IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No.

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Clerk of Supreme Court

ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS;

Petitioners,

v.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for Clark County; THE HONORABLE NANCY L. ALLF, DISTRICT JUDGE, DEPT. 27,

Respondent,

and

UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION; COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RICK RETENTION GROUP, INC.

Real Parties in Interest

PETITION FOR WRIT OF MANDAMUS

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Docket 78301 Document 2019-11056

RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons or entities as described in Nev. R. App. P. 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioner-Defendant Robert Chur is an individual;

Petitioner-Defendant Steve Fogg is an individual;

Petitioner-Defendant Mark Garber is an individual;

Petitioner-Defendant Carol Harter is an individual;

Petitioner-Defendant Robert Hurlbut is an individual;

Petitioner-Defendant Barbara Lumpkin is an individual;

Petitioner-Defendant Jeff Marshall is an individual;

Petitioner-Defendant Eric Stickels is an individual. These individuals have been represented by the following attorneys and law firms in the action below:

J. Stephen Peek, Jessica E. Whelan, and Ryan A. Semerad of Holland & Hart LLP;

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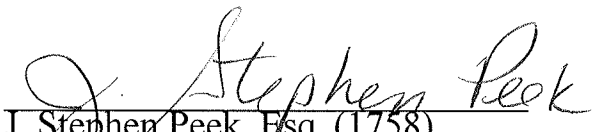
Joseph P. Garin and Angela T. Nakamura Ochoa of Lipson, Neilson, Cole, Seltzer & Garin, P.C.

DATED this 12th day of March 2019.



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ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because it stems from a case "originating in Business Court" that involves a question of first impression. NRAP 17(a)(10); NRAP 17(b)(7). Moreover, this Court should retain this writ proceeding because it raises a question of statewide public importance. NRAP 17(a)(11). In particular, this matter directly concerns the interpretation and application of NRS 78.138 and the proper pleading standard for imposing individual liability on directors and officers of Nevada corporate entities.

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I. INTRODUCTION AND RELIEF SOUGHT

Petitioners Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels ("Petitioners" or the "Director Defendants") respectfully request this Court issue a writ of mandamus to compel the District Court to apply NRS 78.138 as it is written. In the proceedings below, the District Court created and applied an unwritten exception to NRS 78.138 through judicial fiat in order to deny Petitioners' motions to dismiss the insufficient allegations against them. This Court should not endorse the District Court's improper judicial activism.

Under Nevada law, "when the language of a statute is unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. No. 52, 399 P.3d 334, 344 (2017). And, as this Court recently determined, "NRS 78.138 is unambiguous." *Id.*

NRS 78.138(3) provides that directors and officers of Nevada corporate entities may only be individually liable "under circumstances described in subsection 7." Subsection 7 of NRS 78.138 provides, in turn, that a director or officer is not individually liable for damages unless three conditions are met: (1) the presumptions of the business judgment rule are rebutted, NRS 78.138(7)(a); (2) "[t]he director's or officer's act or failure to act constituted a breach of his or her

fiduciary duties as a director or officer"; and, (3) "[s]uch breach involved intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b). NRS 78.138(7) does not distinguish in any way between the fiduciary duties directors and officers owe their corporations—*i.e.*, the duty of care and the duty of loyalty.

However, the District Court, in denying both Petitioners' motion for judgment on the pleadings pursuant to NRCP 12(c) and their motion for reconsideration, concluded that NRS 78.138(7)(b) does not apply to "breach-of-the-fiduciary-duty-of-due-care claim[s]." In so doing, the District Court purported to assume, in direct contradiction to the plain text of NRS 78.138, and specifically NRS 78.138(3) and NRS 78.138(7), that different schemes exist to evaluate allegations of individual liability predicated upon the fiduciary duty of care and those predicated upon the fiduciary duty of loyalty. In reaching this conclusion, the District Court relied extensively on this Court's decision in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), and cases citing to *Shoen*. *See* VI APP01380.[1] The District Court read *Shoen* and its progeny to mean that allegations of "gross negligence" alone are sufficient to state a "breach-of-the-fiduciary-duty-of-due-care claim"; whereas, the elements required by

[1]Citations to the appellate record are formatted with the appendix volume number in Roman numerals. followed by the pin cite with the prefix "APP."

NRS 78.138(7)(b) are required to state "a duty-of-loyalty claim." VI APP01431 (quoting *Jacobi v. Ergen*, No. 2:12-cv-2075-JAD-GWF, 2015 WL 1442223, at *4 (D. Nev. Mar. 30, 2015)).

This Court should exercise its discretion to consider the merits of this writ petition to (1) clarify the application of NRS 78.138 and *Shoen*; (2) remind the district courts that they cannot look beyond the plain text of an unambiguous statute in order to create and apply a wholly separate legal standard that contradicts the statutory scheme; and (3) prevent inconsistent application of the law of individual liability of officers and directors as written and intended by the Legislature. Thus, this Court should issue a writ of mandamus to compel the District Court to properly apply NRS 78.138 and dismiss the claims against Petitioners.

II. ISSUES PRESENTED

Under Nevada law, must claims for individual liability against officers or directors be dismissed at the pleading stage when the operative complaint[2] fails to include any allegation of breach of fiduciary duty or such a breach involving intentional misconduct, fraud, or knowing violation of the law as expressly required by NRS 78.138(7)(b)?

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[2] Plaintiff's Third Amended Complaint ("TAC") contains two claims for relief against Petitioners, Gross Negligence in the First Claim for Relief and Deepening Insolvency in the Second Claim for Relief.

III. STATEMENT OF UNDISPUTED FACTS

Petitioners Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hulbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels are former directors of L&C, a corporation that is now in a liquidation receivership. On December 23, 2014, Respondent, as receiver for L&C, filed a complaint against Petitioners (among others), alleging claims of gross negligence and deepening insolvency. I APP00016.

A. Petitioners' Motion for Judgment on the Pleadings

On December 11, 2015, Petitioners filed a 12(b)(5) Motion to Dismiss the claims against them based on the fact that Respondent failed to make sufficient allegations to hold Petitioners individually liable under NRS 78.138(7) (*i.e.*, that Petitioners had committed a breach of fiduciary duty arising out of intentional misconduct, fraud, or knowing violation of the law). The District Court granted in part and denied in part the Motion. I APP00007:17. The District Court dismissed the gross negligence claim with leave to amend on the basis that the factual allegations supported only simple negligence, not gross negligence. I APP00007:18-22. Presumably recognizing the requirements of NRS 78.138(7), the District Court further stated that "[i]ntentional conduct would have to be pled in order to proceed on that gross negligence cause of action." I APP00007:22-24. The District Court dismissed the second cause of action for deepening insolvency,

stating that such cause of action can only exist as a "collateral cause of action." I APP00008:4-5.

On April 1, 2016, Respondent filed the First Amended Complaint. On April 18, 2016, Petitioners filed a Motion to Dismiss First Amended Complaint on the basis that the First Amended Complaint did nothing more than add conclusory allegations, based upon information and belief, that still did not make out a viable cause of action for gross negligence. I APP00010.

While that Motion was pending, Respondent filed both a Second Amended Complaint and a Third Amended Complaint ("TAC"). In the TAC—the operative complaint—Respondent once again made only two claims against Petitioners: gross negligence, I APP00075-79 at ¶¶ 217-234, and deepening insolvency, I APP00079 at ¶¶ 235-240. Regarding its gross negligence claim, Respondent alleged that Petitioners failed to properly inform themselves of the financial condition of L&C and failed to take corrective actions to improve L&C's financial condition. I APP00075-78 at ¶¶ 220-232. As to its deepening insolvency claim, Respondent alleged that Petitioners' failure to take corrective actions prolonged L&C's operations such that Petitioners' inaction increased L&C's insolvency. I APP00079 at ¶¶ 236-238. Respondent did not allege that Petitioners breached any of their fiduciary duties *or* that any breach involved intentional misconduct, fraud, or a knowing violation of law. *See* NRS 78.138(7)(b)(1)-(2).

Petitioners supplemented their briefing on such Motion, and a hearing was held on September 15, 2016 to decide the Motion, which was then deemed directed against the operative TAC. *See* III APP0566-601. Having found that Respondent stated a claim for gross negligence, the District Court summarily denied the Motion. *See* III APP0602-606. On October 21, 2016, Petitioners filed their Answer to the TAC.

On August 14, 2018, Petitioners filed a 12(c) Motion for Judgment on the Pleadings ("12(c) Motion"), which argued that, even accepting the allegations in the TAC as true, Respondent could prove no set of facts sufficient to hold Petitioners *individually liable* for claims of gross negligence or deepening insolvency. *See* III APP00610-611. Relying on the same analysis that it employed in 2016, although without reference to its prior statement that intentional conduct must be pled for the gross negligence claim to survive, the District Court denied Petitioners' 12(c) Motion. *See* VI APP01380.

B. Petitioners' Motion for Reconsideration

Following the District Court's denial of their 12(c) Motion, Petitioners filed a Motion for Reconsideration, arguing that the District Court's order denying their 12(c) Motion was clearly erroneous. *See* VI APP01385-86. Petitioners maintained that the District Court's order improperly ignored NRS 78.138 altogether and relied solely upon *Shoen*, a demand futility case, to reach its conclusion about the

pleading standard for the imposition of individual liability on corporate directors. *See id.* Incredibly, in its Opposition, Respondent argued that NRS 78.138 does not apply at all to the pleadings required for claims seeking to impose individual liability on directors or officers so long as the claims could be characterized as so-called "duty of care cases . . . ." *See* VI APP01408. In fact, Respondent went further and averred that NRS 78.138 only applies to "the evidentiary stage vis-à-vis director liability," not the pleading stage. *See* VI APP01405.

The District Court denied Petitioners' Motion for Reconsideration. In so doing, it expressly created and adopted a bifurcated approach to evaluating the sufficiency of the allegations for claims seeking to impose individual liability on directors or officers: (1) a new claim for relief – if the claim concerns a "breach-of-the-fiduciary-duty-of-due-care," then allegations of misconduct that do not rise to the level of intentional misconduct but rise "at least to the level of gross negligence" are sufficient to hold directors liable; alternatively, (2) if the claim concerns a "duty-of-loyalty claim," then the alleged misconduct must involve "intentional misconduct, fraud, or knowing violation of the law." VI APP01431. The District Court also found that Respondent had pled sufficient facts to state a claim against Petitioners for "deepening insolvency." VI APP01432 (citing *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 995 (9th Cir. 2005)). Because this bifurcated approach stands in direct conflict to the plain, unambiguous language of

NRS 78.138, specifically subparts (3) and (7), and is unsupported by any of this Court's caselaw, including *Shoen*, the District Court erred as a matter of law and this Court should intervene to compel the District Court to rectify its error.

IV. STATEMENT OF REASONS THE WRIT SHOULD ISSUE

A. The Order Raises a Question of First Impression Involving Nevada Common Law and a Principal Issue of Statewide Public Importance, and Public Policy Militates in Favor of Hearing the Writ Petition

"This Court has original jurisdiction to issue writs of mandamus and prohibition." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012). Generally, writ relief is available when a petition presents legal rather than factual issues. *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 57, 399 P.3d 334, 341 (2017). Extraordinary writ relief is available when there is no plain, speedy, and adequate remedy at law. *Badger v. Eighth Judicial Dist. Court*, 132 Nev. Adv. Op. 39, 373 P.3d 89, 93 (2016).

This Court has held that writ relief is available to review a district court's denial of a motion to dismiss on a limited basis. *State v. Eighth Judicial Dist. Court*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002). A motion for judgment on the pleadings is considered under the same standard as a motion to dismiss under NRCP 12(b)(5). *Peck v. Zipf*, 133 Nev. Adv. Op. 108, 407 P.3d 775, 778 (2017) (citing *Sadler v. PacifiCare of Nev., Inc.*, 130 Nev. 990, 993-94, 340 P.3d 1264,

1266-67 (2014)). This Court may review a motion to dismiss, and by extension, a motion for judgment on the pleadings, when "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *State*, 118 Nev. at 147, 42 P.3d at 238. Although only one of these criteria is required to be met, both are met here. Additionally, judicial economy and Nevada's pro-corporation public policy weigh in favor of granting writ relief.

1. The Petition presents a purely legal issue, no factual dispute exists for purposes of the Petition, and NRS 78.138 compels dismissal of the TAC

This Court has considered extraordinary writs challenging a district court's refusal to dismiss a case in similar circumstances where no factual dispute existed and clear statutory authority mandated dismissal of an action. For example, in *Libby v. Eighth Judicial Dist. Court of the State*, 130 Nev. Adv. Rep. 39, 325 P.3d 1276, 1279 (2014), a medical malpractice case, the Court considered a writ petition challenging the district court's denial of a motion for summary judgment on statute of limitations grounds where the facts concerning the timeline of events were not in dispute and the clear language of NRS 419.097(2), the applicable statute of limitations, compelled dismissal. Importantly, the Court noted that "[s]tatutory

interpretation is a question of law that we review de novo, even in the context of a writ petition." *Id.* (quoting *Int'l Game Tech.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008)).

Similarly, here, there is no dispute as to what Respondent has plead in its TAC. Whether Respondent has plead sufficient allegations to satisfy the strictures of NRS 78.138 is a question of law that this Court reviews de novo. As will be shown below, even accepting all of Respondent's allegations as true for purposes of the motion for judgment on the pleadings, as the district court must, and for purposes of this writ petition, Respondent has failed to plead any allegations sufficient to plead a prima facie case of the clear requirements of NRS 78.138(7)(b)(1) (breach of fiduciary duty) and (b)(2) (intentional misconduct, fraud or a knowing violation of law) in the TAC.

2. *The Petition presents an important issue of law that requires clarification*

This Court has entertained writs of mandamus where they present important issues of law that require clarification. *State*, 118 Nev. at 147, 42 P.3d at 238. One particularly compelling reason the Court has exercised its discretion to clarify the law is where "there is great potential for the district courts to inconsistently interpret [a] legal issue." *Washoe Med. Ctr. v. Second Judicia. Dist. Ct.*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006); *see also Libby*, 325 P.3d at 1279 (where "the Nevada district courts have inconsistently applied the [medical malpractice

statute of limitations], we elect to exercise our discretion to consider the merits of this writ petition and clarify this question of law.").

Here, an important issue of law—the pleadings required for imposing individual liability on a director or officer of a Nevada corporate entity—needs clarification because not only is there the *potential* for district courts to inconsistently interpret NRS 78.138's requirements for imposing individual liability on officers and directors based on *dicta* in the *Shoen* opinion, but the District Court below *actually* misinterpreted and misapplied NRS 78.138.

According to the plain text of NRS 78.138(3) and NRS 78.138(7), courts should evaluate the sufficiency of pleadings seeking to impose individual liability on directors or officers using a single standard where the claims are predicated upon the fiduciary duties. However, the District Court's approach creates a vastly less stringent pleading standard for duty of care cases, which standard is unsupported by statute or case law. This Court's intervention is necessary to affirm the plain text of NRS 78.138(3) and NRS 78.138(7) as the proper pleading standard and give guidance to the lower courts that gross negligence in duty of care cases is not a new claim for relief for imposing liability on officers and directors.

3. Affording writ relief will promote judicial economy

Moreover, judicial economy militates in favor of granting the writ petition. Nevada has become a fertile ground for corporate disputes seeking to impose

individual liability on directors and officers. *See, e.g.*, *Parametric Sound Corp. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. No. 59, 401 P.3d 1100 (2017); *In re DISH Network Deriv. Litig.*, 133 Nev. Adv. Op. No. 61, 401 P.3d 1081 (2017); *Okada v. Eighth Judicial Dist. Court*, 134 Nev. Adv. Op. No. 2, 408 P.3d 566 (2018); *Cotter v. Eighth Judicial Dist. Court*, 134 Nev. Adv. Op. 32, 416 P.3d 228 (2018). Avoiding fundamentally inconsistent results for different litigants in these high-stakes disputes is paramount to the integrity of Nevada courts. Greater clarity as to the requirements of NRS 78.138 and the pleadings required in these kinds of cases sooner rather than later will aid in the early and consistent resolution of these suits.

4. Affording writ relief will promote Nevada's pro-corporation public policy

Finally, the Nevada Legislature has pursued a public policy of encouraging corporations to locate themselves to Nevada. *See* S.B. 203, Assembly Committee on Judiciary, May 25, 2017, Minutes at p. 54 ("Nevada corporate laws are very good. Companies like U-Haul that incorporate in Nevada like them. They want to see that the statutes are enforced as written."). Permitting a single district court judge to lower the threshold for personal liability of directors and officers in direct contravention of the plain text of the applicable statute would undermine the clear public policy of the State and ultimately discourage corporations from basing themselves in Nevada. Opening the floodgates to litigation unsupported by NRS

78.138 and the protections afforded officers and directors under the business judgment rule based upon judicial activism violates Nevada's policy of encouraging and promoting incorporation under Nevada's corporate structure for the protection of officers and directors.

In sum, this case presents a ripe opportunity for this Court to provide a much-needed answer to an important question of law affecting a growing number of cases before Nevada's district courts and to ensure that those cases are uniformly decided consistent with the Legislature's intent and clear written mandate.

B. Even Assuming All Facts in the TAC as True, NRS 78.138 Compels Dismissal of All Claims against Petitioners in their Personal Capacities

This Court reviews the District Court's order denying Petitioners' motion for judgment on the pleadings by accepting all factual allegations in the operative complaint as true and drawing all inferences in favor of Respondent and then deciding if Petitioners are entitled to judgment as a matter of law. *Peck*, 133 Nev. at ___, 407 P.3d at 778. This Court reviews questions of law, including the interpretation of statutes and statutory construction, de novo. *Lawrence v. Clark Cty.*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011). "[W]hen the language of a statute is unambiguous, the courts are not permitted to look beyond the statute

itself when determining its meaning." *Wynn Resorts*, 133 Nev. at ___, 399 P.3d at 344.

In determining whether a director or officer may be individually liable for her conduct as a director or officer, the court's inquiry begins with NRS 78.138(3), which states, "A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7." NRS 78.138(7) thus provides the sole avenue through which a plaintiff may seek to impose individual liability on a director or officer for her acts or failures to act in her capacity as a director or officer. *See id.*

NRS 78.138(7) creates a two-step inquiry to impose individual liability on a director or officer. First, the plaintiff must rebut the presumptions of the business judgment rule established by NRS 78.138(3). NRS 78.138(7)(a). The business judgment rule states, in relevant part, that "directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3).[3] Second, the plaintiff must plead and prove both that the director's or officer's act or failure to

[3] This Court has developed an extensive body of case law discussing the circumstances under which the business judgment rule is or is not applicable. For purposes of this Petition, this Court can assume, without deciding, that the business judgment rule has been rebutted by the allegations in the TAC.

act constituted a "breach of his or her fiduciary duties as a director or officer" and that the breach "involved intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(1)-(2). Because Respondent's TAC fails to satisfy this second step of NRS 78.138(7), the claims against Petitioners in the TAC must be dismissed as a matter of law.

The sum total of Respondent's allegations against Petitioners is that Petitioners, as directors and officers of L&C, failed to inform themselves fully of the financial state of L&C and, due to their ignorance, failed to take certain steps that may have stemmed L&C's financial losses. I APP00040-41 at ¶ 34; I APP00078 at ¶ 232. Respondent includes two claims against Petitioners—gross negligence and deepening of the insolvency—seeking to impose individual liability upon Petitioners. Respondent does not include a claim for breach of fiduciary duty against Petitioners. Nor does Respondent allege that Petitioners breached any fiduciary duty, let alone that any breach involved intentional misconduct, fraud, or knowing violation of law.

Rather, Respondent's allegations in the TAC focus solely on Petitioners' alleged gross negligence in relying on three co-defendants, U.S. RE Corporation, Uni-Ter Underwriting Management Corporation, and Uni-Ter Claims Services Corporation. I APP00040-41 at ¶ 34. Respondent alleges that U.S. RE Corporation provided reinsurance to L&C while Uni-Ter Underwriting

Management Corporation and Uni-Ter Claims Services Corporation (the "Uni-Ter Parties") were retained to manage L&C. I APP00040 at ¶ 33. Respondent alleges that Petitioners "were aware at the time [they] retained Uni-Ter and its affiliates that they [the Uni-Ter Parties] had only recently been formed and had limited operating history." I APP00040-41 at ¶ 34. Respondent alleges that Petitioners "understood that [Petitioners] had not previously organized an insurance company." *Id.* Accordingly, Respondent alleges Petitioners "placed undue reliance on Uni-Ter as its manager without properly informing itself of the information provided by Uni-Ter and its affiliates" and, "on information and belief, [Petitioners] continued to rely on information and recommendations from Uni-Ter despite clear indications that the information was incomplete and inaccurate and the recommendations were ill advised . . . ." *Id.*

Respondent's allegations do not support either a prima facie case or an ultimate finding of breach of fiduciary duty nor do they couple such a breach with intentional misconduct, fraud, or knowing violation of the law. Instead, Respondent fills the pages of the TAC with conclusory allegations based on "information and belief" that are buoyed and bloated by speculation.[4] And, even

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[4]For example, in paragraph 145 of the TAC, Respondent alleges that, at a special meeting held on October 5, 2011, Petitioners requested "more frequent financial reporting to the Board [Petitioners] **as discussed at the last meeting**, preferably monthly." I APP00059-60 at ¶ 145 (emphasis in the original). From Petitioners' seemingly reasonable and responsible request, Respondent infers wrongdoing by

accepting Respondent's guesswork as true, these allegations do not connect Petitioners' acts or failures to act to a breach of any fiduciary duty which involved intentional misconduct, fraud, or knowing violation of the law. Consequently, Respondent's claims against Petitioners seeking individual liability—gross negligence *and* deepening insolvency—should have been dismissed.

C. Gross Negligence Cannot Create Individual Liability without also Satisfying NRS 78.138(7)(b)

Respondent contended below – and the District Court agreed – that NRS 78.138 "has no bearing" on how individual liability for directors must be pled and that allegations of gross negligence are sufficient to state a claim for breach of the fiduciary duty of care. *See* Opp. to Motion for Reconsideration at 5. To this end, Respondent conceded that NRS 78.138 relates to what must be proven at trial, just not what must be plead. *Id.* Yet, Respondent did not explain how a party could ignore the elements required to plead a claim.[5]

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alleging "[o]n information and belief the Board [Petitioners] failed to exercise even slight diligence or scant care and failed to ensure that Uni-Ter did, in fact, provide more complete and accurate reporting of L&C's financial status." *Id.* The TAC is riddled with similar allegations—referring only to Petitioners' "slight diligence or scant care"—that fail to allege any meaningful facts beyond, perhaps, Petitioners' negligence and do not satisfy the required elements of NRS 78.138(7)(b). *See* Motion for Reconsideration at 9 n.4.

[5] It is axiomatic that a claim to be proven at the evidentiary stage must be pled at the pleading stage. For example, under Respondent's theory, a plaintiff could proceed with a negligence claim at trial without ever making any allegation of duty, breach of duty, and damages. Put simply, Respondent's theory takes the "notice" out of "notice pleading."

Respondent's entire position rests on its argument that *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), established that, for claims based on breaches of the fiduciary duty of care, allegations of gross negligence are sufficient to impose individual liability on a director or officer. However, Respondent's argument is constructed around a misreading of *Shoen*.

Shoen involved an appeal from the dismissal of numerous shareholder derivative complaints based upon those complaints' failure to "sufficiently allege that . . . a demand [upon the board of directors] would be futile." 122 Nev. at 626, 137 P.3d at 1174. Thus, the issue presented in *Shoen* was the determination of pleading requirements for demand futility in shareholder derivative suits pursuant to NRCP 23.1. This Court held that "when a shareholder's demand would be made to the same board that voted to take (or reject) an action, so that the allegedly improper action constitutes a business decision by the board, a shareholder asserting demand futility must allege, with particularity, facts that raise a reasonable doubt as to the directors' independence or their entitlement to protection under the business judgment rule." *Id.* at 626-27, 137 P.3d at 1174.

The Court observed that a derivative plaintiff could demonstrate demand futility by showing that a majority of the board of directors could not evaluate the plaintiff's demand in a disinterested fashion—that is, considering the merits of the demand request impartially and "without being influenced by improper

considerations." *Id.* at 639, 137 P.3d at 1183. The Court held that the derivative plaintiff, to show interestedness (or a lack of board independence), "must allege that a majority of the board members would be 'materially affected, either to [their] benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders.'" *Id.* (quoting *Seminaris v. Landa*, 662 A.2d 1350, 1354 (Del. Ch. 1995)).

The Court pointed out that showing interestedness through potential liability can only be shown in rare cases where the likelihood of director liability is "substantial." *Id.* at 639–40, 137 P.3d at 1183–84. To illustrate this difficulty, the Court observed:

> With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers. And directors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law. Accordingly, interestedness through potential liability is a difficult threshold to meet.

Id.

According to Respondent's tortured reading, the first sentence in the above passage from *Shoen* (the "*Shoen* Passage") established a brand-new, extra-statutory framework for individual liability of directors and officers in duty of care cases, despite the fact that that issue was not before the Court. Specifically, Respondent reads the *Shoen* Passage to mean that NRS 78.138(7)(b) does not apply in duty of

care cases and allegations seeking to rebut the presumptions of the business judgment rule alone under NRS 78.138(7)(a) are sufficient to state a claim imposing individual liability on directors or officers. Contrary to the final sentence of the *Shoen* Passage, which notes the *difficulty* in showing interestedness, Respondent's interpretation would make interestedness much *easier* to plead in duty of care cases, since the requirements of NRS 78.138(7)(b) would be inapplicable and superfluous.

Contrary to Respondent's overbroad reading of the first sentence of the *Shoen* Passage, the first sentence states only that "the **business judgment rule** does not protect the gross negligence of uninformed directors and officers." *Id.* (Emphasis added). Pursuant to NRS 78.138(7), the inapplicability of the business judgment rule is only step one in the inquiry of whether it is legally appropriate to impose individual liability on officers and directors. *See supra* at page 14-15. The absence of the business judgment rule's protections alone, if pled and proven, does not impose individual liability on a director or officer "as a result of any act or failure to act in his or her capacity as a director or officer." A plaintiff must still plead and prove the elements required by NRS 78.138(7)(b).

In other words, to the extent the *Shoen* Passage affects the individual liability analysis at all, it can be read consistently with NRS 78.138 insofar as it stands solely for the proposition that gross negligence can overcome the

presumptions of the business judgment rule. Yet, the *Shoen* Passage alone does not create a new claim for breach-of-the-duty-of-care claims separate and apart from the statutory framework prescribed by NRS 78.138.

And, once again, Respondent has not made any allegations to satisfy NRS 78.138(7)(b). Respondent's only allegations of the existence or breach of a fiduciary duty relate to the Uni-Ter parties or U.S. RE. *See* I APP00042 at ¶¶ 45-46; I APP00045 at ¶ 66; I APP00047 at ¶ 74; I APP00048 at ¶ 84; I APP00049 at ¶¶ 88, 93; I APP00080 at ¶¶ 250-251; I APP00082 at ¶¶ 264-266. Respondent does not allege that Petitioners owed or breached any fiduciary duties nor does Respondent allege that it or L&C were damaged as a result of any breach of Petitioners' fiduciary duties. Thus, Respondent does not satisfy NRS 78.138(7)(b)(1).

Respondent likewise fails to allege that Petitioners' breach involved "intentional misconduct, fraud or knowing violation of law." NRS 78.138(7)(b)(2). Respondent's only allegations relating to intentional acts by any defendant relate to U.S. RE. I APP00049-50 at ¶¶ 92-94; I APP00082-83 at ¶¶ 265-267. And, Respondent does not make any allegations to support a finding that any defendant, including Petitioners, engaged in fraud or a knowing violation of law.

Alternatively, if *Shoen* did in some implied fashion obviate the need to plead and prove the elements of NRS 78.138(7)(b), then *Shoen* is plainly wrong and contrary to the legislative mandate of NRS 78.138(7)(b). Nowhere does NRS 78.138 differentiate between duty of care claims and duty of loyalty claims. Rather, the statute applies generally to "[t]he fiduciary duties of directors and officers . . . ." NRS 78.138(1); *see also* NRS 78.138(7)(b)(1) (requiring a plaintiff to prove that the director's or officer's "act or failure to act constituted a breach of his or her ***fiduciary duties*** . . ." without differentiating between the duty of care and the duty of loyalty) (emphasis added). A single sentence from a demand futility case, *Shoen*, illustrating the difficulties of showing director interestedness through potential liability should not be permitted to render the clear statutory language of NRS 78.138(7)(b) meaningless in duty of care cases. *See Karcher Firestopping v. Meadow Valley Contractors, Inc.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009) ("This court generally avoids statutory interpretation that renders language meaningless or superfluous.").

Finally, the cases Respondent and the District Court cited to support their contention that *Shoen* created a scheme separate from NRS 78.138 for evaluating claims of individual liability in "duty of care cases" are utterly inapplicable to the legal issue in this case.

First, *Jacobi v. Ergen*, No. 2:12-cv-2075-JAD-GWF, 2015 WL 1442223 (D. Nev. Mar. 30, 2015), is, like *Shoen*, a demand futility decision in a shareholder derivative suit,[6] and the relevant passage to which both Respondent and the District Court cite concerns the difficulty of showing interestedness through potential liability. *See Jacobi*, 2015 WL 1442223, at *4 ("[T]he Nevada Supreme Court recognized in *Shoen* that 'allegations of mere threats of liability through approval of the wrongdoing or other participation . . . do not show sufficient interestedness to excuse the demand requirement.'" (quoting *Shoen*, 122 Nev. at 639, 137 P.3d at 1183)). Moreover, while the *Jacobi* court interpreted the *Shoen* Passage as demonstrating that a "director's misconduct must rise at least to the level of gross negligence to state a breach-of-the-fiduciary-duty-of-due-care claim," *id.*, this interpretation cannot and does not overrule or remove the requirements of NRS 78.138(7)(b) in so-called "duty of care" cases. *Jacobi* was a demand futility/shareholder derivative case—not a "duty of care" case. Whatever persuasive value it has, *Jacobi* cannot be used to vitiate the clear statutory mandate of NRS 78.138.

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[6] In its Opposition to Petitioners' Motion for Reconsideration, Respondent implies that the analysis of courts deciding shareholder derivative cases (like *Shoen* and *Jacobi*) is inapplicable to the analysis of this duty of care case seeking individual liability of officers and directors. VI APP01404.

Second, *FDIC v. Jacobs*, No. 3:13-cv-00084-RCJ-VPC, 2014 WL 5822873 (D. Nev. Nov. 10, 2014), involved a motion for summary judgment on claims of gross negligence under a federal statute, 12 U.S.C. § 1821(k). Pursuant to 12 U.S.C. § 1821(k), a director of officer of an insured depository institution **may be held personally liable for**, *inter alia*, "**gross negligence**, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law." (Emphasis added). Thus, *Jacobs* is immediately distinguishable from the case here because the statute in *Jacobs* ***expressly authorized*** personal liability under federal law for gross negligence in the operation of a federally insured depository institution. NRS 78.138, on the contrary, requires the higher standard of breach of fiduciary duty, coupled with intentional misconduct, fraud, or knowing violation of the law.

The *Jacobs* court cited the *Shoen* Passage for the proposition that "[i]n Nevada, the business judgment rule defines the line between unactionable ordinary negligence and actionable gross negligence." 2014 WL 5822873, at *4. However, as described in greater detail above, this interpretation can be read as consistent with the first sentence of the *Shoen* Passage, which only establishes that the presumptions of the business judgment rule may not apply to a director or officer's gross negligence. Moreover, whatever effects the *Shoen* Passage has on director

liability, it does not define or determine the term "gross negligence." *See Shoen*, 122 Nev. at 639–40, 137 P.3d at 1183–84 ("With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers."). Therefore, citation to the *Shoen* Passage in the context of 12 U.S.C. § 1281(k) is inappropriate.[7]

Respondent also cited *McDonald v. Palacios*, No. 2:09-cv-01470-MMD-PAL, 2016 WL 5346067 (D. Nev. Sept. 23, 2016) *aff'd but criticized*, 710 F. App'x 318 (9th Cir. 2018), in its Opposition to Petitioners' Motion for Reconsideration below. *See* VI APP01406. However, the District Court did not incorporate *McDonald* into its decision. The *McDonald* decision helpfully illustrates the proper application of NRS 78.138(7) and its interplay with the legal requirements for imposing personal liability on a director or officer.

The *McDonald* court concluded that the defendants' counterclaim for breach of a fiduciary duty failed because "even if there was a breach of fiduciary duty, the [defendants] fail to prove that the breach involved intentional misconduct, fraud, or a violation of law." *See McDonald*, 2016 WL 5346067, at *20. In this way, the *McDonald* court properly applied NRS 78.138(7), concluding that all three

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[7]Respondent also cited to *FDIC v. Jones*, No. 2:13-cv-168-JAD-GWF, 2014 WL 4699511 (D. Nev. Sept. 19, 2014), to bolster their argument that NRS 78.138(7)(b) is superfluous in "duty of care" cases. *See* VI APP01406. Like *Jacobs*, *Jones* also misused *Shoen* in the context of 12 U.S.C. § 1821(k). Thus, for the same reasons, *Jones* does not support Respondent's (or the District Court's) contentions.

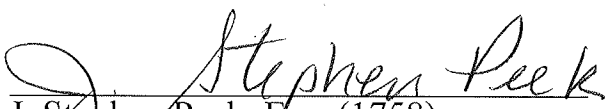
factors—(7)(a), (7)(b)(1), and (7)(b)(2)—must be plead and proven for a director or officer to be individually liable. In other words, as the *McDonald* court implicitly acknowledged, even if Respondent's allegations of gross negligence are sufficient to rebut the presumptions of the business judgment rule and so satisfy NRS 78.138(7)(a), Respondent must still make sufficient allegations to satisfy NRS 78.138(7)(b)(1) and NRS 78.138(7)(b)(2).

V. CONCLUSION

The District Court has twice failed to apply NRS 78.138 by its plain, unambiguous terms. Rather than defer to the clear statutory language governing the circumstances when directors and officers may be held individually liable, the District Court has applied a misreading of this Court's decision in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), in order to find that a separate scheme for evaluating individual liability of directors and officers exists for "duty of care" claims. The District Court's approach flies in the face of the plain text of NRS 78.138 and the public policy of Nevada and creates an extra-statutory standard that will lead to inconsistent results, increased and more complex litigation, and harm to the State's business-friendly environment. This Court should issue a writ to correct the District Court's misunderstanding of the legal requirements to state a claim for individual liability against a director or

officer and direct the District Court to enter an order dismissing Respondent's claims against Petitioners.

DATED this 12th day of March 2019.



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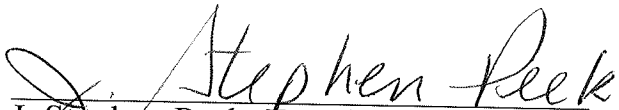
CERTIFICATE OF COMPLIANCE

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

DATED this 12th day of March 2019.



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VERIFICATION

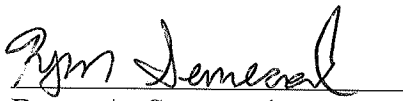
I, Ryan A. Semerad, declare:

1. I am an attorney with Holland & Hart LLP, counsel of record for Petitioners-Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels.

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

3. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of March 2019, in Clark County, Nevada.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Holland & Hart, LLP, and that on this 12th day of March 2019, I electronically filed and served by electronic mail and United States Mail a true and correct copy of the above and foregoing **PETITION FOR WRIT OF MANDAMUS** properly addressed to the following:

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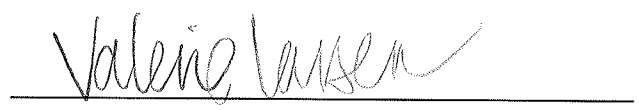

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