

2015 WL 4699548 (Nev. Dist. Ct.) (Trial Motion, Memorandum and Affidavit)  
District Court of Nevada.  
Clark County

Eva MEDER, individually and as the Special Administrator of the Estate of Howard Meder, Plaintiff,

v.

THI OF NEVADA AT LAS VEGAS I, LLC dba Harmon Medical Center and Rehab Hospital, a Delaware Corporation; the staff of Thi of Nevada At Las Vegas I, LLC dba Harmon Medical Center and Rehab Hospital, a Delaware Corporation; Fundamental Administrative Services, LLC, a Delaware Corporation; Fundamental Long Term Care Holdings, LLC, a Delaware Corporation; Fundamental Clinical and Operational Services, LLC, a Delaware Corporation; Doe Defendants 1 through 10; Roe Corporations 10 through 20, Defendant.

No. 11A649839.  
February 6, 2015.

Dept. No.: III

**Motion for Summary Judgment, or in the Alternative, Summary  
Adjudication of Issues By Fundamental Administrative Services, LLC**

Marquis Aurbach Coffing, [Jason M. Gerber](#), Esq., Nevada Bar No. 9812, 10001 Park Run Drive, Las Vegas, Nevada 89145, Telephone: (702) 382-0711, Facsimile: (702) 382-5816, for defendant. Fundamental Administrative Services.

Giovanniello Law Group, [Alexander F. Giovanniello](#), Esq., Nevada Bar No. 11141, Shane Phayakapong, Esq., Nevada Bar No. 12468, 3753 Howard Hughes Parkway, Suite 200-399, Las Vegas, NV 89169, Telephone: (702) 784-7638, for defendant Fundamental Administrative Services.

Pursuant to [NRCp 56](#), Defendant Fundamental Administrative Services, LLC ("FAS"), by and through its counsels of record, Jason M. Gerber, Esq. of the law firm of Marquis Aurbach Coffing, and Alexander Giovanniello, Esq. and Shane Phayakapong, Esq. of the Giovanniello Law Firm, respectfully submits this motion for summary judgment which demonstrates that there is no genuine issue of material fact with respect to Plaintiffs' claims against FAS, and that FAS is entitled to summary judgment as a matter of law, or in the alternative, summary adjudication of the claims that Plaintiffs have asserted against FAS.

This Motion is based upon and supported by the following Memorandum of Points and Authorities, the pleadings and papers on file herein, the declaration and exhibits attached hereto, any oral argument that this Court may allow at the time of the hearing.

Dated this 6<sup>th</sup> day of February, 2015.

MARQUI AURBACH COFFING

By

Jason M. Gerber, Esq.

Nevada Bar No. 9812

10001 Park Run Drive

Las Vegas, Nevada 89145

Giovanniello Law Group

Alexander F. Giovanniello, Esq.

Nevada Bar No. 11141

Shane Phayakapong, Esq.

Nevada Bar No. 12468

3753 Howard Hughes Parkway, Suite 200-399

Las Vegas, NV 89169

Attorney(s) for Fundamental Administrative Services, LLC

#### **NOTICE OF MOTION**

You and each of you, will please take notice that the MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF THE ISSUES BY FUNDAMENTAL ADMINISTRATIVE SERVICES, LLC will come on regularly for hearing on the *11* day of *March*, 2015, at the hour of *9:00 a.m.*, or as soon thereafter as counsel may be heard, in Department 3 in the above-referenced court.

Dated this *6<sup>th</sup>* day of February, 2015.

MARQUIS AURBACH COFFING

By

Jason M. Gerber, Esq.

Nevada Bar No. 9812

10001 Park Run Drive

Las Vegas, Nevada 89145

Giovanniello Law Group

Alexander F. Giovanniello, Esq.

Nevada Bar No. 11141

Shane Phayakapong, Esq.

Nevada Bar No. 12468

3753 Howard Hughes Parkway, Suite 200-399

Las Vegas, NV 89169

Attorney(s) for Fundamental Administrative Services, LLC

## MEMORANDUM OF POINTS AND AUTHORITES

### I. INTRODUCTION

In their Second Amended Complaint (“SAC”), the Estate of Howard Meder, by and through Special Administrator Eva Meder, and Eva Meder, individually, (“Plaintiffs”) assert seven causes of action against FAS arising from injuries that Mr. Meder purportedly sustained while he was a patient at Defendant Harmon Medical and Rehab Hospital (“Harmon Hospital”): Medical Malpractice (Count 1); Negligence—Hiring, Training, Retention (Count 2); Simple Negligence (Count 3); **Abuse** of an Older or Vulnerable Adult (Count 4); Wrongful Death (Count 5); Fraud (Count 6); and alter ego/piercing the corporate veil and direct corporate negligence (Count 7). *See* March 4, 2014 Second Amended Complaint (“SAC”) at ¶¶ 16-65.

As explained below, Plaintiffs' lawsuit against FAS is utterly baseless and must be dismissed. After a full opportunity for discovery, the record evidence does not support—in fact, it specifically *refutes*—all of Plaintiffs' claims against FAS. Accordingly, FAS' Motion should be granted.

### II. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. FAS is a Delaware limited liability company that is headquartered in Sparks, Maryland. *See* Deposition of Ken Tabler attached as **Exhibit A**, 8:24-25. FAS provides accounting and other back-office, administrative support services, to facilities like Harmon Hospital pursuant to written administrative support agreements. *See* **Exhibit A**, 12:5-7. None of FAS's employees have offices at Harmon Hospital. *See* **Exhibit A**, 27:12-13; 27:18-20.

2. The services that FAS provides to Harmon Hospital are set forth in an Administrative Support Agreement (“ASA”). *See* Administrative Support Agreement attached as **Exhibit B**.

3. Under the ASA, Harmon Hospital contracted with FAS to “perform certain support services required in connection with the management” of Harmon Hospital and its business. *See* **Exhibit B**, p.1 The ASA states that in providing services to Harmon Hospital, FAS “shall comply with any reasonable and lawful policies or directives established from time to time by [Harmon Hospital]” *See* **Exhibit B**, p.1, Sec. 1.2.

4. Subject to Harmon Hospital's approval, FAS provided services related to the handling of Harmon Hospital's bank accounts and accounting records and FAS functioned as a contract administrator for Harmon Hospital's third party agreements. *See* **Exhibit B**, p.2, Sec. 2.2, 2.3 and 2.4. Under the ASA, FAS had authority to enter into agreements for Harmon Hospital's benefit, but Harmon Hospital was responsible for the performance of those agreements. *See* **Exhibit B**, p.2, Sec. 2.4.

5. Pursuant to the ASA, Harmon was the employer of all its employees and was solely responsible for hiring, firing, promoting, discharging, and supervising. *See* **Exhibit B**, p. 2, Sec. 3.1. FAS does not have any employees who work at or for Harmon Hospital. *See* **Exhibit A**, 27:18-25. Additionally, pursuant [42 CFR 482.12](#), Harmon Hospital is required to have a governing body that appoints the CEO who is responsible for managing the hospital.

6. Under the ASA, Harmon Hospital was responsible for paying “all debts, expenses and costs associated with the facility...” *See* **Exhibit B**, p.2, Sec. 3.2. FAS had no responsibility to pay these or other costs/expenses associated with Harmon Hospital's

employees, which were solely the responsibility of Harmon Hospital. *See Exhibit B*, p.2, Sec. 3.1 and 3.2. FAS had no duty or obligation to make any expenditure whatsoever on behalf of Harmon Hospital. *See Exhibit B*, p. 4, Sec. 6.4.

7. None of the services that FAS provided to Harmon Hospital pursuant to the ASA related to patient care. *See Exhibit B*, p.8. Instead, FAS rendered only administrative support services, such as providing assistance with respect to employee payroll and human resources operations, obtaining equipment and office supplies, accounting and book-keeping services, insurance, and advising Harmon Hospital regarding licensing and the Health Insurance Portability and Accountability Act. *See Exhibit B*, p.8, generally.

8. Plaintiffs do not contend that FAS provided direct *medical* care and/or treatment to Howard Meder. *See* Eva Meder's Responses to FAS' Requests for Production, Set 1, attached **Exhibit C**, 5:14-24; Howard Meder's Responses to FAS' Requests for Production, Set 1, attached as **Exhibit D**, 5: 15-25.

9. Plaintiffs do not contend that FAS provided direct *custodial* care and/or treatment to Howard Meder. *See Exhibit C*, 6:1-8; **Exhibit D**, 5:26-28.

10. Despite their allegations in the SAC ¶ 57, Plaintiffs admit that FAS did not own 100% of Harmon Hospital. *See* Plaintiffs' Responses to FAS' Requests for Admissions, Set 2, attached collectively as **Exhibit E**, 2:1-5. In fact, FAS has no ownership interest in Harmon Hospital. *See Exhibit A*, 40:23-25 - 41:1-8.

11. Plaintiffs have also admitted that they never spoke to anyone from FAS, did not know what FAS does and were unaware FAS was a named defendant in this case. *See* Declaration of Jason M. Gerber Esq. attached as **Exhibit J**. The SAC does not detail any allegations of misrepresentations made by FAS or its representatives. *See* SAC ¶¶47-54.

12. Harmon Hospital has a CEO, Melissa War, who oversees its operations and management. *See* Deposition of Melissa War attached as **Exhibit G**, 22:10-25. Ms. War reports to Harmon Hospital's governing body (the "Governing Body"). *See Exhibit G*, 17:7-10.

13. The Governing Body includes Harmon Hospital's department directors and managers, a representative from FCOS (acting in a separate capacity from his/her role with FCOS) and two members of the community. *See Exhibit G*, 17:12-20. Unlike FAS, FCOS has specifically contracted with Harmon to provide an individual, who serves in a separate capacity from his or her employment with FCOS, on the Hospital's Governing Body. *See Exhibit A*, 71:14-18. FAS does not have any representatives on the Governing Body. *Id.*

14. Harmon Hospital has its own process for approving its internal policies and procedures. *See Exhibit G*, 82:23-25 - 83:1-10.

15. Harmon Hospital is responsible for creating its financial projections each year. *See Exhibit G*, 240:5-15. FAS may be consulted regarding the projections, but, does not have approval authority over the final projection. *See Exhibit A*, 74:11-13. *Exhibit G*, 240:16-23. In fact, Harmon Hospital does not always adopt FAS' recommendations regarding the projections. *See Exhibit G*, 243:20-24.

16. FAS and Harmon Hospital keep and maintain separate books and accounting records. *See Exhibit A*, 186: 22-24.

17. FAS and Harmon Hospital maintain corporate formalities. *See Exhibit A*, 186:25, 187: 1-2.

18. FAS and Harmon Hospital do not share any common officers or directors. *See Exhibit A*, 187: 6-8.

19. FAS is headquartered in Sparks, Maryland; Harmon Hospital is in Las Vegas, Nevada. *See Exhibit A*, 188:6-22.

20. Harmon Hospital is adequately capitalized through a third-party lender. *See Exhibit A*, 190:1-2.

21. Pursuant to the ASA, FAS had authority to open and maintain accounts and investments for Harmon Hospital, including, but not limited to, deposits and disbursements, subject to Harmon Hospital's approval. *See Exhibit B*, p. 2, Sec. 2.2.

22. FAS and Harmon Hospital did not enter into, or participate in, a joint venture or partnership relationship. *See Exhibit B*, p.6, Sec. 7.1.

23. Under Mr. Meder's admission agreement, Harmon Hospital was responsible for his care and treatment. The admission agreement imposed no duty, right or obligation on FAS to provide care and treatment to Mr. Meder. *See* Harmon Hospital Miscellaneous Admissions Documents attached **Exhibit F**.

### III. SUMMARY JUDGMENT STANDARD

[NRCPC 56\(c\)](#) states in relevant part that “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Schmidt v. Washoe County*, 159 P.3d 1099 (Nev. 2007). Additionally, the pleadings and documentary evidence must be construed in the light, which is most favorable to the party against whom the motion for summary judgment is directed. *Mullis v. Nevada National Bank*, 98 Nev. 510, 512 (1982).

To defeat a summary judgment motion, the non-moving party—here, Plaintiffs—may not rest on mere allegations, but rather, must adduce *evidence* setting forth “specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him.” *Bulbman, Inc. v. Nevada Bell*, 825 P. 2d 588, 591 (Nev. 1992). A court must enter summary judgment against “a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, in which that party will bear the burden of proof at trial.” *Celeotex Corp. V. Cartett*, 477 U.S. 317, 322 (1986).

### IV. LAW AND ARGUMENT

#### A. FAS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' MEDICAL MALPRACTICE CLAIM (COUNT 1)

To survive summary judgment, a medical-malpractice plaintiff must proffer evidence establishing (1) the accepted standard of medical care or practice, (2) that the doctor's conduct departed from the standard of care, and (3) that his conduct was the legal cause of the plaintiff's injuries. *See Lockart v. Maclean*, 77 Nev. 210, 361 P.2d 670 (1961).

Plaintiffs' medical malpractice claim must be dismissed because it is undisputed that FAS did not provide any care or treatment to Mr. Meder. Indeed, Plaintiffs do not even allege that FAS rendered any direct medical care or treatment to Howard Meder. *See Exhibits C, D and E*. Nor do Plaintiffs allege that FAS provided any custodial care to Howard Meder. *See Exhibits C, D and E*. Because FAS provided no care to Mr. Meder, FAS could not possibly have departed from the applicable standard of care—which Plaintiffs also must prove to prevail on their medical malpractice claim. Accordingly, Plaintiff's medical malpractice claim in Count 1 of the SAC must be dismissed as to FAS, with prejudice.

#### B. FAS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR NEGLIGENCE—HIRING, TRAINING, RETENTION (COUNT 2)

The tort of negligent hiring imposes a general duty on an *employer* to conduct a reasonable background check on a potential employee to ensure that s/he is fit for the position. *See Hall v. SSF, Inc.*, 112 Nev. 1384, 1392, 930 P.2d 94, 98 (1996). The tort of negligent training and supervision likewise imposes direct liability only on an *employer* if (1) *the employer* knew that

the employee acted in a negligent manner, (2) **the employer** failed to train or supervise the employee adequately, and (3) **the employer's** negligence proximately caused the plaintiffs injuries. See *Helle v. Core Home Health Servs. of Nevada*, 124 Nev. 1474, 238 P.3d 818 (2008).

Plaintiffs' claim against FAS for negligent hiring, training and retention of Harmon Hospital's employees must be dismissed because the record evidence establishes that FAS did not employ Harmon Hospital's staff who rendered care and treatment to Mr. Meder. See **Exhibit A**, 27:10-25; **Exhibit B**, generally. The ASA between FAS and Harmon Hospital specifically provides that Harmon Hospital—**not FAS**—“shall be responsible for the hiring, firing, promotion, discharge and supervision of [Harmon Hospital's] Employees.” See **Exhibit B**, p.2, Sec. 3.1. Because there is no evidence to support any of the elements of this cause of action, it must be dismissed as to FAS, with prejudice.

### C. FAS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR SIMPLE NEGLIGENCE (COUNT 3)

To prevail on a negligence claim, a plaintiff must plead and prove that: (1) the defendant had a duty to exercise due care towards the plaintiff; (2) the defendant breached the duty; (3) the breach was an actual cause of the plaintiffs injury; (4) the breach was the proximate cause of the injury; and (5) the plaintiff suffered damages. See *Perez v. Las Vegas Med. Ctr.*, 805 P.2d 589 (1991).

Plaintiffs' negligence claim is doomed because the FAS owed no duty of care to Mr. Meder. Without a duty owed there can be no actionable negligence. See *Turney v. Sullivan*, 89 Nev. 554, 555, 516 P.2d 738, 738 (1973). Whether a defendant owes a plaintiff a duty of care is a question of law. See *Scialabba v. Brandise Const. Co.*, 112 Nev. 965, 968, 921 P.2d 928, 930 (1996). The record evidence makes clear that only Harmon Hospital—**not FAS**—assumed the responsibility to provide care and treatment of Howard Meder. See **Exhibit B**. Indeed, FAS had no contractual or other relationship with Mr. Meder that could have given rise to a duty of care—in fact, FAS had no **contact** with Mr. Meder at all. See **Exhibit J**. Because FAS and Mr. Meder were strangers, FAS had no duty of care, which is an indispensable element of Plaintiffs' claim. Moreover, even if such a duty existed (which it did not), it is undisputed that FAS did not render care or treatment to Mr. Meder. In short, Plaintiffs' negligence claim must be dismissed as to FAS, with prejudice.

### D. FAS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR ELDER ABUSE (COUNT 4)

Plaintiffs' claim for **elder abuse** in Count 4 of the SAC likewise must be dismissed. To prevail on an **elder abuse** claim, a plaintiff must plead and prove that “an older person or a vulnerable person suffer[ed] a personal injury or death that [was] caused by **abuse** or neglect or suffer[ed] a loss of money or property caused by exploitation...” NRS 41,1395(1).

Under NRS 41.1395(4)(a), “**abuse**” is the “willful and unjustified infliction of pain, injury or mental anguish; or deprivation of food, shelter, clothing or services which are necessary to maintain the physical or mental health of an older person or a vulnerable person.” Moreover, NRS 41.1395(4)(c) defines “neglect” as “the failure of a person who has assumed legal responsibility or a contractual obligation for caring for an older person or a vulnerable person, or who has voluntarily assumed responsibility for such a person's care, to provide food, shelter, clothing or services within the scope of the person's responsibility or obligation, which are necessary to maintain the physical or mental health of the older person or vulnerable person. For the purposes of this paragraph, a person voluntarily assumes responsibility to provide care for an older or vulnerable person only to the extent that the person has expressly acknowledged the person's responsibility to provide such care.”

FAS is entitled to summary judgment on Plaintiffs' **elder abuse** claim because FAS did not “**abuse**” or “neglect” Mr. Meder within the meaning of the statute (or otherwise). Nor do Plaintiffs even allege that FAS “exploited” Mr. Meder which resulted in his loss of money or property. As explained above, there is no record evidence that FAS had any **contact or relationship** with Mr. Meder, much less that FAS assumed a legal duty—contractually, voluntarily or otherwise—to provide care and treatment to him. See **Exhibits F** and **J**. Moreover, there is not a shred of proof that FAS committed any of the substantive acts, omissions



or deprivations necessary to give rise to a claim of **elder abuse**. Accordingly, this cause of action must be dismissed as to FAS, with prejudice.

#### **E. FAS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' WRONGFUL DEATH CLAIM (COUNT 5)**

Plaintiffs' wrongful death claim is predicated on the allegation that "Defendants" committed "wrongful and negligent actions" that "lead [sic] to the premature and wrongful death of Howard Meder." See SAC ¶45. As explained above, there is no evidence that FAS had any contact or relationship with Mr. Meder at all, let alone that FAS committed any "wrongful or negligent actions" that injured him. Consequently, Plaintiffs' wrongful death claim must be dismissed as to FAS, with prejudice.

#### **F. FAS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FRAUD CLAIM (COUNT 6)**

A plaintiff asserting fraud must plead and prove by clear and convincing evidence (1) a false representation made by the defendant; (2) defendant's knowledge or belief that the representation is false (or insufficient basis for making the representation); (3) defendant's intention to induce the plaintiff to act or to refrain from acting in reliance upon the misrepresentation; (4) plaintiffs justifiable reliance upon the misrepresentation; and (5) damages to the plaintiff resulting from such reliance. See *Lubbe v. Barba*, 91 Nev. 596, 599, 540 P.2d 115, 117 (1975).

Plaintiffs claim that "Defendants" defrauded Mr. Meder by charging for wound care services that never were provided to him. See SAC, ¶¶47-54. There is no allegation or evidence, however, that FAS made any representation to Mr. Meder or Plaintiffs that could give rise to a fraud claim against FAS. In fact, the opposite is true. During her deposition, Ms. Meder admitted that she had never spoken to anyone who worked for FAS, did not know what FAS is and was not aware that FAS was even a party to this litigation. See **Exhibit J**. It is axiomatic that a misrepresentation claim cannot survive where there is no representation made. Not surprisingly, there are not any allegations or evidence that Mr. Meder or Plaintiffs justifiably relied on any false statement by FAS, or that they suffered damages as a result - ***because no representation of any kind was ever made by FAS to the Plaintiffs***. See **Exhibit J**. Accordingly, Plaintiffs' fraud claim must be dismissed as to FAS, with prejudice.

#### **G. FAS IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIM FOR ALTER EGO/PIERCING THE CORPORATE VEIL AND DIRECT CORPORATE NEGLIGENCE (COUNT 7)**

Plaintiffs also contend that FAS is derivatively liable for the allegedly wrongful acts and omissions of Harmon Hospital based on alter ego theory. See SAC ¶¶ 55-65. "The corporate cloak is not lightly thrown aside." *Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 807, 963 P.2d 488, 496 (1998). The elements of alter ego liability are: (1) the corporation must be influenced and governed by the person asserted to be the alter ego; (2) there must be such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the corporate fiction of a separate entity would, under the circumstances, sanction a fraud or promote injustice. See *Polaris Industrial Corp. v. Kaplan*, 103 Nev. 598, 601, 747 P.2d 884, 886 (1987). The following factors, though not conclusive, may indicate the existence of an alter ego relationship: (1) commingling of funds; (2) undercapitalization; (3) unauthorized diversion of funds; (4) treatment of corporate assets as the individual's own; and (5) failure to observe corporate formalities. *Id.* at 601, 747 P.2d at 887.

As explained below, there is no evidence to establish any of the elements of alter ego liability with respect to FAS.

##### **1. FAS Did Not Govern or Improperly Influence Harmon Hospital**

There is no evidence to satisfy the first element of the alter ego analysis - *i.e.*, that FAS governed or improperly influenced Harmon Hospital. To be sure, ***FAS has no ownership interest in Harmon Hospital*** through which FAS could govern or control Harmon Hospital in its provision of care and treatment to patients, like Mr. Meder. See **Exhibit A**, 40:19-24. Nor is there any

evidence that FAS actually did exercise control and dominion over Harmon Hospital's employees and staff in the discharge of their employment functions. As explained above, the record evidence establishes that FAS provided administrative support services to Harmon Hospital pursuant to the ASA; that FAS did not serve on Harmon Hospital's governing body; and that FAS did not govern or control the facility. *See Exhibits A, B and G, generally*, Harmon Hospital retained responsibility and control over the services that it rendered to Mr. Meder and other residents. *See Exhibit B*. In sum, Plaintiffs do not - and cannot - demonstrate that FAS governed or improperly influenced Harmon Hospital to the extraordinary extent necessary to impose alter ego liability.

The degree of control required to pierce the veil is exclusive domination and control to the point that the subsidiary no longer has legal or independent significance of its own. *See Wallace ex rel. Cencom Cable Income Partners II, Inc. L.P. v. Wood*, 752 A.2d 1175, 1184 (Del. Ch. 1999). A parent may involve itself directly in its subsidiaries activities without becoming an alter ego so long as that involvement is consistent with the parent's investor status. *Harris Rutsky & Co. Ins. Servs. V. Bell & Clements Ltd.*, 328 F.3d 1122, 1134 (9<sup>th</sup> Cir. 2003). A parent corporation may be involved directly in certain aspects of its wholly owned subsidiary's affairs without subjecting itself to alter ego status. *In re W. States Wholesale Natural Gas Litig.*, 605 F. Supp. 2d 1118 1133 (D. Nev. 2009). Plaintiffs' alter ego theory must be dismissed for this reason alone. Moreover, given that FAS is undisputedly not a direct or indirect parent company of Harmon Hospital, and exercises no dominion or control over the operations of Harmon Hospital, it is clear that FAS did not, and could not, have governed or improperly influenced Harmon Hospital.

## 2. There is No Unity of Interest between FAS and Harmon Hospital

Plaintiffs also cannot meet the second element of the alter ego analysis—*i.e.*, a unity of interest between FAS and Harmon Hospital. To prove a unity of interest, Plaintiffs must adduce evidence that Harmon Hospital “is so organized and controlled, and its affairs are so conducted that it is, in fact, a mere instrumentality or adjunct of [FAS].” *Bonanza Hotel Gift Shop, Inc. v. Bonanza No. 2*, 95 Nev. 463, 466, 596 P.2d 227, 229 (1979) (internal quotation marks and citation omitted). The requisite level of control is demonstrated by showing the parent controls the subsidiary's internal affairs or daily operations. *See Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980) (rejecting an alter ego claim where the parent company guaranteed loans for the subsidiary, reviewed and approved major decisions, placed several of its directors on the subsidiary's board, and was closely involved in the subsidiary's pricing decisions). In *Bonanza*, the Supreme Court of Nevada specifically found:

In the case at hand, the evidence showed that separate corporate books and accounts were kept. Separate directors' meetings were held, and minutes recorded, with full corporate formalities observed. The corporations had independent headquarters, separate business responsibilities and operations. There was no showing that the parent companies had in any way impaired the assets of the company with which appellants had dealt.

95 Nev. at 467.

Here, as in *Bonanza*, there is no evidence of improper unity of interest between FAS and Harmon Hospital. Moreover, there is no evidence of any unity of interest whatsoever since FAS holds no direct or indirect ownership interest in Harmon Hospital. *See Exhibit A*, 40:23-25-41:1-8. Instead, FAS simply provides administrative support services to Harmon Hospital pursuant to the ASA. *See Exhibit B*. FAS and Harmon Hospital do not share any common directors or officers, and there is no proof FAS controls the internal affairs and daily operations of Harmon Hospital—in fact, the record evidence shows exactly the opposite. *See Exhibit A*, 67:1-17; *Exhibit B*. In addition, the record evidence makes plain that FAS and Harmon Hospital function independently—they maintain separate books and records and have different corporate offices. *See Exhibit A*, 186: 22-24.



Finally, the record evidence shows that Harmon Hospital is responsible for its own day-to-day operations and utilizes FAS' services as it deems appropriate. *See Exhibit B; Exhibit G*, 17:11-20; 22:1-25. Indeed, Harmon Hospital can choose to reject recommendations from FAS if it chooses. *See Exhibit G*, 243:20-24. Because there is no evidence of a unity of interest between FAS and Harmon Hospital, Plaintiffs' alter ego theory of liability as to FAS must be dismissed.

### 3. There Is No Evidence of Fraud or Injustice

Finally, there is no allegation or proof of fraud or injustice that warrants the imposition of alter ego liability. In the SAC ¶ 65, Plaintiffs make only the bare allegation that “adherence to the corporate fiction of [Harmon Hospital as] a separate entity would sanction fraud or promote manifest injustice”—but Plaintiffs do not explain why that is so, let alone provide any evidence to support this allegation. In the absence of a viable theory or evidence by Plaintiffs with respect to fraud or injustice, Plaintiffs' alter ego claim must be dismissed as to FAS.

### 4. The Polaris Factors Further Demonstrate That Plaintiffs' Alter Ego Theory Is Invalid

The *Polaris* factors further demonstrate that Plaintiffs' alter ego theory is invalid and must be dismissed.

*First*, Plaintiffs do not even allege in the SAC, nor is there any evidence, that FAS and Harmon Hospital “commingle” their respective funds. Throughout this litigation, Plaintiffs have argued that the Revolving Credit Agreement, to which Harmon Hospital is a borrower, requires the use of a lockbox account (into which the revenues earned by the various parties to the agreement are deposited) is evidence that FAS and Harmon Hospital commingles their respective funds. Nothing could be further from the truth. Every lockbox transaction is recorded by accountants into the separate books and records of the respective entity involved. *See Exhibit A*, 78:19-20. As Mr. Tabler testified, separate books and records, including accounting records are maintained for both FAS and Harmon Hospital, as well as for the other client organizations to which FAS provided administrative support services. *See Exhibit A*, 186:22-24.

Moreover, lockboxes are a standard requirement imposed by banks and lenders in order to secure lines of credit issued. It is not uncommon for lenders to require lockboxes as a means of limiting the risk of non-payment from their borrowers and lenders. In fact, lenders have imposed lockbox requirements on borrowers for decades. In this case, a commercial lender unrelated to Harmon Hospital and FAS set the lockbox requirement and neither FAS nor Harmon Hospital have access once funds are deposited in the lockbox. *See Exhibit A*, 80:6-18; 186:10-17; *Exhibit H*. The lockbox, therefore, does not serve as any evidence of comingling, it is not even an account controlled by any party to this litigation.

Second, there is no evidence that Harmon Hospital is undercapitalized. In fact, exactly the opposite is true because Harmon Hospital is adequately capitalized to conduct its business via a third-party lender. *See Exhibit A*, 190:1-2. There is no evidence Harmon Hospital does not have sufficient monetary resources to pay its bills, satisfy its payroll obligations to its employees, cover its necessary licensing and business costs, and meet its other ongoing financial obligations. Indeed, as detailed above, Harmon Hospital has a revolving credit agreement, with a commercial lending institution, that provides the opportunity to obtain funds for operations as they are needed. *See Exhibit A*, 190:1-2; *Exhibit H*.

Third, there is no allegation or evidence that FAS diverted funds belonging to Harmon Hospital at all, let alone without its authorization.

*Fourth*, Plaintiffs do not allege that FAS ever treated Harmon Hospital's assets as its own. Nor is there any evidence that could support such an allegation in any event.

*Finally*, there is no evidence that FAS and/or Harmon have disregarded corporate formalities. As explained above, the record evidence demonstrates that Harmon Hospital and FAS function independently, and maintain their own separate books and records.

In sum, Plaintiffs cannot establish any of the elements of alter ego liability. Accordingly, this claim must be dismissed as to FAS, with prejudice.

## V. CONCLUSION

For all of the foregoing reasons, FAS' motion for summary judgment should be granted in its entirety.

Dated this 6<sup>th</sup> day of February, 2015.

MARQUIS AURBACH COFFING

By

Jason M. Gerber, Esq.

Nevada Bar No. 9812

10001 Park Run Drive

Las Vegas, Nevada 89145

Giovanniello Law Group

Alexander F. Giovanniello, Esq.

Nevada Bar No. 11141

Shane Phayakapong, Esq.

Nevada Bar No. 12468

3753 Howard Hughes Parkway, Suite 200-399

Las Vegas, NV 89169

Attorney(s) for Fundamental Administrative Services, LLC