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ROBERT O. KURTH, JR.
Nevada Bar No. 4659
**KURTH LAW OFFICE**
P.O. Box 42816
Las Vegas, NV 89116
(702) 438-5810
Attorney for Defendant,
Steel Engineers, Inc.

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

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| **NEVADA INSURANCE GUARANTY ASSOCIATION**, a non-profit, unincorporated Nevada entity,<br><br>Plaintiff,<br><br>vs.<br><br>**MGM/MIRAGE**, a Delaware Corporation; **STEEL ENGINEERS, INC.**, a Nevada Corporation; and DOE CORPORATIONS I - X,<br><br>Defendants. | Case no. A512004<br>Dept. IV<br><br>Date of Hearing: 12/11/06<br>Time of Hearing: 9:00 a.m. |

# DEFENDANT SEI'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND COUNTER-MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, STEEL ENGINEERS, INC. ("SEI"), by and through its counsel, Robert O. Kurth, Jr., of the KURTH LAW OFFICE, and hereby files its Opposition to Plaintiff's Motion for Summary Judgment and Counter-Motion for Summary Judgment. This Opposition and Counter-Motion is based on the Points and Authorities submitted herewith, the pleadings and papers on file herein, the affidavits attached hereto, together with such evidence to be adduced at the hearing of this matter.

## MEMORANDUM OF POINTS AND AUTHORITIES

This Court has the authority to hear SEI's Counter-Motion pursuant to E.D.C.R. 2.20(c), which provides as follows:

> An opposition to a motion which contains a motion related to the same subject matter will be considered as a counter-motion. A counter-motion will be heard and decided at the same time set for the hearing of the original motion and no separate notice of motion is required.

## I.

## FACTS/BACKGROUND

The facts of this case are generally undisputed.[1]

The Defendant, SEI, is a Nevada corporation that principally operates within the State of Nevada. For the purposes of workers' compensation, SEI is a self-insured employer pursuant to NRS 616B.300. However, in order for SEI to qualify as a self-insured employer, the law requires that it carry excess insurance coverage for all workers' compensation claims above its self-insured retention. NRS 616B.300(5). Accordingly, between September, 1998, and September, 1999, SEI purchased its Excess Workers' Compensation Insurance Policy no. NXC0112374-04 (the "SEI Excess Insurance Policy") from Reliance National Indemnity Company ("RELIANCE"), a Pennsylvania entity formerly licensed to do business in the State of Nevada. Unfortunately, RELIANCE experienced significant financial difficulties, and on or about October 3, 2001, the Commonwealth Court of Pennsylvania declared the company insolvent and ordered its liquidation. As a result, certain workers'

[1] Given that the parties are in general agreement as to the facts of this case, Defendant SEI does not dispute the appropriateness of trying this matter under Summary Judgment as a matter of law.

compensation claims that exceeded SEI's self-insured retention and which would be covered by the SEI Excess Insurance Policy from RELIANCE (that was required by the State of Nevada), are being directly paid by SEI because the Plaintiff, Nevada Insurance Guaranty Association ("NIGA"), refused and continues to refuse to cover such. Consequently, SEI has been forced to cover hundreds of thousands of dollars in worker's compensation claims; laying out monies far exceeding its expected liability as a self-insured employer with mandatory excess insurance coverage.

The Plaintiff, NIGA, is a non-profit, unincorporated entity created by the Nevada Legislature. As dictated by statute, NIGA is obligated to pay certain obligations of insolvent insurance companies, like RELIANCE. See **NRS 687A.010** Short title, providing that "This chapter shall be known and may be cited as the **Nevada Insurance Guaranty Association Act**." (Added to NRS by 1971, 1943). See also **NRS 687A.020 Applicability**, which provides as follows:

> Except as otherwise provided in subsection 5 of NRS 695E.200, this chapter applies to all direct insurance, except:
>
> 1. Life, annuity, health or disability insurance;
>
> 2. Mortgage guaranty, financial guaranty or other forms of insurance offering protection against investment risks;
>
> 3. Fidelity or surety bonds or any other bonding obligations;
>
> 4. Credit insurance as defined in NRS 690A.015;
>
> 5. Insurance of warranties or service contracts;
>
> 6. Title insurance;
>
> 7. Ocean marine insurance;
>
> 8. Any transaction or combination of transactions between a person, including affiliates of the person, and an insurer, including affiliates of the insurer, which involves the transfer of investment or credit risk unaccompanied by the transfer of insurance risk; or

9. Any insurance provided by or guaranteed by a governmental entity. (Added to NRS by 1971, 1943; A 1973, 312; 1977, 434; 1987, 1333; 1993, 1396; 1995, 1773, 2057; 1997, 579; 1999, 1833)

**NRS 687A.033 ""Covered claim"" defined.**

1. ""Covered claim"" means an unpaid claim or judgment, including a claim for unearned premiums, which arises out of and is within the coverage of an insurance policy to which this chapter applies issued by an insurer which becomes an insolvent insurer, if one of the following conditions exists:

(a) The claimant or insured, if a natural person, is a resident of this State at the time of the insured event.

(b) The claimant or insured, if other than a natural person, maintains its principal place of business in this State at the time of the insured event.

(c) The property from which the first party property damage claim arises is permanently located in this State.

(d) The claim is not a covered claim pursuant to the laws of any other state and the premium tax imposed on the insurance policy is payable in this State pursuant to NRS 680B.027.

2. The term does not include:

(a) An amount that is directly or indirectly due a reinsurer, insurer, insurance pool or underwriting association, as recovered by subrogation, indemnity or contribution, or otherwise.

(b) That part of a loss which would not be payable because of a provision for a deductible or a self-insured retention specified in the policy.

(c) Except as otherwise provided in this paragraph, any claim filed with the Association:

(1) More than 18 months after the date of the order of liquidation; or

(2) After the final date set by the court for the filing of claims against the liquidator or receiver of the insolvent insurer, ÊÊ whichever is earlier. The provisions of this paragraph do not apply to a claim for workers'' compensation that is reopened pursuant to the provisions of NRS 616C.390 or 616C.392.

(d) A claim filed with the Association for a loss that is incurred but is not reported to the Association before the expiration of the period specified in subparagraph (1) or (2) of paragraph (c).

> (e) An obligation to make a supplementary payment for adjustment or attorney''s fees and expenses, court costs or interest and bond premiums incurred by the insolvent insurer before the appointment of a liquidator, unless the expenses would also be a valid claim against the insured.
>
> (f) A first party or third party claim brought by or against an insured, if the aggregate net worth of the insured and any affiliate of the insured, as determined on a consolidated basis, is more than $25,000,000 on December 31 of the year immediately preceding the date the insurer becomes an insolvent insurer. The provisions of this paragraph do not apply to a claim for workers'' compensation. As used in this paragraph, ""affiliate"" means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For the purpose of this definition, the terms ""owns,"" ""is owned"" and ""ownership"" mean ownership of an equity interest, or the equivalent thereof, of 10 percent or more.
>
> (Added to NRS by 1985, 1072; A 1987, 1065; 1989, 565; 1993, 1396; 1999, 2521; 2001, 2215; 2003, 3307; 2005, 1497)

NIGA was basically formed to cover claims by an insured for insolvent motor vehicle insurance carriers and insolvent workers' compensation insurance carriers. A "covered claim" is an unpaid claim, which arises out of and is within the coverage of an insurance policy issued by an insurer which becomes an insolvent insurer. This additional layer of surety protects individuals and companies from suffering financial hardship when, through no fault of their own, their insurance carrier becomes insolvent and incapable of paying monies owed under its insurance policies for which they paid premiums. Under the NIGA Act, the State of Nevada will step in and cover certain workers' compensation claims arising out of and within the coverage of "direct insurance" policies issued by an insurer that has become "insolvent." See NRS 687A.033, 687A.020.

NIGA admits that RELIANCE, when in operation, was licensed to sell insurance in the State of Nevada and sold policies to the Defendants, SEI and MGM. Further, NIGA admits that

RELIANCE, upon declaring bankruptcy, became an "insolvent insurer" as defined under NRS 687A.035. Accordingly, NIGA is obligated to pay any "covered claims" arising under the "direct insurance" policies that RELIANCE issued to Nevada residents and businesses. However, in the present case, NIGA contends that the Defendant's SEI's Excess Insurance Policy through RELIANCE does not qualify as "direct insurance" and fails to meet the definition of a "covered claim" as defined under statutes NRS 687A.020 and 687A.033, respectively. Based on this reasoning, NIGA is refusing to cover the obligations that the insolvent insurer, RELIANCE, owes the Defendants.

On October 21, 2005, NIGA filed its Complaint against the Defendants, seeking a declaration from the Court clarifying the Nevada Insurance Guaranty Association Act, as codified in NRS Title 687A. The Defendants filed their Answers and have agreed that this is a matter of the interpretation of Nevada law. On November 6, 2006, the Plaintiff filed its Motion for Summary Judgment. Subsequently, the Defendant SEI is filing its Opposition to Plaintiff's Motion for Summary Judgment and asks that this Court, instead, grant summary judgment in favor of the Defendants.

## II.

## ARGUMENT/ANALYSIS

Under Nevada Law, a Motion for Summary Judgment shall be granted if the moving party satisfies the initial burden of showing the absence of a genuine issue of material fact. Zoslow vs. MCA Distributing, Corp., 693 F.2d 870, 883 (9th Cir. 1982). Although, the record must be reviewed in the light most favorable to the non-moving party in making such a determination. Tienda vs. Holiday Casino, Inc., 109 Nev. 507, 853 P.2d 1057 (1993). Moreover, Rule 56 of the Nevada Rules of Civil Procedure provides that a case may be summarily decided when only a question of law

1 is present. N.R.C.P. 56(c) states as follows:

2 3 4
> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions 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.

5 Further, the Nevada Supreme Court has held that a motion for summary judgment should be granted
6 7 when the truth is quite clear and no genuine issue(s) of fact remains. Bader Enterprises, Inc. vs.
8 Becker, 95 Nev. 807, 603 P.2d 268 (1979). This is such a case where a question of fact does NOT
9 exist and summary judgment is appropriate and should be granted in favor of the Defendant SEI.

10 At the center of this case stands a question of statutory interpretation; specifically,
11 12 whether the excess insurance policies of self-insured business entities qualify as "direct insurance" as
13 referred to in NRS 687A.020 and are thus afforded the protection of the Nevada Insurance Guaranty
14 Association ("NIGA"). Through a close reading of Title 687A and a thorough analysis of the purposes
15 behind this statutory framework, answering this question will help shape the scope and substance of
16 Nevada's system of insurance safeguards.
17
18 When interpreting the meaning of a statute, the Court often considers three relevant
19 factors: (1) the plain meaning of the statute's language, (2) the legislative intent with which the statute
20 was drafted, and (3) the reason and public policy interests underlying the statute. See e.g., Salas v.
21 22 Allstate Rent-A-Car, Inc., 116 Nev. 1165, 1168, 14 P.3d 511, 513-14 (2000). "When the statutory
23 language is plain, the sole function of the courts -- at least where the disposition required by the text
24 is not absurd -- is to enforce it according to its terms." Arlington Cent. Sch. Dist. Bd. of Educ. v.
25 Murphy, 126 S. Ct. 2455, 2459 (2006). If, however, the statutory language is vague or ambiguous, the
26 27 Court should then consider the legislative intent with which the statute was drafted. Sheriff v.
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Marcum, 105 Nev. 824, 826, 783 P.2d 1389, 1390 (1989). In determining legislative intent, the Court may consider the reason and public policy considerations that underlie the entire statutory framework. See e.g., State, Dep't of Mtr. Vehicles v. Lovett, 110 Nev. 473, 477, 874 P.2d 1247, 1249-50 (1994); SIIS v. Bokelman, 113 Nev. 1116, 1123, 946 P.2d 179, 184 (1997).

In the present case, all three of the abovementioned factors indicate that NIGA is obligated to cover the claims arising under SEI's Excess Insurance Policy. As demonstrated in the following argument, SEI's insurance claims qualify for the surety protections of NIGA because exempting these claims would (A) violate the plain language of the NIGA Act, (B) violate the purpose of the NIGA Act, and (C) violate basic notions of public policy.

## A. REFUSING TO GUARANTY THE MONIES OWED UNDER SEI'S EXCESS INSURANCE POLICY WOULD VIOLATE THE PLAIN LANGUAGE OF THE NIGA ACT.

The monies owed under SEI's Excess Worker's Compensation Insurance Policy through RELIANCE fall squarely within the plain meaning of the "covered claims" which NIGA is obligated to guarantee. The NIGA Act defines "covered claims" as follows:

> "Covered claim" means an unpaid claim or judgment, including a claim for unearned premiums, which arises out of and is within the coverage of an insurance policy to which this chapter applies [i.e. "direct insurance" ] issued by an insurer which becomes an insolvent insurer, if one of the following conditions exists: [...] (b) The claimant or insured, if other than a natural person, maintains its principal place of business in this state at the time of the insured event.

NRS 687A.033(1). Here, NIGA admits that SEI is a Nevada corporation that maintained its principal place of business in this state at the time of the insured event(s). Further, NIGA admits that SEI's

insurance carrier, RELIANCE, is an "insolvent insurer" within the meaning of the statute cited above. Finally, NIGA admits that RELIANCE failed to pay the claims arising out of and within the coverage of SEI's Excess Insurance Policy, which is required by NIGA and which is in existence to pay covered claims.

Based purely upon these admissions, SEI's insurance claims for which they paid premiums, appear to satisfy the standards set forth in the above-referenced statute, i.e., the Defendant SEI, a Nevada corporation, properly held an insurance policy from a licensed insurer; the insurer became insolvent; and the insurer failed to meet its obligations under SEI's insurance policy to pay workers' compensation claims in excess of SEI's self-insured retention. Therefore, a plain reading of the statute's text suggests that NIGA is obligated to cover the unpaid claims arising under SEI's Excess Insurance Policy with RELIANCE.

Nevertheless, NIGA has seized upon a very narrow reading of the NIGA Act, focusing on a specific exception cited in subsection (2) of NRS 687A.033. That exception reads as follows:

> The term ["covered claim"] does not include: (a) An amount that is directly or indirectly due a reinsurer, insurer, insurance pool or underwriting association, as recovered by subrogation, indemnity or contribution, or otherwise.

Although NIGA admits that SEI is neither an "insurance pool" nor an "underwriting association," NIGA contends that SEI's role as a self-insured employer makes it an "insurer" within the meaning of the above statute and thus prevents SEI from utilizing the sureties of the NIGA act. This is NIGA's contention; despite the fact that SEI has never directly profited from or otherwise engaged in the insurance business, which is undisputed. SEI does not now, nor has it ever, engaged in the business of insurance, reinsurance, or any other related field of surety finance.

### 1. SEI IS NOT AN "INSURER" AS THE TERM IS USED IN NRS 687A.033(2)(a).

The common understanding of the term "insurer," particularly within the context of NRS 687A.033(2)(a), is an insurance company or other professional entity engaged in the insurance business. Including SEI within the definition of "insurer" stretches the term beyond its intended meaning and leads to absurd results that undermine the purpose of the NIGA act and contravene the plain meaning of the statute's language.

The statutes of this state, when using the term "insurer," traditionally refer to an entity that engages in the business of insurance, contracting with individuals or companies to indemnify against particularized losses. See e.g., 679A.100, 361.7312, 485.316, 629.095. For instance, NRS 679A.100 defines the term "insurers" as follows: "'Insurer' includes every person engaged as principal and as indemnitor, surety or contractor in the business of entering into contracts of insurance." NRS 679A.100 (emphasis added). This definition, which is also used in NRS 361.7312, 485.316, is actually somewhat expansive; nevertheless, it still limits the definition to those individuals "in the business of entering into contracts for insurance." Similarly, under NRS 629.095(4)(d), "'Insurer' means: (1) An insurer that issues policies of individual health insurance in accordance with chapter 689A of NRS; and (2) An insurer that issues policies of group health insurance in accordance with chapter 689B of NRS." Again, the statute limits the definition to professionals within the insurance industry and insurers always issue insurance policies.

In fact, only one provision within all of Nevada's Revised Statutes includes "self-insured" employers within the definition of "insurer." As noted in the Plaintiff's Motion for

1 Summary Judgment, NRS 616A.270 defines "insurer" as:
2
3 1. A self-insured employer;
2. An association of self-insured public employers;
4 3. An association of self-insured private employers; and
4. A private carrier.
5 (Added to NRS by 1981, 1449; A 1993, 694; 1995, 2009; 1999, 1760)
6
7 This is the definition given to an insurer under the Nevada Industrial Insurance Act. Though, a
8 "private carrier" is defined separately in NRS 616A.290 as:
9
10 > any insurer or the legal representative of an insurer authorized to provide industrial insurance pursuant to chapters 616A to 617, inclusive, of NRS. **The term does not include a self-insured employer** or an association of self-insured public or private employers. (Emphasis added) (Added to NRS by 1995, 2000; A 1999, 1760)
11
12
13 Moreover, NRS 616A.305 goes on to specifically define a "Self-insured employer" as:
14
15 > any employer who possesses a certification from the Commissioner of Insurance that he has the capability to assume the responsibility for the payment of compensation pursuant to chapters 616A to 617, inclusive, of NRS. (Added to NRS by 1979, 1035; A 1995, 2009)——(Substituted in revision for NRS 616.112)
16
17
18
19 This provision is an outlying definition of the term "insurer" that does not coincide with
20 any other accepted definition of the term in the Nevada Revised Statutes or otherwise. Nowhere else
21 within Nevada's Revised Statutes has the legislature defined the term, "insurer", to include
22 "self-insured" entities. Moreover, this outlying definition sits within a section of the NRS that deals
23 exclusively with the allowance of self-insured employers for worker's compensation coverage after
24 the Nevada Industrial Insurance System was revised to allow employers to be self-insured for purposes
25 of workers' compensation coverage, which would explain its unique inclusion of such entities within
26 its definition of "insurers."
27
28

Note that the term "insurer," as used here, makes no mention of insurance companies, underwriters, or entities that other person's traditionally categorize as "insurers"; except for the "private carrier", which is the only actual insurance company, i.e., insurer, listed. This is because the Nevada Industrial Insurance Act did not previously let employers obtain workers' compensation insurance coverage through private insurance carries; but required employers to pay the State of Nevada and its system for such. Moreover, the "private carrier" definition (which is an actual insurance company) specifically EXCLUDES self-insured employers from the definition. The only reason self-insured employers are included in the definition of insurer for purposes of the Nevada Industrial Insurance Act is for ease of reference because employers must provide workers' compensation coverage and being self-insured with a private, excess insurance carrier, is one of those options. Therefore, this court should view NRS 616A.270 as an anomaly and outlying definition of the term that applies solely to Chapter 616A.

Overwhelmingly, throughout the Nevada Revised Statutes, the term "insurer" refers to entities engaged in the business of insuring others. It is UNDISPUTED that SEI has never engaged in the business of insuring others; the company does not issue insurance policies or otherwise conduct an organized effort to insure against the losses of others. SEI is merely a self-insured employer for purposes of workers' compensation coverage, which allowed SEI to exempt itself from having to use the Nevada State Industrial Insurance System as its sole provider for workers' compensation coverage. As a "self-insured" employer for workers' compensation coverage, SEI simply sought to limit its own monthly workers' compensation insurance costs by agreeing to what is effectively a very high self-insured retention insurance deductible. Notwithstanding, under the self-insurance laws of Nevada, a

self-insured employer MUST CARRY excess insurance coverage to protect against "catastrophic losses." NRS 616B.300(5). If SEI was really an insurance company because it is self-insured, then why would SEI be required to carry excess insurance coverage through a private insurance carrier? Accordingly, SEI, as a self-insured employer, agreed to pay out of its own finances any workers' compensation claims up to a certain self-insured retention amount. However, any claims above that set amount remained covered under SEI's excess insurance policy, which they are required to maintain. Being self-insured simply allows them to manage their claims until they reach the self-insured retention and the excess insurance policy; one for which they paid insurance premiums, kicks in and becomes effective.

The Plaintiff NIGA argues that an employer who is self-insured is different than an individual or business entity that procures car insurance with an umbrella policy because the vehicle owner is seeking to insure a potential risk. SEI and all participants in the Nevada workers' compensation system or seeking to insure a potential risk, and must insure that risk because the State of Nevada mandates that all employers must provide workers' compensation coverage and are liable no matter the amount. Nevertheless, the Plaintiff NIGA admits that employers have options for workers' compensation coverage such as going through the State of Nevada, paying a private insurance carrier, being self-insured (though, they must maintain excess insurance coverage through an insurer approved and licensed to do business in the State of Nevada), etc. Being self-insured is simply like having a very high insurance deductible. The only way Nevada will allow an employer to be self-insured is to demonstrate their financial responsibility and ability to pay claims up to their self-insured retention. If the employer does not pay the claim through their self-insured retention, surely the

employee could make a claim for workers' compensation that would be paid through NIGA and/or some other source. If NIGA was just for claimants, they would not talk about covering insureds. Understand that an insured is usually a person, who pays for certain insurance coverage and is provided that coverage in return for the payment of a premium. For the foregoing reasons, SEI does not fall within the definition of "insurer" as used in NRS 687A.033(2)(a) and therefore, is eligible for the protections granted under the NIGA Act. Accordingly, this Court should find that NIGA is obligated to cover the unpaid sums owed under SEI's Excess Insurance Policy with RELIANCE.

Last, as the Plaintiff concedes, the majority of jurisdictions with similar statutory schemes, allow self-insured employers to make a claim against various state insurance guarantee funds when their excess insurance carrier, for which they pay insurance premiums, becomes insolvent. See *Zinke-Smith, Inc. v. Florida Ins. Guar. Assn.*, 304 So. 2d 507,509-510 (Fla. Dist. Ct. App. 1974), accord *Doucette v. Pomes*, 247 Conn. 442,445 (Conn. 1999), compare *Cities Service Gas Co. v. Witt*, 500 P.2d 288 (Okl.1972).

**B. REFUSING TO GUARANTY THE MONIES OWED UNDER SEI'S EXCESS INSURANCE POLICY WOULD VIOLATE THE UNDERLYING PURPOSE OF THE NIGA ACT.**

Plaintiff's reading of the NIGA Act runs against the legislative purpose for which it was drafted. NIGA was created to ensure that persons who purchase insurance benefits, i.e, insured(s), are protected from claims when their insurance company becomes insolvent and is granted some sort of insolvency protection against these claims. See Cimini v. Nevada Ins Guar Ass'n, 112 Nev. 442, 915

P.2d 279 (1996). Nevada's worker's compensation laws clearly favor the public policy of providing economic security for employees who are injured on the job. See Department of Indus. Relations v. Circus Circus Enters., 101 Nev. 405, 411 (Nev. 1985). Additionally, "The modern trend is to construe the industrial insurance acts broadly and liberally, to protect the interest of the injured worker and his dependents. A reasonable, liberal and practical construction is preferable to a narrow one, since these acts are enacted for the purpose of giving compensation, not for the denial thereof." Id at 411.

NIGA's narrow interpretation of the statutes at issue eliminates the core benefit of becoming a self-insured employer - the cost savings associated with administering the employer's own worker's compensation claims and avoiding paying unnecessary monies in insurance premiums for a fully, externally administered worker's compensation insurance plan. NIGA's intent was not to deny claims through a narrow interpretation and saddle a self-insured employer with worker's compensation claims that would have been covered by an excess insurance policy, were it not for an insolvent insurer. If that was the case, the self-insured employed would be driven to insolvency because of the insolvency of its required, excess insurance carrier as the company would be required to layoff all of the employees, including the injured employees, who subsequently will not be covered by the one 'policy of last resort' intended to protect that injured employee - NIGA. If the goal of NIGA is to ensure that claimant's, insured's, and the interests of the injured worker and his dependants are protected, NIGA's interpretation fails to accomplish this underlying public purpose.

For the foregoing reasons, the Plaintiff's interpretation of the NIGA Act goes against the legislative purpose for which it was drafted. Accordingly, this Court should find that NIGA is obligated to cover the unpaid claims owed under SEI's Excess Insurance Policy with RELIANCE.

### C. REFUSING TO GUARANTY THE MONIES OWED UNDER SEI'S REQUIRED EXCESS INSURANCE POLICY VIOLATES BASIC TENETS OF PUBLIC POLICY.

The Plaintiff's narrow reading of the NIGA Act needlessly thrusts additional liabilities and business risks upon the shoulders of self-insured employers; compromising the efficiency of our State's capitalist framework and jeopardizing our ability to attract and retain responsible corporate citizens. Without the protections of NIGA, self-insured employers operate in a more uncertain marketplace, incapable of effectively forecasting their future liabilities and unable to hedge against the risks of future workers' compensation claims.

A stable and prosperous economy relies upon some degree of predictability. Although businesses take on sizeable risks as they invest in the community, they consistently seek out ways of limiting that risk and ensuring future stability. For this very reason, most companies carry large insurance policies guaranteeing against any number of business risks, including the threat of workers' compensation claims. In such instances, companies essentially pay out money today to guard against the unforeseen liabilities of tomorrow. This arrangement limits the risks of operating any given business; meanwhile allowing managers and executives to focus their attentions upon more effectively managing their operations, finances, and future growth.

Insurance guaranty funds like NIGA provide an added layer of stability and certainty within the marketplace. Without the guarantees of organizations like NIGA, businesses run the risk that their insurance provider will become insolvent and incapable of covering any future claims arising under its policies. Under such circumstances, a company might lay out thousands of dollars in

monthly insurance premiums, but when a claim actually arises, the insurance company, now insolvent, may prove unable to cover those unforeseen liabilities.

The abovementioned scenario matches, almost perfectly, the situation of the Defendant SEI. The Defendant purchased an excess insurance policy from RELIANCE and diligently paid its monthly premiums. However, when a major claim arose under the policy, RELIANCE proved insolvent and incapable of covering those losses. As a result, SEI was forced to cover hundreds of thousands of dollars in excess workers' compensation claims that it had never anticipated, planned for, or otherwise factored in to its financial forecasts. That is why Nevada requires self-insured employers to carry excess insurance coverage, and that is why SEI obtained excess insurance coverage. SEI knows it is responsible for the self-insured retention amount until the excess coverage is in effect. Nevertheless, the excess coverage was purchased and is in existence to protect the company, SEI, from claims that exceed its self-insured retention.

The fact that SEI is a "self-insured" employer is merely a distraction from the core policy considerations of this case, a red-herring as it were. As a self-insured employer, SEI never foresaw that it was solely responsibility for the potentiality of workers' compensation claims. On the contrary, SEI made sure to carry excess insurance coverage. In fact, as noted earlier, the statute governing self-insured employers requires such businesses to carry excess insurance policies. SEI's decision to "self-insure" is really no different than the decision to purchase insurance with a much higher-than-average deductible. SEI, recognizing its own liquidity and ability to cover certain liabilities, chose to cover any future workers' compensation liabilities up to its self-insured retention. Beyond that threshold number, SEI expected that its insurance carrier, a "member insurer" licensed

within the State of Nevada, would cover any claims that might arise in excess of such; thereby, protecting them from financial destruction.

Self-insured employers represent some of this State's most valuable corporate citizens. The continued success and prosperity of these entities requires that they be able to reasonably estimate and forecast the financial risks that their business holds. The protections of NIGA promote economic stability and prosperity. Extending the protections of NIGA to self-insured employers is entirely consistent with the public policy considerations that formed the basis of NIGA's creation. To do otherwise would be detrimental to the fabric and framework of society.

## III.
## CONCLUSION

NRS 687A.033 states that a covered claim is one by the claimant or insured, and subsection (2), which is being argued by the Plaintiff NIGA, speaks to a claim not being covered if it is by an insurer, who is attempting to make a claim by subrogation, indemnity or contribution, or otherwise. It does not refer to insured's or claimants who pay an actual premium for insurance coverage. This clearly distinguishes SEI from the NIGA definition of insurer as SEI is both an insured and a claimant because they pay actual monetary premiums to an insurance company, i.e., private carrier, for excess insurance coverage. SEI is paying for a benefit and should receive the coverage and benefits associated therewith. SEI is not claiming they are entitled to reimbursement for their self-insured retention; only, those monies that would have been paid by their insolvent, excess insurance carrier, whom they were required to procure pursuant to Nevada law. Insurers as referred to in the Nevada statute(s) and law do not pay premiums, they collect them and actually issue policies of insurance. Moreover, NRS 687A.033 (2)(b) specifically speaks to a claim not being covered for a "self-insured retention". This means that the NIGA Act considered self-insured employers as being

covered and entitled to benefits thereunder because it specifically states that self-insured employers cannot make a claim for their self-insured retention. Nevertheless, by omission, the NIGA Act appears to agree that the amount over the "self-insured retention" IS A COVERED CLAIM. Otherwise, it would have specifically stated it was not a covered claim.

The Plaintiff NIGA agrees that the apparent intent of the Legislature was to provide a benefit to individuals and entities, who have insurance coverage and lose that insurance coverage through no fault of their own. This is SEI.

WHEREFORE, in light of the foregoing, when considering (1) the plain meaning of the statute's language, (2) the legislative intent with which the statute was drafted, (3) the reason and public policy interests underlying the statute, (4) and the holding of a majority of jurisdictions with similar statutory schemes, this Court should DECLARE that the Defendant SEI is not an "insurer" and is entitled to recovery from the Plaintiff NIGA as a self-insured employer for those claims that would have otherwise been paid by their insolvent, excess workers' compensation insurance carrier. Additionally, the Defendant SEI requests such other relief this Court deems appropriate, along with their attorney's fees and costs incurred herein.

DATED this 13th day of November, 2006.

Respectfully Submitted by,
**KURTH LAW OFFICE**

/s/Robert O. Kurth, Jr.
ROBERT O. KURTH, JR.
Nevada Bar No. 4659
Attorney for Defendant,
Steel Engineers, Inc.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on the 13th day of November, 2006, I served a true and correct copy of the foregoing **DEFENDANT SEI'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND COUNTER-MOTION FOR SUMMARY JUDGMENT** in the above-entitled case by placing a copy of the same in a sealed envelope in the U.S. Mail, first class, postage prepaid, and addressed as follows:

James H. Randall
Michael K. Wall
HUTCHINSON & STEFFEN, LLC.
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Attorneys for Plaintiff

S. Denise McCurry, Esq.
3260 Industrial Rd.
Las Vegas, NV 89109
Attorneys for Defendant,
MGM Mirage

/s/Janina Moser
An employee of **KURTH LAWOFFICE.**