than Las Vegas, are you aware of
19 whether they set up shops in any other state?

20 A. Permanent shops?

21 Q. I don't know what "permanent" means
22 nowadays, but any shops.

23 Did they set up shops in any other state?

24 A. Unfortunately, that question yields to an
25 unclear answer, potentially, because if you

1 remember, the whole premise of World Class Driving
2 is to move the cars to various locations. And so,
3 in theory, they would set up shop in Florida. They
4 would set up shop in Texas, so forth and so on,
5 right?

6 What I'm talking about, and I thought
7 what you inferred, was after World Class Driving,
8 kind of what happened and where was -- did they
9 hang a permanent flag. And that flag was
10 ultimately in Las Vegas.

11 Q. Right. Fair enough. I appreciate
12 that clarification.

13 And how long after World Class Driving
14 and your investment did they hang up more of a
15 permanent shop in Las Vegas?

16 A. I think it was relatively concurrent with
17 them shutting down World Class Driving and moving
18 to Las Vegas as a place to do something more
19 permanent.

20 Q. And what happened to your investment
21 as a result of World Class Driving shutting
22 down?

23 A. It moved to -- it moved to the Las Vegas
24 entity. And at the time I think it was still World
25 Class Driving, quite frankly, in Las Vegas. It

1 operated there, I believe, for a while. You know,
2 I kind of remember going there and driving some of
3 the cars with some friends.

4 And so I do remember that World Class
5 Driving was still operating out of Las Vegas, but
6 now, as opposed to moving around the country, they
7 were there. They were setting up home -- home
8 base.

9 Q. Fair enough.

10 Do you have an understanding of when they
11 were setting up home or when they first set up
12 home?

13 A. I would be purely speculating at this
14 time. I wasn't intimately involved with that.

15 Q. You mentioned that you may have been
16 on the board of directors of World Class
17 Driving; were you?

18 A. Again, I don't remember. I know I was an
19 investor. I don't think they had a formal board or
20 not-formal board, but I remember like conversations
21 of myself and even other investors about, "Hey, do
22 we set up shop at Las Vegas permanently," right?

23 And so I don't think it was a formal
24 board, necessarily, but I think Aaron and Tom were
25 looking for some, you know, informal approval, you

1 know, to kind of make that happen.

2 Q. And you were involved in that approval
3 process?

4 A. I would have been, yes.

5 Q. Meaning they were asking your advice
6 on that issue?

7 A. I'm not sure it was advice. It was more,
8 you know, "As an investor, would you be willing to
9 do this" type of thing, right? I think they were
10 doing it irrespective of what I said, by the way,
11 just to be, clear. But yes.

12 Q. What ended up having with World Class
13 Driving?

14 A. Ultimately, they shut it down to open up
15 SpeedVegas.

16 Q. Do you have an understanding of when
17 that took place?

18 A. A long time ago. To be perfectly honest,
19 I don't have a great recollection as to when that
20 happened. I don't.

21 Q. Do you know when SpeedVegas opened?

22 A. I have a shovel in my office, my proper
23 office. But no, I don't -- I don't have an exact
24 date of when that opened in my mind.

25 Q. Were you involved in investing

1 additional money when -- into SpeedVegas?

2 A. I believe -- I believe so. Again, I
3 forget the amount, but I do know that we had to
4 build the building, and I know that necessitated an
5 investment and additional investors coming to
6 SpeedVegas.

7 Q. Other than the 1- or \$200,000 initial
8 investment that we've already talked about, how
9 much more money did you invest in SpeedVegas?

10 A. I think for the building -- and, again,
11 I'm purely speculating -- but I think for the
12 building it was another 150- or thereabouts, maybe
13 125-.

14 And then what happened throughout the
15 years is, early, early investors into what was then
16 Vulcan, right? Way back when, they wanted to --
17 let's say they had a \$20,000 investment, right?
18 Tom would call me up and say, "Hey, this guy or gal
19 wants to sell their stuff. You know, can you give
20 them 10 grand?" And I would pick those up.

21 Q. So what was the total investment you
22 had from Vulcan all the way up into SpeedVegas?

23 A. Including the debt side?

24 Q. Yeah.

25 A. I would say somewhere around 350- to

1 400-, thereabouts.

2 Q. Now, with regard to SpeedVegas, they
3 actually had a board of directors, right?

4 A. Yeah. I mean, that got to be a very
5 larger concern than World Class Driving or,
6 certainly, Vulcan was, right? So Tom and Aaron
7 certainly formalized what they were doing. And
8 they brought on a whole array of different
9 investors as well.

10 Q. When did you become a board of
11 directors at SpeedVegas?

12 A. I guess when it became a real entity.
13 Again, I'm not sure of the timing, but it was all
14 happening at once.

15 Q. I want to talk about the purchase of
16 the Lamborghini Aventador.

17 When did -- when did you first become
18 involved or purchase that vehicle -- or lease it?

19 A. I became the owner of that vehicle on
20 November 1st of 2015.

21 Q. And who did you -- who did you
22 purchase it from?

23 A. I had a car broker, if you will, an
24 exotic car broker that I dealt with. But he bought
25 it from Chicago Lamborghini. I don't know the

1 exact name, but it was a dealership out of Chicago.

2 Q. Was that the first exotic car that you
3 had owned?

4 A. No.

5 Q. When was the first time that you
6 purchased an exotic car?

7 A. It depends how you define "exotic." I've
8 had Corvettes and Datsun 280Zs and those type of
9 cars, right, but if you're talking about the level
10 of Ferraris and those types of cars, a couple years
11 prior to me owning a Lamborghini, I had purchased a
12 Ferrari.

13 Q. And what happened with regard to that
14 Ferrari?

15 A. What I did at the time, I actually
16 owned -- I don't consider this an exotic car,
17 although an expensive car -- I had owned the
18 Ferrari and a Rolls Royce. And what I had done was
19 trade those cars for the Lamborghini, essentially.

20 Q. Of the cars that you owned, not
21 including the Lamborghini, did you ever lease
22 those cars to any other person or entity?

23 A. No. But for the Lamborghini, I've
24 never -- I never did a transaction like this, ever.
25 I was just a typical retail buyer of cars.

1 Q. Why was it in November of 2015 that
2 you decided to purchase the Lamborghini
3 Aventador?

4 A. It's always been a dream, right? It's
5 one of those -- one of those cars. At the time
6 when I was growing up, it was the Countach, right?
7 It was on my wall. And I was very fortunate enough
8 to be able to put some things together to be able
9 to find the right car, number one. The car was
10 beautiful and it checked all the boxes for me. And
11 I was able to effect the transaction and own the
12 car of my dreams at the time.

13 Q. And when you got that car, did you
14 make any modifications to it?

15 A. What do you mean by "modifications"?
16 Performance modifications, those types of things?

17 Q. Yes.

18 A. No. The car was perfect from a
19 performance standpoint. It doesn't need to be
20 touched. I will suggest that cosmetic
21 modifications, for instance, just to be very clear,
22 I had the steering wheel upgraded to a full carbon
23 steering wheel. Lamborghini doesn't have a
24 shifter; it has a paddle -- what they call "paddle
25 shifts." I had carbon paddle shifts put in.

1 And I, ultimately, as I went on the
2 various rallies throughout the country, mainly the
3 East Coast with this car -- I had the car what they
4 call "wrapped," which means that it had a vinyl
5 covering on it, if you will, to protect the paint.

6 Q. Other than the wrap and I think you
7 called it the "full steering," other than the
8 steering --

9 A. Yeah. Carbon steering wheel?

10 Q. Yes.

11 A. Paddles, wrap, you know, obviously -- not
12 obviously -- excuse me. I shouldn't say
13 obviously -- but I put customized floor mats in it,
14 those type of things. But everything I did to the
15 car was purely cosmetic.

16 Q. And how long did you own the vehicle
17 before you entered into a commercial lease with
18 SpeedVegas?

19 A. I think -- I think that transaction
20 happened in January of '17.

21 Q. So about a year and a half or so,
22 right?

23 A. I don't think so. I think it's like a
24 year and two months.

25 Q. Well, your math is better than mine

1 for sure.

2 A. Maybe a year and a quarter.

3 Q. All right. So you owned it for a year
4 and a quarter.

5 And tell me how it came about that you
6 were going to lease it to SpeedVegas?

7 A. Well, I'm a finance guy, right? And what
8 happens when you're dealt with something that
9 changes your life financially pretty dramatically,
10 you've got to take inventory of the things that are
11 somewhat inconsequential in your financial life,
12 right?

13 And so when I was let go out of UBS, I
14 literally went from a place of pretty decent income
15 to a place of zero. It wasn't as if I got a
16 severance or anything like that, right?

17 And so I took inventory of the various
18 clubs that I belonged to and other things like
19 that. Once I eliminated all the frivolous clubs
20 and all the stuff that I had been a member of, you
21 know, golf clubs, those types of things, I looked
22 at -- mind you, we're talking about December now,
23 right? December/January, right?

24 I'm looking in my garage, and I see this
25 amazing, beautiful piece of art, but it's a huge

1 asset, and it's a huge expense to me. And so I
2 called my car broker guy at the time and asked him
3 if we think we can get out of it, you know, at a
4 reasonable price. He said, "You're going to get
5 killed. Let's wait until the spring and try it,"
6 which obviously makes sense. You don't sell
7 Lamborghinis in the middle of winter. I get that.

8 And Aaron and I hopped on a call, and he
9 said he would love to have the Lamborghini at the
10 racetrack.

11 Q. So your broker's not the one that
12 found Aaron. You know Aaron and you know
13 SpeedVegas. And so did you make a call to
14 Aaron?

15 A. Well, Aaron and I were talking all the
16 time, right? But, yeah, we spoke specifically
17 about, you know, can the racetrack use a
18 Lamborghini Aventador? It didn't have one at the
19 time. The racetrack up the road -- I'm sorry --
20 it's not up the road. It's at the racetrack, at
21 Las Vegas racetrack.

22 I think both of those, Exotic Racing, and
23 I forget the name of the other one, but there's
24 another racetrack type of business up there in the
25 parking lot. I think they both had several -- oh,

1 Dream Racing -- they both had Aventadors as part of
2 their arsenal.

3 Q. So it was your understanding Aaron was
4 interested in purchasing, or at least leasing, I
5 guess, is fair to say, the Lamborghini
6 Aventador, right?

7 A. Yeah. He thought that would be great for
8 the racetrack as a marquee car.

9 Q. So is that the deal that you entered
10 into, was a lease agreement with him?

11 A. I guess. I'm not sure what the exact
12 deal was. I know we have paperwork relative to it,
13 but, essentially, what was promised is a certain
14 minimum a month, and then profit sharing anything
15 over that on what the car produced.

16 Q. Minimum a month, meaning a minimum
17 payment as well as profits that would come back
18 to you based upon the usage by customers; is
19 that fair to say?

20 A. That's fair.

21 Q. All right. I'm going to show you,
22 Mr. Fiore, an exhibit. We're going to call it
23 "Exhibit Number 1."

24 A. Okay.

25 Q. Let me see if I can share my screen

1 with you.

2 (Exhibit Number 1 was marked.)

3 BY MR. TRAINA:

4 Q. Now, you should see at the top, it
5 says "Commercial Vehicle Lease Agreement"?

6 A. I do.

7 Q. All right. And I'm going to go
8 down -- I think we can identify -- the first
9 page is 498, SpeedVegas 00498, and it goes all
10 the way to SpeedVegas 00500.

11 Do you see that?

12 A. I do.

13 Q. And at the end of this document, it
14 looks like -- there is your signature, right?

15 A. That's correct.

16 Q. And Aaron Fessler's signature.

17 Do you see that?

18 A. I do.

19 Q. And it looks like it's -- the date on
20 there says 1-11-12.

21 Do you see that?

22 A. I don't think it says that. I think it
23 says 1-12-16, is what it says. And mine says
24 1-11-17.

25 Q. Oh, I'm sorry. That looked like a two

1 to me. That's why I was asking. The seven
2 looked like kind of a two.

3 But it looks like it would be
4 January 11th, 2017, right?

5 A. That's correct.

6 Q. And if you go to the top of the
7 document -- by the way, this looks like a true
8 and correct copy of the commercial lease,
9 vehicle lease agreement, that you signed with
10 SpeedVegas and or Aaron Fessler, right?

11 A. It looks to be that, yes.

12 Q. It looks to be that way because, at
13 least on the first page that we are looking at
14 right now, it talks about the Lamborghini
15 Aventador, right?

16 A. It certainly says that, yes.

17 Q. Right.

18 And this lease agreement, you are the
19 lessor; SpeedVegas is the lessee, right?

20 A. Correct.

21 Q. And this would be the true and correct
22 copy of the lease agreement that you signed,
23 right?

24 A. I believe that's right.

25 Q. And the lessor under paragraph 2,

1 that's labeled 2, it says "term," and 3 says
2 "rent and option to purchase." And then it's A,
3 B and C.

4 Do you see that?

5 A. I do.

6 Q. Under A it's "50 percent of the total
7 sales earned by lessee from the rent of the
8 vehicle at SpeedVegas facility each month after
9 deducting the cost of tires, repairs,
10 maintenance expense, incurred by the lessee in
11 operation of the vehicle at the track."

12 That's 50 percent of the sales that you
13 were going to get as lessor, right?

14 A. That's how I understood it.

15 Q. Plus you get additional under B,
16 \$3,000, right?

17 A. That's how I understood that as well.

18 Q. All right. And just so that I
19 understand, did you make any money off this
20 lease?

21 A. I don't know what that means "any money."

22 Q. Did you make any profit from it as a
23 result of the usage by the lessee, who's
24 SpeedVegas?

25 A. So I had a payment of about 6,000 a month

1 to Putnum, who held the note on this car. So I
2 think I got -- I think I got maybe a February
3 payment, March -- I think I got three payments
4 total, I think. Maybe a couple. But that's all I
5 got.

6 Q. Although Putnum held the note on the
7 car, you were the one that was entitled to
8 receive the \$3,000 a month and the profits that
9 would be made from the use of the vehicle; isn't
10 that right?

11 A. That's right. Putnum, all they cared
12 about was their monthly fee debt obligation.

13 Q. As a board of director, I want to talk
14 to you a little bit about the incident on
15 February 12th, 2017.

16 What were you told by Mr. Fiore or others
17 about the incident?

18 A. Are you suggesting -- when was I first
19 told? Like the first time I heard about it?

20 Q. Yeah.

21 A. I was called on that Sunday. I remember
22 I was having dinner with my family, and Aaron
23 picked up the phone and had a -- Aaron is normally
24 a pretty direct guy and, generally, a pretty happy
25 guy. And he had a very strange tone to his voice,

1 and I knew what was coming wasn't going to be
2 great.

3 The first thing he said to me was that
4 SpeedVegas had a very, very, very bad day.

5 Q. And what else did he tell you?

6 A. I went on to ask him what happened, and
7 he told me two people had perished. I'm not sure
8 if I asked him how, or what have you. And we
9 talked about -- I remember him saying that the car
10 hit a wall and those types of things. And it
11 got -- he got to, ultimately, tell me that it was
12 the Lamborghini that was the car involved.

13 Q. And how long did that conversation
14 last?

15 A. I don't know. I was in almost a state of
16 shock, quite frankly. So I have no idea. It could
17 have been ten minutes, two minutes, could have been
18 20. I really have no idea. It was enough for
19 Aaron to tell me what had happened.

20 Q. And after that call, what was the next
21 thing, as far as any conversations you had with
22 Mr. Fessler, regarding the February 12th,
23 2017, incident?

24 A. Well, I don't think it was -- it was
25 conversations with me, necessarily. I think what

1 Aaron did was convene the board of directors quite
2 often as to what was happening, what was going on,
3 shutting down the track, like all these various
4 decisions that had to be made that he was making.

5 Q. And I take it these board of directors
6 meetings were by phone?

7 A. Yes.

8 Q. And these board of directors meetings,
9 were they transcribed?

10 A. Minutes, you're suggesting?

11 Q. Yes.

12 A. I don't know. I don't know.

13 Q. And how many board of directors
14 meeting minutes -- how many board of directors
15 meetings did you have after this incident?

16 A. I don't remember.

17 Q. What were the major decisions --
18 strike that.

19 What were the decisions the board made
20 regarding the February 12th, 2017, incident?

21 A. I think probably the most major was to
22 shut the track down.

23 Q. And how many board members were there
24 at that time?

25 A. Maybe five or six.

1 Q. And other than shutting the track
2 down, what was -- what were other determinations
3 that the board of directors made?

4 A. I don't remember.

5 Q. Were there any reports during --
6 during the period of time after the
7 February 12th, 2017, incident -- reports by
8 Aaron Fessler to the board?

9 A. By "reports," what do you mean
10 specifically?

11 Q. How the accident happened.

12 A. I don't remember a formal report,
13 necessarily. Do I remember some conversations of
14 conjecture and otherwise? Potentially. But I
15 don't remember any formal reports. I don't recall
16 that. By the way, there could have been, but I
17 just don't recall it.

18 Q. Well, other than -- maybe I've limited
19 myself -- and I didn't mean to do that -- when I
20 said "formal reports." But what was he telling
21 the board regarding how the incident happened?

22 A. That he didn't -- I don't remember
23 exactly, quite frankly, but essentially, he didn't
24 make the turn, and he hit the wall.

25 Q. And that's the extent of your memory

1 and the information that you remember?

2 A. Yes. Without speculating.

3 Q. I'm trying to get a sense of after the
4 incident how many board meetings, or board
5 calls, I'll say, that were held between
6 SpeedVegas and the board of directors.

7 A. I can't give you a sense. I will tell
8 you that, in a normal cadence, we were probably
9 meeting, you know, in person a couple times a year,
10 and maybe meeting once a quarter, right? It was
11 more than that post the accident. That's for sure.

12 Q. Okay. Post accident, how many
13 face-to-face meetings did you have out at
14 SpeedVegas?

15 A. Myself, I did not go out to Vegas at all.
16 I haven't been there at all.

17 Q. And it's fair to say one of the
18 reasons you haven't been out there is because
19 you're on the East Coast, right?

20 A. Okay. I guess. I don't remember Aaron
21 calling for an in-person meeting at the time.

22 Q. So you didn't go out there, though,
23 and you had phone conversations with him; is
24 that right?

25 A. Not with him. You know, with everyone,

1 the entire board.

2 Q. Did you have personal phone
3 conversations with him after the incident?

4 A. Not that I recall. I do remember -- I do
5 remember calling Aaron and asking him how he's
6 doing because he was carrying the brunt of what was
7 happening day to day there.

8 Q. Other than what you have told me
9 regarding the board meetings and the
10 conversations at the board and personal
11 conversations with Aaron, have you told me
12 everything that you recall regarding what was
13 told to you how the accident occurred?

14 A. Yeah, to the best of my memory, that's
15 how I recall it.

16 Q. Had you ever gone out to SpeedVegas
17 and driven one of their cars around the track?

18 A. I have.

19 Q. And when was the first time that you
20 did that?

21 A. I don't know. It was my -- well, the
22 first time? The first time might have been shortly
23 after it opened, where I was down there potentially
24 for a board meeting or a business meeting, and I
25 was able to go on the track and have some fun.

1 But I remember specifically -- I don't
2 remember when, but it was a few years, maybe a
3 couple years prior, maybe a year prior to the
4 accident -- that a friend of mine was turning 50,
5 and we went to Las Vegas to celebrate, and we took
6 the guys on the track for a few laps.

7 Q. And I take it this was the time before
8 you leased the Lamborghini to SpeedVegas, right?

9 A. I suspect -- I vaguely remember it was
10 that spring. It was the spring prior. So it was
11 the spring of '16.

12 Q. So you were out there at least on two
13 different occasions?

14 A. At least. Again, I don't recall another
15 one, necessarily, but there could have been a
16 third, but I don't recall it necessarily.

17 Q. And like when you were out there, what
18 did you -- what did you do, or what did
19 SpeedVegas have you do, if anything, prior to
20 getting in the vehicles and driving them around?

21 A. That's a little unclear. Do you want to
22 be more specific?

23 Q. Sure.

24 When you went out there to drive the
25 vehicles, what did you do? You walked through the

1 doors? They give you a vehicle?

2 Or what did they do when you went there?

3 A. Oh, so you're talking about what's the
4 protocol? Is that what you're trying to get to,
5 the protocol?

6 Q. Yeah. Or whatever you went through.

7 A. Well, I was treated -- despite being a
8 board member and an investor, I was treated like
9 any other customer, right? And there's a certain
10 protocol that you go through before you get behind
11 the wheel of a car.

12 Q. And what protocol did they put you
13 through?

14 A. Well, the first thing you do is you go to
15 the desk, and you fill out your information. And
16 you -- and you essentially sign a waiver, but, you
17 know, you also tell them, you know, you're not
18 under the influence of drugs, you haven't been
19 drinking, those types of things, right? And so
20 you're acknowledging certain things to be factual,
21 and you sign, essentially, a waiver.

22 Then, when it's your turn, you kind of go
23 into a tent with coaches, with trainers,
24 professional drivers. And those coaches, the way
25 it works at SpeedVegas and the way it works, I

1 think, at the other racetracks even in Vegas, is
2 that, although you're driving a car, there's a
3 trained professional with you on the passenger seat
4 that has a brake, okay? So all these cars are
5 retrofitted with a brake.

6 And so you're in this classroom, if you
7 will, talking about, you know, how to drive these
8 cars around the track, if you drive it too slow,
9 you know, how to move to the side, listen to
10 your -- listen to your trainer, those types of
11 things. But they're essentially trying to teach
12 you, you know, how to maneuver around the track in
13 a safe way.

14 Q. Going back to -- just a little bit.

15 You said when you walked in there, you go
16 to the front desk, and you mentioned a waiver.

17 Do you remember that testimony?

18 A. I do.

19 Q. And you signed a -- was it a physical
20 waiver, paper?

21 A. I think it was all on an iPad. I think
22 there's iPads set up, and that's kind of how you
23 went through the various questions that they had
24 and ultimately signed the waiver. That's how I
25 remember it at least.

1 Q. I'm sorry, what?

2 A. That's how I remember it at least.

3 Q. And then you mentioned that you told
4 them that you would -- about whether there was
5 any physical -- physical issues that you had?

6 A. No. No. I believe in the waiver I
7 remember -- it may ask -- and, again, I'm going
8 from memory here -- but I know you are unable to
9 drink alcohol or take any drugs or anything like
10 that prior to getting in the vehicle because,
11 obviously, that presents a hazard, right?

12 So I believe some of the questions they
13 asked were around that, but, again, I'm going from
14 memory here. But I kind of remember that.

15 Q. And I think you said you went to a
16 classroom or had the classroom experience?

17 A. That's right.

18 Q. And how long was the classroom
19 experience when you went there?

20 A. I don't know, 20, 25 minutes, maybe 30
21 minutes. Something like that. I don't know.

22 Q. After that, you would go and get into
23 the vehicle?

24 A. After that, once the previous group got
25 off the track, right, the cars would then be lined

1 up according to whatever you purchased and your
2 coach or your trainer, if you will, your --
3 whatever -- your professional driver, would make
4 sure that you're buttoned up good, and you're
5 comfortable, and the mirrors are working, and
6 everything is adjusted the way that you want. And
7 they'd hop in the car and give you a brief little
8 talk, and have at it.

9 Q. What type of gear were you provided
10 with when you got into the vehicle?

11 A. Well, certainly -- certainly a helmet.
12 I'm not sure if a neck -- one of those neck braces
13 came with that or not. I don't recall that. And I
14 also don't recall, necessarily, a racing suit.

15 Q. You mean like a fire suit?

16 A. I guess. I'm not sure it's denoted as a
17 fire suit, but -- it's more of a racing style suit.
18 But can it play a fire suit? Potentially. But I'm
19 not sure it does or doesn't. I have no idea.

20 Q. And no special kind of shoes or
21 anything like that?

22 A. No. However, if, for instance, a young
23 lady would walk in there with high-heeled shoes, I
24 don't imagine that that would be appropriate
25 footwear to wear on the racetrack, nor if someone

1 is wearing sandals, they would allow people with
2 sandals, necessarily, to wear sandals, you know.

3 So sneakers and shoes, those types of
4 things that were well-fitting, you know, because
5 you're driving a car, right? So I would think that
6 rule is relatively generic in driving, period.

7 Q. And you're making that assumption
8 about what SpeedVegas required as far as
9 footwear, right?

10 That's not something you know?

11 A. Yeah, I don't -- you know, yes. Yes, I
12 would suggest that that's an accurate statement,
13 although I don't believe that we allowed sandals
14 and high heels. I just don't believe we did. I
15 don't know how I know that, but I just don't
16 believe we did.

17 Q. How about flip-flops?

18 A. I think I would construe that somewhat as
19 a sandal, but, again, I don't know.

20 Q. And then you -- after the class --
21 what vehicle did you drive, by the way?

22 A. I drove a bunch, a Ferrari, Lamborghini.
23 I believe I also drove one of the Audis, yeah.

24 Q. Do you remember what your top speed
25 was?

1 A. I don't, no.

2 Q. Were you faster than the other guys
3 that you had come with?

4 A. I don't recall that. Maybe.
5 Potentially. I'm not sure.

6 Q. Do you remember where on the racetrack
7 you could reach your top speed?

8 A. Yeah. It would be on the straightaway.

9 Q. On the straightaway between -- it
10 would be before turn 1 and turn 2?

11 A. That's right.

12 Q. And you don't remember the speeds that
13 you could reach on that straightaway?

14 A. I don't.

15 Q. Do you have an understanding of when
16 you were reaching your top speeds at what point
17 you were supposed to start braking before
18 entering turn 1 or turn 2?

19 A. Yeah. So that was part of the training,
20 right, is this whole concept of cones, right, and
21 various markings on the track. And the coach would
22 tell you pretty adamantly when to start braking.
23 Because the way the cars work is, as you brake into
24 turns, the car is much more responsive, which is a
25 little counterintuitive to most people that just

1 drive a car.

2 But professionals understand that, you
3 know, as you brake into these turns, the car is
4 much more responsive on the turns. So they're
5 trying to teach you all that.

6 Q. And these cones that were set up, how
7 many cones that were set up for purposes of
8 braking between -- at turn 1 and turn 2?

9 A. Yeah. I don't know. I don't know
10 exactly.

11 Q. Were you ever informed as a board of
12 director that the cones were moved back after
13 the February 12, 2017, incident?

14 A. I was not.

15 Q. Were you ever told by anybody at
16 SpeedVegas that they knew and they understood
17 that, prior to the incident of February 12th,
18 2017, that if there was an accident that was
19 going to happen, that it would be at turn 1 and
20 turn 2.

21 A. Never told that.

22 Q. You understand that you are a
23 defendant in this lawsuit, right? You have been
24 named as a defendant?

25 A. I do, yes.

1 (Exhibit Number 2 was marked.)

2 BY MR. TRAINA:

3 Q. All right. I'm going to show you just
4 a letter that was sent by my firm regarding
5 what's called a "settlement," a policy limits
6 demand to settle this case.

7 Were you aware of that? Have you ever
8 seen this letter?

9 A. Is this a recent one? Could you show me
10 the date, please?

11 Q. November 9th?

12 A. November 9th. That's not recent.

13 I remember seeing a settlement demand, I
14 guess. I'm not sure of the date. I have recently
15 seen something, but I don't remember it being
16 November 9th. It seemed to be much more recent
17 than November 9th, as far as -- it could be, by
18 the way, the same letter, but I didn't note the
19 date.

20 Q. All right. Fair enough.

21 Whatever the date, you understand that
22 there has been a demand to settle this case for the
23 policy limits and this case would be over?

24 You understand that?

25 A. Yes, sir.

1 Q. And the lawsuit wouldn't go on any
2 further.

3 You understand that, right?

4 A. I do.

5 Q. And you understand that that has been
6 rejected?

7 A. I believe a counter was made -- is how I
8 believe it -- but, yes, I believe there's some
9 negotiation happening. That's all I know.

10 Q. Let me ask you this: Do you have
11 personal counsel?

12 A. I'm sorry.

13 Q. Independent personal counsel?

14 A. On this case?

15 Q. Yeah.

16 A. I do not.

17 MR. TRAINA: Let me look at some of my
18 notes. Give me five more minutes, Mr. Fiore, and
19 we'll see what else I've got. Okay?

20 THE VIDEOGRAPHER: Would you like to go
21 off the record, Mr. Traina?

22 MR. TRAINA: Yes.

23 THE VIDEOGRAPHER: Going off the record.
24 The time is approximately 9:53 a.m.

25 (Recess had.)

1 THE VIDEOGRAPHER: We are back on the
2 record. The time is approximately 10:00 a.m.

3 BY MR. TRAINA:

4 Q. You understand you're still under
5 oath, Mr. Fiore?

6 Are you muted? Can I hear you?

7 A. I don't think I'm muted.

8 Q. I got you. Okay.

9 I don't want to know any conversations
10 you've had with your attorney.

11 Has the insurance carrier for this
12 case -- have they offered to appoint you
13 independent counsel?

14 A. To the extent that a conflict arose, yes.

15 Q. Have they -- has the insurance carrier
16 told you that if the verdict is beyond the
17 policy limits, that you won't be responsible for
18 that?

19 A. Has the insurance carrier told me that?

20 Q. Yes.

21 A. They have not.

22 Q. Okay.

23 MR. TRAINA: I don't have any other
24 questions at this point.

25 Anybody else?

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EXAMINATION

BY MS. VARGAS:

Q. Mr. Fiore, my name is Susan Vargas.

Can you hear me okay?

A. I certainly can, Miss Vargas. How are you.

Q. I'm fine. Thank you.

I'm going to try to ask you questions in a congruent manner, but my questions might jump around a little bit because Mr. Traina already asked you some questions, and I might have a few follow-up based on what he asked you. Okay?

A. Sure.

Q. At the beginning of the deposition, you said your name was Phil Fiore.

Is Phil your legal name?

A. No, it's not. And that's a good clarification. Thank you for that.

My parents are off-the-boat Italians, and my formal name is Felice, F-e-l-i-c-e, Giuseppe Joseph Fiore. Felice translates commonly in America to Phil.

Q. Thank you for that clarification.

When you purchased the 2015 Lamborghini

1 Aventador through your car broker, was the
2 Aventador new or used?

3 A. Used.

4 Q. And how many miles did it have on it
5 when you purchased it?

6 A. Not many. I think -- certainly, less
7 than 2,000, Miss Vargas, but, you know, it could
8 have been around 1,200. Somewhere around there.
9 For all intents and purposes, it was brand-spanking
10 new.

11 Q. Do you have any information about its
12 prior ownership?

13 A. No. I ended up finding out who it was.
14 It was a Mr. Andy Frizlo (phonetic) or something
15 like that. But, no, I don't necessarily know.

16 Q. How did you end up finding out who had
17 previously owned it?

18 A. I actually don't know. My son actually
19 found out that Andy somehow was the previous owner
20 of the car.

21 Q. And was Andy someone that you knew?

22 A. No.

23 Q. And when you purchased the Aventador,
24 had it had modifications made to it, that is to
25 say, it was not in its original factory

1 condition?

2 A. I believe that's -- I believe that's a
3 fair statement.

4 Q. And can you generally describe what
5 modifications had been made to it at the time
6 you purchased it?

7 A. Two of the most striking, I would think,
8 were the muffler system. I think it was a
9 Kreissieg or something like that, Miss Vargas. And
10 they had installed a Liberty Walk wing, which is a
11 much larger rear wing than what Lamborghini
12 generally has on these cars.

13 Q. And so your purchase of the Aventador
14 was for your personal use, correct?

15 A. Yes, ma'am.

16 Q. And would you describe the condition
17 of the Aventador when you purchased it?

18 A. Perfect. Beautiful.

19 Q. And in the time that you owned --
20 strike that.

21 In the time that you had actual
22 possession of the Aventador prior to leasing it to
23 SpeedVegas, did you have that vehicle serviced?

24 A. I only owned it a year, right? So it
25 didn't really need a lot, but as I think I

1 suggested earlier, my son and I would go on these
2 long rallies. And, you know, just to make sure we
3 understand what they were talking about, we would
4 drive this car from, say, New York to Hilton Head,
5 right, with a bunch of other exotic cars.

6 So any time prior to us doing a rally, I
7 would always bring the car into the dealership or
8 otherwise and have it -- make sure all the fluids
9 are topped off and do a full check of the car.

10 Q. And when you say "dealership," you're
11 talking about authorized Lamborghini
12 dealerships?

13 A. Yes. Yeah.

14 Q. And did your son drive the vehicle or
15 just you?

16 A. On the rallies?

17 Q. Yes, on the rallies.

18 A. No. Just me. Just me.

19 Q. Can you give us an estimate of how
20 many miles you put on the Aventador while you
21 had it in your possession?

22 A. Yeah. I think -- I think I gave it to
23 SpeedVegas with just under 8,000 miles on it or
24 thereabouts. So I would think I put, you know, 65-
25 to 7,000 miles on it in that short time. We drove

1 the car. We didn't park it.

2 Q. And when you say "we," who do you
3 mean?

4 A. Well, I mean my son's a car -- he loves
5 cars, and the Lamborghini was his dream as well.
6 And so this car would not be in the garage sitting
7 idle for show, right? We loved to take it out and
8 drive it, and it was a pleasure to do so.

9 Q. In the 2016 timeframe, how old was
10 your son?

11 A. He was turning 16 that August.

12 Q. And when you say it didn't sit in the
13 garage and you would drive it, did you drive it
14 beyond just the long rallies that you would go
15 on?

16 A. Oh, yeah. I mean, we took it out on
17 weekends. I mean, we would -- forget about the
18 long rallies. We would take it to car shows. It's
19 one of those cars, right, that people wanted to
20 see. And so we would constantly take it to car
21 shows and do mini rallies and mini little car
22 meets, where we would meet up with a bunch of other
23 exotic car owners, and we'd whip around Connecticut
24 together, type of thing. I mean, that happened
25 quite often.

1 Q. And is it fair to say that you were
2 the only person in your family that drove it?

3 A. Yeah. I mean, my son, I gave him the
4 luxury -- we live in a very, very, small town,
5 literally 2,000 people, not a stoplight. And one
6 day in the fall of '16, I let him take it with me
7 in it. He drove it a couple miles, you know, and
8 he had a huge smile on his face.

9 Q. And when your son drove it, did he
10 report to you that he had any problems
11 mechanically with the vehicle while he was
12 driving it?

13 A. No. He was only going 20, 25 miles an
14 hour. But no, he did not, no.

15 Q. And in all the time that you owned and
16 operated -- by "operated," I mean drove the
17 Aventador -- did you ever experience any problem
18 with the steering?

19 A. The steering?

20 Q. Yes.

21 A. Never.

22 Q. Any problem with the handling or the
23 vehicle stability?

24 A. Never.

25 Q. Did you have any problems with the

1 brakes?

2 A. Never.

3 Q. Is it fair to say you never had any
4 problems from a mechanical standpoint with the
5 Aventador when you drove it?

6 A. No. Driving that car was picture
7 perfect, quite frankly.

8 Q. Did anyone -- strike that.

9 When you owned the vehicle and had
10 possession of it, did you ever let any friends or
11 other family members drive it?

12 A. No.

13 Q. You had indicated that you had also
14 owned other exotic vehicles and referenced a
15 Ferrari and a Rolls Royce.

16 Do you recall that testimony?

17 A. I do.

18 Q. What was the model -- year and model
19 of the Ferrari?

20 A. It was a California. I want to say it
21 was a '13. It could have been a '12. I forget.

22 Q. And was that vehicle equipped with
23 driver assistance features? By that, I mean
24 ABS, electronic stability control, traction
25 control, those sorts of things?

1 A. You're getting over my skis, Miss Vargas,
2 but I think -- whatever Ferrari had at the time,
3 the car had it, certainly. I think it did. I
4 really don't remember.

5 Q. And the year and model of your
6 Rolls Royce?

7 A. I think around the same. It was a ghost,
8 though. I think that might have been a '12 or
9 something like that.

10 Q. When you added the vinyl covering to
11 the vehicle, what color was it?

12 A. The car was white, right? So I got it
13 from Chicago, and it was white and it had black
14 carbon accents, right? So the vinyl I added to the
15 car -- and it wasn't a full vinyl across the entire
16 car, Miss Vargas, right? It was just in certain
17 spots, like particularly the nose, right? Because
18 the nose sits very low on a Lamborghini, I wanted
19 to make sure that, as we were doing these rallies,
20 no rocks were going to hurt the hood of the car.

21 And so I had the entire nose wrapped and
22 then up the fenders, both back and front, in back
23 vinyl.

24 Q. And when you say "hurt the hood,"
25 you're talking about dings to the paint that

1 would damage the paint; is that what you mean?

2 A. Yeah. Talking about rocks and pebbles
3 and all that stuff, right, just from driving the
4 car behind other cars. Exactly.

5 Q. So the orange wrap that was added
6 later was something done by SpeedVegas with
7 which you personally didn't have any involvement
8 with?

9 A. That is correct.

10 Q. After you leased the vehicle to
11 SpeedVegas, did you have any responsibility for
12 its maintenance and servicing?

13 A. Did not.

14 Q. Were you aware that a modification to
15 the vehicle was being made with respect to
16 adding a brake pedal for the instructor, an
17 auxiliary brake pad?

18 A. I knew that was what they did to all the
19 cars that were on the racetrack. So did I know
20 that that was going to happen to the Lamborghini?

21 Q. Correct.

22 A. Of course.

23 Q. Did you ever drive your Aventador at
24 SpeedVegas?

25 A. No.

1 Q. Again, I apologize. I need to go
2 through my notes. I'm trying not to ask you
3 anything you've been asked already.

4 A. No worries.

5 Q. Was the intention -- strike that.
6 You indicated you had driven a few
7 vehicles at SpeedVegas one or two times prior to
8 the date of the crash, perhaps a third time; is
9 that fair?

10 A. That's fair.

11 Q. And you said that -- strike that.
12 You testified that you drove a Ferrari,
13 Lamborghini, an Audi, as the vehicles you recall;
14 is that correct?

15 A. I think that's right.

16 Q. Do you remember the model of
17 Lamborghini that you drove at SpeedVegas?

18 A. It was not the -- obviously, not the
19 Aventador because my car was the only Aventador
20 there. Gallardo, I think they had there. I'm
21 almost positive that was it.

22 Q. And can you estimate how many laps
23 total you drove on all your visits combined at
24 SpeedVegas?

25 A. Purely guessing, right, but I would

1 think, you know, 20, 25 laps.

2 Q. Did you have -- strike that.

3 Prior to your driving at SpeedVegas, had
4 you driven either on a racetrack or on a
5 driving-experience track before?

6 A. I did drive -- I went to one of our
7 competitors prior to SpeedVegas opening up, up at
8 the Las Vegas racetrack. And I drove some of those
9 cars. And I've also driven like, for instance, on
10 BMW days or Porsche days, you know, here locally,
11 you know, those types of things.

12 Q. And when you talked about going to car
13 shows with the Aventador, you're not talking
14 about like the Detroit Car Show -- strike that.

15 Are you talking about things like the
16 organized Detroit Car Show?

17 A. Well, the Lamborghini was at the Javits
18 Center. It was part of DUB at the Javits Center.
19 The car was spectacular.

20 Q. Your Aventador?

21 A. Yes.

22 Q. Tell me a little bit about that.

23 A. The Javits Center is a very, very large
24 car show, as you probably know. It's called the
25 "New York Car Show at the Javits Center." And

1 upstairs in the Javits Center, you generally have
2 the main manufacturers, right? The Mercedes, the
3 BMWs, the Buicks, the Chevies of the world, right?
4 But down below -- and even Ferrari and Lamborghini
5 could be up there, I think. But I remember
6 particularly the exotic cars being downstairs,
7 right?

8 And they would call that, you know, the
9 DUB, D-U-B, show. And that's where you had all the
10 super exotics and all the customized cars, and all
11 the -- what I would call -- the "fun cars." And
12 so, yeah, my Lamborghini was there.

13 Q. And how did it get to be included in
14 the car show at the Javits Center?

15 A. So the guys that did the wrap on the car,
16 they had a -- what's it called? -- not a booth, but
17 they had a spot where they would showcase the work
18 that they do for the cars, right? And so they
19 wanted to showcase the work that they did for the
20 Lamborghini.

21 Q. And do you remember the name of their
22 outfit?

23 A. ACI Wraps.

24 Q. And in terms of the Aventador and your
25 taking it to car shows, other than this time at

1 the Javits Center, was it involved in any other
2 formal car shows?

3 A. Not formal. Just local -- just what they
4 call "caffeine and coffees," where it's early
5 morning on a Sunday. There's a bunch of amazing
6 cars. You're sitting in a park and you're having
7 coffee and people walking around looking at cars.

8 Q. And taking pictures?

9 A. Tons of pictures.

10 Q. Other than the one time you had driven
11 at the competitors' track, had you done any
12 other race -- strike that.

13 Had you done any other driving on
14 racetracks or driving-experience tracks?

15 A. Prior to the accident?

16 Q. Yes.

17 A. No, not that I recall. I could have, but
18 not that I recall.

19 Q. And during the times you were on the
20 track with the instructors, do you remember who
21 your instructors were?

22 A. I don't.

23 Q. Did you have different instructors, or
24 was it always the same one?

25 A. No. I had different instructors.

1 Q. And during your times going around the
2 track at SpeedVegas, did you ever have one of
3 the instructors grab the steering wheel?

4 A. No.

5 Q. Did you follow the instructions that
6 you were given by the instructors when you were
7 driving at SpeedVegas?

8 A. Oh, yes.

9 Q. Did you have any difficulty
10 maneuvering turn 1 at the track at SpeedVegas?

11 A. No.

12 Q. Did you have any difficulty
13 maneuvering the turn at turn 2 at the track at
14 SpeedVegas?

15 A. No.

16 Q. Do you know whether or not
17 driver-assist features like ABS, traction
18 control, electronic stability control, would be
19 turned off on a vehicle at SpeedVegas if a
20 customer requested it?

21 A. I can't answer that. I have no idea.

22 MS. VARGAS: I think those are all the
23 questions I have. Give me just one second.

24 BY MS. VARGAS:

25 Q. When you described the mini rallies,

1 were those formally organized through a club, or
2 was this just a group of people on Facebook
3 trying to get together?

4 A. Yeah. That's a good question. I'm not a
5 Facebook guy, so it wouldn't happen through there,
6 nor did I join any clubs, right? I wasn't part of
7 Ferrari America nor Lamborghini.

8 But what would happen, inevitably, is
9 that these various coffees and -- you know, coffee
10 events, right? A bunch of exotic cars would say,
11 "Hey, let's go to lunch, you know, on the other
12 side of the state." And so a bunch of cars would
13 rally to the other side of the state and go have
14 lunch. And also by virtue of that, you ended up
15 becoming friendly with other people that own exotic
16 cars.

17 And so, you know, it doesn't need to be
18 100 cars that are doing these things. It could be
19 two or three that are just driving around the state
20 together.

21 MS. VARGAS: I think that's all I have.
22 Thank you, Mr. Fiore.

23 THE WITNESS: Thank you.

24 THE COURT REPORTER: Anybody else?

25 MR. TRAINA: One second here.

1 FURTHER EXAMINATION

2 BY MR. TRAINA:

3 Q. Mr. Fiore, did you have a vanity plate
4 on the car when you owned it?

5 A. Yes, sir.

6 Q. What was it?

7 A. DAWG.1. However, "dawg" was spelled
8 D-A-W-G. DAWG.1.

9 Q. And what did that mean?

10 A. We talked about my best friend, my
11 personal attorney, the godfather to my son,
12 right -- my sons. Back in eighth grade, he started
13 calling me "dawg" and it kind of stuck, you know.
14 So my poor wife drives around in her Range Rover
15 with DAWG2 today. So it's sad but, you know,
16 that's what we do.

17 Q. Okay. I just wanted to know.

18 MR. TRAINA: That's all I have.

20 FURTHER EXAMINATION

21 BY MS. VARGAS:

22 Q. Just one last question. What's
23 your -- well, actually, that's a famous lawyer
24 line, you know "just one last question."

25 But do you have any exotic vehicles

1 currently?

2 A. Not Lamborghini-like, unfortunately. I
3 am driving a very special -- very special Bentley.
4 It's a 2015 GT3-R of which only 99 of those were
5 made in North America.

6 Q. And other than the Ferrari we already
7 spoke of, the California, your Bentley, the
8 Rolls Royce, have you had any other
9 high-performance luxury sports vehicles other
10 than the Aventador?

11 A. Yeah, I had another Bentley, you know, a
12 GTC, prior to the Ferrari and the Rolls. I've had
13 Corvettes and, you know, various Datsun Z cars. I
14 don't consider those to be exotic, necessarily, but
15 they were certainly high performance.

16 MS. VARGAS: That's all I have. Thank
17 you.

18 MS. ANDREEVSKI: I do have a couple of
19 questions. I wasn't sure if you could hear me
20 earlier. This is Jennifer Andreevski for the
21 Ben-Kelys.

22

23 EXAMINATION

24 BY MS. ANDREEVSKI:

25 Q. Mr. Fiore, was the Lamborghini ever --

1 did it ever have a salvage title, to your
2 knowledge?

3 A. Not to my knowledge.

4 Q. And then, are you aware that a recall
5 was issued by the National Highway Traffic
6 Safety Administration regarding the EVAP system
7 on the Lamborghini?

8 A. Am I aware of that now?

9 Q. Yes.

10 A. Yes, I am aware of that now.

11 Q. When did you first become aware of
12 that recall?

13 A. I was sent that recall at the beginning
14 of March. I think the exact stamp on that was
15 March 9th of 2017.

16 Q. Okay.

17 MS. ANDREEVSKI: Those are all the
18 questions that I have. Thank you.

19 THE VIDEOGRAPHER: Anybody have any
20 further questions?

21 MR. TRAINA: I don't think so. Not from
22 me.

23 MS. VARGAS: I don't have any other
24 questions for Mr. Fiore.

25 MR. ANDERSON: Brent Anderson. No

1 questions.

2 THE VIDEOGRAPHER: And just some
3 housekeeping questions. We just have the two
4 exhibits from you, Paul?

5 MR. TRAINA: Yes.

6 THE VIDEOGRAPHER: Okay. Everything
7 seems to be good.

8 Having heard the approval of all
9 attorneys to go off the record at this time, this
10 concludes the video deposition of Phil Fiore. We
11 are now going off the record. The time is
12 approximately 10:24 a.m.

13 (Whereupon, the deposition was concluded
14 at 10:24 a.m. this date.)

15 * * * * *

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1 CERTIFICATE OF REPORTER

2 STATE OF NEVADA)

3) SS:

4 COUNTY OF CLARK)

5
6 I, Monice K. Campbell, a duly
7 commissioned and licensed court reporter, Clark
8 County, State of Nevada, do hereby certify: That I
9 reported the taking of the deposition of the
10 witness, PHIL FIORE, commencing on Wednesday, March
11 10, 2021, at 8:01 a.m.;

12
13 That prior to being examined, the witness
14 was, by me, duly sworn to testify to the truth.
15 That I thereafter transcribed my said shorthand
16 notes into typewriting and that the typewritten
17 transcript of said deposition is a complete, true,
18 and accurate transcription of said shorthand notes.

19
20 I further certify that I am not a relative or
21 employee of an attorney or counsel or any of the
22 parties, nor a relative or employee of an attorney or
23 counsel involved in said action, nor a person
24 financially interested in the action; that a request
25 ([X] has not) been made to review the transcript.

1
2 IN WITNESS THEREOF, I have hereunto set my hand
3 in my office in the County of Clark, State of Nevada,
4 this 22nd day of March, 2021.

5
6 

7
8 Monice K. Campbell, CCR No. 312

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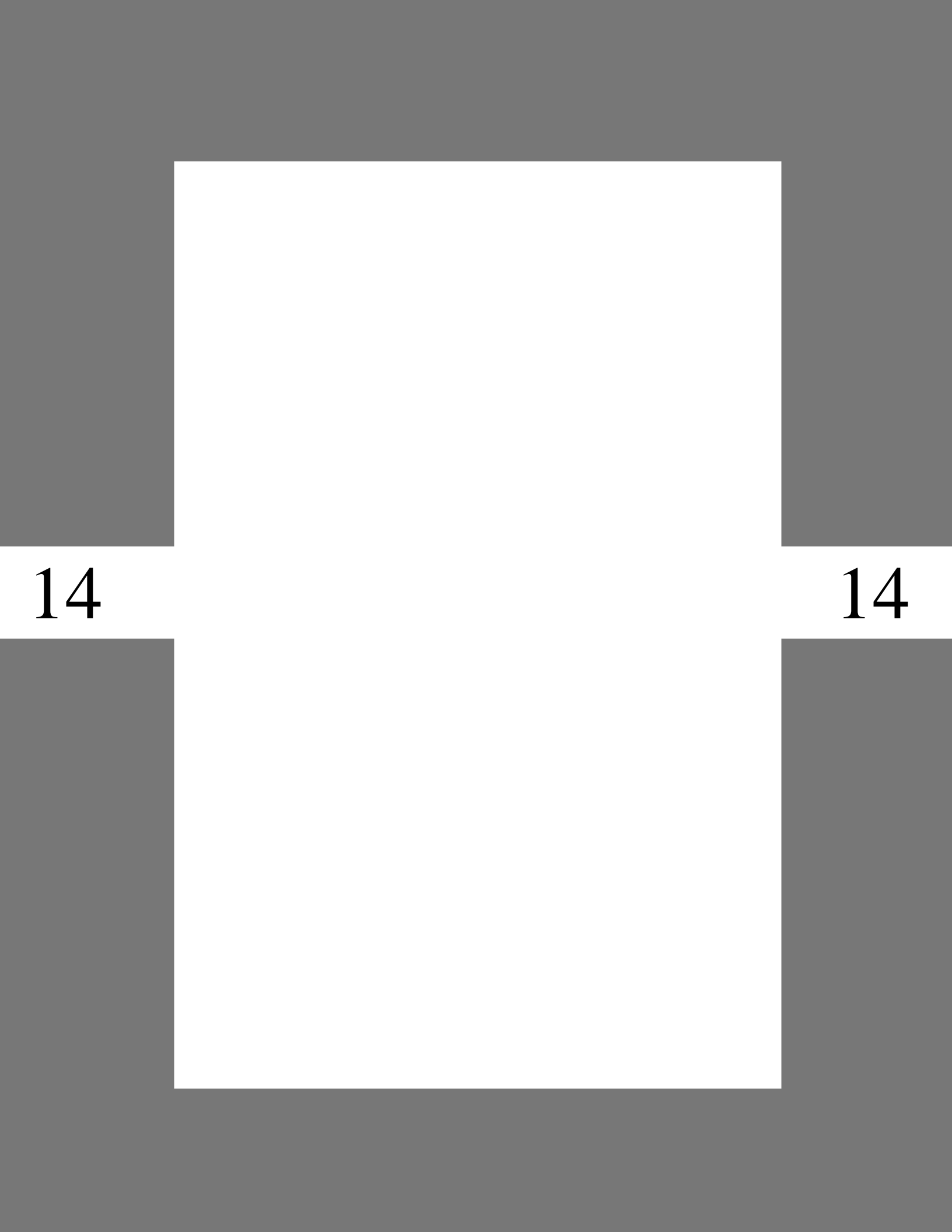
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6/28/2021 3:18 PM

Steven D. Grierson

CLERK OF THE COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

ESTATE OF GIL BEN-KELY by
ANTONELLA BEN-KELY, the duly
appointed representative of the Estate and as
the widow and heir of Decedent GIL
BEN-KELY; SHON BEN-KELY, son and
heir of decedent GIL BEN-KELY;
NATHALIE BEN-KELY-SCOTT, daughter
and heir of the decedent GIL BEN-KELY;
GWENDOLYN WARD, as personal
representative of the ESTATE OF CRAIG
SHERWOOD, deceased; GWENDOLYN
WARD, individually and as surviving spouse
of CRAIG SHERWOOD, deceased;
GWENDOLYN WARD, as mother and
natural guardian of ZANE SHERWOOD,
surviving minor child of CRAIG
SHERWOOD, deceased

Plaintiffs,

vs.

SPEEDVEGAS, LLC, a Delaware Limited
liability company; SCOTT GRAGSON
WORLD CLASS DRIVING, an unknown
entity; SLOAN VENTURES 90, LLC, a
Nevada limited liability company, ROBERT
BARNARD; MOTORSPORT SERVICES
INTERNATIONAL, LLC, a North Carolina

CASE NO.: A-17-757614-C

Dept. No.: XXVII

REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT, OR, IN THE
ALTERNATIVE PARTIAL SUMMARY
JUDGMENT, AS TO DEFENDANT FELICE J.
FIORE, JR., AGAINST PLAINTIFFS ESTATE OF
GIL BEN-KELY, ANTONELLA BEN-KELY,
SHON BEN-KELY, and NATHALIE BEN-KELY
SCOTT

Hearing Date: July 7, 2021

Hearing Time: 1:00 p.m.

1 limited liability company; AARON
2 FESSLER; the ESTATE OF CRAIG
3 SHERWOOD; AUTOMOBILI
4 LAMBORGHINI AMERICAN, LLC a
5 foreign limited liability company; FELICE J.
6 FIORE, JR.; DOES I-X, inclusive; and ROE
CORPORATIONS IX, inclusive,
Defendants

7 GWENDOLYN WARD, as Personal
8 Representative of the ESTATE OF CRAIG
9 SHERWOOD, deceased; GWENDOLYN
10 WARD, Individually, and surviving spouse
11 of CRAIG SHERWOOD, deceased
12 GWENDOLYN WARD, as mother and
natural guardian of ZANE SHERWOOD,
surviving minor child of CRAIG
SHERWOOD, deceased,
Crossclaim Plaintiffs,

13 ESTATE OF GIL BEN-KELY by
14 ANTONELLA BEN-KELY, the duly
15 appointed representative of the ESTATE;
DOES I-X, inclusive,

16 Crossclaim Defendants

17
18 ESTATE OF BEN-KELY by ANTONELLA
19 BEN KELY, duly appointed representative of
20 the Estate and widow and heir of decedent
21 GIL BEN-KELY; SHON BEN KELY, son
22 and heir of decedent GIL BEN-KELY;
NATHALIE BEN-KELY SCOTT, daughter
and here of decedent GIL BEN-KELY,

23 Crossclaim Plaintiffs

24 ESTATE OF CRAIG SHERWOOD; DOES
25 I-X, inclusive; and ROE CORPORATIONS
I-X, inclusive,

26 Crossclaim Defendants.
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Felice J. Fiore, Jr. has brought a motion for summary judgment (“Fiore MSJ”) in response to the Ben-Kely plaintiffs’ Fifth Amended Complaint, which raised four causes of action against Mr. Fiore, Jr.: negligence, products liability, vicarious liability and wrongful death. As explained in Mr. Fiore’s MSJ, Mr. Fiore is not a proper party to this litigation. The Ben-Kely plaintiffs have opposed this motion (“Plaintiffs’ Opposition”).

The Ben-Kely plaintiffs state that they will be abandoning their negligence claim against Mr. Fiore. *See* Plaintiffs’ Opposition at 5:8-10. Based on this representation, Mr. Fiore asks this court to grant summary judgment as to all of the causes of action sounding in negligence (negligence, vicarious liability and wrongful death).

However, the Ben-Kely plaintiffs claim that the strict products liability claim is valid because SpeedVegas was leasing the Aventador from Mr. Fiore for its use on the SpeedVegas track and Mr. Fiore was profiting from the Aventador’s use. *See generally id.*

Add to this the undisputed fact that Mr. Fiore, an individual, has never before or since leased a vehicle that he owned or engaged in the business of buying and selling vehicles, and we are led to the inescapable conclusion that Mr. Fiore does not qualify as a merchant subject to the doctrine of strict products liability. The strict products liability cause of action brought against him should therefore also be dismissed.

In addition, as argued in Mr. Fiore’s MSJ, Mr. Fiore is protected by statute both in his capacity as a shareholder/member of the SpeedVegas LLC and by the Nevada Industrial Insurance Act, which does not recognize the dual capacity doctrine. *See* Fiore MSJ at 19:27-24:9. These arguments apply to all of the causes of action brought against Mr. Fiore. *Id.* Neither the Sherwood plaintiffs nor the Ben-Kely plaintiffs have addressed these arguments. *See generally* Plaintiffs’ Opposition; Sherwood Plaintiffs’ Opposition. The absence of argument against these statutory protections may be viewed as a concession to their merit under the EDCR. As a result, all causes of action brought against Mr. Fiore should be dismissed.

Since the Plaintiffs’ Opposition: (1) has stated plaintiffs will be abandoning their negligence claims against Mr. Fiore; (2) has not identified any facts showing that Mr. Fiore was individually engaged in the

business of selling or leasing automobiles; and (3) has failed to address Mr. Fiore's statutory protections as a shareholder/member of the SpeedVegas LLC and under the NIIA, all causes of action brought by the Ben-Kely plaintiffs against Mr. Fiore should be dismissed.

II. ARGUMENT

A. PLAINTIFFS DO NOT DISPUTE ANY OF THE OFFERED UNDISPUTED MATERIAL FACTS

The plaintiffs do not dispute any of the material facts offered by defendant Fiore or object to evidence offered in support. Pursuant to NRCP Rule 56 subdivision (e)(2) this court may "consider the fact[s] undisputed for purposes of the motion."

Undisputed Material Fact No. 1: Felice J. Fiore, Jr. was a member (shareholder) of the SpeedVegas LLC at the time of the Incident.

Undisputed Material Fact No. 2: Felice J. Fiore, Jr. was a paid member of SpeedVegas's Board of Directors at the time of the Incident.

Undisputed Material Fact No. 5: Felice J. Fiore, Jr. was not, at the time he leased the subject Lamborghini Aventador to SpeedVegas, a merchant engaged in the business of supplying goods of the kind (automobiles) involved in the case.

Undisputed Material Fact No. 6: Felice J. Fiore, Jr. has never been a merchant engaged in the business of supplying goods of the kind (automobiles) involved in the case.

B. DEFENDANT INCORPORATES ITS REPLY IN SUPPORT OF FIORE MOTION FOR SUMMARY JUDGMENT AGAINST THE SHERWOOD PLAINTIFFS

The Ben-Kely plaintiffs note that "Mr. Fiore filed a Motion for Summary Judgment against the Sherwood Plaintiffs that was substantially similar to the motion he filed against the Ben-Kely Plaintiffs." *See* Plaintiffs' Opposition at 3:16-18. The Ben-Kely plaintiffs "adopt[ed] by reference the Sherwood Plaintiffs' Opposition to that motion and incorporate[d] the Sherwood arguments as though fully set forth herein." *Id.* at 3:19-20.

Likewise, Mr. Fiore adopts by reference his Reply in Support of his Motion for Summary Judgment brought against the Sherwood plaintiffs (filed separately with the court) and incorporates its

1 arguments as though fully set forth herein.

2 **C. CAUSES OF ACTION SOUNDING IN NEGLIGENCE SHOULD BE**
3 **DISMISSED BECAUSE THE BEN-KELY PLAINTIFFS ARE**
4 **ABANDONING THEIR CLAIMS OF NEGLIGENCE**

5 The Ben-Kely plaintiffs state that they will be abandoning their negligence claim against Mr. Fiore.
6 *See* Plaintiffs' Opposition at 5:8-10. Based on this representation, Mr. Fiore asks this court to grant
7 summary judgment as to all of the causes of action sounding in negligence (negligence, vicarious liability
8 and wrongful death). Granting summary judgment on these causes of action will avoid later confusion and
9 conserve judicial resources.

10 **D. MR. FIORE DOES NOT QUALIFY AS A MERCHANT SUBJECT TO**
11 **THE DOCTRINE OF STRICT PRODUCTS LIABILITY**

12 Plaintiffs' Opposition wrongly focuses upon the *nature* of the lease/sale of the vehicle rather than
13 the *status* of the lessor/seller. The financial arrangement between Mr. Fiore and SpeedVegas with regard to
14 the subject vehicle was not a simple transfer of title as in a sale, and it was not a simple rental of the
15 vehicle for a set price for an interval of time. However, there is no legal authority cited by plaintiffs or
16 found anywhere in the United States that supports the proposition that it is the *nature of the transaction*
17 that determines whether the seller or lessor of a product is strictly liable in tort for product defects. The
18 sole consideration for holding a person or entity strictly liable for product defects is their status as one who
19 is "engaged in the business of selling such a product." *See* Restatement (Second) of Torts § 402A(1)
20 (1965). No other factor is relevant to such a determination.

21 As set forth in this defendant's moving papers, Nevada's Supreme Court has expressly followed
22 the Restatement (Second) of Torts section 402A on this point. *See Elley v. Stephens*, 104 Nev. 413, 760
23 P.2d 768 (1988). The Court stated:

24 [A] strict liability theory is not applicable to an occasional seller of a product, who
25 does not, in the regular course of his business, sell such a product. *See, e.g.,*
26 Restatement (Second) of Torts § 402A (1965); Prosser and Keaton on Torts 705
27 (5th ed. 1984) ("Only a seller who can be regarded as a merchant or one engaged in
28 the business of supplying goods of the kind involved in the case is subject to strict

liability, whether on warranty or in tort.”); *Bailey v. ITT Grinnell Corp.*, 536 F.Supp. 84, 87 (N.D.Ohio 1982) (“[S]trict tort liability is not an appropriate theory of liability for application to the occasional seller); *Lemley v. J & B Tire Co.*, 426 F.Supp. 1376, 1377 (W.D.Penn.1977) (“The plaintiffs cannot prevail on their [strict liability cause of action] because the defendants ... are not sellers engaged in the business of selling such a product.”).

Elley, 104 Nev. at 418.

The plaintiffs do not dispute the fact that Mr. Fiore was an occasional or one-time seller/lessor of an automobile and did not, “in the regular course of his business, sell such a product.” Restatement (Second) of Torts § 402A (1965). They have offered no evidence to support a finding that Mr. Fiore was “a seller who can be regarded as a merchant or one engaged in the business of supplying goods of the kind involved in the case.” *Prosser and Keaton on Torts* 705 (5th ed. 1984). Indeed, they do not dispute Undisputed Material Fact No. 5: Felice J. Fiore, Jr. was not, at the time he leased the subject Lamborghini Aventador to SpeedVegas, a merchant engaged in the business of supplying goods of the kind (automobiles) involved in the case.

**1. NO TRIABLE ISSUE OF FACT REMAINS WITH
REGARD TO MR. FIORE’S STATUS AS A
SELLOR/LESSOR**

Mr. Fiore’s Motion for Summary Judgment cited to Nevada Jury Instruction 7.1 on Products Liability. It was suggested in the opposition to Mr. Fiore’s summary judgment motion against the Ward/Sherwood plaintiffs (the Ben-Kely plaintiffs have incorporated such opposition into their opposition) that Nevada Jury Instruction 7.1 renders this issue of whether Mr. Fiore is “a merchant engaged in the business of supplying goods of the kind involved in the case” (Nevada Jury Instruction 7.1) a question of fact for the jury to determine. However, when the fact is conceded, unopposed or there is no admissible evidence offered to contest it, the fact may be accepted by the court as true and “grant summary judgment if the motion and supporting materials - including the facts considered undisputed - show that the movant is entitled to it.” NRCF Rule 56, subdivision (e)(3).

///

1 The rule is clear. In order for a person or entity who sells or rents/leases a product to be subject to
2 strict products liability for defects, that person or entity must be engaged in the business of selling such
3 products and cannot be a one-time or occasional seller. The type of sale, lease or rental; whether it was a
4 personal or commercial sale; whether the seller did it to unload something that was unwanted or to turn a
5 profit; has never been the determinative factor in any jurisdiction in applying strict products liability for
6 defects upon the seller. The plaintiffs have not challenged Undisputed Material Facts 5 or 6 and cite no
7 authority in Nevada or anywhere else in the United States in support of their argument. There is no legal
8 basis to deny Mr. Fiore's motion.

9 2. PLAINTIFFS' ARGUMENTS LACK LEGAL SUPPORT

10 Plaintiffs claim that "there is no case on point in Nevada." *See* Plaintiffs' Opposition at 5:18.
11 Actually, there is and it has been cited in both the moving papers and in this Reply: *Elley v. Stephens*,
12 *supra*, 104 Nev. 413 (1988). Plaintiffs just do not agree with it. Instead, they cite to *Kemp v. Miller*, a
13 Wisconsin Supreme Court case which found that rental car company Budget Rent-a-Car is subject to the
14 doctrine of strict products liability. *Id.* 5:18-6:6.

15 *Kemp* is not controlling authority in Nevada. In fact, the Supreme Court of Nevada has declined to
16 make a determination whether strict liability applies to lessors of personalty. *See Maduike v. Agency*
17 *Rent-a-Car*, 114 Nev. 1, 6 n.1, 953 P.2d 24, 27 n.1 (1998). Indeed, the rental agency defendant waived
18 this issue by failing to address it in its opening brief; instead, the rental agency simply assumed that strict
19 liability applied. Because of that waiver, the Court expressly "decline[d] to address the general
20 applicability of strict liability to lessors of personalty." *Id.*

21 Further, both the facts and application of law in *Kemp* are also very distinguishable from the
22 present case. The court in *Kemp* was asked to apply strict products liability law for product defects to a
23 rental car agency when the defendant agency argued that such liability was limited to *sellers*, not renters.
24 In finding that Budget Rent-a-Car could be held strictly liable for product defects in the cars it rented to
25 the public, the Wisconsin Supreme Court stated:

26 Accordingly, we hold that a commercial lessor may be held strictly liable in
27 tort for damages resulting from the lease of a defective and unreasonably
28 dangerous product. We further hold that such liability extends not only to

1 design and manufacturing defects but also to defects which arise after the
2 product leaves the manufacturer's control. In proving an action in strict
3 liability against a commercial lessor, the plaintiff must establish that the
4 product was in a defective condition when it left the possession or control of
5 the manufacturer or the lessor; that it was unreasonably dangerous to the
6 user or consumer; that the defect was a cause or a substantial factor of the
7 plaintiff's injuries or damages; *that the lessor was engaged in the business of*
8 *leasing the product or, put negatively, that the lease was not an isolated or*
9 *infrequent transaction not related to the principal business of the lessor;* and
10 that the product was expected to and did reach the user or consumer without
11 substantial change in the condition in which it was leased. (Emphasis added.
12 *Kemp v. Miller*, 154 Wis. 2d 538, 558 (1990).)

13 The one case cited by plaintiffs to counter the argument that Mr. Fiore cannot be held liable to
14 plaintiffs for strict products liability actually proves the rule. Unlike Budget Rent-a-Car, Mr. Fiore, as an
15 individual, was not in the business of selling, renting or leasing cars. Other than the Aventador, Mr. Fiore
16 has never leased a car he owned. The Ben-Kely plaintiffs do not dispute this fact.

17 What plaintiffs have also failed to provide is a case that supports their claim that Mr. Fiore, by
18 leasing a single car for use at SpeedVegas in his capacity as a “part owner” and “board member” of
19 SpeedVegas, was converted from an individual who was a one-time seller/lessor of a single car, into a
20 merchant engaged in the business of supplying goods of the kind involved in this case. Again, the rule is
21 clear and none of these other factors have ever been considered regarding the application of strict products
22 liability to a seller.

23 Further, if denied, what is the triable issue of fact as to this cause of action? What does the jury
24 have to decide before the law governing strict liability in tort for defective products is applied? Plaintiffs
25 have not presented any evidence that Mr. Fiore was a merchant engaged in the business of selling or
26 leasing vehicles. Plaintiffs do not dispute the fact that Mr. Fiore has never entered into a lease agreement
27 like this either before or since the incident. If there is no material fact in dispute to present to the jury,
28 summary judgment is appropriate.

1 In sum, Mr. Fiore was a one-time seller/lessor of the Aventador. As such, he is not subject to the
2 doctrine of strict products liability. Plaintiffs' Opposition has not identified any facts or authority that view
3 Mr. Fiore's leasing of a single vehicle to SpeedVegas as automatically converting him into a merchant
4 engaged in the business of selling or leasing vehicles subject to strict products liability. There are no facts
5 in dispute for a jury to consider that go to this question. To hold otherwise would go against the public
6 policy underlying the doctrine. Consequently, the cause of action for strict products liability against Mr.
7 Fiore should be dismissed.

8 **E. PLAINTIFFS' OPPOSITION DOES NOT DISPUTE MR. FIORE'S**
9 **STATUTORY IMMUNITY**

10 EDCR Rule 2.20(e) states: "Failure of the opposing party to serve and file written opposition may
11 be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the
12 same." EDCR Rule 2.20(I) provides: "A memorandum of points and authorities that consists of bare
13 citations to statutes, rules, or case authority does not comply with this rule and the court may decline to
14 consider it."

15 Mr. Fiore's summary judgment motion has explained that, as an LLC member (shareholder), under
16 Nevada Revised Statute ("NRS") 86.371, Mr. Fiore is protected from individual liability for SpeedVegas's
17 debts or liabilities. *See* Fiore MSJ at 19:27-20:28. Pursuant to NRS 86.381, Mr. Fiore is also not a proper
18 party in these proceedings against SpeedVegas (causes of action for negligence, vicarious liability,
19 products liability and wrongful death). *Id.*

20 Under Nevada law, members and managers of Nevada limited liability companies are not proper
21 parties in proceedings against the company and are not personally liable for company debts or liabilities.
22 *See* NRS 86.381.

23 Chapter 86 of the NRS identifies the exceptions to these rules: when a person acts as a
24 limited-liability company without authority to do so (NRS 86.361); if the individual protection is waived
25 either within the written articles of organization or an agreement signed by the member (NRS 86.371); or
26 when a person acts as the alter ego of a company (NRS 86.376).

27 None of these exceptions apply here. As explained in the Fiore MSJ, Mr. Fiore leased the subject
28 Lamborghini Aventador to SpeedVegas in his capacity as a member of the SpeedVegas LLC, and was

1 authorized to do so. *See* Fiore MSJ at 21:3-8. Mr. Fiore has never waived the protection from individual
2 liability provided by NRS Chapter 86 for the debts or liabilities of SpeedVegas in any written instrument.
3 *Id.* Plaintiffs have not alleged that Mr. Fiore was acting as the alter ego of SpeedVegas and no facts have
4 been produced showing this. *Id.*; *see also generally* Plaintiffs’ Opposition.

5 In *Gardner v. Henderson Water Park, LLC*, 133 Nev. 391, 399 P.3d 350 (2017), the Nevada
6 Supreme Court clarified that members of an LLC are liable only for the breach of a personal duty owed to
7 the plaintiffs. If the challenged conduct of an individual member is not “separate and apart from the
8 challenged conduct” of the LLC, the member is not personally liable. *Id.* at 393-94.

9 Here, plaintiffs seek to hold Fiore liable solely by virtue of his membership in SpeedVegas. The
10 conduct of which he is accused applies equally to the LLC. And there is no evidence that Fiore assumed a
11 personal duty to the plaintiffs outside of his membership in the LLC.

12 In fact, the lease agreement for the Aventador, attached by plaintiffs as Exhibit 1 to their
13 Opposition, includes a provision wherein SpeedVegas specifically indemnifies Mr. Fiore for any liabilities
14 related to the lease of the car. *See* Plaintiffs’ Opposition, Ex. 1 - Aventador Lease at ¶ 7.

15 Mr. Fiore’s MSJ also explained that, as a paid member of SpeedVegas’s board of directors, Mr.
16 Fiore is afforded the protection of the Nevada Industrial Insurance Act’s (“NIIA”) exclusive remedy
17 provision. *See* Fiore MSJ at 21:1-24:9. Though he may have had another role at SpeedVegas as the owner
18 of the Aventador, Nevada does not recognize the dual capacity doctrine in worker’s compensation cases.
19 Consequently, the NIIA remedy supersedes any liability he may face as the vehicle’s owner (causes of
20 action for negligence, vicarious liability, products liability and wrongful death). *Id.*

21 Neither Plaintiffs’ Opposition nor the Sherwood Plaintiffs’ Opposition has addressed Mr. Fiore’s
22 statutory immunities at all. The failure to address the statutory immunity arguments does not satisfy the
23 requirements of the EDCR. Mr. Fiore asks this court to exercise its authority to construe plaintiffs’ failure
24 to address the arguments as plaintiffs’ admission that the arguments are meritorious and a consent to
25 granting this motion.

26 Since Mr. Fiore’s statutory immunities apply to all causes of action brought against him by
27 plaintiffs, Mr. Fiore requests that this court dismiss any remaining causes of action not disposed of by
28 plaintiffs’ abandonment of their negligence claims.

III. CONCLUSION

Based on the foregoing, defendant Felice J. Fiore, Jr. asks this Court to grant summary judgment in his favor and dismiss all of the causes of action raised against him in the Ben-Kely plaintiffs' Complaint. Three of the four causes of action raised by plaintiffs against Mr. Fiore that sound in negligence – negligence, vicarious liability and wrongful death – have been abandoned by the plaintiffs. As to the last remaining cause of action against Mr. Fiore, strict products liability, this claim should be dismissed since Mr. Fiore was not and has never been a merchant engaged in the business of supplying goods of the kind involved in this matter (automobiles). Further, Mr. Fiore asks this court to construe the total absence of any argument against Mr. Fiore's statutory immunities as an admission that Mr. Fiore's arguments are meritorious and a consent to granting the motion as to all causes of action brought against Mr. Fiore.

DATED: June 29, 2021

PERRY & WESTBROOK

/s/ Alan W. Westbrook

Alan W. Westbrook, Esq.
Attorneys for Defendants, SPEEDVEGAS, LLC;
FELICE J. FIORE, JR.; and TOM MIZZONE

DATED: June 29, 2021

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DATED: June 29, 2021

TAYLOR ANDERSON, LLP

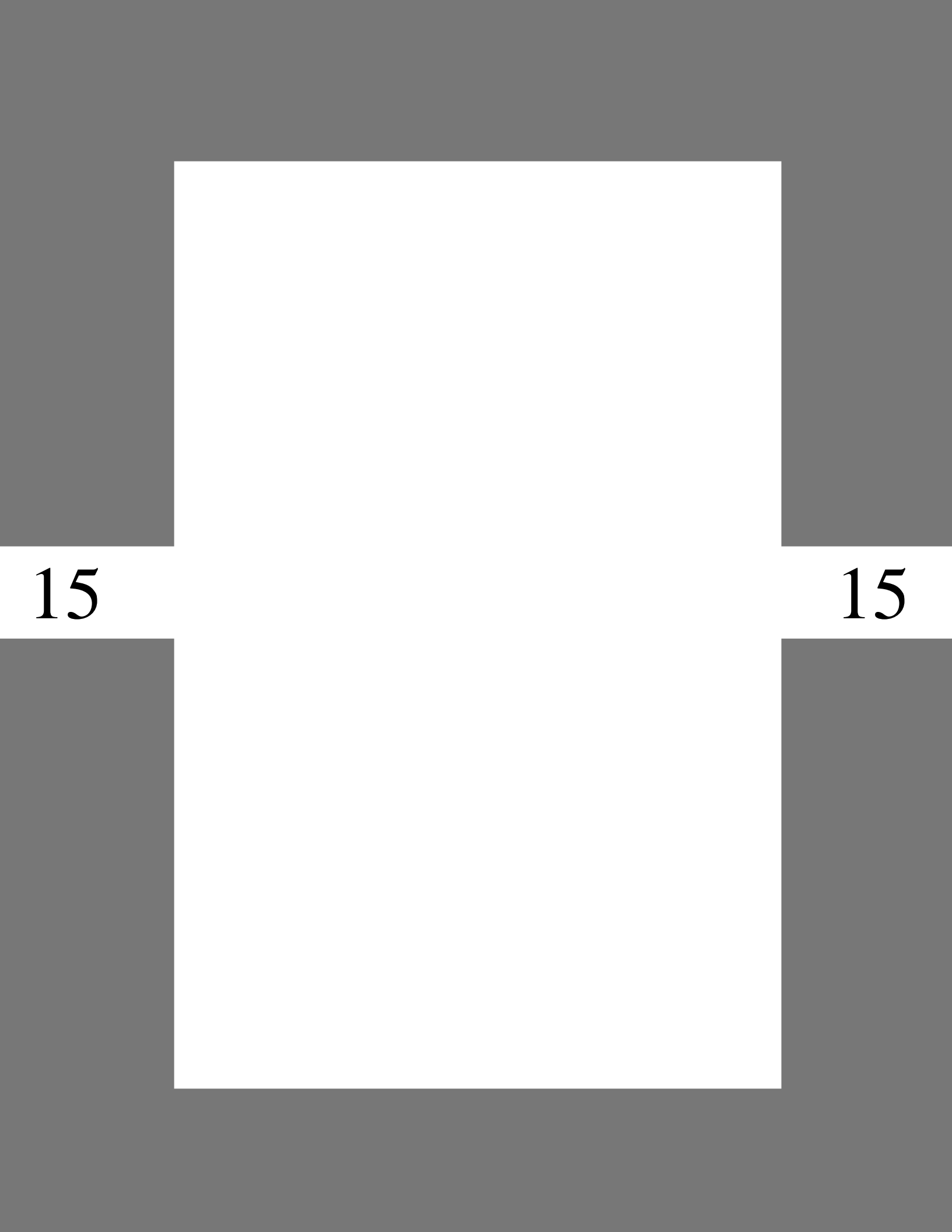
/s/ James D. Murdock

Brent D. Anderson, Esq.
James D. Murdock, Esq.
Attorneys for Defendants, SPEEDVEGAS, LLC;
FELICE J. FIORE, JR.; and TOM MIZZONE

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that service of the foregoing: **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT FELICE J. FIORE, JR., AGAINST PLAINTIFFS ESTATE OF GIL BEN-KELY, ANTONELLA BEN-KELY, SHON BEN-KELY, and NATHALIE BEN-KELY SCOTT** was made on this 28th day of June 2021 to all parties appearing on the electronic service list in Odyssey E-File.

/s/ 
Angelica Green-Rosas



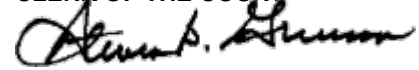
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Steven D. Grierson

CLERK OF THE COURT

**RIS**

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DISTRICT COURT
CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by
ANTONELLA BEN-KELY, the duly
appointed representative of the Estate and as
the widow and heir of Decedent GIL
BEN-KELY; SHON BEN-KELY, son and
heir of decedent GIL BEN-KELY;
NATHALIE BEN-KELY-SCOTT, daughter
and heir of the decedent GIL BEN-KELY;
GWENDOLYN WARD, as personal
representative of the ESTATE OF CRAIG
SHERWOOD, deceased; GWENDOLYN
WARD, individually and as surviving spouse
of CRAIG SHERWOOD, deceased;
GWENDOLYN WARD, as mother and
natural guardian of ZANE SHERWOOD,
surviving minor child of CRAIG
SHERWOOD, deceased

Plaintiffs,

vs.

SPEEDVEGAS, LLC, a Delaware Limited
liability company; SCOTT GRAGSON
WORLD CLASS DRIVING, an unknown
entity; SLOAN VENTURES 90, LLC, a
Nevada limited liability company, ROBERT
BARNARD; MOTORSPORT SERVICES
INTERNATIONAL, LLC, a North Carolina

CASE NO.: A-17-757614-C

Dept. No.: XXVII

REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT, OR, IN THE
ALTERNATIVE PARTIAL SUMMARY
JUDGMENT, AS TO DEFENDANT FELICE J.
FIORE, JR., AGAINST PLAINTIFFS ESTATE OF
CRAIG SHERWOOD, GWENDOLYN WARD,
and ZANE SHERWOOD

Hearing Date: July 6, 2021

Hearing Time: 1:00 p.m.

limited liability company; AARON
FESSLER; the ESTATE OF CRAIG
SHERWOOD; AUTOMOBILI
LAMBORGHINI AMERICAN, LLC a
foreign limited liability company; FELICE J.
FIORE, JR.; DOES I-X, inclusive; and ROE
CORPORATIONS IX, inclusive,
Defendants

GWENDOLYN WARD, as Personal
Representative of the ESTATE OF CRAIG
SHERWOOD, deceased; GWENDOLYN
WARD, Individually, and surviving spouse
of CRAIG SHERWOOD, deceased
GWENDOLYN WARD, as mother and
natural guardian of ZANE SHERWOOD,
surviving minor child of CRAIG
SHERWOOD, deceased,
Crossclaim Plaintiffs,

ESTATE OF GIL BEN-KELY by
ANTONELLA BEN-KELY, the duly
appointed representative of the ESTATE;
DOES I-X, inclusive,
Crossclaim Defendants

ESTATE OF BEN-KELY by ANTONELLA
BEN KELY, duly appointed representative of
the Estate and widow and heir of decedent
GIL BEN-KELY; SHON BEN KELY, son
and heir of decedent GIL BEN-KELY;
NATHALIE BEN-KELY SCOTT, daughter
and here of decedent GIL BEN-KELY,
Crossclaim Plaintiffs

ESTATE OF CRAIG SHERWOOD; DOES
I-X, inclusive; and ROE CORPORATIONS
I-X, inclusive,
Crossclaim Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Ward/Sherwood plaintiffs' Opposition to Felice J. Fiore's Motion for Summary Judgment ("Plaintiffs' Opposition") states that the Ward/Sherwood plaintiffs ("Sherwood plaintiffs" or "plaintiffs") "intend to drop the negligence claims against Mr. Fiore at the time of the pretrial memorandum, thereby mooting that portion of his motion." *See* Plaintiffs' Opposition at 4:9-11. *See also id.* at 5:6-10. Since the pretrial memorandum has not yet been filed by the Sherwood plaintiffs, Mr. Fiore asks this court grant summary judgment based on plaintiffs' representation as to the four causes of action raised by the Sherwood plaintiffs against Mr. Fiore that sound in negligence: wrongful death, negligence, negligent entrustment, and negligent products liability.

As for plaintiffs' remaining cause of action against Mr. Fiore, for strict products liability, Plaintiffs' Opposition has not provided any authority showing that Mr. Fiore qualifies as a "merchant" subject to strict products liability. Plaintiffs' Opposition acknowledges that Mr. Fiore was a shareholder/member of the SpeedVegas LLC and a member of its board of directors, describing him as a "part-owner" in the SpeedVegas racetrack who "negotiated a lease deal" for the use of the Aventador subject vehicle at the racetrack. *See* Plaintiffs' Opposition at 4:27-5:3. Mr. Fiore's Motion for Summary Judgment has explained that Mr. Fiore was not engaged in the business of leasing or selling automobiles to others and therefore does not qualify as a merchant who is subject to strict liability for product defects. Plaintiffs' arguments against this do not overcome the simple fact that Mr. Fiore was not, at the time he leased the subject Lamborghini Aventador to SpeedVegas, a merchant engaged in the business of supplying goods of the kind (automobiles) involved in this case, nor has he ever leased a car that he owned to anyone else or engaged in the business of supplying goods of the kind (automobiles) involved in this matter.

Importantly, by acknowledging Mr. Fiore's status as a shareholder/member or, as plaintiffs put it, a "part-owner" of the SpeedVegas racetrack, Mr. Fiore has statutory immunity from individual liability for SpeedVegas's debts or liabilities and, by statute, he is not a proper party to this suit. Plaintiffs' Opposition has completely failed to address this argument; plaintiffs do not dispute the statutory protection or discuss it anywhere in their Opposition. Under EDCR Rule 2.20(e), the court may treat this failure as an admission

1 by plaintiffs that the motion is meritorious and a consent to granting the same. EDCR Rule 2.20(i)
2 provides that a memorandum of points and authorities consisting of bare citations to statutes, rules, or case
3 authority does not comply with this rule and the court may decline to consider it.

4 Since Mr. Fiore, as an individual, was not and has never been a merchant engaged in the business
5 of supplying goods of the kind involved in this matter (automobiles), Mr. Fiore asks this court to dismiss
6 the cause of action brought against him for strict products liability. In addition, Mr. Fiore asks this court to
7 construe the total absence of any argument against Mr. Fiore's statutory immunity as an admission by
8 plaintiffs that Mr. Fiore's arguments as to his statutory immunities are meritorious and a consent to
9 granting the Motion. As Mr. Fiore's statutory immunity apply to all causes of action brought against him
10 by plaintiffs, Mr. Fiore requests that this court dismiss any remaining causes of action not disposed of by
11 plaintiffs' abandonment of their negligence claims.

12 **II. ARGUMENT**

13 **A. PLAINTIFFS DO NOT DISPUTE ANY OF THE OFFERED** 14 **UNDISPUTED MATERIAL FACTS.**

15 The plaintiffs do not dispute any of the material facts offered by defendant Fiore or object to
16 evidence offered in support. Pursuant to NRCP Rule 56 subdivision (e)(2) this court may "consider the
17 fact[s] undisputed for purposes of the motion."

18 Undisputed Material Fact No. 1: Felice J. Fiore, Jr. was a member (shareholder) of the SpeedVegas
19 LLC at the time of the Incident.

20 Undisputed Material Fact No. 2: Felice J. Fiore, Jr. was a paid member of SpeedVegas's Board of
21 Directors at the time of the Incident.

22 Undisputed Material Fact No. 5: Felice J. Fiore, Jr. was not, at the time he leased the subject
23 Lamborghini Aventador to SpeedVegas, a merchant engaged in the business of supplying goods of the
24 kind (automobiles) involved in the case.

25 Undisputed Material Fact No. 6: Felice J. Fiore, Jr. has never been a merchant engaged in the
26 business of supplying goods of the kind (automobiles) involved in the case.

27 ///

28 ///

B. MR. FIORE WAS NOT A MERCHANT SELLER THAT SUBJECTS HIM TO STRICT PRODUCTS LIABILITY FOR DEFECTS

As explained in the Fiore motion for summary judgment (hereafter, “Fiore MSJ”), the doctrine of strict liability in tort for product defects does not apply to occasional sellers or lessors of goods. *See* Fiore MSJ at 15:10-20:10. The Fiore MSJ cites Nevada Supreme Court case *Elley v. Stephens*, 104 Nev. 413, 760 P.2d 768 (1988), which adopts the Restatement (Second) of Torts’ rule on products liability (§ 402A(1)). *See id.* at 16:11-17:20. *Elley* notes that under the Restatement (Second), strict products liability does not apply to the occasional seller of products who is not engaged in that activity as part of his business. *Id.* As quoted in the Fiore MSJ: “Thus it does not apply to the housewife who, on one occasion, sells to her neighbor a jar of jam or a pound of sugar. Nor does it apply to the owner of an automobile who, on one occasion, sells it to his neighbor, or even sells it to a dealer in used cars. . . . [H]e is not liable to a third person, or even to his buyer, in the absence of his negligence.” *Id.*

The Fiore MSJ’s citation to Nevada Jury Instruction 7.1 on Products Liability further demonstrates Nevada’s adoption of the Restatement’s exclusion of a seller who is not “a merchant engaged in the business of supplying goods of the kind involved in the case” from strict liability for a product defect. *See* Fiore MSJ at 17:21-18:7. The Fiore MSJ further explains that, in surveying all 50 states and the District of Columbia, every jurisdiction that has examined the issue of what constitutes a “seller” for purposes of applying strict products liability either follows the Restatement (Second) or has adopted its own legislation that is virtually identical. *Id.* at 18:8-18:22. The Fiore MSJ then cites sixteen cases which demonstrate widespread application, across the country, of the rule that occasional sellers or lessors are not subject to the doctrine of strict products liability. *See id.*

The Sherwood Plaintiffs argue that because the Fiore MSJ cites to the Nevada Jury Instruction for strict products liability, this operates as an acknowledgment that Mr. Fiore’s status as a “merchant” is “a question of fact for the jury.” *See* Plaintiffs’ Opposition at 5:21-23. This argument infers that if a jury instruction exists for a cause of action, the cause of action cannot be summarily adjudicated. No authority is cited to support Plaintiffs’ contention that the mere existence of a jury instruction for a cause of action prevents the cause of action from being decided on summary judgment. When the fact is conceded, unopposed or there is no admissible evidence offered to contest it, the fact may be accepted by the court as

1 true and “grant summary judgment if the motion and supporting materials - including the facts considered
2 undisputed - show that the movant is entitled to it.” NRC Rule 56, subdivision (e)(3).

3 The Sherwood Plaintiffs erroneously cite *Lucas v. Dorsey Corp.*, 609 N.E.2d 1191 (Ind. 1993) for
4 their claim that a jury must decide whether a defendant is a merchant subject to strict products liability.
5 See Plaintiffs’ Opposition at 5:24-26. *Lucas* is cited in the Fiore motion because it, like more than a dozen
6 other cases throughout the United States, acknowledged that an occasional seller is not subject to strict
7 products liability. See generally *Lucas v. Dorsey Corp.*, 609 N.E.2d 1191, 1202 (Ind. 1993). *Lucas*,
8 however, did not deal with the sale or lease of a single item; the defendant in *Lucas* sold nine digger
9 derricks (construction cranes), four of which were returned to defendant, who scrapped them rather than
10 reselling them. See generally *id.* Unlike the present case, which involves a single item, the defendant in
11 *Lucas* participated in multiple sales, but no resales of any returned items; the court in *Lucas* specifically
12 said these facts differ from another case, *Sukljian v. Charles Ross and Son Co.*, where “a corporation sold
13 a single machine that it had previously used in its own production for eleven years, as surplus property.”
14 See *id.* It is because of this distinction that the *Lucas* court found that the jury must determine whether the
15 *Lucas* defendant was a merchant subject to strict products liability. See generally *id.*

16 The distinctions plaintiffs attempt to draw between the present case and the cases cited in the Fiore
17 summary judgment motion similarly miss the point. The cases cited in the Fiore Motion unequivocally
18 demonstrate that occasional sellers or lessors of a product are not subject to the doctrine of strict products
19 liability. There is no legal authority cited by plaintiffs or found anywhere in the United States that supports
20 the proposition that it is the *nature of the transaction* that determines whether the seller or lessor of a
21 product is strictly liable in tort for product defects. The sole consideration for holding a person or entity
22 strictly liable for product defects is their status as one who is “engaged in the business of selling such a
23 product.” Restatement (Second) of Torts § 402A(1) (1965). No other factor is relevant to such a
24 determination. Thus, whether Mr. Fiore was making money in the deal is not determinative.

25 As set forth in this defendant’s moving papers, Nevada’s Supreme Court has expressly followed
26 the Restatement (Second) of Torts section 402A on this point. See *Elley v. Stephens*, 104 Nev. 413, 760
27 P.2d 768 (1988). The Court stated:

28 [A] strict liability theory is not applicable to an occasional seller of a product, who

1 does not, in the regular course of his business, sell such a product. See, e.g.,
2 Restatement (Second) of Torts § 402A (1965); Prosser and Keaton on Torts 705
3 (5th ed. 1984) (“Only a seller who can be regarded as a merchant or one engaged in
4 the business of supplying goods of the kind involved in the case is subject to strict
5 liability, whether on warranty or in tort.”); Bailey v. ITT Grinnell Corp., 536
6 F.Supp. 84, 87 (N.D.Ohio 1982) (“[S]trict tort liability is not an appropriate theory
7 of liability for application to the occasional seller); Lemley v. J & B Tire Co., 426
8 F.Supp. 1376, 1377 (W.D.Penn.1977) (“The plaintiffs cannot prevail on their [strict
9 liability cause of action] because the defendants ... are not sellers engaged in the
10 business of selling such a product.”).

11 *Elley*, 104 Nev. at 418.

12 The plaintiffs do not dispute the fact that Mr. Fiore was an occasional or one-time seller/lessor of
13 an automobile and did not, “in the regular course of his business, sell such a product.” Restatement
14 (Second) of Torts § 402A (1965). They have offered no evidence to support a finding that Mr. Fiore was
15 “a seller who can be regarded as a merchant or one engaged in the business of supplying goods of the kind
16 involved in the case.” Prosser and Keaton on Torts 705 (5th ed. 1984). Indeed, they do not dispute
17 Undisputed Material Fact No. 5: Felice J. Fiore, Jr. was not, at the time he leased the subject Lamborghini
18 Aventador to SpeedVegas, a merchant engaged in the business of supplying goods of the kind
19 (automobiles) involved in the case.

20 Notably, all cases regarding this question look at the *status* of the purported merchant. It is not a
21 question of how the person was paid, whether it was a commercial or private transaction, or whether the
22 product was sold to make money or to dispose of it. The question of whether the seller is a “merchant”
23 subject to strict products liability turns on the status of the person selling the item.

24 Plaintiffs spent considerable time unsuccessfully drawing distinctions between this case and the
25 cases cited in the Fiore MSJ, but they do not come up with a single case that held that something other
26 than the status of the purported merchant is to be considered.

27 Plaintiffs briefly mention that *Maduike v. Agency Rent-a-Car*, 114 Nev. 1, 953 P.2d 24 (1998)
28 “appl[ied] strict liability principles to [a] lessor.” See Plaintiffs’ Opposition at 6:4-5. What they fail to

1 disclose is that the Nevada Supreme Court did not decide whether strict liability applies to “lessors of
2 personalty.” *See Maduike v. Agency Rent-a-Car*, 114 Nev. 1, 6 n.1, 953 P.2d 24, 27 n.1 (1998). Indeed,
3 the rental agency defendant waived this issue by failing to address it in its opening brief; instead, the rental
4 agency simply assumed that strict liability applied. Because of that waiver, the Court expressly “decline[d]
5 to address the general applicability of strict liability to lessors of personalty.” *Id.*

6 What Plaintiffs have also failed to provide is a case that supports their claim that Mr. Fiore, by
7 leasing a single car for use at SpeedVegas in his capacity as a “part owner” and “board member” of
8 SpeedVegas, was converted from an individual who was an occasional seller/lessor of a single car, into a
9 merchant engaged in the business of supplying goods of the kind involved in this case. Again, the rule is
10 clear and none of these other factors have ever been considered regarding the application of strict products
11 liability to a seller.

12 Further, if denied, what is the triable issue of fact as to this cause of action? What does the jury
13 have to decide before the law governing strict liability in tort for defective products is applied? Plaintiffs
14 have not presented any evidence that Mr. Fiore was a merchant engaged in the business of selling or
15 leasing vehicles. Plaintiffs do not dispute the fact that Mr. Fiore has never entered into a lease agreement
16 like this either before or since the incident. If there is no material fact in dispute to present to the jury,
17 summary judgment is appropriate.

18 The rule is clear. In order for a person or entity who sells or rents/leases a product to be subject to
19 strict products liability for defects, that person or entity must be engaged in the business of selling such
20 products and cannot be a one-time or occasional seller. The type of sale, lease or rental; whether it was a
21 personal or commercial sale; whether the seller did it to unload something that was unwanted or to turn a
22 profit; has never been the determinative factor in any jurisdiction in applying strict products liability for
23 defects upon the seller. The plaintiffs have not challenged Undisputed Material Facts 5 or 6 and cite no
24 authority in Nevada or anywhere else in the United States in support of their argument. There is no legal
25 basis to deny Mr. Fiore’s Motion.

26 In sum, Mr. Fiore was a one-time seller/lessor of the Aventador. As such, he is not subject to the
27 doctrine of strict products liability. Plaintiffs’ Opposition has not identified any facts or authority that view
28 Mr. Fiore’s leasing of a single vehicle to SpeedVegas as automatically converting him into a merchant

engaged in the business of selling or leasing vehicles subject to strict products liability. There are no facts in dispute for a jury to consider that go to this question. To hold otherwise would go against the public policy underlying the doctrine. Consequently, the cause of action for strict products liability against Mr. Fiore should be dismissed.

**C. MR. FIORE IS NOT LIABLE FOR THE DEBTS, OBLIGATIONS OR
LIABILITIES OF SPEEDVEGAS, LLC**

EDCR Rule 2.20(e) states: “Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.” EDCR Rule 2.20(i) provides: “A memorandum of points and authorities that consists of bare citations to statutes, rules, or case authority does not comply with this rule and the court may decline to consider it.”

As explained in Mr. Fiore’s Motion for Summary Judgement, Mr. Fiore is a member of SpeedVegas LLC. In Delaware, the state in which SpeedVegas, LLC was organized, limited liability company members and managers are not personally obligated for company debt, obligations, or liabilities. *See* Fiore MSJ, Ex. 26 – 6 Del.C. § 18-303(a).

Under Nevada law, members and managers of Nevada limited liability companies are not proper parties in proceedings against the company and are not personally liable for company debts or liabilities. *See* NRS 86.381.

Chapter 86 of the NRS identifies the exceptions to these rules: when a person acts as a limited-liability company without authority to do so (NRS 86.361); if the individual protection is waived either within the written articles of organization or an agreement signed by the member (NRS 86.371); or when a person acts as the alter ego of a company (NRS 86.376).

None of these exceptions apply here. As explained in the Fiore MSJ, Mr. Fiore leased the subject Lamborghini Aventador to SpeedVegas in his capacity as a member of the SpeedVegas LLC, and was authorized to do so. *See* Fiore MSJ at 21:3-8. Mr. Fiore has never waived the protection from individual liability provided by NRS Chapter 86 for the debts or liabilities of SpeedVegas in any written instrument. *Id.* Plaintiffs have not alleged that Mr. Fiore was acting as the alter ego of SpeedVegas and no facts have been produced showing this. *Id.*; *see also generally* Plaintiffs’ Opposition.

1 In *Gardner v. Henderson Water Park, LLC*, 133 Nev. 391, 399 P.3d 350 (2017), the Nevada
2 Supreme Court clarified that members of an LLC are liable only for the breach of a personal duty owed to
3 the plaintiffs. If the challenged conduct of an individual member is not “separate and apart from the
4 challenged conduct” of the LLC, the member is not personally liable. *Id.* at 393-94.

5 Here, plaintiffs seek to hold Fiore liable solely by virtue of his membership in SpeedVegas. The
6 conduct of which he is accused applies equally to the LLC. And there is no evidence that Fiore assumed a
7 personal duty to the plaintiffs outside of his membership in the LLC.

8 In fact, the lease agreement for the Aventador, attached by plaintiffs as Exhibit 1 to their
9 Opposition, includes a provision wherein SpeedVegas specifically indemnifies Mr. Fiore for any liabilities
10 related to the lease of the car. *See* Plaintiffs’ Opposition, Exhibit 1, p.2, ¶ 7.

11 Simply put, under NRS Chapter 86, Mr. Fiore is protected from individual liability as a member of
12 SpeedVegas LLC and is not a proper party in these proceeding. Plaintiffs’ Opposition has not identified
13 the presence of any exceptions to these well-established rules. More importantly, Plaintiffs’ Opposition
14 has not addressed Mr. Fiore’s statutory immunities at all. The failure to address the statutory immunity
15 arguments does not satisfy the requirements of the EDCR. Mr. Fiore asks this court to exercise its
16 authority to construe plaintiffs’ failure to address the arguments as plaintiffs’ admission that the arguments
17 are meritorious and a consent to granting the same.

18 Since Mr. Fiore’s statutory immunities apply to all causes of action brought against him by
19 plaintiffs, Mr. Fiore requests that this court dismiss any remaining causes of action not disposed of by
20 plaintiffs’ abandonment of their negligence claims.

21 **III. CONCLUSION**

22 Based on the foregoing, defendant Felice J. Fiore, Jr. asks this Court to grant summary judgment in
23 his favor and dismiss all of the causes of action raised against him in the Ward/Sherwood plaintiffs’
24 Complaint. Four of the five causes of action raised by the Ward/Sherwood plaintiffs against Mr.
25 Fiore—wrongful death, negligence, negligent entrustment, and negligent products liability – have been
26 abandoned by the Sherwood plaintiffs. As to the last remaining cause of action against Mr. Fiore, strict
27 products liability, this claim should be dismissed since Mr. Fiore was not and has never been a merchant
28 engaged in the business of supplying goods of the kind involved in this matter (automobiles). Further, Mr.

1 Fiore asks this court to construe the total absence of any argument against Mr. Fiore's statutory immunity
 2 as an admission that Mr. Fiore's arguments are meritorious and a consent to granting the same as to all
 3 causes of action brought against Mr. Fiore.

4
 5 DATED: June 29, 2021

PERRY & WESTBROOK

6 /s/ Alan W. Westbrook

7 Alan W. Westbrook, Esq.
 8 Attorneys for Defendants, SPEEDVEGAS, LLC;
 FELICE J. FIORE, JR.; and TOM MIZZONE

9 DATED: June 29, 2021

10 AGAJANIAN, McFALL, WEISS,
 TETREAULT & CRIST LLP

11 /s/ Paul L. Tetreault

12 Paul L. Tetreault, Esq.
 Regina S. Zernay, Esq.
 Attorneys for Defendants, SPEEDVEGAS, LLC;
 13 FELICE J. FIORE, JR.; and TOM MIZZONE

14 DATED: June 29, 2021

TAYLOR ANDERSON, LLP

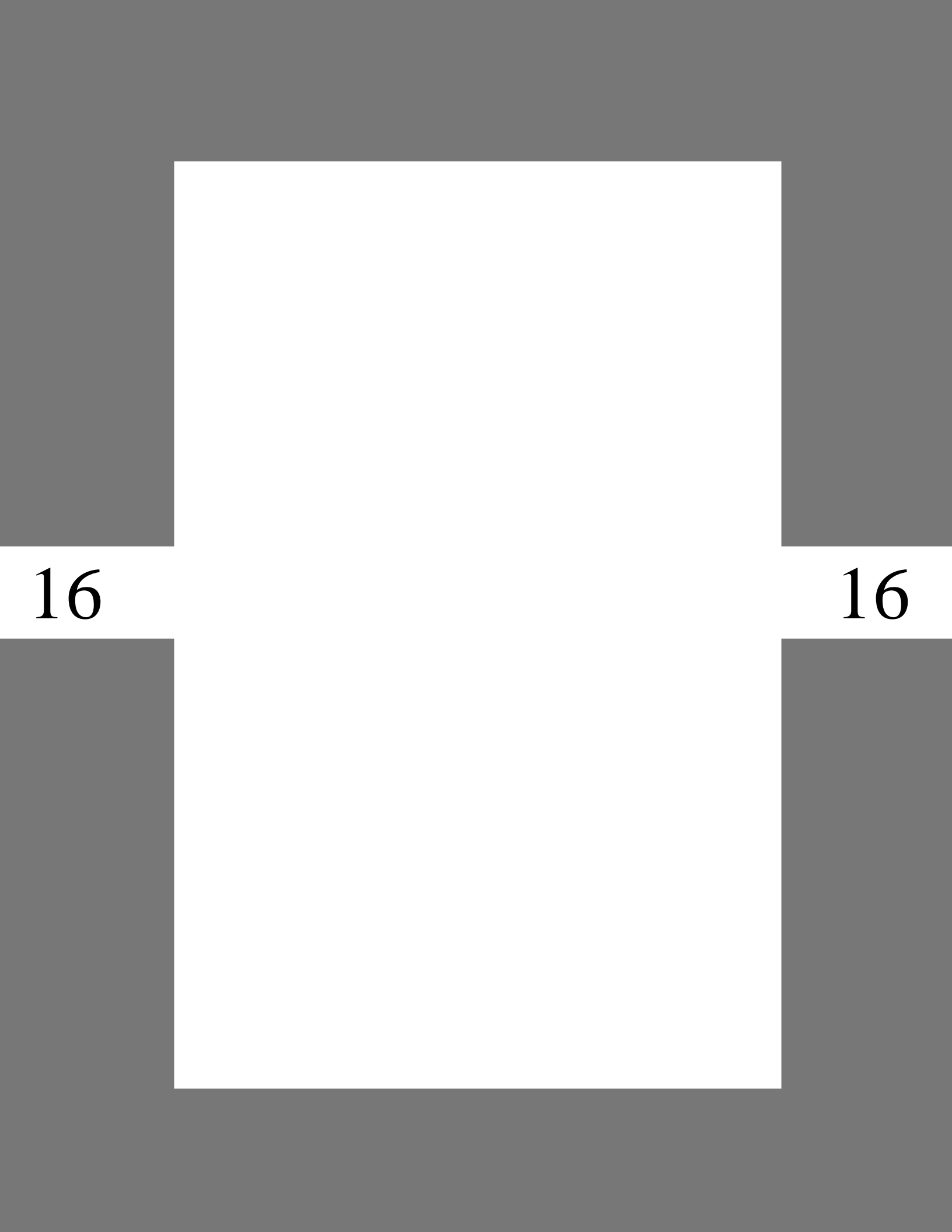
15 /s/ James D. Murdock

16 Brent D. Anderson, Esq.
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 Attorneys for Defendants, SPEEDVEGAS, LLC;
 17 FELICE J. FIORE, JR.; and TOM MIZZONE

CERTIFICATE OF SERVICE

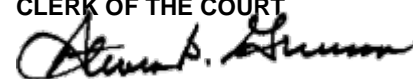
Pursuant to N.R.C.P. 5(b), I hereby certify that service of the foregoing: **REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT FELICE J. FIORE, JR., AGAINST PLAINTIFFS ESTATE OF CRAIG SHERWOOD, GWENDOLYN WARD, and ZANE SHERWOOD** was made on this 28th day of June 2021 to all parties appearing on the electronic service list in Odyssey E-File.

/s/ 
Angelica Green-Rosas



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Attorneys for Defendants, SPEEDVEGAS, LLC; FELICE J. FIORE, JR.; and TOM MIZZONE

DISTRICT COURT
CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by
ANTONELLA BEN-KELY, the duly
appointed representative of the Estate and as
the widow and heir of Decedent GIL
BEN-KELY; SHON BEN-KELY, son and
heir of decedent GIL BEN-KELY;
NATHALIE BENKELY-SCOTT, daughter
and heir of the decedent GIL BEN-KELY;
GWENDOLYN WARD, as personal
representative of the ESTATE OF CRAIG
SHERWOOD, deceased; GWENDOLYN
WARD, individually and as surviving spouse
of CRAIG SHERWOOD, deceased;
GWENDOLYN WARD, as mother and
natural guardian of ZANE SHERWOOD,
surviving minor child of CRAIG
SHERWOOD, deceased

Plaintiffs,

vs.

SPEEDVEGAS, LLC, a Delaware Limited
liability company; SCOTT GRAGSON
WORLD CLASS DRIVING, an unknown
entity; SLOAN VENTURES 90, LLC, a
Nevada limited liability company, ROBERT
BARNARD; MOTORSPORT SERVICES
INTERNATIONAL, LLC, a North Carolina

CASE NO.: A-17-757614-C
Dept. No.: XXVII

REPLY IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT, OR, IN THE
ALTERNATIVE PARTIAL SUMMARY
JUDGMENT, AS TO DEFENDANT
SPEEDVEGAS, LLC; AGAINST PLAINTIFFS
ESTATE OF CRAIG SHERWOOD,
GWENDOLYN WARD, and ZANE SHERWOOD

Hearing Date: July 6, 2021
Hearing Time: 1:00 p.m.

1 limited liability company; AARON
2 FESSLER; the ESTATE OF CRAIG
3 SHERWOOD; AUTOMOBILI
4 LAMBORGHINI AMERICA, LLC a foreign
5 limited liability company; FELICE J. FIORE,
6 JR.; DOES I-X, inclusive; and ROE
CORPORATIONS IX, inclusive,
Defendants

7 GWENDOLYN WARD, as Personal
8 Representative of the ESTATE OF CRAIG
9 SHERWOOD, deceased; GWENDOLYN
10 WARD, Individually, and surviving spouse
11 of CRAIG SHERWOOD, deceased
12 GWENDOLYN WARD, as mother and
natural guardian of ZANE SHERWOOD,
surviving minor child of CRAIG
SHERWOOD, deceased,
Crossclaim Plaintiffs,

13
14 ESTATE OF GIL BEN-KELY by
15 ANTONELLA BEN-KELY, the duly
appointed representative of the ESTATE;
DOES I-X, inclusive,

16
17 Crossclaim Defendants

18 ESTATE OF BEN-KELY by ANTONELLA
19 BEN KELY, duly appointed representative of
20 the Estate and widow and heir of decedent
21 GIL BEN-KELY; SHON BEN KELY, son
and heir of decedent GIL BEN-KELY;
22 NATHALIE BEN-KELY SCOTT, daughter
and here of decedent GIL BEN-KELY,

23 Crossclaim Plaintiffs

24 ESTATE OF CRAIG SHERWOOD; DOES
25 I-X, inclusive; and ROE CORPORATIONS
I-X, inclusive,

26 Crossclaim Defendants.
27
28

DECLARATION OF PAUL TETREAULT

I, Paul Tetreault, declare, as follows:

1. I am an attorney duly licensed to practice law in the State of California and admitted by Motion to practice in the above-referenced matter. I am a partner with the law firm of Agajanian, McFall, Weiss, Tetreault & Crist, LLP, attorneys of record for defendant, SPEEDVEGAS, LLC (“SpeedVegas” or “defendant”). I have personal knowledge of the facts set forth herein and if called upon, I could and would competently testify thereto.
2. Attached hereto as Exhibit “1” is a true and correct copy of relevant portions from the transcript of the Deposition of Cam Cope.
3. Attached hereto as Exhibit “2” is a true and correct copy of relevant portions from the transcript of the Deposition of Martyn Thake.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct. EXECUTED this 29th day of June, 2021, at Los Angeles, California.

/s/ Paul Tetreault

Paul Tetreault, Declarant

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The Ward/Sherwood plaintiffs (“Sherwood plaintiffs” or plaintiffs”) have raised six causes of action against defendant SpeedVegas, LLC (“SpeedVegas” or “defendant”): wrongful death, negligence, negligent hiring, respondeat superior, negligent products liability, and strict products liability. SpeedVegas has brought a Motion for Summary Judgment against the Sherwood Plaintiffs (“SpeedVegas Motion”) on the grounds that: (1) there is no evidence that SpeedVegas acted negligently; (2) there is no evidence that any of the acts or omissions of SpeedVegas caused or contributed to the incident in question; and (3) SpeedVegas does not qualify as a merchant that is subject to the doctrine of strict products liability. The Sherwood plaintiffs’ Opposition to SpeedVegas’s Motion (“Plaintiffs’ Opposition”) fails to establish that there are any material facts in dispute regarding the claims raised by them against SpeedVegas. Consequently, SpeedVegas asks this court to dismiss the six causes of raised by the Sherwood plaintiffs in this case.

II. ARGUMENT

Plaintiffs do not dispute the following material facts:

- The SpeedVegas track was designed and constructed by Robert Barnard and Motorsports Services International.
- There is no evidence that the crash of the Lamborghini at the SpeedVegas driving experience track on February 12, 2017, was caused by a mechanical failure, modification to the vehicle or improper maintenance.
- Although notice of a recall of the Lamborghini Aventador to correct a problem with the fuel evaporative canister was announced, such notice was not sent to owners, and Mr. Felice Fiore did not receive it, until after the date of this accident.
- There is no evidence that the crash of the Lamborghini Aventador at the SpeedVegas driving experience track on February 12, 2017, was caused by a negligently designed or constructed track, or negligently designed or constructed wall.
- There is no evidence that the fire following the crash of the Lamborghini Avantador was the result of a negligently designed or constructed track or wall.

1 Rather, plaintiffs allege that: (1) Ben-Kely plaintiffs' decedent Gil Ben-Kely was negligent in his
2 coaching of Mr. Sherwood; (2) SpeedVegas was negligent when it came to fire-related issues; and (3)
3 SpeedVegas's alleged track deficiencies raise genuine issues of material fact. The evidence presented in
4 Plaintiffs' Opposition does not support these claims. Further, plaintiffs' evidence does not go to material
5 facts in this case.

6 **A. THERE IS NO EVIDENCE THAT SPEEDVEGAS ACTED NEGLIGENTLY**

7 Plaintiffs argue that Gil Ben-Kely was negligent in his instruction because: (1) Mr. Ben-Kely failed
8 to apply the brake pedal (Opposition at 6:7-8:21); and (2) Mr. Ben-Kely was "far more aggressive" than
9 another instructor and "focused on hitting 'top speed'" (*Id.* at 8:22-10:2).

10 The two arguments raised by plaintiffs are contradictory - one claims Mr. Ben-Kely failed to apply
11 the brakes, while the other claims he was more aggressive than other instructors.

12 The arguments are also unfounded.

13 There is clear, undisputed evidence that the brakes were used. The Sherwood plaintiffs' accident
14 reconstruction and fire origin and cause expert, Cam Cope, testified that there was evidence of 565 feet of
15 "full braking" skid marks leading up to the point of impact. *See* Exh. 1, deposition of Cam Cope, 25:1-13.

16 Plaintiffs' Opposition includes testimony from Mr. Ipekian where he states he took more
17 instruction from Mr. Ben-Kely, and that Mr. Ben-Kely instructed him when to increase his speed and
18 when to brake. *See* Plaintiffs' Opposition at 8:27-9:10. This demonstrates that Mr. Ben-Kely was
19 providing sufficient instructions, and more instruction than the other coach who assisted Mr. Ipekian
20 earlier the same day.

21 Sherwood Expert Cam Cope's and others' opinions about any instructions given by Mr. Ben-Kely
22 during the driving experience are purely speculative and without any foundation whatsoever; there are no
23 recordings of Mr. Sherwood's driving experience with Mr. Ben-Kely. Mr. Cope made it clear that anything
24 that happened inside the vehicle before the accident is pure conjecture:

25 Q. Is it your analysis that the right front occupant had no involvement in the
26 steering or braking of this vehicle?

27 A. He was --

28 MS. ANDREEVSKI: Object to the form.

 MR. GUELKER: Join.

1 THE WITNESS: He was capable of doing it. I don't have any proof whether he
2 actually input into this. I don't know whether he actually put his foot on the brake
3 or he actually touched the steering wheel. He may have had verbal commands with
4 the driver, but we don't have any evidence that he did anything.

See Exh. 1, deposition of Cam Cope, 22:20-23:7.

5 Further testimony from Mr. Cope was obtained regarding the full braking applied to the vehicle by
6 either the driver or passenger (or both) up to the point of impact.

7 Q. I understand that, but we're going to go through your reconstruction in some
8 detail, sir. I'm just trying to get it from a 5,000-foot level, if you have any opinion
9 whether the steering of the vehicle at any point or the braking of the vehicle at any
10 point was input by Mr. Ben-Kely as opposed to Mr. Sherwood.

MR. SAMSON: Object to the form.

MS. ANDREEVSKI: Object to the form.

MR. GUELKER: Join.

THE WITNESS: I would think, as a professional driver, he certainly is
13 pushing on the brake. It's attached to the driver's side, so even though he has
14 his foot on it, it's not going to change the performance of the braking system.

15 BY MR. HOSTETLER: Q. Do you have an opinion as to when Mr. Gil
16 Ben-Kely applied the brakes in this crash?

MR. SAMSON: Object to the form.

MS. ANDREEVSKI: Join.

MR. GUELKER: Join.

THE WITNESS: We don't know whether he did or he didn't. We don't know
19 whether he was the one who put it on at 565 feet, but the brakes were applied at and
20 took effect at 565 feet.

21 BY MR. HOSTETLER: Q. And it's your opinion that the brakes remained on from
22 565 feet up to the point of impact?

A. That's correct.

23 Q. And would you call this full braking? Hard braking? Partial braking? How
24 would you describe it?

A. Full braking.

25 *Id.*, 24:3-25:13.

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28 ///

1 **1. CAM COPE IS NOT QUALIFIED TO GIVE EXPERT**
2 **OPINION TESTIMONY REGARDING DRIVING**
3 **EXPERIENCE TRACK SAFETY, DESIGN OR OPERATIONS**

4 Mr. Cope admits to having no experience as an expert regarding the design of a driving experience
5 track or their operations (*Id.* at 292:16-24) and is therefore not qualified to offer opinions regarding the
6 standard of care for such facilities or driving coaches such as Mr. Ben-Kely. This defendant objects to the
7 opinions offered by Mr. Cope as set forth in Plaintiffs' Opposition to SpeedVegas' Motion for Summary
8 Judgment in that he does not possess the requisite special knowledge, skill, experience, training or
9 education required of an expert. NRS 50.275. Mr. Cope's opinion testimony should be disregarded.

10 The plaintiffs have offered no competent expert opinion testimony regarding the standard of
11 practice for driving experience tracks, how they should be designed or operated, or what the proper role is
12 of the on-board coach or instructor. Rather, they attempt to incorrectly apply a strict liability or *res ipsa*
13 standard against SpeedVegas through its argument that the accident was the fault of Mr. Ben-Kely *simply*
14 *because it happened*. It is plaintiffs' burden to prove all of the elements of negligence yet they
15 acknowledge that they have no evidence of what his duty of care was or that he breached it resulting in the
16 accident.

17 **B. THERE IS NO EVIDENCE THAT SPEEDVEGAS WAS NEGLIGENT IN**
18 **FIRE-RELATED ISSUES**

19 Plaintiffs claim that SpeedVegas was "grossly negligent" when it came to fire-related issues,
20 alleging that SpeedVegas: (1) did not mandate the use of fire suits; (2) had firefighting equipment
21 incapable of fighting a vehicle fire; and (3) relied on the county's fire department, making any vehicle fire
22 a death sentence for the occupants. *See* Plaintiffs' Opposition at 10:3-13:28.

23 Once again we turn to Mr. Cope, the Sherwood plaintiffs' expert regarding accident reconstruction
24 and fire origin and safety matters. When asked in deposition if he was aware of any driving experience
25 track in the United States that mandated the use of fire suits for customers such as Mr. Sherwood, he
26 replied that he did not know of any. *See* Exh. 1, deposition of Mr. Cope, 288:11-17.

27 Although he criticized the lack of a water tank and other fire suppression equipment on
28 SpeedVegas' fire and safety vehicle that responded to the accident, when asked if in his opinion it would

1 have altered the outcome (the death of both occupants), he said “I think it has the *possibility* of doing
2 that.” *Id.*, 312:6-21 (emphasis added). A possibly different outcome does not meet the evidentiary
3 standard. It is mere speculation.

4 Plaintiffs’ opposition refers to FIA standards and states that SpeedVegas was not in compliance
5 with certain of its standards. The FIA (Fédération Internationale de l'Automobile) is an international
6 association headquartered in Paris, France. Its most prominent role is in the licensing and sanctioning of
7 Formula One, World Rally Championship, World Endurance Championship, World Touring Car Cup,
8 World Rallycross Championship, Formula E and various other forms of racing. It does not sanction or
9 promote driving experience tracks such as SpeedVegas.

10 **1. MARTYN THAKE IS NOT QUALIFIED TO GIVE EXPERT**
11 **OPINION TESTIMONY REGARDING DRIVING**
12 **EXPERIENCE TRACK SAFETY, DESIGN OR OPERATIONS**

13 The Sherwood plaintiffs quoted Martyn Thake in their opposition to SpeedVegas’ summary
14 judgment motion. Mr. Thake, designated as an expert by the Ben-Kely plaintiffs with regard to track
15 safety, had never before been retained as an expert or to consult on the design, construction or operation of
16 a driving experience track such as SpeedVegas. He had never owned or operated a driving experience
17 track. *See* Exh. 2, deposition of Martyn Thake, 17:3-23. As with Mr. Cope, this defendant objects to the
18 opinions offered by Mr. Thake as set forth in Plaintiffs’ Opposition to SpeedVegas’ Motion for Summary
19 Judgment in that he does not possess the requisite special knowledge, skill, experience, training or
20 education required of an expert in this field. NRS 50.275. Mr. Cope’s opinion testimony should be
21 disregarded.

22 Regardless, Mr. Thake testified in his deposition that driving experience tracks are not required to
23 adhere to FIA standards of any kind, including those involving track design and the placement of tire
24 barriers. *Id.*, 22:22-24.

25 There has been no reference to a legal mandate or competent expert testimony on the standard of
26 practice for driving experience tracks with regard to fire suppression equipment, personnel and training as
27 well as causation of injury. There is nothing to present to a jury on these issues and summary judgment is
28 appropriate.

**C. THERE IS NO EVIDENCE THAT THE CONDITION PROMPTING THE
LAMBORGHINI AVENTADOR RECALL CAUSED OR CONTRIBUTED
TO THE ACCIDENT OR RESULTING FIRE**

Undisputed Material Fact No. 6 to this motion, which has not been contested or opposed, states:

6. There is no evidence that a mechanical failure in the subject Lamborghini Aventador caused or was a contributing factor in the February 12, 2017, crash that caused the deaths of Gil Ben-Kely and Craig Sherwood.

Evidence in support of this fact was cited and attached to the Motion: Ex. 6 – Depo of Robert Butler, Ph.D., 284:7-11; Ex. 5 – Depo of Martyn Thake, 33:10-13; Ex. 7 – Depo of Robert Banta, 194:3-15; Ex. 8 – Depo of Cam Cope, 272:12-22; Ex. 9 – Depo of Mark Arndt, 284:11-17; 290:11-17.

Not a single expert witness in this case has reported or testified in deposition that in their opinion the subject of the recall of the Lamborghini Aventador caused or contributed either to the crash or ensuing fire. Therefore, having knowledge of an alleged defect (which is disputed) does not leapfrog causation, and there is no causation with regard to the notice of recall.

Robert Banta, the Ben-Kely plaintiffs' expert, testified that the recall condition did not cause the crash. *See* SpeedVegas Motion at 16:2-20. He also testified that he does not hold the opinion that the recall condition caused the post-collision fire. *Id.* Robert Butler, an expert retained by the Sherwood plaintiffs, testified that he did not have an opinion on whether the recall condition on the Lamborghini had any bearing on this case. *Id.* Sherwood plaintiffs' expert Mr. Cope testified that in his opinion the recall had nothing to do with this crash and release of gasoline from the fuel tank. *Id.* Jack Ridenour, Lamborghini America's expert, testified that in his opinion the reasons for the manufacturer's recall of the Lamborghini did not cause or contribute to the accident or resulting fire. *Id.*

In both the Sherwood and Ben-Kely cases, a motion for summary judgment has been filed concurrently with this Motion but on behalf of defendant Felice Fiore. Claims of negligence against Mr. Fiore were alleged in both cases, and that included notice of recall and the alleged defect in the car. In both of these cases the respective plaintiffs have announced their intention of withdrawing or abandoning their negligence claims against Mr. Fiore. This is further evidence of the lack of merit in such claim.

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1 The uncontroverted evidence is that the vehicle's mechanical condition was non-contributory to
 2 this accident and that the condition that precipitated the manufacturer's recall of the subject Lamborghini
 3 had nothing to do with this accident.

4 **D. THERE IS NO EVIDENCE OF NEGLIGENCE IN TRACK-RELATED**
 5 **ISSUES**

6 The SpeedVegas Motion has explained that the accident and resulting fatalities were not caused by
 7 a negligently designed or constructed track, and there is no evidence that the accident was the result of
 8 negligent track operations or employees. *See* SpeedVegas Motion at 16:21-19:6.

9 Plaintiffs raise an argument regarding SpeedVegas's decision to follow Bob Barnard's track design
 10 and its responsibility for it. *See* Plaintiffs Opposition at 14:1-17:16. It is not negligence on SpeedVegas's
 11 part to reasonably rely on the expertise of an experienced track designer. In addition, there is no evidence
 12 that SpeedVegas has not satisfied its duty of care in regard to the racetrack.

13 What the evidence does show is that: The Sherwood plaintiffs did not designate any expert witness
 14 to offer opinion testimony regarding track design or construction, nor did they endorse any other party's
 15 experts in those fields; Sherwood plaintiffs' expert Mark Arndt had no opinions regarding the track's
 16 physical condition as a cause or contributing factor to the accident (*See* SpeedVegas Motion at 17:2-5);
 17 Sherwood plaintiffs' expert Mr. Cope testified that in his opinion the tire barrier positioned in front of the
 18 concrete wall where the accident occurred was improperly constructed, but he believed Mr. Sherwood
 19 survived the impact with the tire barrier and wall despite its construction (*Id.*, 17:6-14); Mr. Cope opined
 20 that a different construction of the tire barrier would not have prevented the resulting fire (*Id.*); Mr. Cope
 21 did not offer the opinion that had the tire barrier been constructed to the standards he described that Mr.
 22 Sherwood would have survived the crash and fire (*Id.*); Sherwood plaintiffs' expert Mariusz Ziejewski had
 23 no opinions regarding the design of the SpeedVegas track or its operations (*Id.*, 17:15-17); Ben-Kely
 24 plaintiffs' expert Dr. Robert Butler had no opinions regarding the design of the SpeedVegas track as it may
 25 relate to the accident (*Id.*, 17:18-20); Ben-Kely expert Mr. Banta had no opinions regarding the design of
 26 the SpeedVegas track (*Id.*, 17:21-23); Ben-Kely expert Martyn Thake had no opinion on the fire cause and
 27 origin and he testified that he was not going to offer any opinions that if the wall had been designed
 28 differently, it would have changed the outcome of the accident (*Id.*, 17:24-26); Lamborghini expert Mr.

Ridenour offered no criticisms of the SpeedVegas tire barrier and wall where the accident occurred and he had no opinions that were critical of SpeedVegas (*Id.*, 17:27-18-1).

Plaintiffs offer opinions in the form of deposition testimony from Martyn Thake. This defendant has previously objected to Mr. Thake's opinions as lacking foundation and the requisite specialized training, education and experience with regard to driving experience tracks. He simply has no such experience and his opinions should not be allowed to form the basis for the denial of summary judgment.

Counsel for plaintiffs attempts to turn SpeedVegas's own track design expert, Ben Willshire, against itself by citing to Mr. Willshire's report following this accident. The quoted piece from Mr. Willshire's report does not do what counsel imagines. Here is the quoted excerpt:

Following a visit by the Author in 2017, it was observed that the latter segment of the safety barrier could be moved further away from the track, with the objective of reducing risk of impact – this was based on a similar risk assessment exercise to that shown above and assumes the vehicle has successfully navigated turn 1 and 2. It is not believed that the location of the barrier could have been designed to reasonably mitigate against a driver completely disregarding the Turn 1 & 2 complex.

One need not be a linguist to appreciate that Mr. Willshire is not, in the above, criticizing the placement of the subject barrier. He simply says that it could be moved back and that the location could not have been designed to address a driver who completely disregards the subject "S" turn complex that preceded it. Mr. Willshire neither characterizes the pre-crash location of the barrier as negligent nor does he opine that the crash would have been avoided if placed elsewhere. Finally, SpeedVegas objects to the introduction of evidence of subsequent remedial measures to prove negligence. NRS 48.095.

E. SPEEDVEGAS WAS NOT A MERCHANT SELLER SUBJECT TO STRICT PRODUCTS LIABILITY FOR DEFECTS

As explained in the SpeedVegas Motion, in order for liability to be imposed upon a party based upon strict products liability, that party must be a manufacturer of the product, a distributor of the product, or a seller who can be regarded as a merchant engaged in the business of supplying goods of the kind involved in the case. SpeedVegas Motion at 19:7-20:21. SpeedVegas was not the manufacturer or distributor of the subject vehicle and did not sell, rent, lease or otherwise transfer possessory rights to the vehicle to Mr. Sherwood. *Id.* Therefore, SpeedVegas cannot be found strictly liable in tort for any alleged defect in the vehicle. *Id.*

1 The Sherwood plaintiffs argue that because the SpeedVegas Motion cites to the Nevada Jury
 2 Instruction for strict products liability, this operates as an acknowledgment that SpeedVegas's status as a
 3 "merchant" is "a question of fact for the jury." *See* Plaintiffs' Opposition at 18:8-14. This argument infers
 4 that if a jury instruction exists for a cause of action, the cause of action cannot be summarily adjudicated.
 5 No authority is cited to support plaintiffs' contention that the mere existence of a jury instruction for a
 6 cause of action prevents the cause of action from being decided on summary judgment.

7 Plaintiffs attempted in their Opposition to draw distinctions between this case and the cases cited
 8 in the SpeedVegas Motion, but they do not cite to a single Nevada case that states that SpeedVegas's
 9 business model qualifies as a merchant selling goods that is subject to the doctrine of strict products
 10 liability.

11 Plaintiffs briefly mention that *Maduike v. Agency Rent-a-Car*, 114 Nev. 1, 953 P.2d 24 (1998)
 12 "appl[ied] strict liability principles to [a] lessor." *See* Plaintiffs' Opposition at 18:23-24. What they fail to
 13 disclose is that the Nevada Supreme Court did not decide whether strict liability applies to "lessors of
 14 personalty." *See Maduike v. Agency Rent-a-Car*, 114 Nev. 1, 6 n.1, 953 P.2d 24, 27 n.1 (1998). Indeed,
 15 the rental agency defendant waived this issue by failing to address it in its opening brief; instead, the rental
 16 agency simply assumed that strict liability applied. Because of that waiver, the Court expressly "decline[d]
 17 to address the general applicability of strict liability to lessors of personalty." *Id.*

18 In sum, SpeedVegas, did not "sell" Mr. Sherwood the allegedly defective Lamborghini. It sold the
 19 experience (a service) of driving an exotic car on a track with a coach. SpeedVegas is not a seller or
 20 manufacturer or distributor of Lamborghinis, and thus cannot be liable under a strict products liability
 21 theory for defects within the car it did not create or know about as a matter of law.

22 **F. Wrongful Death**

23 The Wrongful Death cause of action stems from the negligence-based claims and the strict
 24 products liability cause of action. As the negligence claims and strict products liability should be
 25 dismissed, so too should the first cause of action for wrongful death.

26 **III. CONCLUSION**

27 Based on the foregoing, defendant SpeedVegas, LLC, asks this court to grant summary judgment in
 28 its favor and against the Ward/Sherwood plaintiffs, and dismiss the First, Second, Third, Fourth, Sixth and

Seventh causes of action in the Ward/Sherwood plaintiffs' complaint. Alternatively, it is requested that this court, if in its judgment and discretion, cannot grant summary judgment as to each and every cause of action against this defendant, that it grant partial summary judgment with regard to the causes of action for which there is no triable issue of fact and summary judgment would be appropriate.

DATED: June 29, 2021

PERRY & WESTBROOK

/s/ Alan W. Westbrook
Alan W. Westbrook, Esq.
Attorneys for Defendants, SPEEDVEGAS, LLC;
FELICE J. FIORE, JR.; and TOM MIZZONE

DATED: June 29, 2021

AGAJANIAN, McFALL, WEISS,
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/s/ Paul L. Tetreault
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/s/ James D. Murdock
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/s/ 
Angelica Green-Rosas

EXHIBIT 1

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by)
 ANTONELLA BEN-KELY as the)
 duly appointed representative))
 of the Estate and as the)
 widow and heir of Decedent)
 GIL BEN-KELY; SHON BEN-KELY,)
 son and heir of Decedent GIL) Case No.:
 BEN-KELY; NATHALIE BEN-KELY) A-17-757614-C
 SCOTT, daughter and heir of)
 the Decedent GIL BEN-KELY,)
 GWENDOLYN WARD, as Personal)
 Representative of the ESTATE) Dept. No.:
 OF CRAIG SHERWOOD, deceased;)
 GWENDOLYN WARD, individually) XXVII
 and as surviving spouse of)
 CRAIG SHERWOOD; GWENDOLYN)
 WARD, as mother and natural)
 guardian of ZANE SHERWOOD,)
 surviving minor child of)
 CRAIG SHERWOOD,)
)
)
 Plaintiffs,)
)
)

VIDEOCONFERENCE DEPOSITION OF

CAM COPE, B.S., CFII, CFEI, CVFR, CLI

WEDNESDAY, MARCH 17, 2021

Reported by: Monice K. Campbell, NV CCR No. 312

Job No.: 5237

March 17, 2021

Cam Cope, B.S., CFII, CFEI, CVFR, CLI

Page 22

1 A. No.

2 Q. Is it your conclusion that improper
3 driver control inputs resulted in the crash?

4 A. Yes. Improper driver input, correct.

5 Q. Maybe I should change that question
6 slightly.

7 Is it your opinion that improper vehicle
8 control inputs caused the crash?

9 A. Yes. Improper input controls, yes.

10 Q. And I ask that, sir, not to quibble
11 with you, but there is a possibility that this
12 driver -- I'm sorry, that there were vehicle
13 control inputs that were input by the right
14 occupant, Mr. Ben-Kely, correct?

15 MR. SAMSON: Objection to form.

16 THE WITNESS: I don't know what proof you
17 have that a right front occupant put input into
18 this particular vehicle.

19 BY MR. HOSTETLER:

20 Q. Is it your analysis that the right
21 front occupant had no involvement in the
22 steering or braking of this vehicle?

23 A. He was --

24 MS. ANDREEVSKI: Object to the form.

25 MR. GUELKER: Join.

March 17, 2021

Cam Cope, B.S., CFII, CFEI, CVFR, CLI

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1 THE WITNESS: He was capable of doing it.
2 I don't have any proof whether he actually input
3 into this. I don't know whether he actually put
4 his foot on the brake or he actually touched the
5 steering wheel. He may have had verbal commands
6 with the driver, but we don't have any evidence
7 that he did anything.

8 BY MR. HOSTETLER:

9 Q. Sir, is that something you looked for
10 as part of your work in this case?

11 A. Yes.

12 Q. And when you said that there's no
13 evidence, what items did you look for to try to
14 determine whether there was evidence or not?

15 A. We look at to see if there was some way
16 that you could determine if he was putting his foot
17 onto the brake or not. We know that the vehicle
18 was being braked 100 percent, but we don't know
19 whether the right front passenger was adding to it
20 since it was connected to the driver's pedal.

21 We know that the driver -- or feel
22 comfortable that the driver was braking
23 100 percent. And since the passenger side is
24 connected by a cable, it wouldn't make much
25 difference whether Ben-Kely was applying that brake

March 17, 2021

Cam Cope, B.S., CFII, CFEI, CVFR, CLI

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1 THE WITNESS: We don't know whether he
2 did or he didn't. We don't know whether he was the
3 one who put it on at 565 feet, but the brakes were
4 applied at and took effect at 565 feet.

5 BY MR. HOSTETLER:

6 Q. And it's your opinion that the brakes
7 remained on from 565 feet up to the point of
8 impact?

9 A. That's correct.

10 Q. And would you call this full braking?
11 Hard braking? Partial braking? How would you
12 describe it?

13 A. Full braking.

14 Q. Did you make any assumptions as to
15 whether the full braking was made by the driver
16 or the driving instructor?

17 A. I think it's made by the driver.

18 Q. And what is the basis for that
19 opinion?

20 A. Well, that's the pedal -- he is the
21 person who's behind the wheel, and I think he is
22 the person who's certainly applying the brakes in
23 order to control the vehicle speed, and that most
24 likely the professional driver, Ben-Kely, is
25 telling him to apply the brakes, and he's doing

March 17, 2021

Cam Cope, B.S., CFII, CFEI, CVFR, CLI

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1 occurred?

2 MR. SAMSON: Object to form.

3 THE WITNESS: I thought that one of the
4 witnesses indicated that she did both professional
5 racing and events, and that she was called out
6 there as a fire science person or a fire safety
7 person for both customers and for events that they
8 had. So I assume they did professional racing
9 there.

10 BY MR. MURDOCK:

11 Q. Are you aware of any other driving
12 experience tracks in the United States that
13 provide customers with fire suits when they're
14 operating cars?

15 MR. SAMSON: Objection to form.

16 THE WITNESS: I don't know of any that
17 do. At this time, I don't know of any.

18 BY MR. MURDOCK:

19 Q. Do you have a specific type of fire
20 suit that should have been provided in this
21 case? Do you have an opinion as to the specific
22 brand or type of fire suit that should have been
23 available?

24 A. No, I don't have a specific brand.
25 They're available, and if you pull up on the

EXHIBIT 2

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by)	
ANTONELLA BEN-KELY as the)	
duly appointed representative)	
of the Estate and as the)	
widow and heir of Decedent)	Case No.
GIL BEN-KELY; SHON BEN-KELY,)	A-17-757614-C
son and heir of Decedent GIL)	
BEN-KELY; NATHALIE BEN-KELY)	Dept. No. XXVII
SCOTT, daughter and heir of)	
the Decedent GIL BEN-KELY;)	
GWENDOLYN WARD, as Personal)	
Representative of the ESTATE)	
OF CRAIG SHERWOOD, deceased;)	
GWENDOLYN WARD, individually)	
and as surviving spouse of)	
CRAIG SHERWOOD; GWENDOLYN)	
WARD, as mother and natural)	
guardian of ZANE SHERWOOD,)	
surviving minor child of)	
CRAIG SHERWOOD,)	
)	
Plaintiffs,)	
)	

REMOTE VIDEOTAPED ZOOM DEPOSITION OF: MARTYN THAKE
APRIL 7, 2021
9:09 A.M.

Reporter: Vickie Larsen, CCR/RMR
Utah License No. 109887-7801
Nevada License No. 966
Notary Public in and for the State of Utah

April 07, 2021

Martyn Thake

Page 17

1 it's -- it's a very easy way to make a driver feel
2 more comfortable.

3 Q. Do you have any ownership interests in
4 any experience tracks?

5 A. I do not.

6 Q. Have you ever held an ownership interest
7 in any experience tracks?

8 A. I have not.

9 Q. Have you ever been in -- in the
10 business -- have you ever been consulted regarding the
11 development of briefing meetings for experience
12 tracks?

13 A. No.

14 Q. Have you ever been involved in the
15 development of policies and procedures for experience
16 tracks?

17 A. No.

18 Q. Have you ever testified as an expert
19 regarding any case that involves an experience track,
20 apart from this case?

21 A. Thinking. A lot of them. The
22 specifically dedicated experience track like this one,
23 I think this is the first.

24 Q. Have you ever been retained as a
25 consultant for an experience track such as SpeedVegas?

April 07, 2021

Martyn Thake

Page 22

1 that correct?

2 A. Yes, that's correct.

3 Q. And just because you found issues at the
4 Ontario, California, track did not mean that that
5 track was unsafe; is that correct?

6 A. It was safe for the purpose it was being
7 used for at the time, which was the experience, the
8 exotic experience. It needed changes to be made for
9 competition.

10 Q. And the difference being that the
11 experience track doesn't have to comply with FIA2
12 standards, but the racing track would; correct?

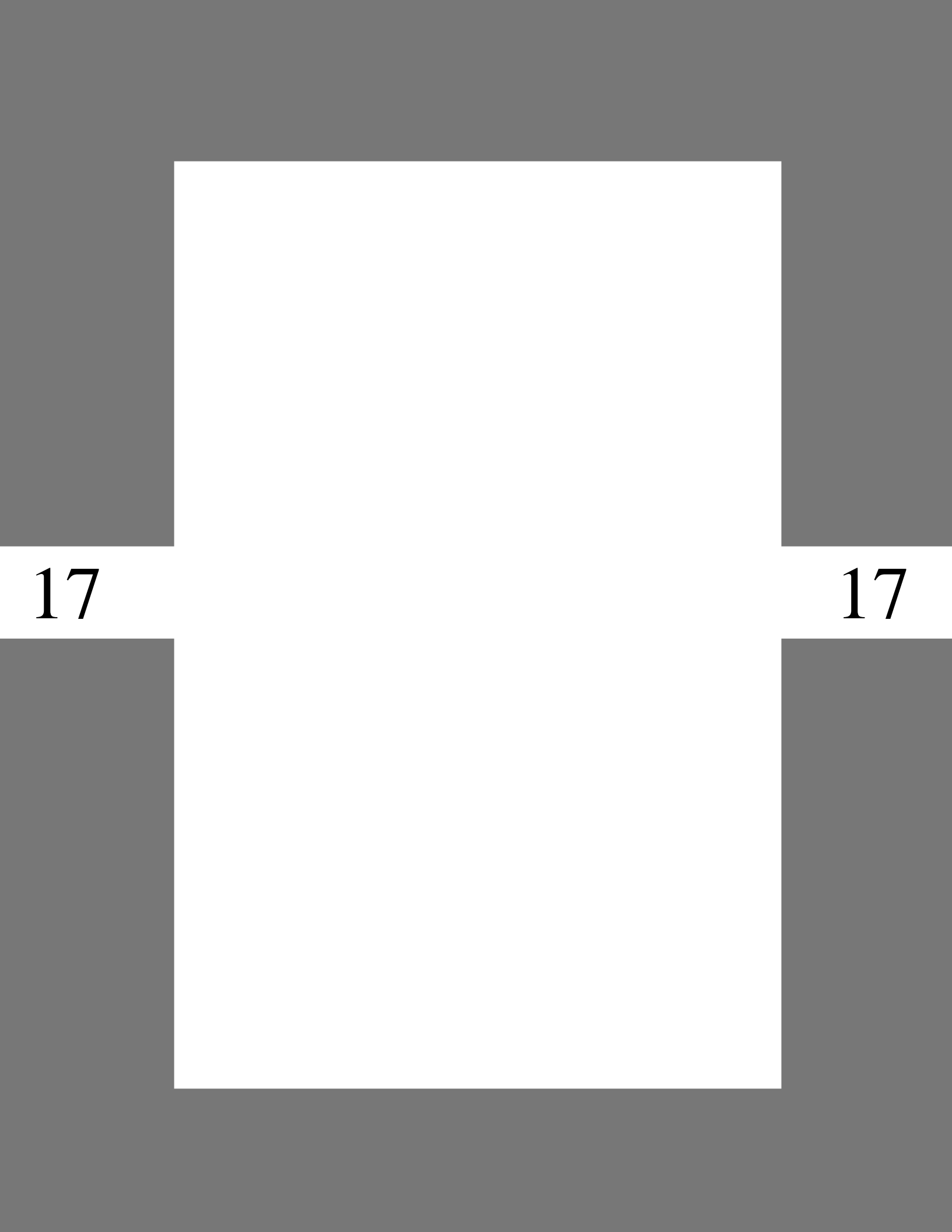
13 A. Not all tracks have to apply for -- have
14 to -- have to have FIA certification. That's an
15 entirely voluntary or even a business decision based
16 on the track.

17 And there are -- there are levels of --
18 different levels of FIA certification, 1 through 4,
19 depending upon the competition, what vehicles you're
20 running on track or what -- who's racing, I should
21 say.

22 Q. Is it your opinion that all experience
23 tracks must be FIA compliant?

24 A. No.

25 Q. Was the Ontario, California, track FIA



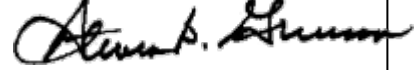
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Steven D. Grierson

CLERK OF THE COURT



WILLIAM R. BRENSKE, ESQ.
Nevada Bar No. 1806
JENNIFER R. ANDREEVSKI, ESQ.
Nevada Bar No. 9095
RYAN D. KRAMETBAUER, ESQ.
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Email: bak@baklawlv.com
*Attorneys for Ben-Kely Plaintiffs,
Ben-Kely Cross-Claimants, and
Ben-Kely Counterclaimants*

**EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA**

ESTATE OF GIL BEN-KELY by ANTONELLA
BEN-KELY as the duly appointed representative of
the Estate and as the widow and heir of Decedent
GIL BEN-KELY; SHON BEN-KELY, son and heir
of decedent GIL BEN-KELY; NATHALIE BEN-
KELY-SCOTT, daughter and heir of the decedent
GIL BEN-KELY,

Plaintiffs,

v.

SPEEDVEGAS, LLC, a foreign-limited liability
company; VULCAN MOTOR CLUB, LLC d/b/a
WORLD CLASS DRIVING, a New Jersey Limited
Liability Company; SLOAN VENTURES 90, LLC, a
Nevada limited liability company; MOTORSPORT
SERVICES INTERNATIONAL, LLC, a North
Carolina limited liability company; AARON
FESSLER, an individual; the ESTATE OF CRAIG
SHERWOOD; AUTOMOBILI LAMBORGHINI
AMERICA, LLC, a foreign-limited liability
company; TOM MIZZONE, an individual; SCOTT
GRAGSON, an individual; PHIL FIORE aka
FELICE FIORE, an individual; DOES I-X; and ROE
ENTITIES XI-XX, inclusive,

Defendants.

AND ALL RELATED CLAIMS HERE AND IN
THE CONSOLIDATED ACTION.

Case No.: A-17-757614-C

Dept. No.: XXVII

Consolidated with:

Case No.: A-18-779648-C

**THE BEN-KELY PLAINTIFFS'
SUPPLEMENTAL OPPOSITION
TO THE MOTION FOR
SUMMARY JUDGMENT, OR, IN
THE ALTERNATIVE PARTIAL
SUMMARY JUDGMENT, AS TO
DEFENDANT FELICE J. FIORE,
JR., AGAINST PLAINTIFFS
ESTATE OF GIL BEN-KELY,
ANTONELLA BEN-KELY, SHON
BEN-KELY, and NATHALIE BEN-
KELY SCOTT**

1 The Ben-Kely Plaintiffs, by and through their attorneys of record, Brenske Andreevski &
2 Krametbauer, hereby supplement their opposition to the Motion for Summary Judgment, or, in the
3 alternative, Motion for Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., against
4 Plaintiffs Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely
5 Scott. This supplemental opposition is based on the pleadings and papers on file herein, the
6 attached Memorandum of Points and Authorities, and any oral argument this Court may wish to
7 entertain.
8

9 As noted in Plaintiff's initial opposition, Mr. Fiore was the owner of the subject
10 Lamborghini and he had leased it to Speed Vegas prior to the incident in question. Although Mr.
11 Fiore would like to escape liability, it is essential that this Court remember the purpose and policy
12 behind product defect law in Nevada.
13

14 The Nevada Court of Appeals recently discussed the development of product liability law
15 and noted the Restatement (Second) of Torts section 402A – which is followed by the State of
16 Nevada – provides “that if a product is defective and that defect causes harm to person or property,
17 liability will be imposed upon the manufacturer or distributors, notwithstanding the manufacturer's
18 or distributor's lack of fault and whether or not they were in privity with the plaintiff.” Schueler v.
19 Ad Art, Inc., 472 P.3d 686, 690 (2020). In this case, both Automobili Lamborghini America was
20 the “distributor” of the vehicle in question and Mr. Fiore was an owner who distributed his vehicle
21 to Speed Vegas by way of a commercial lease agreement.
22

23 The policy rationale underpinning product liability laws “are generally consistent and
24 always have the consumer's or ultimate user's ability to recover in mind.” Id. Further, public
25 policy dictates that the cost of damage from dangerously defective products be spread between the
26 manufacturer and seller, and to protect users by providing an avenue of recovery for losses
27 sustained by the use of defective products. Id.
28

1 In this case, whether he intended to or not, Mr. Fiore placed a defective vehicle into the
2 stream of commerce. He profited off of Speed Vegas's repeated use of his vehicle and reaped the
3 benefits of multiple people paying to drive his vehicle around the Speed Vegas track. Mr. Fiore is
4 covered under the \$10,000,000.00 liability and excess liability policy and public policy would
5 dictate that the losses sustained by the Ben-Kely family be borne by those who put the defective
6 Lamborghini into the stream of commerce.
7

8 DATED this 1st day of July 2021.

9 */S/ William Brenske*

10 WILLIAM R. BRENSKE, ESQ.
11 Nevada Bar No. 1806
12 JENNIFER R. ANDREEVSKI, ESQ.
13 Nevada Bar No. 9095
14 RYAN D. KRAMETBAUER, ESQ.
15 Nevada Bar No. 12800
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CERTIFICATE OF SERVICE

I am employed with Brenske Andreevski & Krametbauer. I am over the age of 18 and not a party to the within action; my business address is 3800 Howard Hughes Pkwy., Ste. 500, Las Vegas, Nevada 89169. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under its practice mail is to be deposited with the U. S. Postal Service on that same day as stated below, with postage thereon fully prepaid.

I served the foregoing document described as **"THE BEN-KELY PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT FELICE J. FIORE, JR., AGAINST PLAINTIFFS ESTATE OF GIL BEN-KELY, ANTONELLA BEN-KELY, SHON BEN-KELY, and NATHALIE BEN-KELY SCOTT"** on this 1st day of July 2021 to all interested parties as follows:

- ☐ BY MAIL: Pursuant to N.R.C.P. 5(b), I placed a true copy thereof enclosed in a sealed envelope addressed as follows:
- ☐ BY FACSIMILE: Pursuant to EDCR 7.26, I transmitted a copy of the foregoing document this date via telecopier to the facsimile number shown below:
- ☒ BY ELECTRONIC SERVICE: by electronically filing and serving the foregoing document with the Eighth Judicial District Court's electronic filing system:

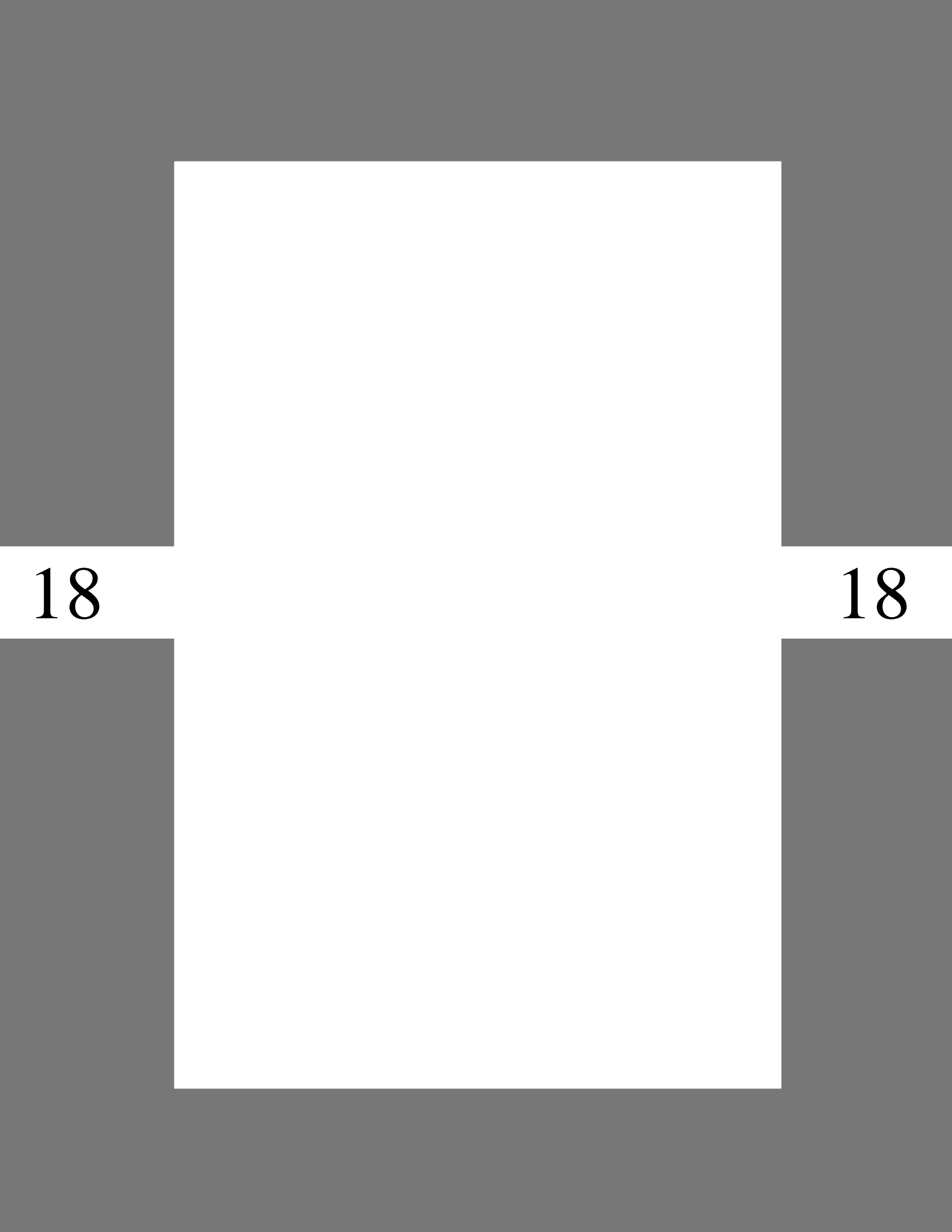
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Claudia Lomeli, Esq.

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Michael R. Merritt, Esq.
Meredith Holmes, Esq.

1	Paul Traina, Esq. Isolde Parr, Esq.	Laura Lybarger, Esq. Allison Rothgeb, Esq. 8337 W. Sunset Rd., Ste. 350 Las Vegas, NV 89113 <i>Attorneys for Defendants Sloan Ventures 90, LLC and Scott Gragson</i>
2	Jacqueline 8816 Spanish Ridge Avenue Las Vegas, Nevada 89148 <i>Attorneys for Plaintiffs', Estate of Craig Sherwood</i>	
3		
4		
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6		
7		
8	KING & SPALDING, LLP Philip E. Holladay, Jr., Esq. 1180 Peachtree St., NE Suite 1600 Atlanta, GA 30309	AGAJANIAN, McFALL, WEISS, TETREAULT & CHRIST LLP Paul L. Tetreault, Esq. <i>Pro Hac Vice</i> Paul Lydon Tetreault, Esq. <i>Pro Hac Vice</i> Regina S. Zernay, Esq. <i>Pro Hac Vice</i> 346 N. Larchmont Boulevard Los Angeles, California 90004
9		
10		
11	KING & SPALDING, LLP Susan V. Vargas, Esq.(Pro Hac Vice) Alexander G. Calfo (Pro Hac Vice) 633 West Fifth Street, Suite 1600 Los Angeles, California 90071	TAYLOR ANDERSON, LLP Brent D. Anderson, Esq. James D. Murdock, II, Esq. 1670 Broadway Suite 900 Denver, CO 80202
12	MUSICK PEELER & GARRETT LLP Harry Franklin Hostetler, III, Esq 650 Town Center Drive, Suite 1200	<i>Attorney for Defendant SpeedVegas, LLC Tom Mizzone & Felice J. Fiore, Jr.</i>
13	<i>Attorneys for Defendant/Crossclaimant Automobili Lamborghini America, LLC</i>	
14		
15	RESNICK & LOUIS, P.C. <i>Gary R. Ruelker, Esq.</i> 8925 W. Russell Road., Suite 220 Las Vegas, Nevada 89148 <i>Attorneys for Crossclaim Defendant, Estate of Gil Ben-Kely</i>	GORDON REES SCULLY MANSUKHANI, LLP Robert E. Schumacher, Esq. Dylan Houston, Esq. Bradley G. Taylor, Esq. Dylan E. Houston, Esq. Deborah Kingham, Esq. Andrea C. Montero, Esq. Sean Owens, Esq. Cristina Pagaduan, Esq. 300 S. 4 th Street, Suite 1550 Las Vegas, Nevada 89101 <i>Attorneys for Defendant Aaron Fessler</i>
16		
17		
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23		
24		/S/ Amy Doughty
25		An employee of the Brenske Andreevski & Krametbauer
26		
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18

18

7/6/2021 11:29 AM

Steven D. Grierson

CLERK OF THE COURT

**OBJ**

Alan W. Westbrook, Esq., NV Bar No. 6167

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Attorneys for Defendants, SPEEDVEGAS, LLC; FELICE J. FIORE, JR.; and TOM MIZZONE

DISTRICT COURT
CLARK COUNTY, NEVADA

ESTATE OF GIL BEN-KELY by
ANTONELLA BEN-KELY, the duly
appointed representative of the Estate and as
the widow and heir of Decedent GIL
BEN-KELY; SHON BEN-KELY, son and
heir of decedent GIL BEN-KELY;
NATHALIE BEN-KELY-SCOTT, daughter
and heir of the decedent GIL BEN-KELY;
GWENDOLYN WARD, as personal
representative of the ESTATE OF CRAIG
SHERWOOD, deceased; GWENDOLYN
WARD, individually and as surviving spouse
of CRAIG SHERWOOD, deceased;
GWENDOLYN WARD, as mother and
natural guardian of ZANE SHERWOOD,
surviving minor child of CRAIG
SHERWOOD, deceased

Plaintiffs,

vs.

SPEEDVEGAS, LLC, a Delaware Limited
liability company; SCOTT GRAGSON
WORLD CLASS DRIVING, an unknown
entity; SLOAN VENTURES 90, LLC, a
Nevada limited liability company, ROBERT
BARNARD; MOTORSPORT SERVICES
INTERNATIONAL, LLC, a North Carolina

CASE NO.: A-17-757614-C
Dept. No.: XXVII

OBJECTION TO AND MOTION TO STRIKE
BEN-KELY PLAINTIFFS' SUPPLEMENTAL
OPPOSITION TO MOTION FOR SUMMARY
JUDGMENT, OR, IN THE ALTERNATIVE
PARTIAL SUMMARY JUDGMENT, AS TO
DEFENDANT FELICE J. FIORE, JR., AGAINST
PLAINTIFFS ESTATE OF GIL BEN-KELY,
ANTONELLA BEN-KELY, SHON BEN-KELY,
and NATHALIE BEN-KELY SCOTT

Hearing Date: July 7, 2021
Hearing Time: 1:00 p.m.

limited liability company; AARON FESSLER; the ESTATE OF CRAIG SHERWOOD; AUTOMOBILI LAMBORGHINI AMERICAN, LLC a foreign limited liability company; FELICE J. FIORE, JR.; DOES I-X, inclusive; and ROE CORPORATIONS IX, inclusive,
Defendants

GWENDOLYN WARD, as Personal Representative of the ESTATE OF CRAIG SHERWOOD, deceased; GWENDOLYN WARD, Individually, and surviving spouse of CRAIG SHERWOOD, deceased
GWENDOLYN WARD, as mother and natural guardian of ZANE SHERWOOD, surviving minor child of CRAIG SHERWOOD, deceased,
Crossclaim Plaintiffs,

ESTATE OF GIL BEN-KELY by ANTONELLA BEN-KELY, the duly appointed representative of the ESTATE; DOES I-X, inclusive,

Crossclaim Defendants

ESTATE OF BEN-KELY by ANTONELLA BEN KELY, duly appointed representative of the Estate and widow and heir of decedent GIL BEN-KELY; SHON BEN KELY, son and heir of decedent GIL BEN-KELY; NATHALIE BEN-KELY SCOTT, daughter and here of decedent GIL BEN-KELY,

Crossclaim Plaintiffs

ESTATE OF CRAIG SHERWOOD; DOES I-X, inclusive; and ROE CORPORATIONS I-X, inclusive,

Crossclaim Defendants.

Defendant Felice J. Fiore, Jr. (“defendant”) hereby objects to and moves to strike the Ben-Kely Plaintiffs’ Supplemental Opposition to the Motion for Summary Judgment, or, in the Alternative Partial Summary Judgment, as to Defendant Felice J. Fiore, Jr., Against Plaintiffs Estate of Gil Ben-Kely, Antonella Ben-Kely, Shon Ben-Kely, and Nathalie Ben-Kely Scott (“Ben-Kely Supplemental Opposition”).

NRCP Rule 15(d) states: “***On motion and reasonable notice***, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented.” (Emphasis added). EDCR Rule 2.20(I) provides: “Supplemental briefs ***will only be permitted*** if filed within the original time limitations of paragraphs (d), (e), or (g), or by order of the court.” (Emphasis added.) EDCR Rule 15(e) states that oppositions must be filed within 14 days after the service of a motion.

Defendant’s Motion was filed on May 14, 2021. Pursuant to a stipulation, defendant agreed to extend the filing date for the Ben-Kely plaintiffs’ opposition to June 3, 2021.

The Ben-Kely plaintiffs have failed to meet the procedural requirements described above. The Ben-Kely Supplemental Opposition was filed without a motion or providing any notice to defendant. The Supplemental Opposition was filed on July 1, long after the 14-day time period provided by EDCR Rule 15(e) and several weeks after the agreed-upon opposition filing date of June 3, 2021. No order has been issued by the court permitting the Ben-Kely plaintiffs to file their Supplemental Opposition.

Since the filing of the Ben-Kely Supplemental Opposition is procedurally improper, defendant asks this court to strike the Ben-Kely Supplemental Opposition and disregard it in its entirety.

DATED: July 6, 2021

PERRY & WESTBROOK

/s/ Alan W. Westbrook

Alan W. Westbrook, Esq.

Attorneys for Defendant , SPEEDVEGAS, LLC;
FELICE J. FIORE, JR.; and TOM MIZZONE

DATED: July 6, 2021

AGAJANIAN, McFALL, WEISS,
TETREAULT & CRIST LLP

/s/ Paul L. Tetreault

Paul L. Tetreault, Esq.

Attorneys for Defendants, SPEEDVEGAS, LLC;
FELICE J. FIORE, JR.; and TOM MIZZONE

DATED: July 6, 2021

TAYLOR ANDERSON, LLP

/s/ James D. Murdock

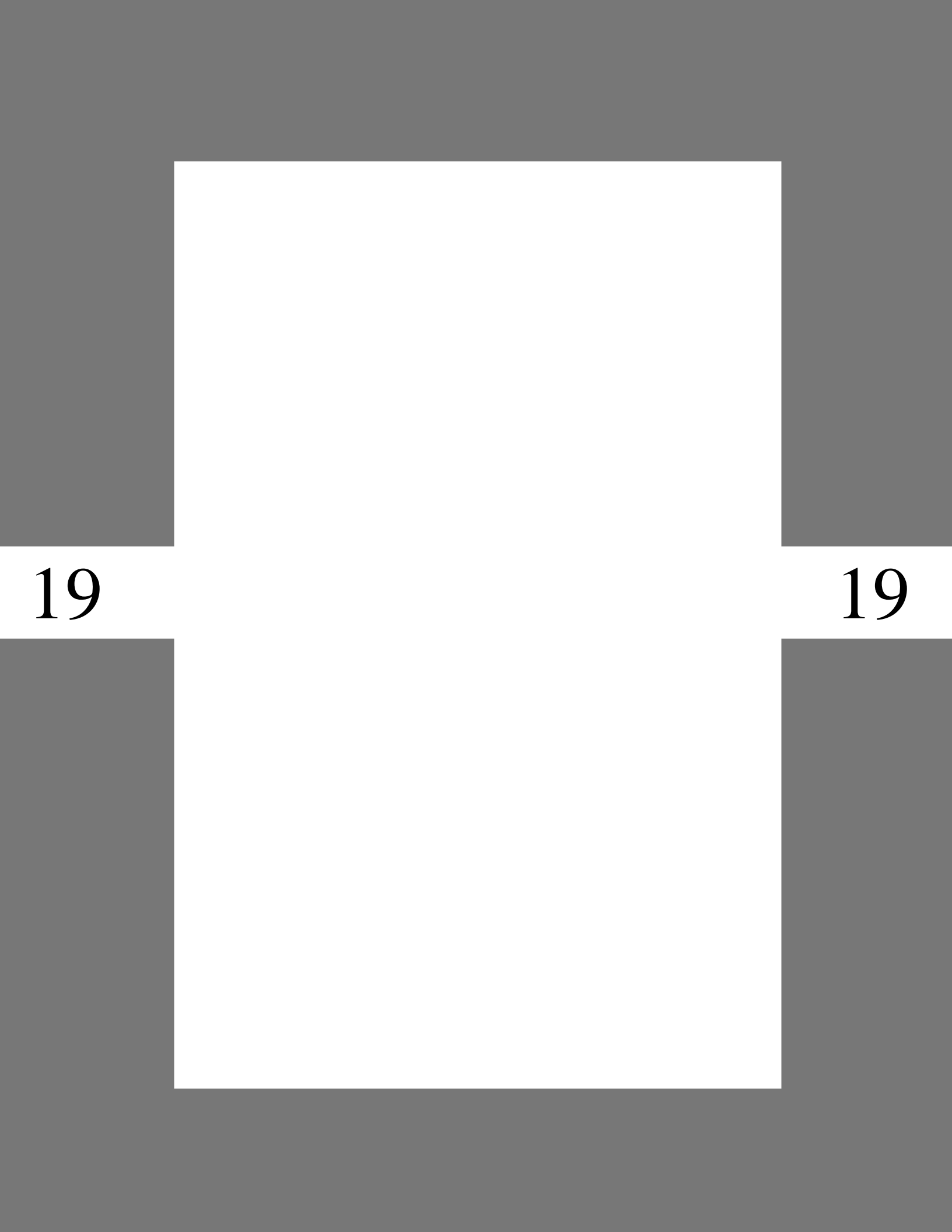
James D. Murdock, Esq.

Attorneys for Defendants, SPEEDVEGAS, LLC;
FELICE J. FIORE, JR.; and TOM MIZZONE

CERTIFICATE OF SERVICE

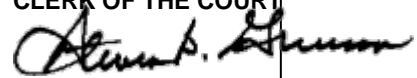
Pursuant to N.R.C.P. 5(b), I hereby certify that service of the foregoing: OBJECTION TO AND MOTION TO STRIKE BEN-KELY PLAINTIFFS' SUPPLEMENTAL OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE PARTIAL SUMMARY JUDGMENT, AS TO DEFENDANT FELICE J. FIORE, JR., AGAINST PLAINTIFFS ESTATE OF GIL BEN-KELY, ANTONELLA BEN-KELY, SHON BEN-KELY, and NATHALIE BEN-KELY SCOTT was made on this 6th day of July 2021 to all parties appearing on the electronic service list in Odyssey E-File.

/s/ 
Angelica Green-Rosas



19

19



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA

Estate of Ben-Kely,)	
)	
Plaintiff(s),)	CASE NO: A-17-757614-C
)	
vs.)	DEPT. XXVII
)	
SpeedVegas, LLC,)	
)	
Defendant(s).)	

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

TUESDAY, JULY 6, 2021

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS (via Blue Jeans)

APPEARANCES:

For the Plaintiff(s):	IAN SAMSON, ESQ.
(via Blue Jeans)	WILLIAM R. BRENSKE, ESQ.
(via Blue Jeans)	GARY R. GUELKER, ESQ.
For the Defendant(s):	JAMES D. MURDOCK II, ESQ.
	RYAN PETERSEN, ESQ.
	RAUL RAVIPUDI, ESQ. (via video)
	SUSAN V. VARGAS, ESQ.
	ALAN H. WESTBROOK, ESQ.
(via Blue Jeans)	PAUL L. TETREALT, ESQ.

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1 **LAS VEGAS, NEVADA, TUESDAY, JULY 6, 2021**

2 [Proceeding commenced at 1:12 p.m.]

3
4 THE COURT: Thank you. Please be seated. That's a
5 pleasant surprise today.

6 All right. Let me call the case of Ben-Kely versus
7 SpeedVegas. Let's take appearances from the plaintiff -- from your
8 right to left.

9 MR. SAMSON: Good afternoon, Your Honor. Ian Samson
10 for the Sherwood plaintiffs.

11 THE COURT: Thank you.

12 MR. BRENSKE: Good afternoon, Your Honor. Attorney
13 Bill Brenske, Bar No. 1806, on Zoom today, on behalf of the estate of
14 Gil Ben-Kely and Antonella Ben-Kely, Nathalie Ben-Kely, and Shon
15 Ben-Kely.

16 THE COURT: Thank you.

17 MR. RAVIPUDI: Good afternoon, Your Honor. Rahul
18 Ravipudi for the -- also on behalf of the Sherwood complainants.

19 THE COURT: Thank you.

20 MR. PETERSEN: Good morning, Your Honor. Ryan
21 Petersen, on behalf of Automobili Lamborghini America.

22 THE COURT: Thank you.

23 MS. VARGAS: Good afternoon, Your Honor. Susan
24 Vargas, on behalf of defendant Automobili Lamborghini America
25 LLC.

1 THE COURT: Thank you.

2 MR. MURDOCK: Good afternoon, Your Honor. J.D.
3 Murdock, on behalf of defendant SpeedVegas and Phil Fiore.

4 THE COURT: Thank you.

5 MR. GUELKER: Your Honor, this is Gary Guelker,
6 appearing as defense counsel for the estate of Ben-Kely.

7 THE COURT: All right.

8 We have one more person in the courtroom, then we'll go
9 back to the phone.

10 MR. WESTBROOK: Alan Westbrook on behalf of
11 SpeedVegas and Mr. Fiore.

12 THE COURT: Thank you.

13 Any other appearances by phone? All right.

14 MR. TETREAULT: Yes, Your Honor. This is Paul Tetreault,
15 on behalf of defendants SpeedVegas and Felice Fiore.

16 THE COURT: Thank you.

17 I think that's everyone now.

18 All right. So we have a number of motions that are
19 scheduled today. The first is the Fiore summary judgment with
20 regard to Sherwood.

21 MR. MURDOCK: Very well, Your Honor. Your Honor, if we
22 may -- do you want us to stand or how would you like us to present?

23 THE COURT: Where -- however you're most comfortable.
24 I think we've learned from COVID that we don't need so much
25 formality.

1 MR. MURDOCK: And I like the old formality, if you don't
2 mind.

3 So Your Honor, to begin, I would ask if Your Honor has
4 any specific questions based on the briefing that has been
5 submitted?

6 THE COURT: No.

7 MR. MURDOCK: Okay.

8 THE COURT: I do want to hear the arguments.

9 MR. MURDOCK: Very well.

10 So Your Honor, I think this begins with that Mr. Fiore -- as
11 you can see from the briefings, the plaintiffs have waived the claims
12 and essentially dismissed those against negligence -- or those of
13 negligence against Mr. Fiore.

14 So we will focus then on the claim for the product liability
15 against Mr. Fiore.

16 And just for clarifications, we have a couple different
17 motions. This is the Sherwood -- the Phil Fiore claim against the
18 Sherwood Estate; is that correct?

19 THE COURT: Right.

20 MR. MURDOCK: Summary judgment, yes.

21 THE COURT: Right.

22 MR. MURDOCK: So Your Honor, the controlling case law,
23 and this is the *Elley versus Stephens* matter.

24 THE COURT: This is the strict products issue?

25 MR. MURDOCK: Correct. It is. For -- for background,

1 Mr. Fiore was the owner of the subject Lamborghini. He had
2 purchased the car from a dealer. It was a used vehicle when he
3 purchased it.

4 And while, at the time of the incident, he was on the board
5 of directors for SpeedVegas, in his capacity as on board, he had
6 leased the vehicle to SpeedVegas. It was a one-time transaction,
7 saying, Here, this car could be used. I lease it to you. Here are the
8 terms of the lease. And the vehicle was then used by SpeedVegas.

9 Mr. Fiore did not have any control over when the vehicle
10 was to be used, how it was to be used. Essentially, here's the
11 vehicle. If it's rented, here's the time that I get, this is the sum that I
12 get, and otherwise this is the payment that I get.

13 There was no promise that it was going to be rented. This
14 is obviously customer-driven. The folks that come there want to get
15 an experience, and they can choose which vehicles to drive.

16 SpeedVegas operates differently than say Budget or Hertz
17 because the vehicles are rented for an experience. Someone is
18 driving on the track to experience being able to drive a vehicle they
19 would not otherwise be able to own. It's a closed setting so they can
20 drive it at speeds that you would not on a normal roadway. And
21 they're navigating through different turns and straightaways that
22 you may not see in normal traffic -- in a road.

23 And so what we're dealing with here is Mr. Fiore, as a
24 one-time lessor of the vehicle to SpeedVegas, does not fall under the
25 definition in Nevada of a seller, a distributor, or a manufacturer.

1 Plaintiffs do not challenge the arguments by the defense
2 that Mr. Fiore was a distributor, nor do they challenge the arguments
3 by the defense that he was not a manufacturer.

4 Their focus is solely on is the one-time lease an event
5 which would trigger strict product liability? And we submit that that
6 is incorrect. Specifically going to the *Elley* case, it's *Elley versus*
7 *Stephens*. We're cite -- we cited that throughout our briefing.

8 And in that case, what you've got is a property owner who
9 had a prefabricated home that sold the house to a subsequent owner
10 and someone was injured on the property. The injured party tried to
11 sue the seller and said, This is a strict products liability claim -- case.

12 The Nevada Supreme Court rejected that argument and
13 said, In fact, no, unless you are engaged in a routine practice of
14 selling or distributing the product, then you're not falling into that
15 category.

16 And we submit that this case would be on all fours -- or is
17 on all fours with *Elley*, insofar as if the house had been sold or
18 rented, say, to the plaintiffs in the *Elley* case, to the *Elley* family, and
19 they had sublet it out to another family, or rented it, they cannot sue
20 the original -- the injured parties cannot sue the original owners, the
21 *Stephens* folks -- which here would be SpeedVegas -- under the
22 premise that this is like a routine -- like a multiple rental -- it's a
23 one-time lease of the property. Here -- or it's a one-time sale. Here,
24 it's a one-time lease of the property -- the car.

25 He leased the vehicle to SpeedVegas in one transaction.

1 It's one contract. There's not multiple rentals. There's not multiple
2 leases.

3 We submitted an affidavit by Mr. Fiore that detailed his
4 history. He had never done this before. He's never done this since.
5 He is the typical car owner that is reselling their vehicle. He is the
6 typical car owner that might be leasing it to another person. Doing
7 that does not subject one to a products liability claim in Nevada.

8 In his affidavit -- and, again, these are uncontested facts,
9 Your Honor. These are not challenged by the plaintiffs. They
10 challenge that the nature of the transaction draws one into a -- the
11 relationship and can subject one to products liability. But, in fact,
12 that's not -- there's no authority for that.

13 So the actual affidavit of Mr. Fiore is not in dispute by the
14 plaintiffs. This is a one-time deal. He leased it once to SpeedVegas.

15 As you can see from the affidavit, Mr. Fiore was a financial
16 advisor and investment manager. He was not in the business of
17 leasing vehicles. He was not in the business of manufacturing or
18 distributing vehicles. There is no claim that Mr. Fiore had, in fact,
19 ever leased a vehicle previously or subsequent to this incident.

20 Jury Instruction 7.1 -- the Nevada Jury Instruction 7.1 is
21 instructive on this. The three categories in which an entity can be
22 subjected to products liability -- is it a manufacturer, distributor, or
23 seller? And again, as we've outlined, Mr. Fiore doesn't fall into any
24 of those categories.

25 There is no case law throughout the country that would

1 subject Mr. Fiore to liability. I know we're dealing with Nevada here.
2 But there is no authority that would subject him to liability anywhere
3 in the country.

4 The plaintiffs cite to -- well, first the plaintiffs discuss the
5 *Lucas versus Dorsey* court case that is referenced in the defense
6 motion for summary judgment. That case, as we state in our reply is
7 clearly distinguishable. It was cited simply for the premise that in
8 Indiana and in then elsewhere, that the Courts have adopted the
9 second restatement towards as to defining what a seller is. And in
10 that case the Court did find that the retailer of that could possibly -- it
11 was a jury question -- but in that case, Dorsey actually sold nine of
12 the units -- four of which were returned.

13 This is again not that deal. Mr. Fiore has only had one
14 vehicle which he has used in this -- or it was actually in a lease in this
15 capacity. Any other vehicles he has ever owned, he has sold. And
16 those are not -- nothing to SpeedVegas. It is not a routine business
17 that he is engaged in.

18 And further, if you reference in the *Lucas* statements
19 case -- and this is on page 6 our reply -- it talks about the Suclagen
20 [phonetic] matter, where there is a corporation that sold a single
21 machine for the use in production for 11 years of surplus property.
22 And insofar as the Court even considers *Lucas*, the Suclagen case,
23 which is cited by *Lucas* identifies that in that instance, the
24 corporation was found not to be a retailer or seller of the property.

25 And so again the *Lucas* court acknowledged exactly our

1 argument here, a one-time sell or a one-time lease does not subject
2 one to products liability exposure.

3 The other aspect that I would like to talk about, apart from
4 the fact that Mr. Fiore's single transaction does not bring him into
5 the scope of products liability is that under the -- under EDCR 2.20(e),
6 we also made a second argument, which is that Mr. Fiore cannot be
7 exposed to liability where he is a member of the board for
8 SpeedVegas, and in that scope he is immune from the lawsuit. It's
9 under the NIIA for Nevada rules, under Nevada Rules -- or Statute
10 86.361, which is where an individual is also a member of the
11 company that's being sued, he is or she cannot be exposed to
12 personal liability unless there's a dispute between that individual
13 and the entity. That doesn't exist here.

14 They are suing Mr. Fiore as a member of the board of
15 directors for SpeedVegas. They're attempting to sue him in a
16 capacity as the owner of the vehicle. But there is no dual purpose,
17 no multiple capacity recognition in Nevada.

18 One is either an employee of the company or they're not
19 or on the board of directors or not. If they are in the board of
20 directors' position, they're immune from suit and liability cannot
21 attach to them.

22 In this capacity, Mr. Fiore is clearly protected under
23 *Gardner v Henderson Water Park*, which is 133 Nev. 391, 2017. The
24 Supreme Court acknowledged that, in fact, if someone is sued in
25 their personal capacity, along with the company, that fail -- that

1 claim fails. It is just the company.

2 And here Mr. Fiore is a member of the company. It's
3 established by his affidavit. It's not contested by the plaintiff's
4 briefing. They don't challenge it.

5 So on that separate basis, he is entitled to the summary
6 judgment as well.

7 If Your Honor doesn't mind, I'm just going to reference my
8 notes for a moment.

9 THE COURT: Take your time. You know, I'm as rusty as
10 you guys all, even though we all worked through the pandemic. So
11 don't worry about if you need a moment.

12 MR. MURDOCK: I appreciate it.

13 And for Your Honor's reference, the dual capacity that I
14 referenced, it's also *Noland versus Westinghouse* case, *96 Nev. 268,*
15 *1981*, which is wherein the Court found that the dual capacity
16 doctrine does not apply to Nevada.

17 Also *Harris versus Rio Hotel & Casino, 117 Nev. 482 2001*
18 case -- the same finding that when an individual is sued by both in
19 the corporate -- the corporation is sued and they are also sued and
20 they're on the board of directors, like Mr. Fiore was, they're immune
21 from suit individually.

22 So if Your Honor has any specific questions. I mean, I
23 think I've covered this pretty thoroughly, but it's a pretty
24 straightforward issue.

25 THE COURT: I don't. I've spent hours getting ready.

1 MR. MURDOCK: I appreciate that. Thank you.

2 THE COURT: Thank you.

3 And the opposition, please.

4 Before Mr. Samson speaks, is anyone else going to weigh
5 in? No.

6 Go ahead.

7 MR. SAMSON: Thank you, Your Honor. And thanks for
8 having us here. It's good to be back.

9 I wanted to pick up where Mr. Murdock left off with -- I
10 wrote down several of the phrases that he used to describe their
11 argument and the way in which they frame it.

12 And it's pretty simple. If Mr. Fiore is found to be a
13 one-time lessor or a typical car owner in a routine practice, that's the
14 kind of thing that would not subject him to liability, according to him.

15 We can take a step back as to who he is, because I don't
16 think Mr. Murdock's statements about his background fully inform
17 the Court about the nature of this transaction and what it really
18 means.

19 To start with the legal standard. A case they cite in their
20 brief, *Lucas*, that was referenced up here, clearly makes this question
21 a question of fact. And so if there is a question of fact, it should go
22 to the jury.

23 And since we're at summary judgment, the burden is
24 strongest on Mr. Fiore to prove that there is no such question of fact.
25 And if there is one, the motion should be denied.

1 Starting first on the relationship of Mr. Fiore and
2 SpeedVegas. Mr. Fiore is not just a -- someone who is selling a car.
3 He's someone that has a relationship with SpeedVegas. He
4 understands what that car is going to be used for. And beyond that,
5 it's not a one-time lease. It's not a one-time I'm going to sign, give
6 you the keys, and hand it over to you.

7 It's a 50/50 partnership between him and SpeedVegas
8 every time that car is rented. He gets 50 percent of the money;
9 SpeedVegas gets 50 percent of the money.

10 So that's not the kind of one-time sale, one-off sale that all
11 the cases they've cited protects someone from facing the jury with
12 this question of fact. And say, that person we're going to exclude
13 from strict product liability. That person because it was just a
14 one-time sale. Here, it's not.

15 There's one agreement. But that agreement contemplates
16 multiple and ongoing contacts between SpeedVegas, Mr. Fiore, and
17 individuals in Las Vegas, who are coming to rent this car. Use this
18 car, drive it around the track, and do precisely with it what Mr. Fiore
19 knew would happen.

20 He is outside of the sellers who either have a product that
21 they purchased, like someone, for instance, selling their car, taking it
22 down to a used car lot, et cetera. They sign it; hand the keys over;
23 it's gone. They have no continuing relationship with that vehicle.
24 That's not true of Mr. Fiore.

25 He's not like someone in the manufacturing space who

1 says, I have an extra machine lying around. I'm going to sell it to
2 another factory. You guys take it and it's gone. That's not Mr. Fiore.

3 All -- each and every one of the cases they've cited and the
4 examples they've cited, exclude someone like him, who signed what
5 even he and SpeedVegas called a commercial lease agreement for
6 an ongoing commercial relationship with this vehicle that was keyed
7 off of every time it was rented out to a customer and used by a
8 customer -- the end user and consumer.

9 So for those reasons we submit he fits squarely within the
10 definition of a seller, because he is exploiting the car for commercial
11 gain over and over and over and over again, and he's doing so right
12 here in the state of Nevada.

13 The argument that he's protected by laws intended to
14 protect shareholders from the debts and liabilities of a corporation
15 misses the mark in this respect because Mr. Fiore is being sued in
16 his individual capacity.

17 SpeedVegas is really trying to have it both ways -- or
18 Mr. Fiore's counsel and SpeedVegas's joint counsel -- by presenting
19 him in one instance as just a ho-hum, ordinary guy, who is selling
20 his car; and in the other instance, he's doing so in his capacity as a
21 board member of SpeedVegas. That's a question of fact. Those are
22 two irreconcilable facts that cannot coexist. That has to be resolved
23 by a jury.

24 But the point is that Mr. Fiore's liability, with respect to
25 strict products liability, is because of the ongoing lease agreement

1 he made with SpeedVegas for the use of this car, in a commercial
2 capacity, in Nevada.

3 I've touched on it, Your Honor, but each and every one of
4 the cases that they've cited we went through in our brief, and frankly
5 our brief is going to do a lot better job than I could up here, walking
6 through why each one of those cases is inapplicable. And I really do
7 mean each one of them.

8 They attached a huge appendix of cases to the back of
9 their motion. Taking a closer look at every one of those, the
10 conclusion is inescapable, that this is a question of fact that has to
11 go to the jury to be resolved. And they're free to make their
12 arguments that they're making now about the nature of the
13 transaction, that he's not really a merchant. The jury can sort that
14 out. And by their own admission and their own case law, that's a
15 question of fact.

16 So for those reasons, Your Honor, we would submit that
17 the motion should be denied. And both on the grounds of the seller
18 point that they've raised with respect to strict products liability and
19 on their protections on the dual capacity argument, because in this
20 particular instance, Mr. Fiore is being sued in his individual capacity.

21 Thank you for your time, Your Honor.

22 THE COURT: Thank you.

23 And the reply, please.

24 MR. MURDOCK: Yes, briefly, Your Honor.

25 First --

1 MR. BRENSKE: Your Honor, excuse me. This is attorney
2 Bill Brenske on behalf of the Ben-Kelys.

3 Our opposition to be motion is not to be heard until
4 another date, but it's the same basic fact pattern. And our concern is
5 if you grant this Motion for Summary Judgment against the
6 Sherwoods, that's going to in effect grant the Motion for Summary
7 Judgment against the Ben-Kelys.

8 So I just wanted to point out to the Court that whether
9 Mr. Fiore was, in fact, engaged in the business of leading the
10 subject -- leasing the subject Lamborghini to SpeedVegas for
11 customers, is clearly a question of fact.

12 And whether or not he was engaged in supplying goods of
13 the kind involved in the particular case, which is what 402(a) says, is
14 definitely a question of fact.

15 I don't want to interrupt Mr. Murdock. But, you know, if
16 you skewer Mr. Samson, I get hit with the same lance.

17 So I just wanted to put that in the record. Thank you,
18 Your Honor.

19 Good enough.

20 Mr. Murdock.

21 MR. MURDOCK: Yes. Well, two things: One is I take
22 issue, certainly, with Mr. Brenske's interjection. As
23 Your Honor knows, the -- their motion is set for tomorrow. While the
24 issues the similar, there's an additional prong here. And if
25 Your Honor would like, I can address it now. If you would prefer to

1 address that hearing tomorrow, we can.

2 But the only difference here is Mr. Ben-Kely was suing
3 SpeedVegas, but he's also an employee of SpeedVegas. And there's
4 an additional protection under the NIIA that applies to him that
5 premeditates the exact arguments Mr. Brenske is attempting to raise
6 here.

7 I can address that if you would like.

8 THE COURT: Let's deal with that, tomorrow.

9 MR. MURDOCK: Very well. So Your Honor --

10 THE COURT: Actually, I have a scheduling issue
11 tomorrow, and we will deal with that at the end of the day. I don't
12 want to throw you guys off now.

13 MR. MURDOCK: It's okay.

14 So Your Honor, Mr. Samson made a remark that I think is
15 telling here. He says that, you know, the defendants can't have it
16 both ways with respect to Mr. Fiore in this litigation.

17 But the plaintiff cannot attempt to circumvent the laws of
18 Nevada by phrasing claims in a clever fashion to remove or to bring
19 someone outside the scope of what their protections are under the
20 law.

21 Here, it is undisputed Mr. Fiore was a member and on the
22 board of directors of SpeedVegas at the time of this accident. The
23 NIIA makes it clear he is entitled to protections under that.

24 And Mr. Samson's argument here doesn't do anything to
25 quell -- or to address the issue that they omitted any response in

1 their briefing. And so insofar as he raised that argument today, I
2 think it's improper, and I would ask the Court to strike it.

3 Again, the issue of Mr. Fiore's position with SpeedVegas
4 usurps any argument that he's being sued in his individual capacity
5 and he's being sued as a product liability defendant -- any of those
6 arguments. There is no authority for that. And that is an
7 uncontested argument we have raised in our briefing.

8 Secondly, the issue of Mr. Fiore's lease -- again, the idea
9 here is there's a conflation of what happened. Mr. Fiore leased the
10 car one time. There's one contract. There's not a contract for
11 multiple vehicles. He leased it in one document to SpeedVegas. The
12 terms of that lease, the substance of that relationship, is not a
13 consequence. It is he leased the vehicle to SpeedVegas and said,
14 Yes, as the vehicle is used, I get paid by that, but that is it.

15 That's no different than if someone says, hey, when you
16 rent a car from -- or if someone were to say, I'm going to rent a
17 home to -- I'm going to, you know, have a condo and someone
18 sublets the condo. That does not transmit or transform the condo
19 owner into a product liability claim.

20 Under *Elley*, that would not make sense. That would
21 subject pretty much anyone that sells a car that's used to product
22 liability down the stream. That would subject anyone that has a
23 condo or owns a property and leases it to someone, who then
24 subleases it out, to strict products liability. And that is -- there are
25 public policy arguments -- I know we will address this tomorrow --

1 but that runs contrary to those exact issues.

2 And so, Your Honor, if you have no further questions -- if
3 you have any questions, I will address them, but --

4 THE COURT: I don't.

5 MR. MURDOCK: -- otherwise, thank you for your time.

6 THE COURT: Thank you.

7 All right. So this is the Fiore Motion for Summary
8 Judgment on the strict liability cause of action.

9 The motion will be denied for the following reasons:
10 Mr. Fiore wasn't sued in an effort to pierce the corporate veil. He
11 was sued based upon a commercial transaction that he participated
12 in with the company on which he sits on the board.

13 So the jury is the finder of fact with whether or not he
14 meets the merchant test. And so the matter will be left with the jury.

15 With regard to the use of the car, it was irrelevant to me
16 when he found out about the recall because in strict liability, the
17 plaintiff will try to convince the jury that defect existed when the
18 product left his possession. Again, that's in the province of the jury.

19 So for those reasons, the motion will be denied.

20 Mr. Samson to prepare the order, simple order.

21 Anyone who wishes to sign off on the -- approving the
22 form only of the order, let us know.

23 I'm sure Mr. Murdock and his team.

24 MR. MURDOCK: Oh, yes, yes, Your Honor. Apologies.

25 THE COURT: Okay. Automobili?

1 MS. VARGAS: No, Your Honor.

2 THE COURT: Okay. Anyone else?

3 All right. So let's now take SpeedVegas's Motion for
4 Summary Judgment against Sherwood.

5 And I think Fiore is also included in this motion.

6 MR. MURDOCK: Yes.

7 Your Honor, I'll start this off in the same fashion as
8 arguments last time. Do you have any particular questions based on
9 the briefing? Or you want us just to --

10 THE COURT: No. I really honestly want to hear your
11 arguments on both sides.

12 MR. MURDOCK: Okay. Your Honor, the arguments here
13 are multi-fold.

14 So by way of background, I know that Your Honor is
15 familiar with the facts in this case, but I think it is still helpful for a bit
16 of an overview.

17 THE COURT: Sure.

18 MR. MURDOCK: So SpeedVegas is a track -- is a -- an
19 experience track, as I've talked about previously, where customers
20 can come to the location and drive various cars. And the track itself
21 was designed by an individual, Mr. Barnard, who is not affiliated
22 with SpeedVegas. SpeedVegas hired him as a track design expert to
23 help provide -- to essentially design the track based on the plot of
24 land that existed in the property.

25 The issue in this -- well, so there are multilayers to the

1 argument that we want to -- that we've made to the Court. And
2 there's an argument of negligence; there's an argument of --

3 Well, let me back up. So SpeedVegas, the track is
4 designed by Mr. Barnard, and then SpeedVegas operated the actual
5 vending of the vehicles for folks to drive.

6 And the plaintiffs have several arguments that
7 SpeedVegas is liable, for which that there aren't competent facts to
8 support that. And one -- the arguments are first on a negligence
9 theory against SpeedVegas, and that falls into a couple subsections.
10 One is it was a negligent design of the track, including a
11 straightaway and turn at the end of the straightaway.

12 Second is a negligent instruction by Mr. Ben-Kely, who
13 was the coach that was a victim in this crash as well. Based on the
14 fact that they -- there's an argument that he either -- or that there
15 was a general sense of encouraging people to drive too fast.
16 Specifically that Ben -- Mr. Ben-Kely failed to provide Mr. Sherwood
17 proper instruction about braking or turning prior to the crash, or that
18 if he felt it used the brake pedal as well.

19 The plaintiffs also claim that there was negligence by the
20 track in failing to have proper fire and safety gear present.

21 For each of those claims, however, there's a major issue
22 that is -- there's -- plaintiffs have stated no basis to establish
23 causation between those arguments.

24 The plaintiffs say that the track was negligently designed.
25 First, SpeedVegas was not -- again, was not responsible for the

1 design of the track. That is an uncontested fact. The plaintiffs -- the
2 Sherwood plaintiffs do not have a premise liability claim against
3 SpeedVegas. It is a negligence claim. And they have not stated any
4 grounds on which SpeedVegas was negligent with respect to the
5 design of the track. It's an uncontested fact in this case.

6 The second aspect is that the design, even if the Court
7 were to find that there -- that SpeedVegas had a hand or was
8 responsible for the design of the track, which it wasn't, that the -- the
9 track itself did not cause the crash. There is no competent
10 testimony, expert or otherwise, that Mr. Sherwood was unable to
11 properly navigate the turn where the crash occurred due to the
12 design of the track.

13 The facts show that he drove a Mercedes AMG for seven
14 laps without crashing to the same location. He drove the subject
15 Lamborghini for six laps before the crash occurred. There is no
16 testimony, and there's no evidence, that the actual layout of the track
17 was a factor in the crash itself.

18 The plaintiffs further argue that Mr. Ben-Kely, as the
19 coach, failed to provide proper instruction to Mr. Sherwood or that
20 there was improper conduct by Mr. Ben-Kely in Mr. Sherwood's
21 operation of the car.

22 And again the same issue that persists, plaintiffs have no
23 facts that would establish what Mr. Ben-Kely said or didn't say in the
24 cab of the vehicle. There is no evidence that it talks about what
25 Mr. Ben-Kely did or didn't do in the moments leading up to the

1 crash.

2 The evidence in the case is that there was hard braking,
3 100 percent braking, in the direction of the travel of the vehicle, and
4 the location of the crash. We know that those are the factors in this
5 accident. We don't know why that what -- what led to those -- to the
6 failure for Mr. Sherwood to operate the car correctly through the
7 turn.

8 Any testimony that it had to do with the design of the
9 track, any testimony that it had to do with the instruction of the
10 vehicle, or any testimony that it had to do with Mr. Ben-Kely failing
11 to operate -- failing to properly instruct or react in the time sequence
12 leading up to the crash is purely speculative and, again, has no
13 competitive evidence to support it.

14 Further, plaintiffs argue that the SpeedVegas failed to have
15 proper fire-fighting gear, fire-fighting equipment, and fire response
16 to the crash.

17 Same issue exists with those arguments, Your Honor.
18 There is no causable link between that conduct -- that alleged
19 conduct and the incident.

20 The plaintiffs admit -- or the plaintiffs contend that there
21 was a fire that occurred when the car impacted the wall, and that
22 Mr. Sherwood died as a result of that fire.

23 They do not contend that the wall caused the fire. In fact,
24 their own experts admit this fire shouldn't have occurred in this
25 crash. There is nothing wrong with the track that caused the fire.

1 That's a different argument than they're making. So they're arguing
2 that the fire shouldn't have occurred in this crash, first.

3 And then, second, they're saying that there was a failure
4 by the track to have fire suits, fire response, and that there was
5 some -- in some fashion that the track could have done something
6 different that would have changed the outcome.

7 But again, there isn't a single expert -- not a forensic
8 pathologist, not a medical doctor, not a biomechanist, and there's no
9 fire experts in this case that would say, Had there been a different
10 fire fighting equipment present, had there been fire suits, had people
11 worn those fire suits, the outcome would have been different. No
12 one says that.

13 And to let the jury consider something like that type of
14 testimony is improper when the plaintiff does not have a shred of
15 evidence to support those arguments.

16 Further, the whole claim against SpeedVegas for the
17 product liability -- that's the negligence side. There's a products
18 liability side as well. And that is that SpeedVegas actually provided
19 a service and was not a lessor or a reseller or a retailer of vehicles.

20 SpeedVegas, as I alluded to in the prior argument,
21 provided a service. It's akin to when you go to a doctor's office and
22 you get medical care. It is something where someone goes and
23 experiences driving a vehicle at speeds and in locations you can't do
24 it elsewhere. It is an experience. It is not -- SpeedVegas isn't leasing
25 vehicles.

1 They -- the individual that comes in, whenever they are
2 experiencing on the track, they have a coach that's present, that is in
3 the room -- in the vehicle, telling them: Turn here, brake there,
4 accelerate here. That's part of what they paid for. They paid for
5 the conditions at the track, the layout, the maintenance of the track.
6 Those are all factors in which this is actually a service provided by
7 SpeedVegas. It's not actually -- they are not engaged in the retail of
8 business.

9 Now, Your Honor, I would cite to the *Shoshone* case,
10 *Shoshone Coca-Cola versus Dolinski*. It's 82nd Nev. 439 -- or, sorry,
11 *82 Nev. 439 in 1966*, and the *Allison versus Merck* case *110 Nev. 762*,
12 *in 1994*, which talk exactly about this issue.

13 SpeedVegas, again, is providing a service. And it cannot
14 be held liable for a products theory on that basis.

15 This would also apply, as you mentioned, to Mr. Fiore,
16 though, you've indicated that your finding on the prior motion is
17 based on him being sued in his individual capacity. So I won't
18 re-address that.

19 But insofar as this would apply to him as a board member,
20 it does apply. And we restate the same arguments we made for --
21 about the fact that he is entitled to summary judgment under NIIA,
22 but I won't rehash that, Your Honor.

23 Pursuant to the Cusi [phonetic] case, which establishes the
24 standard for summary judgment, the plaintiffs fail to present the
25 issues -- present material -- issues of material fact that would

1 establish liability on any of those fronts.

2 On the negligence side, there's no causation opinions.
3 There's no evidence that would create a disputed issue of material
4 fact on the liability, on -- or for causation.

5 On the product liability side, again, SpeedVegas provides
6 a service. It is not a seller, distributor, or retailer. And therefore, it's
7 not -- there is no -- or SpeedVegas is entitled to summary judgment
8 on that basis as well.

9 For those reasons, the defense has met its burden of proof
10 under NRCP 56 and is entitled to summary judgment as to plaintiff's
11 claims.

12 THE COURT: Thank you.

13 MR. MURDOCK: Thank you.

14 THE COURT: And anyone wish to weigh in, before I hear
15 from Mr. Samson?

16 Okay.

17 MR. SAMSON: It looks like just me, Your Honor.

18 THE COURT: Go ahead.

19 MR. SAMSON: Okay. Thank you, Your Honor.

20 I'll take all of these -- those issues in turn.

21 I do want to start with the standard again, which is that
22 this is a motion for summary judgment, and the question here is a
23 genuine issue of fact that should be tried to the jury. And as we've
24 presented in our opposition, there are multiple issues of fact that
25 require trying this case to a jury, and that makes summary judgment

1 on these claims inappropriate.

2 I'll start with the negligence claims. As we laid out in our
3 briefing, there is a significant number of shortcomings and failings
4 that led to this incident. And I heard counsel focus on causation, so
5 I'll make sure I address that as well.

6 The instruction that SpeedVegas provided -- their own
7 experts that they retained, Mr. Wilshire [phonetic] and Mr. Dark
8 [phonetic], who we cite in our briefing -- they found that it was a
9 dangerous culture with a high potential for incidents.

10 And I raise that at the top because it colors everything that
11 happens in this case and everything that SpeedVegas does.

12 It's not that the instruction is the only claim of negligence.
13 It's not that the improper providing of where to brake, where to turn,
14 is the only claim of negligence. It's one of many. And the
15 instruction colors everything and is the lens through which the Court
16 should view all the evidence, because, frankly, that's how the jury
17 should view it as well.

18 The control of the vehicle, and I really -- I cannot stress this
19 enough -- this is a vehicle in which an instructor brake pedal has
20 been put in. And the only evidence in this case from SpeedVegas
21 employees is that that instructor brake pedal worked just the same
22 as the driver brake pedal. So the person sitting in the passenger seat
23 has equal ability to slow the car as the person sitting in the front
24 seat. There's not a single piece of evidence presented in this motion
25 or anywhere in this case that that's not true.

1 And what we are left with are SpeedVegas's experts
2 saying, This crash happened because the car is going too fast. It's
3 going too fast. It's on the wrong driving line. And that's why the car
4 hits the wall.

5 Mr. Ben-Kely, as a driving coach and a driving instructor,
6 in the course of his -- course and scope of his employment with
7 SpeedVegas, had control over the direction and speed of the car that
8 led to the crash. And when it comes to causation, that's a direct
9 straight-line causation. The car's going too fast. It's within the
10 control of the employee whose job it is to make sure something like
11 that doesn't happen.

12 And there's a lot of testimony -- or a lot of references in
13 the briefing to, hey, listen, unfortunately and tragically both of them
14 passed away. There's no video. We don't know what was said
15 between them.

16 Actions speak louder than words. Their own experts are
17 saying, The car is going too fast and on the wrong line. And their
18 own employees are saying, Mr. Ben-Kely had the ability that that
19 wouldn't have happened and that this crash would have been
20 prevented. That's negligence. However you break it down, that is
21 negligence. And it's for the jury to decide whether it's the person off
22 the street, an amateur driver who is being put in the car for the first
23 time, going as Mr. Murdock is saying, far in excess of speeds he can
24 do on an ordinary highway, or the person who is a professional
25 instructor and a driving coach, hired by the facility to prevent just

1 this sort of thing from happening -- both of which with equal control.
2 The jury can make that determination as to the failings of that
3 person, designated as the coach, based on that evidence.

4 And just because there's no record of what was said
5 between the two of them does not foreclose their ability to consider
6 that evidence and resolve that question of fact.

7 The fire experts in this case -- I was surprised to hear that
8 there were no fire experts. We have a fire expert. There are several
9 fire experts in the case. And what they testified to is that the
10 presence of the fire-related items, such as fire suits, a proper fire
11 truck, that, coincidentally, SpeedVegas employees begged
12 management to get prior to this incident happening -- had that been
13 present, there would have been time to save someone's life.

14 And that is the kind of causation that counsel claims is
15 missing and is, again, a question of fact for the jury to resolve.

16 The FIA2 standard issue -- I want to raise that as well.
17 There's some response to that. And FIA2, if Your Honor recalls, is a
18 standard for racetracks around the world. And I heard some of this
19 was touched on earlier, and I read some of it in the briefing -- that
20 there's no one to come forward as a driving experience expert to
21 provide testimony on a driving experience.

22 SpeedVegas promoted itself as an FIA2 racetrack. It sent
23 out letters saying that's what we do. We've designed this racetrack
24 to meet those standards. And so it can't run away from those now,
25 and that's more than adequate for the jury to consider what is it --

1 what's the standard of care for what you're supposed to do in one of
2 these driving tracks? And what the evidence shows -- and we lay it
3 all out in our opposition -- is that none of those FIA2 requirements
4 were present. None of those were there.

5 And to make matters worse, Your Honor, you have direct
6 knowledge that the place in which this crash occurred is the most
7 dangerous part of the track. You have direct knowledge by
8 SpeedVegas employees and instruction that they're not to speak
9 about those things with customers before they go out. And the
10 stated reason being that you don't want to talk about accidents
11 before an experience.

12 All of these things go directly to the instruction both that
13 SpeedVegas provides and that Mr. Sherwood got before he got
14 behind the wheel, and all of these go to negligence and to the
15 causation of the crash.

16 There's no dispute from SpeedVegas or any of their
17 experts that the crash itself led to the fire, that the fire killed
18 Mr. Sherwood. So there's straight-line causation for each one of
19 these, because all of them contribute to the crash.

20 I would like to just turn to strict products liability quickly.
21 Earlier in the afternoon, I heard Mr. Murdock talking about how
22 SpeedVegas rents the car. That was actually a term that he used.
23 And I think that when we're talking about Mr. Fiore's liability and
24 also SpeedVegas, it's that same question of fact as to what it is that
25 SpeedVegas does.

1 Each and every time someone shows up and says, I want
2 to drive that car, they hand them the keys and they let them go
3 around the track with somebody with them. That is a commercial
4 exploitation of a good. It's not -- to reference all of the real estate
5 cases that were cited, that's real estate. We're talking about a good
6 here. And that's a car that's being rented over and over and over
7 again, and injected into the stream of commerce over and over and
8 over again by SpeedVegas.

9 And it's not just a service. There's a service component to
10 it. But both of the cases that they cite to make that point, both of
11 which are unpublished dispositions from district -- one, there's no
12 evidence that a chair in a hotel is something that the hotel says,
13 here, I'm going to rent you this chair for you to sit in. It's just a piece
14 of equipment that's there.

15 And the other, there's not enough facts to even make an
16 intelligible decision one way or the other. It's literally just a
17 statement of there's -- this person is not a seller.

18 All that does really is emphasize that this is a question of
19 fact for the jury to resolve, just as it was for Mr. Fiore.

20 And I want to make sure I hit everything, Your Honor. And
21 just -- if you'll indulge me just briefly.

22 THE COURT: Take your time.

23 MR. SAMSON: And the -- so what I -- I really want to
24 emphasize to the Court, above all else, is that each of these
25 negligence theories is -- operates independently, but they are

1 [indiscernible]. I mean, this is a single event, and all of these things
2 conspired to come up with this one horrible and horrific thing that
3 happened to my client and his family.

4 And the takeaway that I have from it, though, and the
5 thing that I think is just inescapable, is that it is a place in which a
6 coach is in the car, who has control of the vehicle, and the vehicle
7 crashes leading to the death.

8 And on those facts, that's a question for the jury to resolve
9 as to, well, how did that happen? And what was the negligence
10 behind it?

11 And the subtext of, well, it was in Mr. Sherwood's control
12 and it was Mr. Sherwood's fault, is that hitting the wall was
13 negligent and that that shouldn't have happened. And so if the
14 question is, whose fault is it? And who has the opportunity to
15 control the car? Which the evidence is clearly that Mr. Ben-Kely does
16 as well -- that's a question of fact for the jury to resolve on the
17 negligence point.

18 Thank you very much for your time, Your Honor. I
19 appreciate it.

20 THE COURT: Thank you.

21 And Mr. Brenske, are you going to add something today?
22 Or wait until tomorrow -- or wait until --

23 MALE SPEAKER: I'll wait until the -- my chance comes
24 before the Court, Your Honor.

25 THE COURT: Very good.

1 MALE SPEAKER: Thank you so much for the opportunity,
2 though.

3 THE COURT: Mr. Murdock, your reply, please.

4 MR. MURDOCK: Yes, Your Honor.

5 Mr. Samson spoke about a number of different points. But
6 one thing that he did not state -- and insofar as I misstated that there
7 are fire experts -- there are a number of experts talking about the
8 fire, the breach of the gas tank, and an ignition source.

9 I'm talking more specifically about an expert that would
10 talk about how much time would a fire suit ostensibly give someone;
11 how much protection would it have provided them; what
12 temperature would it have protected them. How would that have
13 changed, if at all, the outcome of this case?

14 There's also no expert that says how long the individuals
15 would have lived, with -- or Mr. Sherwood would have lived with a
16 fire suit versus not. There's not a single expert.

17 The plaintiffs' briefing on this issue cites only that
18 Mr. Cope to talk about that there's a possibility that having fire suits
19 or fire protection or fire mitigation -- different fire mitigation support
20 would have changed the outcome. And as the plaintiffs note, in their
21 briefing -- I know that Your Honor has not yet reached it -- but on the
22 6th affirmative defense by the defendants, mere possibility is not
23 sufficient. That is their burden of proof. They have to prove that the
24 design of the track caused the accident; that the layout of the track
25 caused this accident; that the failure to have fire mitigation gear, fire

1 suits, the fire response team -- that that would have changed. The
2 possibility does not meet the burden that they have, and the
3 defendant is entitled to summary judgment on that basis.

4 One other aspect that I wanted to raise. I know it's in our
5 briefing, and I omitted it in our discussion, is the recall issue. And
6 again, that's -- it's a red herring. And I hate that phrase. But it really
7 is, because there was an e-mail about a recall that was taking place
8 in Australia. Mr. Banta [phonetic], who is the -- or I'm sorry -- the --
9 anyway, there was a recall that was taking place in Australia. It was
10 not a U.S. recall.

11 And the issue there was, is there some sort of conduct that
12 SpeedVegas should have engaged in that would have changed -- it
13 would have done anything differently? All experts agree that that
14 recall issue is not a factor in this crash. It had to do with the fuel
15 evaporation system. It was not an issue.

16 The plaintiffs' own expert on that front for the recall
17 agreed that SpeedVegas had no obligation to react on that. We
18 reference that generally in our brief, but I wanted to address that.

19 And then also, Mr. Samson raised the FIA standards. And
20 again, there's no expert in this case that says a different design of
21 the wall, a different placement of the wall, would have changed the
22 outcome in this crash.

23 The experts all testified that Mr. Sherwood, in the initial
24 impact, sustained a very minor injury of a broken rib and would have
25 walked away. That's not -- the crash is not what caused his death,

1 and the plaintiffs don't contend that the crash itself caused his death.

2 So again, the causation issue is pervasive in the theories
3 against SpeedVegas, and is pervasive in the sense that there's an
4 absence of evidence that the plaintiffs can point to that say, I can
5 draw a connection between my contention that this is defective,
6 deficient, insufficient. The instruction provided by the instructor was
7 improper. They didn't react properly. No one draws a connection
8 between that and the actual impact.

9 And so again, for those reasons, the defendants is entitled
10 to summary judgment -- SpeedVegas and Mr. Fiore -- because those
11 contentions -- that does not have the burden -- I mean, it has no
12 competent evidence that could sustain that or prevail on that on trial.

13 So again, the defendants are entitled to summary
14 judgment on this basis.

15 THE COURT: Thank you.

16 MR. MURDOCK: Thank you.

17 THE COURT: This is the Defendant SpeedVegas' Motion
18 for Summary Judgment.

19 And it will be denied in its entirety. There are just issues
20 of fact here for a jury to determine, such as whether or not there was
21 adequate instruction, whether there was proper control of the
22 vehicle, if the vehicle was driving too fast or on the wrong driving
23 line, whether or not the fire response or the presence of fire
24 equipment could have affected the outcome, whether or not the
25 track was compliant with industry standards, and also the fact that

1 the student driver wasn't told with regard to the -- that turn being the
2 most dangerous one on the course.

3 So for those reasons, the motion will be denied.

4 It's 2:03. I like to take a break after lunch. Let's be back at
5 2:15, please.

6 MR. SAMSON: And Your Honor, on that, I'm to prepare
7 the order, I assume?

8 THE COURT: You are to prepare the order, please.

9 MR. SAMSON: Thank you, Your Honor.

10 THE COURT: Make sure that Mr. Murdock and his team
11 have the ability to review and approve the form.

12 I don't accept competing orders. But if you have an
13 objection, file that to preserve your record. And I take it from there.
14 Thank you.

15 See you at 2:15.

16 [Recess taken from 2:03 p.m., until 2:17 p.m.]

17 THE COURT: Thank you. Please remain seated. Thank
18 you, everyone.

19 Recalling the case of Ben-Kely versus SpeedVegas.

20 And we're ready for the third motion, Sherwood Motion
21 for Summary Judgment on the 6th Affirmative Defense.

22 MR. SAMSON: Thank you, Your Honor.

23 So, Your Honor, we filed this motion as to a theory that
24 we've discussed quite a bit before in this case, especially with
25 respect to Dr. Raphael -- the theory that Mr. Sherwood suffered a

1 seizure in the moments leading up to the crash and that that seizure
2 is what led to the crash.

3 We were just discussing earlier some of the other
4 evidence in the case, such as the testimony by SpeedVegas' experts
5 that the car was traveling too fast on the wrong line, and that that is,
6 in fact, what led to the crash.

7 The theory of seizure is being offered as an alternative --
8 an alternative causation theory that eliminates the negligence of
9 SpeedVegas and posits something else, which is that no matter what
10 they did, however bad, however good, Mr. Sherwood suffered this
11 seizure and the seizure led to the crash and then his death.

12 This motion is brought because there isn't sufficient
13 evidence that meets the requisite burden of proof for them to
14 support that defense. And so even though we're the plaintiff here,
15 this is an affirmative defense and must be met with the same
16 standard that we would have to meet in proving our case. There's
17 no expert that SpeedVegas has disclosed that has any qualification
18 to discuss seizure. There's no expert that even discusses seizure
19 beyond merely raising it as something that someone said down at
20 the track. And really what this was was SpeedVegas' employees
21 putting it in their statements on the day the incident happened, just
22 because of something they heard from somebody else.

23 There's never been a medical diagnosis of seizure.
24 There's never been a doctor to come forward and say, That's
25 reasonable; more likely than not to have happened, or anything to

1 elevate it beyond just a mere possibility. And that's why we brought
2 this.

3 The defendants and SpeedVegas and Mr. Fiore -- the
4 defendants who are pushing this defense have come back and said,
5 Well, look, you did offer an expert that said seizure was more likely
6 than not to have not occurred. And that's all we're doing is we're
7 coming in and we're going to now cross-examine and question your
8 expert.

9 And frankly, that has [indiscernible]. The reason that that
10 expert was disclosed on seizure is because it was an anticipated part
11 of the case that SpeedVegas would make as a defense.

12 So we did hire a neurologist. That neurologist looked at
13 all the medical records. That neurologist looked at the evidence,
14 looked at the facts, and said, More likely than not, this didn't happen.

15 They did not. They did not hire an expert on this. And
16 there is no one to offer the counter to that. Instead, they wish to
17 question our expert, who again was designated in anticipation of
18 their defense, in order to establish it. That has it totally backwards,
19 and it misuses the Williams' case on which they rely.

20 Because what Williams is talking about is medical
21 causation -- medical causation of injuries. So if someone gets hurt,
22 there's a -- let's say a back injury, and the plaintiff expert says, We
23 believe it was this. They caused it, this crash, more likely than not.
24 Williams permits the defense expert to come in -- not posit that it
25 was something else in the past that more likely than not raised it --

1 but that there are other potential causes for that, and then to
2 question the plaintiffs' expert about it, because the plaintiff in that
3 case bears the burden of proof.

4 But here the seizure defense is an invention of
5 SpeedVegas. It's their defense. We didn't have to prove that
6 Mr. Sherwood didn't have a heart attack, an aneurysm, a stroke -- I
7 mean, you can go down the list of all possible medical conditions
8 that he may have had that are possibilities for a human being to
9 suffer. We didn't designate experts on those because we don't have
10 to prove that those didn't occur. But we did designate on seizure,
11 because that's their defense that they have raised repeatedly.

12 They can't bootstrap the evidence in at a lower evidentiary
13 standard to prove that defense, which is precisely what they're
14 doing. And the way in which they're doing it is not even to use their
15 own expert, but to use an expert disclosed by Automobili
16 Lamborghini, Dr. Raphael. And their motion makes clear, that's it.
17 That's all they've got when it comes to expert testimony.

18 They do raise some things like, well, seizure can arise from
19 lack of sleep; seizure can arise from alcohol use, ignoring that
20 Mr. Sherwood was blood tested when he died and had no blood
21 alcohol in his system; seizure can arise from a myriad of things.
22 Those aren't facts that are commonly understandable to a jury.
23 That's not like driving a car -- cars shouldn't hit each other -- that is
24 within the ordinary understanding of a layperson. You need an
25 expert to contextualize those facts.

1 And all that they've done is simply raise that things are
2 possible. Things can happen. And an equal possibility of a person
3 who has been medicated and has no seizures for over a decade; has
4 a therapeutic dose of antiseizure medication in his system, as
5 admitted by the expert on whom they rely -- that there's no objective
6 evidence of seizure -- as equally possible that a seizure happened
7 there is that an ordinary, otherwise healthy person with no seizure
8 condition can suffer one too.

9 And these -- that's the point, is that all of these are just
10 possibilities picked from the ether, which then we put forward an
11 expert to defend, using the relevant legal standard, and now, they
12 want to introduce into the case, without ever having to cross that
13 threshold and argue that to the jury. And that's improper.

14 And that's why we filed this motion because ultimately
15 they are bringing alternative causation theories here. They must
16 meet the standard that you -- that it must be proved to a reasonable
17 degree of medical probability. And there's no one in the case that's
18 willing to say that. And that if our expert does not testify as to their
19 defense, they don't even have a rationale for how any of this
20 evidence could even be offered.

21 So for all those reasons, Your Honor, we submit for
22 Summary Judgment on the 6th Affirmative Defense, focusing on
23 seizure.

24 And I do want to make that clear, we're focusing on this
25 particular cause. We styled it as the 6th Affirmative Defense. They

1 have others, like Mr. Sherwood was driving negligently. And I agree
2 those are questions of fact for the jury, just like the negligence issues
3 we raised with SpeedVegas.

4 I'm talking specifically about the seizure, that the Motion
5 for Summary Judgment should be granted as to that particular
6 argument.

7 Thank you, Your Honor.

8 THE COURT: Thank you.

9 Mr. Murdock.

10 MR. MURDOCK: Thank you, Judge.

11 I'll pick up where Mr. Samson left off.

12 And this issue really resonates based on some arguments
13 he made a little bit earlier this afternoon. And I recall that he talked
14 about that there was, you know, oh, we don't have the people in the
15 vehicle because they passed away. Unfortunately, we don't have
16 video or audio of what people said or what transpired inside the
17 vehicle. That was the argument he made in response to our
18 argument -- again, just the failure to properly provide instruction.

19 And that argument cuts both ways. It also applies here.

20 What we have is we have an absence of evidence as to
21 why -- well, the plaintiff, I cannot point to any reason why the vehicle
22 crashed. They had pointed to this idea that maybe the track was
23 improperly designed; maybe that the instructor failed to provide
24 Mr. Sherwood proper instruction.

25 And I would note that Mr. Samson suggested that in his

1 prior argument about the failure to provide proper instruction,
2 because he should have taken over control of the car. And it seemed
3 to me he was hinting at an absence of driver input, which would
4 factor in and suggest incapacitation.

5 This is an issue that is ripe for cross-examination, just as
6 Mr. Samson argued in response to our contentions about the fire
7 suits and the negligent instruction of the driver -- the instructor or
8 the coach. That too applies here. This is right on with
9 cross-examination, to ask Mr. Cope, Why did the vehicle lose
10 control? Did you consider that Mr. Sherwood may have had a
11 seizure? Could that explain it? That is something that's ripe for this.

12 This is not picked from the ether. Mr. Sherwood has
13 diagnosed seizure disorder. As we noted in our response, there's a
14 history of prior crashes caused by a seizure. He fainted at work.
15 There are questions out there that the jury should be able to
16 consider as to why the vehicle was not controlled on the 14th lap as
17 it approached the S-turn where this crash occurred.

18 That is well within the scope of cross-examination. It does
19 not need to meet the threshold of the 50 percent or greater the
20 probability. This is -- these are questions we can ask of Mr. Cope; of
21 the plaintiff's expert if he wants to put on the doctor, the neurologist
22 to talk about this. This is something the jury should consider, should
23 be allowed to consider as to why the crash occurred.

24 It would be improper for the Court to take that question
25 away, Why did the crash happen? That is the plaintiffs are pursuing

1 a negligence claim against SpeedVegas, so we get to talk about
2 Mr. Sherwood's conduct.

3 Mr. Samson has admitted that the 6th Affirmative Defense
4 about his contributory negligence is ripe for the jury's consideration.

5 This is a more discrete issue of why did the crash happen,
6 and what would explain it. And the jury should be able to consider
7 all of the evidence, just as Your Honor ruled that it should be able to
8 consider whether or not Mr. Ben-Kely provided instruction, whether
9 or not Mr. Ben-Kely applied the brakes, whether or not the fire suits
10 would have made a difference here, whether or not the layout of the
11 track is something that might have been a factor in this crash.

12 So should they be able to consider whether Mr. Sherwood
13 had a seizure in this crash, and it's a documented history. This is not
14 something we pulled up of, oh, maybe it was a heart attack or it was
15 a stroke.

16 And the reasons why are twofold on this: One, the heart
17 attack or stroke, there's no medical evidence of that, but there could
18 be biomarkers. There would be evidence of it on autopsy. Someone
19 has a heart attack, there's elevated levels of troponins in their blood.
20 Stroke, you can see it on exam.

21 The seizure, by definition, is not something that can be
22 viewed objectively postevent. All experts have testified to that. The
23 plaintiff's neurology expert admitted that.

24 So this is a question of, Can someone determine, or
25 should a jury be allowed to consider, why the vehicle wasn't

1 controlled? And we submit that, in fact, it's a question of fact for the
2 jury to consider. It is a disputed issue in this case, and it's ripe for
3 cross-examination.

4 If Your Honor has any questions, I can certainly address
5 those.

6 THE COURT: Well, my only question is we deferred the
7 scope of Dr. Raphael's testimony till the time of trial.

8 Is it premature to make a decision on this motion today?

9 MR. MURDOCK: Well, I think possibly. But I think that the
10 issue is pretty straightforward that this is well within the purview of
11 the jury's consideration. We could use this on cross-examination of
12 their own traffic -- or their own crash accident reconstruction expert,
13 Mr. Cope. He says he thinks that the track designed by the
14 benefactor.

15 Well, Mr. Cope, is it possible that Mr. Sherwood had a
16 seizure? Did you consider that as part of your opinion?

17 That is cross-examination. And this falls well within
18 that scope.

19 THE COURT: Thank you.

20 MR. MURDOCK: Thank you.

21 THE COURT: And the same question to you, Mr. Samson.

22 MR. SAMSON: Our doctor -- and to address the Court's
23 question, on Dr. Raphael, she admitted at deposition, she -- even
24 though she contends she's qualified; we contend she is not. She is
25 not making the opinion that he had a seizure to a reasonable degree

1 of medical probability. She admitted that. So no one is making that
2 opinion in this case.

3 I think we're conflating a couple different issues here.
4 We're talking about cross-examine of experts, and now we're talking
5 about Mr. Cope.

6 I'm reading straight out of their opposition, page 10, lines
7 13 to 14: The only reason that this provided testimony from experts
8 for SpeedVegas and other defendants rebut claims by plaintiff's
9 experts that Sherwood, to a reasonable degree of medical
10 probability, did not suffer a seizure.

11 There's nothing referenced about cross-examining
12 accident reconstructionists with a possibility of a seizure here or a
13 possibility of a seizure there. They're talking about Dr. John Hickson,
14 the neurologist who is designated to rebut this defense.

15 And cross-examining experts is a subject for something
16 else. Right now we're talking about a defense and merely saying,
17 Hey, all I'm going to do is cross-examine and raise the possibility is
18 tacitly an admission, We can't satisfy the burden of this defense
19 without proving the seizure independent of providing this kind of
20 possibility cross-examination to someone like Mr. Cope, who isn't
21 going to testify about seizure; isn't qualified to do that. He's not a
22 medical doctor.

23 And so to Your Honor's point, I don't think it's premature
24 to consider this motion with respect to Dr. Raphael, because she
25 can't meet that threshold anyway. And nothing else that they have

1 offered meets that threshold, including this cross-examination of
2 mere possibilities.

3 It's different from what we were talking about earlier. I
4 don't -- it's not the same. What we were talking about earlier were
5 claims of negligence that are borne out by independent facts. So the
6 fact that there's no camera in the car, or recitation of what was said
7 between the occupants, is not the only evidence of what happened
8 in the car, because we know about the instructor brake pedal. We
9 know about the ability of the instructor to slow the car. We know
10 that both of these guys were breathing after the event. We know
11 that the -- you know, their -- the list goes on and on of what the jury
12 can be told.

13 Seizure is just conjecture. That's thrown in there with no
14 one to contextualize these statements that are made about its
15 probability or possibility with respect to someone who fainted at
16 work over 12 years ago. That's what an expert has to do. And there
17 is no -- nowhere in any of the briefing or in any of the argument
18 today do they identify anyone who can meet the threshold they have
19 to meet to satisfy that defense.

20 So for those reasons, Your Honor, we submit that
21 summary judgment is appropriate.

22 THE COURT: Okay.

23 MR. SAMSON: Thank you.

24 THE COURT: So this is the Plaintiff's Motion No. 3, to --
25 let's see, where are my notes? with regard to the 6th -- the 6th

1 Affirmative Defense.

2 I'm going to deny the motion because the plaintiffs -- the
3 deceased plaintiffs' physicality, medical conditions have some
4 limited relevance.

5 But I'm going to caution you, Mr. Murdock, that because
6 you -- there's not going to be an expert who is going to testify to a
7 reasonable degree of medical certainty, that you can ask and then go
8 on. It has very limited relevance at the time of trial.

9 Okay. Number 4 is Sloan Ventures' Motion for Summary
10 Judgment.

11 MR. SAMSON: I believe that's been resolved, Your Honor,
12 as --

13 MR. BRENSKE: Yes, Your Honor.

14 THE COURT: And I wasn't sure. I went ahead and finished
15 preparing for it, but let me have confirmation.

16 MR. BRENSKE: Yes, Your Honor. This is attorney Bill
17 Brenske, Bar No. 1806.

18 The Motion for Summary Judgment by Sloan -- because
19 we have settled the case, that should have been taken off calendar.

20 THE COURT: Okay.

21 MR. BRENSKE: Sloan sent a file, a notice of settlement in
22 this case, I believe early last week.

23 THE COURT: We all saw that Thursday, and we were
24 happy until we saw how limited it was. Anyway, I shouldn't tell you
25 that, should I?

1 MR. BRENSKE: Yes.

2 THE COURT: All right. So this takes us to the Gragson
3 Motion.

4 MR. SAMSON: Your Honor, I think that falls in the same --

5 MR. BRENSKE: And Your Honor, --

6 MR. SAMSON: -- the same purview.

7 THE COURT: Same -- same -- okay. So we're done for
8 today?

9 MR. BRENSKE: Yes, Your Honor.

10 Well, I thought Automobili Lamborghini America's Motion
11 for Partial Summary Judgment against Sherwood was on today.

12 THE COURT: Okay. Let's take that then.

13 Ms. Vargas.

14 MS. VARGAS: Good afternoon, Your Honor.

15 May it please the Court, with respect to the Motion for
16 Partial Summary Judgment, filed by Automobili Lamborghini
17 America, often referred to as ALA in our papers, I wanted to note
18 that in the face of summary judgment, the Sherwood plaintiffs
19 abandoned their negligence indemnity and contribution claims. And
20 so on that basis, the Court can assume that they have conceded the
21 motion had merit, and they had no basis to oppose it as they had no
22 evidence for it.

23 With respect to the remaining claim addressed in the
24 motion, Your Honor, for punitive damages, the Court should grant
25 ALA's motion because their demand for punitive damages has no

1 basis. They've produced no evidence in this case.

2 Unlike other Motions for Summary Judgment Your Honor
3 heard today where there was testimony from the defendants
4 employees; for other individuals, there was documentation; there
5 were e-mails and so forth.

6 In this instance, there's absolutely not a scintilla of
7 evidence from ALA with respect to any information related to its
8 conduct, its alleged culpable mental state.

9 Instead, plaintiffs want to address conduct by ALA through
10 its retained expert. And that's improper for the reasons I'll explain,
11 Your Honor.

12 First, as Your Honor, I'm sure, is very well aware, that the
13 plaintiff must demonstrate that the defendant displayed a conscious
14 disregard for others' rights, when it knows the probable harmful
15 consequences of a wrongful act and that it exhibits a woeful and
16 deliberate failure to act -- to avoid those consequences.

17 As noted in the *Countrywide versus Thitchener* case, this
18 is a high standard and denotes conduct that at the minimum must
19 exceed mere recklessness and gross negligence.

20 I think it's telling, Your Honor, that the Sherwood plaintiffs
21 abandoned their negligence claim against ALA presumably because
22 they didn't have any evidence to support it, yet they turn around and
23 ask this Court to deny our motion when they have to show that the
24 conduct of ALA exceeded gross negligence, much less just standard
25 run-of-the-mill negligence.

1 In addition, the plaintiff has to prove by clear and
2 convincing evidence that they can meet every factual element. And
3 they haven't demonstrated it.

4 In their opposition, Your Honor, they provided one page of
5 argument. That argument was entirely focused on their paid expert,
6 Mark Arndt. And in the opposition and in Mr. Arndt's testimony,
7 Your Honor, there's a conflation of conduct of ALA and that of a
8 nonparty Automobili Lamborghini S.p.A., in Italy, who was the
9 manufacturer of this vehicle.

10 For years that this case has been litigated, everyone in this
11 case has been aware that ALA is the distributor of the vehicle. It is
12 not the designer; it is not the manufacturer. Yet in their opposition,
13 the plaintiffs are attempting to use Mr. Arndt's testimony related to
14 the design of the fuel tank in order to overcome summary judgment,
15 and there simply isn't a basis to do that.

16 Moreover, Your Honor, I would point out that Mr. Arndt's
17 testimony related to design is focused on foreseeability, that it was
18 foreseeable that this would occur; that a defect, the alleged defect in
19 the tank would result in a fire. Yet, foreseeability is an issue that's
20 grounded in negligence, which is a claim that they've abandoned,
21 and that's the *Taylor* case.

22 I would like to also point out, Your Honor, that the
23 plaintiff's reliance on the *Thitchener* case is misplaced. ALA is not
24 disputing that intentionally disregarding known risks may allow a
25 plaintiff to recover punitive damages, but it doesn't mean that that

1 recovery can occur simply through evidence proffered from a paid
2 expert who alleges that there was this conduct.

3 To distinguish the incident case from *Thitchener*,
4 Your Honor, in *Thitchener*, the plaintiffs in that case actually
5 obtained testimony and documents from Countrywide employees
6 that demonstrated very clearly there was a willful disregard for the
7 consequences of their actions. It wasn't that they had a paid expert
8 who said that X, Y, and Z was done. It was actual evidence obtained
9 from the company and the company employees, with respect to the
10 employee who had the power to stop the foreclosure, Ms. Baldwin.
11 She was a foreclosure specialist. And she just completely
12 disregarded all the warning signs. She dismissed the contact by the
13 broker on two separate occasions, when it was very clear that there
14 was confusion.

15 There is no such evidence here, Your Honor. Absolutely
16 none. It is simply Mr. Arndt saying that the manufacturer should
17 have known about this alleged defect.

18 ALA is not the manufacturer. The alleged culpable
19 conduct of the nonparty cannot be imputed to ALA for punitive
20 damages.

21 So unlike *Thitchener*, Your Honor, there can be no
22 inferences drawn from the evidence that the plaintiffs have
23 attempted to present here.

24 Importantly, I would note that, unlike the *Thitchener* case,
25 the plaintiffs here have completely failed to identify any officer,

1 director, or managing agent that ratified this alleged conduct that
2 Mr. Arndt has testified with respect to the design of the vehicle. On
3 that basis alone, the motion should be granted.

4 Finally, Your Honor, with respect to NRCP 50/60, there's a
5 passing reference to that in the opposition. And the opposition on
6 page 6, at line 21, states that with respect to the Court, if it should
7 instead defer ruling, the request is it should defer ruling pursuant to
8 NRCP 50/60 instead of granting the motion in light of the recent
9 compulsion of production of documents from ALA about the
10 knowledge within its corporate hierarchy.

11 So first, Your Honor, with respect to NRCP 50/60, that
12 request can be made, but it has to be made with specificity. The
13 plaintiffs have to demonstrate what genuine triable issue will be
14 discovered in their affidavit and their request. They didn't do either
15 of those things. They've had years, Your Honor, in order to obtain
16 this information. They haven't done that. There simply isn't that
17 evidence.

18 ALA has responded to discovery. The documents have
19 been produced. That information shows nothing different than what
20 has been shown for the last four and a half years since this -- the
21 initial case was filed.

22 So Your Honor, on that we would submit that the plaintiffs
23 have not met their burden and that the motion should be granted.

24 THE COURT: Thank you.

25 MS. VARGAS: Thank you, Your Honor.

1 THE COURT: Mr. Samson.

2 MR. SAMSON: Thank you, Your Honor.

3 I'll start with something, Your Honor, that ALA's counsel
4 indicated she is not disputing, and that's that the intentional or
5 reckless disregard for known consequences -- that subjects one to
6 punitive damages in the state of Nevada. And that's the evidence
7 that we presented to the Court.

8 Nearly all of the argument that I just heard from counsel
9 focused on the source of that evidence -- where it could come from.
10 And there were some words thrown in that I think are particularly
11 telling -- things like paid expert, paid compensation, those kinds of
12 words, indicating and previewing already the cross-examination
13 strategy that ALA is free to use in front of the jury when questioning
14 Mr. Arndt. And that's because these are questions of fact.

15 And even the attack now on Mr. Arndt as a paid expert
16 only serves to highlight that, that these are questions of fact for the
17 jury, and that we have presented sufficient questions of fact.

18 And this isn't like the *Thitchener* case which was readily
19 understandable by just about anybody, involved moving
20 possessions outside of a residence, understand that it was well
21 within the capability of an ordinary understanding of the jury to
22 know why that was wrong.

23 This is a case about the design of a fuel tank in a \$500,000
24 sports car. We need expert testimony to help jurors understand
25 what was done and then what was done after this happened. And

1 that's really what Mr. Arndt is doing. It's not as simple, I think, as
2 counsel made it seem.

3 There's clear indications in the crash test photos that were
4 provided to us that Mr. Arndt says, Look, this is an inevitability that
5 this was going to happen. The movement of this vehicle is an
6 inevitability in how it was designed. And then after this crash, we
7 see a redesign of the tank to eliminate the danger that he identified.

8 Those actions, as I said earlier today, those actions speak
9 louder than words. And the fact that it's a, quote, paid expert from
10 the plaintiff is a topic for ALA to raise on cross-examination -- not as
11 an excuse for summary judgment.

12 The -- there was a lot of supposition too as to why we
13 dropped the negligence claim. That's -- that has nothing to do with
14 our arguments on punitive damages. There are implications of
15 trying a negligence and strict product liability claim in Nevada that
16 lead us to drop the negligence claim which has nothing -- it should
17 not be construed as any kind of admission on our part that we can't
18 prove these things.

19 To the contrary, that's what we're showing with
20 Mr. Arndt's testimony is that it rises above negligence to this level of
21 culpability for punitive damages.

22 On the 50/60 request, we got -- I believe -- I don't want to
23 speak out of turn -- but I think it was last night, a production of over
24 10,000 documents from Automobili Lamborghini America. I
25 obviously haven't had a chance to look at them. But they're directly

1 responsive to compelled production that we reference in our motion.

2 And so if anything, Mr. Arndt's testimony, which we
3 believe is sufficient to get us through the door and have this
4 presented to a jury and let them decide, as Nevada law provides, if
5 that's insufficient, we would submit that these documents -- that any
6 ruling should be deferred until we have an opportunity to fully
7 assess what's in these documents that were literally produced
8 yesterday.

9 And so for those reasons, we would respectfully request
10 the motion be denied.

11 And I also do want to emphasize that on the negligence
12 claims, the indemnity and contribution claims, which I believe were
13 disposed of through a good faith settlement months ago, on the
14 negligence claim, in particular, it was something that in anticipation
15 of trial and consistent with the rules here we were going to abandon
16 is why we did not oppose. And so no implication should be drawn
17 from that, other than what I just said.

18 Thank you very much, Your Honor.

19 THE COURT: Ms. Vargas --

20 MS. VARGAS: Thank you.

21 THE COURT: -- do you wish to respond only to the request
22 for a deferral of the decision?

23 MS. VARGAS: Yes, Your Honor.

24 So the documentation that was produced, I can represent
25 to the Court, is largely related to information that ALA has in its