8, 9, 12 (pleadings stage); *see also, e.g.*, NRCP 56, 50(a) (evidentiary stage). The Directors, however, seek to blur this line in trying to overturn this Court's prior decisions regarding the pleadings.

For its part, NRS 78.138 relates only to the evidentiary stage vis-à-vis director liability: "[A] director or officer is not individually liable … unless: (a) The **trier of fact determines** that the [BJR] has been rebutted; and (b) It is **proven** that: …" *See id.* (emphasis added). No version or variation of the word "plead" appears anywhere in NRS 78.138. Therefore, by its plain and unambiguous language, NRS 78.138 has no bearing on whether director liability must be pled with specificity, as Defendants claim. *See id.*

Because this Motion for Reconsideration pertains to the Directors' 12(c) Motion, a pleadings stage motion, the Directors' attempts to distract this Court from a focus on the applicable **pleading** rules and authorities is inappropriate and must be rejected. *See* NRCP 12(c); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1367; *Gumpad*, 19 F.Supp.3d at 328; *Sadler*, 130 Nev.Adv.Op. 98, 340 P.3d at 1266–67; *Howell*, 2016 WL 4579086, at *1; *Bernard*, 103 Nev. at 135–36, 734 P.2d at 1241.Importantly, the Directors actually admit the sufficiency of Plaintiff's TAC for stating a claim of director liability:

> [F]or purposes of this Motion [for Reconsideration], the Director Defendants do not dispute that, at the pleading stage, allegations of gross negligence involving inattention and lack of diligence … may be sufficient to plead rebuttal of the [BJR] presumption[.]
> *See* Directors' Motion for Reconsideration, at 11:21-12:2, and n.8.

Furthermore, this Court has already addressed the sufficiency of Plaintiff's well pled allegations with respect to the 12(c) Motion. Defendants have not raised any new legal issues that would require this Court to change that decision, which is wholly consistent with mandatory case authority from the Supreme Court of Nevada.

2. The Shoen case plainly states that, in duty of care cases such as this one, allegations of gross negligence suffice.

In *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 639, 137 P.3d 1171, 1184 (2006), the Supreme Court of Nevada correctly addressed this issue, and contrary to the Directors'

suggestion, *Schoen* remains good law today:

> **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 *[of the duty of loyalty]* involves intentional misconduct, fraud, or a knowing violation of the law.

See Shoen, 122 Nev. at 639, 137 P.3d at 1184. The Nevada Supreme Court confirmed the validity of *Shoen* in the recent case of *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev.Adv.Op. 52, 399 P.3d 334, 342 (2017), *reh'g denied* (Sept. 28, 2017), and thus it remains this Court's legal starting point. Based on *Shoen*, as well as the other procedural and substantive reasons set forth herein, this Court must deny the Directors' Motion for Reconsideration.

a. This Court should reject the Directors' unsupported attack on *Schoen*'s analysis of the business judgment rule as *dicta*.

The Directors' attack on Schoen's analysis as "dicta" is not supported by any legal *See* Directors' Motion for Reconsideration, at 6:15-18 (no citation to any supporting case authorities by the Directors), 6:18-20 (same), 11:12-17 (same), 12:19-21 (same). In fact, in addition to failing to cite authorities in support of this *dicta* characterization, the Directors ignore multiple federal case authorities citing to the above quoted language from *Schoen* as good Nevada law. *See, e.g., Jacobi v. Ergen*, 2015 WL 1442223, at *4 (D. Nev. Mar. 30, 2015) ("**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, or involve "intentional misconduct, fraud, or a knowing violation of the law," to state a duty-of-loyalty claim**..."); *F.D.I.C. v. Jacobs*, 2014 WL 5822873, at *4 (D.Nev. Nov. 10, 2014) ("In Nevada, the business judgment rule defines the line between unactionable ordinary negligence **and actionable gross negligence**.") (emphasis added); *F.D.I.C. v. Jones*, 2014 WL 4699511, at *10 (D.Nev.); *see also McDonald v. Palacios*, 209CV01470MMDPAL, 2016 WL 5346067, at *20 (D.Nev.), *aff'd but criticized*, 710 Fed.Appx. 318 (9th Cir.2018).

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b. Gross negligence is less than fraud and, therefore, only requires pleading under NRCP 8.

A director's fiduciary relationship with a corporation imposes on the director duties of both care and loyalty. *See Shoen*, 122 Nev. at 632, 137 P.3d at 1178. "[T]he duty of care consists of an obligation to act on an informed basis[.]" *See id.* Separately, "the duty of loyalty requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests." *See id.* (emphasis added).

As noted above, the *Shoen* Court recognized the distinction between these duties:

> ***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 *[of the duty of loyalty]* involves intentional misconduct, fraud, or a knowing violation of the law.

See id. at 639, 137 P.3d at 1184 (emphasis added). Based on *Shoen*, the only issue for this Court is whether a gross negligence-based cause of action is subject to the pleading requirements of NRCP 8 or 9. The plain language of the pleading rules and applicable case authority demonstrates that NRCP 8 governs the pleading of "gross negligence".

"Gross negligence" is defined in numerous Nevada authorities.. *See Hart v. Kline*, 61 Nev. 96, 116 P.2d 672, 674 (1941); *Dushane v. Acosta*, 2015 WL 9480185, at *1 (Nev.App.); *F.D.I.C. v. Johnson*, No. 2:12-CV-00209-KJD, 2012 WL 5818259, at *6 (D.Nev.).

> Gross negligence ... amounts to indifference to present legal duty, and ... is a heedless and palpable violation of legal duty respecting the rights of others. ... Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man. But it falls short of being such reckless disregard ... as is equivalent to a willful and intentional wrong. Ordinary and gross negligence differ in degree of inattention, while both differ in kind from willful and intentional conduct[.]

See Hart, 61 Nev. 96, 116 P.2d at 674. In Nevada, then, "gross negligence" is something less than "willful and intentional conduct." *See id.* Therefore, the related pleading standard is also less than that required for intentional conduct.

The analysis at the pleadings stage is straightforward. As to duty of loyalty (and shareholder derivative) cases – neither of which are at issue in this case – heightened pleading is required pursuant to NRCP 9(b) (and NRCP 23.1). *See Shoen*, 122 Nev. *at* 639, 137 P.3d at 1184; NRCP 9(b); NRCP 23.1; *see also* cases cited by the Directors, including *McFarland v. Long*, 2017 U.S. Dist. LEXIS 168998 at *12 (D.Nev.); *Louisiana Mun. Police Emps. Ret. Sys. v. Wynn*, 829 F.3d 1048, 1062 (9th Cir. 2016); *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 286 (Del.Ch. 2003); *Israni v. Bittman*, 473 Fed.Appx. 548 (9th Cir. 2012)[3]; *In re Amerco Derivative Litig.*, 127 Nev. 196, 223, 252 P.3d 681, 700–01 (2011). However, in duty of care cases, which only deal with gross negligence (conduct that is not willful or intentional) NRCP 8 applies.

It bears noting that the pleading requirements for duty of care cases does **not** emanate from NRS 78.138. As discussed above, that statute deals strictly with the proof requirements at trial. *See* NRS 78.138. Rather, whatever the pleading requirements applicable to director liability claims come directly from the plain and unambiguous requirements of the applicable pleading rules (NRCP 8(a), 9(b), and 23.1) and case authorities. The Directors have not cited a single authority construing NRS 78.138 to provide heightened pleading standards. *See e.g.*, Directors' Motion for Reconsideration, at p.8; *see also Wynn Resorts, Ltd.*, 399 P.3d at 344 (NRS 78.138, which makes no reference at all to "pleading," must be enforced as written.)

The Directors try to avoid the effect of *Schoen* and *Wynn Resorts* by citing to *In re Las Vegas Sands Corp. Derivative Litig.* case, 2009 WL 6038660 (Nev.Dist.Ct.) for its citation to *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 123 (Del. Ch. 2009). However, the Director Defendants' reliance on both cases undermines their arguments because *Las Vegas Sands* – and its reliance on *Citigroup* – only dealt with pleading requirements for demand futility under NRCP 23.1. In *Las Vegas Sands* Judge Earl determined, according to the Directors themselves, that "allegations were insufficient to adequately plead demand futility **under NRCP 23.1**." *See* Directors' Motion for Reconsideration, at 15:14-16 (emphasis added). Critically,

[3] It bears noting that the *Israni* case on which the Director Defendants rely is an unpublished decision which is not precedent even within the Ninth Circuit pursuant to Ninth Circuit Rule 36-3.

however, NRCP 23.1 does not apply in this case. None of the other cases cited by the Directors to support an argument for heightened pleading was a duty of care/ gross negligence case.. *See e.g.*, *McFarland*, 2017 U.S. Dist. LEXIS 168998 at *12; *Louisiana Mun. Police Emps. Ret. Sys.*, 829 F.3d at 1062; *In re Walt Disney Co. Derivative Litig.*, 825 A.2d at 286; *Israni*, 473 Fed.Appx. 548; *In re Amerco Derivative Litig.*, 127 Nev. at 223, 252 P.3d at 700–01.[4]

Defendants ignore the plain language of the pleading statutes themselves. NRCP 9, which is entitled "Pleading Special Matters," does not provide that gross negligence claims are subject to its heightened requirements. Nor do the Directors cite to any case assigning heightened pleading standards to gross negligence claims. *See generally*, Directors' Motion for Reconsideration. Thus, in the absence of any mention of gross negligence in NRCP 9, pleading of gross negligence must be governed by NRCP 8, which is entitled "General Rules of Pleading."

Moreover, even if NRCP 9 was applicable to the conduct in this case, Defendants do not prevail. "[M]alice, intent, knowledge and other conditions of the mind of a person may be averred **generally**." *See* NRCP 9(b); *Brown v. Kellar*, 97 Nev. 582, 583–84, 636 P.2d 874, 874 (1981) (*citing Occhiuto v. Occhiuto*, 97 Nev. 143, 625 P.2d 568 (1981)); FRCP 9(b); *Cave Consulting Grp., Inc. v. OptumInsight, Inc.*, No. 15-CV-03424-JCS, 2016 WL 4744165, at *8-9 (N.D. Cal. Sept. 12, 2016). The Directors only challenge the pleadings with respect to intent and knowledge. Thus, because NRCP 9 permits general allegations as to these elements of a claim, Plaintiff only was required to satisfy the general pleading requirements of NRCP 8, which Plaintiff did.

The *In re Amerco Derivative Litig.* case provides additional guidance on pleading claims that are not fiduciary duty claims:

> Because appellants' claims of breach of the fiduciary duty are, in this instance, allegations of fraud committed by respondent officers and directors, for those causes of action, appellants must satisfy the heightened pleading requirement of

[4] It goes without saying – and the Director Defendants even admit – that the Director Defendants' citation to *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996), is not consistent with Nevada case law regarding claims for gross negligence which, in Nevada, expressly do not require a finding of bad faith or fraud. Thus, to the extent the Director Defendants rely on this standard their Motion for Reconsideration must be denied.

> NRCP 9(b). For all other causes of action, appellants need only satisfy the more liberal pleading requirements of NRCP 8(a)[.]

See id. at 223, 252 P.3d at 700. The critical point is that *Amerco Derivative* distinguished fiduciary duty claims which are based on fraud from other claims against directors. *See id.* This distinction is central to why Defendants cannot prevail on the Motion for Reconsideration. Except for claims of fraud, "[A]ll other causes of action, need only satisfy the more liberal pleading requirements of NRCP 8(a)[.]" *See id.*

With Rule 8 as the applicable pleading standard, and the numerous prior decisions by this Court, Plaintiff's TAC is plainly sufficient to withstand the Directors' 12(c) Motion, as well as the instant Motion for Reconsideration. *See e.g.* TAC, at ¶¶ 59, 105, 108, 113, 122, 145, 148, 153, 154, 164, 192, 193, 194, 226, 228, 232.

i. The deepening of insolvency claim is also subject only to NRCP 8's lower pleading standards.

The same analysis applies to the "deepening of insolvency" claim. As noted in *Smith v. Arthur Andersen LLP*, 421 F.3d 989 (9th Cir. 2005), deepening of the insolvency is not fraud-based: "This *[deepening]* was accomplished by, among other things, misrepresenting (not necessarily intentionally) the firm's financial condition to its outside directors ..." *See id.* at 995. As such, Plaintiff's deepening of insolvency claim is only subject to NRCP 8's general pleading requirements.

Defendants' cite law from the Third Circuit for the proposition that the deepening of insolvency claim must be fraud-based. *See In re CitX Corp., Inc.*, 448 F.3d 672, 677 (3d Cir.2006) and Directors' Motion for Reconsideration, at p.6, n.2. But, the decision was limited to the specifics of "Pennsylvania law." *Id.* ("we note that *Lafferty* holds only that fraudulent conduct will suffice to support a deepening-insolvency claim under Pennsylvania law"). The Directors also fail to explain that, since then, that *CitX* decision has been rejected in other courts. *See e.g., In re Greater Southeast Community Hospital Corp. I*, 353 B.R. 324, 336-37 (D.D.C. 2006):

> [The 3rd Circuit's] conclusions give the court serious pause. … [T]he Third Circuit's reinterpretation of *Lafferty* contradicts the conclusions reached by this court[.] The court has therefore been especially careful in its review of the *CitX* decision. … [Nonetheless, this] court is equally unmoved by the Third Circuit's decision to restrict recoveries for deepening insolvency to actions involving fraud.

See id. The flawed *CitX* case is not controlling and the case criticizing CitX bolsters Plaintiff's position that deepening insolvency is not a fraud based claim: "[T]he Ninth Circuit Court of Appeals recently suggested that deepening insolvency does not require intentional conduct." *See id.* at 680–81. As with duty of care, a claim for deepening the insolvency only requires NRCP 8 pleading.

ii. Nor does "knowing violation of law" equate to fraud.

The Directors desperately and inaccurately cling to the phrase "intentional misconduct, fraud or knowing violation of law" to support their thrice failed argument that all of these claims require pleading fraud with particularity *See e.g.*, Directors' Motion for Reconsideration, including at 6:18-20, 8:13-14, 9:4-11, 12:3-8, 15:17-23, 16:12-14. The Directors, however, cite to no authority for the proposition that "intentional misconduct" is the same as "fraud" and that both of these are the same as "knowing violation of law." The very fact that the Legislature used these separate concepts and terms and the conjunctive "or" cannot be ignored. Had the Legislature actually meant that all director liability turns on fraud, the statute would be materially different. *See e.g.*, *Wynn Resorts, Ltd.*, 399 P.3d at 343 (noting substantive meaning of Legislature adopting most, but not all, of the Model Business Corporation Act). And had the Legislature intended to create an exception for pleading standards vis-à-vis director liability, it could and would have done so. *See id.*; *see also, e.g.*, *Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 535 (2003). It did not. Once again, then, the proper analysis returns to the *Shoen* language and the different pleading requirements for non-fraud claims (such as gross negligence and deepening insolvency) versus fraud-based claims (breach of duty of loyalty).

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c. But even under NRCP 9's heightened standards, Plaintiff's TAC still suffices.

Even if this Court were to apply NRCP 9's heightened pleading standards, it still must do so subject to: (1) the applicable case authorities; and (2) the substantive distinction between the pleadings and evidentiary stages. Most critically, under NRCP 9, not all allegations require particularity.

> In actions involving fraud, the circumstances of the fraud are required by NRCP 9(b) to be stated with particularity. The circumstances that must be detailed include averments to the time, the place, the identity of the parties involved, and the nature of the fraud or mistake. *5 Wright and Miller, Federal Practice and Procedure s 1297* at p. 403 (1969). Malice, intent, knowledge and other conditions of the mind of a person may be averred generally. NRCP 9(b); *see Occhiuto v. Occhiuto*, 97 Nev. 143, 625 P.2d 568 (1981).

Brown, 97 Nev. at 583–84, 636 P.2d at 874; *see also* NRCP 9(b); *Occhiuto*, 97 Nev. 143, 625 P.2d 568; FRCP 9(b); *Cave Consulting Grp., Inc.*, 2016 WL 4744165, at *8-9. Therefore, as long as the TAC sufficiently describes those four (4), and only those four, "circumstances" of the supposed fraud – (1) time; (2) place; (3) party identity; and (4) nature – it would properly survive any pleadings stage motion to dismiss. *See id.* "Malice, intent, knowledge and other conditions of the mind of a person may be averred generally." *See* NRCP 9(b); *Brown*, 97 Nev. at 583–84, 636 P.2d at 874.

Plaintiff's TAC includes, but is not limited to, the following allegations:

- As to **time**, *see* ¶¶ 34, 36, 42, 55, 58-60, 92-94, 96, 99, 102-13, 141-63, among others.
- As to **persons**, *see* ¶¶ 3–25 (individually identifying each and every Director), and ¶¶ 32, 34 ("the Defendants who were directors and officers of L&C ("Board") …"), 58-60, 94, 96, 102, 104, 112, 117, 126, 143-46, 154, 159, 170, 185, among others.
- As to **nature**, *see* ¶¶ 34, 36, 42, 55[5], 58-60, 69-71, 92-99, 102-17, 141-63, among others.
- As to **place**, Plaintiff submits that there is no single pertinent "place" by virtue of the fact that the Board's acts and omissions were collectively taken at various places, including

both in and out of the country, as well as via telephonic conference with the participants simultaneously in different places. Nonetheless, by specifically referencing particular Board meetings, the TAC gives the Directors a roadmap to the precise location thereof and, thus, is sufficient for pleading purposes. *See also* TAC, at ¶¶ 1, 4, 7, 10, 13, 16, 18, 21, 24, 31, 142 (Sonoma, CA), 143 (Las Vegas, but Fogg attending via telephone), 149 (telephonic by all).

Nowhere have the Directors attacked the particularity of the TAC on any of those "circumstances" that require specificity for a claim they mischaracterize as fraud-based. *See generally*, Directors' Motion for Reconsideration. Instead, the Directors only attack the sufficiency of the pleadings as to the Directors' state of mind. *See e.g., id.* at 9:4-11, 12:14-18, 15:5-16. But, as previously pointed out, even under NRCP 9, state of mind is only subject to NRCP 8's lower, generalized pleading standard. *See Brown*, 97 Nev. at 583–84, 636 P.2d at 874; *see also* NRCP 9(b); *Occhiuto*, 97 Nev. 143, 625 P.2d 568; FRCP 9(b); *Cave Consulting Grp., Inc.*, 2016 WL 4744165, at *8-9. The TAC thus suffices and the Directors' Motion for Reconsideration should be denied.

III. COUNTERMOTION FOR ATTORNEY'S FEES

NRS 18.010(2)(b) allows for attorneys' fees "when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." The Nevada Supreme Court has "consistently recognized that '[t]he decision to award attorney fees is within the [district court's] sound discretion ... and will not be overturned absent a 'manifest abuse of discretion.' " *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, 130 P.3d 1280, 1288 (2006). In this case there is no legitimate basis for the instant Motion for Reconsideration. It is a fourth bite at the apple meant to run up fees and costs for the Plaintiff so the Directors can continue to roll the dice and hope for a different result. Accordingly, given the Director Defendants' behavior, Plaintiff requests its attorneys' fees and costs incurred in defending against the instant Motion for Reconsideration.

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IV. CONCLUSION

For all these reasons, Plaintiff respectfully requests this Court deny the Directors' Motion for Reconsideration, grant its countermotion for fees, and grant such other and further relief as the Court deems appropriate.

DATED this 27 day of December, 2018.

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DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,

Plaintiff,

v.

ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION, DOES 1-50, inclusive; and ROES 51-100, inclusive;

Defendants.

Case No. A-14-711535-C
Dept. No. XXVII

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

AND

OPPOSITION TO COUNTERMOTION FOR ATTORNEY'S FEES

Defendants, Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels (the "Director Defendants") by and through their undersigned counsel of record hereby submit this Reply in support of their Motion for Reconsideration ("Motion").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Nevada Legislature made it clear when it adopted NRS 78.138 that officers and directors of Nevada corporations are entitled to the protection of the business judgment rule, but that in certain circumstances officers may be found liable. Gross negligence is not one of those circumstances.

NRS 78.138(3) provides:

"3. Except as otherwise provided in subsection 1 of NRS 78.139, 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. 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***." (emphasis added).

In turn, NRS 78.138(7) provides:

7. Except as otherwise provided in NRS35.230, 90.660, 91.250, 452.270, 668.045 and 694A.030 or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of ***any act or failure to act*** in his or her capacity as a ***director or officer*** unless:

(a) The trier of fact determines that the presumption established by subsection 3 has been rebutted; ***and***

(b) It is ***proven*** that:

(1) The 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***

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(2) Such breach involved intentional misconduct, fraud or a knowing violation of law."

Plaintiff Commissioner of Insurance for the State of Nevada ("Plaintiff"), a receiver for Lewis & Clark, LTC Risk Retention Group, Inc. ("L&C"), alleges that the Director Defendants are personally liable for failing to inform themselves properly about the financial state of their company. Thus, Plaintiff's claim is governed by NRS 78.138(3) and NRS 78.138(7) because it is predicated upon an alleged failure to act. Accordingly, Plaintiff must allege sufficient, particularized facts to demonstrate that the Director Defendants' failure to act constitute a breach of their fiduciary duties and involved intentional misconduct, fraud, or a knowing violation of the law.

In response to the plain language of NRS 78.138(7), Plaintiff points to a single piece of *dicta* from *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), which, in the context of pleading demand futility, explains an exceedingly narrow type of pleading demand futility, and nothing more.[1] Plaintiff argues that this one sentence in *Shoen* creates, through judicial activism, a new claim for relief and liability for officers and directors that flies in the face of the clear and unambiguous language of NRS 78.138(3) and NRS 78.138(7). Plaintiff asserts that this single passage collapses NRS 78.138(7)(a) into NRS 78.138(7)(b) obviating the need to plead that a director's alleged breach of his or her fiduciary duties involved "intentional misconduct, fraud, or a knowing violation of law" in order to permit recovery from an individual director.

Unfortunately, this Court adopted Plaintiff's misinterpretation of *Shoen*, overriding the plain text of NRS 78.138, when it denied the Director Defendants' 12(c) motion for judgment on the pleadings. Accordingly, the Director Defendants have moved this Court to reconsider that decision and abandon the flawed, tautologous reasoning Plaintiff advanced and continues to advance in order to insulate its allegations of gross negligence from proper legal scrutiny under

[1]In *Shoen*, the Nevada Supreme Court considered whether allegations of "gross negligence" directed at directors could excuse demand upon those directors. *Shoen* did not consider or address whether allegations of "gross negligence" directed at directors can impose personal liability upon those directors.

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NRS 78.138(7). Thus, this Court should exercise its discretion to reject Plaintiff's misrepresentations and grant the Director Defendants' 12(c) motion.

II. ARGUMENT

A. Legal Standard

"[A] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Here, the underlying "decided issue" is the Director Defendants' 12(c) motion for judgment on the pleadings.[2]

B. Director Defendants' Motion for Reconsideration is Procedurally Proper

Plaintiff argues that the Director Defendants' Motion for Reconsideration merely adds case authority to supplement the arguments they made in their 12(c) motion. What's worse, the Plaintiff also argues that the cases the Director Defendants cite to are inapposite to the factual and procedural conditions present in this case because they concern breaches of the fiduciary duty of loyalty or demand futility in shareholder derivative matters, not breaches of the fiduciary duty of care, as is the issue in this case. These arguments ring hollow and prove the basis for dismissal—*i.e.*, Plaintiff's allegations of the breach of duty of care or gross negligence, without more do not create a claim for relief.[3] At most, they may only overcome the presumption that the Director

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[2]In its opposition to the Director Defendants' motion for reconsideration, Plaintiff assails for the first time the timing of the Director Defendants' 12(c) motion. *See* Opp. at 3. Because Plaintiff did not raise this argument in the briefing or oral arguments related to the Director Defendants' 12(c) motion and raises it for the first time in opposition to the current motion, this Court should not consider it.

[3]Plaintiff's argument that *Moore v. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244 (1976), requires that "new issues of . . . law" to be raised in order for a district court to grant a motion for reconsideration is inapposite. In *Moore*, two consecutive motions for reconsideration were filed following the denial of a motion for summary judgment. *Moore*, 92 Nev. at 404, 551 P.2d at 245. The first motion for reconsideration was denied, but the second granted though the only distinguishing features between the two were additional case citations. *Id.* The Nevada Supreme Court reversed the district court's order granting the second motion for reconsideration because it did not raise "new issues of law" and did not make "reference to . . . new or additional facts." *Id.* By contrast, the Director Defendants' Motion for Reconsideration before the Court here is the Director Defendants' first such motion and addresses a distinct legal question—can allegations of gross negligence alone create personal liability for directors of Nevada companies under NRS 78.138(7)?—from any previous motion. Thus, this Court should reject Plaintiff's argument that "new issues of . . . law" must be (and are not) raised before the Court may grant the Director Defendants' Motion for Reconsideration.

Defendants are not protected by the business judgment rule, but that, standing alone does not entitle the Plaintiff to recover against the Director Defendants.

The Director Defendants' Motion for Reconsideration is predicated upon this Court's adoption of Plaintiff's clearly erroneous legal standard as to individual liability for directors when evaluating the Director Defendants' 12(c) motion and thus falls squarely within the narrow universe of claims reviewable in a motion for reconsideration. *See Masonry & Tile Contractors*, 113 Nev. at 741, 941 P.2d at 489. Furthermore, the Director Defendants support their Motion for Reconsideration with citations to caselaw and statutes that define and govern the pleading standards for breaches of fiduciary duties generally. *See, e.g.*, NRS 78.138(7) (governing the standards for directors' individual liability for breaches of "fiduciary duties"); *McFarland v. Long*, 2017 WL 4582268, at *4 (D. Nev. Oct. 6, 2017) ("[T]he plain language of N.R.S. 78.138.7(b) states that a higher, 'intentional misconduct' standard applies to *all* officer and director *claims*." (emphasis added)); *Israni v. Bittman*, 473 Fed. Appx. 548, 551 (9th Cir. 2012) ("Additionally, the complaint does not contain particularized facts showing that the committee members engaged in 'intentional misconduct, fraud or a knowing violation of the law,' *as required under Nevada law*." (emphasis added) (citing NRS 78.138(7)); *Bratcher v. City of Las Vegas*, 113 Nev. 502, 507, 937 P.2d 485, 489 (1997); *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. 52, 399 P.3d 334 (2017). Thus, despite Plaintiff's representations to the contrary, the legal authorities cited by the Director Defendants go directly to the heart of the legal issue in the Motion for Reconsideration.[4]

[4]What's more, Plaintiff's key case, *Shoen*, is itself a demand futility case. *See Shoen*, 122 Nev. at 644-45, 137 P.3d at 118-87 ("Today, we clarify the pleading requirements for shareholder derivative suits pursuant to NRCP 23.1. By extending this court's holding in *Johnson* to incorporate the approaches enunciated by the Delaware Supreme Court in *Aronson* and *Rales* for determining demand futility, we conclude that when it is asserted that a demand upon the corporation's board of directors or shareholders would be futile and should be excused, the shareholder must plead, with sufficient particularity, that a reasonable doubt exists that the directors are independent and disinterested or entitled to the protections of the business judgment rule. However, where the contested corporate transaction is not the result of director action, the demand futility analysis is limited to whether a majority of the directors had a disqualifying interest in the matter or were otherwise unable to act on the demand with impartiality."). Accordingly, if, as Plaintiff contends, citation to shareholder derivative matters is a vain exercise considering the issues before this Court, then *Shoen* has no place here as well.

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C. Director Defendants' Motion for Reconsideration is Meritorious

The Court denied the Director Defendants' 12(c) motion because it found *Shoen* controlling over the matter of whether a director may be personally liable without any allegations or proof of "intentional misconduct, fraud, or a knowing violation of law." *See* Order at 2. It concluded that *Shoen* established that allegations or proof of one of these three elements is not required to survive a 12(c) motion when the claim at issue is gross negligence. However, the plain, unambiguous language of NRS 78.138(7), which governs personal liability for the actions or omissions of directors, requires proof of "intentional misconduct, fraud, or a knowing violation of law" before a director may be personally liable for his or her conduct as a director no matter the claim. No exception or exemption from NRS 78.138(7)'s strictures exists for claims of "gross negligence" anywhere in NRS 78.138. And, "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.*, 133 Nev. at ___, 399 P.3d at 344. Thus, the Court applied a clearly erroneous legal standard and so the Director Defendants' Motion for Reconsideration is meritorious.

D. Plaintiff's Attempts to Obscure the Director Defendants' Legal Arguments Should Be Rejected

Still, Plaintiff argues that the Director Defendants "improperly conflate the pleadings and evidentiary stages" because NRS 78.138 "relates only to the evidentiary stage vis-à-vis director liability." Opp. at 4-5. Thus, "NRS 78.138 has no bearing on whether director liability must be pled with specificity, as Defendants claim." *Id.* at 5.[5]

NRS 78.138(7)(b)(2) requires a plaintiff to plead and prove that the alleged breach of a fiduciary duty involves "intentional misconduct, fraud, or a knowing violation of law" to impose personal liability on a director. In other words, the pleadings must establish the director acted in "bad faith." *See In re Las Vegas Sands Corp. Deriv. Litig.*, 2009 WL 6038660, at *7 (D. Nev. Nov. 4, 2009); *In re Citigroup Inc. Shareholder Deriv. Litig.*, 964 A.2d 106, 125 (Del. Ch. 2009).

[5]*Shoen* itself refers to NRS 78.138(7) in its discussion of the duty of care and the duty of loyalty. *See* 122 Nev. at 640 & n.60, 137 P.3d at 1184 & n.60.

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And "particularized factual allegations" are required to show "bad faith." *Citigroup*, 964 A.2d at 127.[6]

Still, the Director Defendants point to NRS 78.138(7) not only to criticize Plaintiff's pleadings as qualitatively insufficient, but to show that Plaintiff's pleadings are quantitively insufficient because they do not make sufficient, particularized allegations to satisfy NRS 78.138(7)(b)(2), which requires a showing that the alleged breach involved "intentional misconduct, fraud, or a knowing violation of law." Thus, Plaintiff's pleadings do not support or address any one of the elements required to impose personal liability on a director such that, even if they are presumed to be true, those pleadings would not permit recovery of damages from a director in his or her individual capacity.

Plaintiff offers up one more red herring by attempting to color the Director Defendants' citation to NRS 78.138(7) as improperly blending pleading requirements with evidentiary requirements. Opp. at 4-5. Though NRS 78.138(7) uses the phrases "[t]he trier of fact determines" and "[i]t is proven," these phrases alone do not mean that plaintiffs can ignore NRS 78.138(7)'s requirements until trial any more than they can ignore the elements of any other claim until trial.[7]

Further, the Director Defendants do not cite to NRS 78.138 generally or NRS 78.138(7) specifically in order to make any point about the relative burdens of proof or persuasion each party bears. Rather, the Director Defendants cite NRS 78.138(7) to identify a claim for relief with the elements that must be present in the operative pleadings and later proven before a director may be personally liable for his or her conduct as a director. Certainly, a plaintiff must *prove to the trier of fact* the elements of NRS 78.138(7) to win her case. But, she must also make sufficient allegations in her complaint to cover each required element in order to survive a 12(b)(5) or 12(c)

[6]Plaintiff assails *Las Vegas Sands* on the grounds that it "only dealt with pleading requirements for demand futility under NRCP 23.1. First, this argument is incorrect: *Las Vegas Sands* also dealt with sufficient pleadings in light of a 12(b)(5) motion. *See Las Vegas Sands*, 2009 WL 6038660, at *9-*10. Second, even if this argument accurately characterized *Las Vegas Sands* as a case focused on the pleadings required for demand futility, once again, Plaintiff's key case, *Shoen*, is exactly the same kind of case and should be disregarded for the same reasons. *See supra* note 3.

[7]"In order to establish a prima facie case of defamation, a plaintiff *must prove*: (1) a false and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages." *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997) (emphasis added). Still, if the plaintiff does not allege sufficient facts to support one or more of those elements, her complaint is subject to dismissal.

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motion. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.").

Finally, NRS 78.138(7) states that it applies "in each case filed on or after October 1, 2003." Thus, Plaintiff's contention that it would not apply to the current case for any reason is belied by the plain text of the statute. In fact, Plaintiff's citation to *Rice v. Wadkins*, 92 Nev. 631, 632, 555 P.2d 1232, 1233 (1976), supports this reading as the language of the statute at issue, NRS 78.138(7), "clearly manifest[s]" application of the statute to any case filed on or after October 1, 2003.

E. The *Shoen Dictum*

Plaintiff trots out *Shoen* to attack the plain language of NRS 78.138(7) and the Director Defendants' Motion for Reconsideration. Plaintiff once again represents that a single sentence in *Shoen* renders the protections of NRS 78.138(7)(b) superfluous. To this end, Plaintiff strains to remind this Court that *Shoen* itself has not been overruled since it was decided in 2006 and that it has, in fact, been cited favorably by the Nevada Supreme Court recently. *See Wynn Resorts, Ltd.*, 133 Nev. at ___, 399 P.3d at 341-42 (citing *Shoen* for the basic principle that "[t]he business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."). However, it does not follow that *Shoen* created a new claim for relief in the face of NRS 78.138(7)(b)

In *Shoen*, the Nevada Supreme Court considered 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. The Nevada Supreme Court addressed the pleading requirements for shareholder derivative suits pursuant to NRCP 23.1 and 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

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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.

In discussing the ways in which a plaintiff could show that a board of directors was sufficiently "interested" (or not independent) in a matter for demand upon the board to be futile, the *Shoen* Court concluded a shareholder must allege that a majority of the board would be "materially affected" by the decision. *Id.* at 639, 137 P.3d at 1183. The *Shoen* Court pointed out that "interestedness because of potential liability can be shown only in those 'rare case[s] . . . where defendants' actions were so egregious that a substantial likelihood of director liability exists.'" *Id.* at 640, 137 P.3d at 1183-84 (quoting *Seminaris v. Landa*, 662 A.2d 1350, 1354 (Del. Ch. 1995)).

The very next passage presents the single sentence upon which Plaintiff's entire defense to this motion and the 12(c) motion rests:

> 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. at 640, 137 P.3d at 1184 (emphasis added).[8]

The sentence in *Shoen* upon which Plaintiff relies is illustrative only and was not necessary to that decision's resolution of its only question—*i.e.*, a decision on what are the required pleadings to show demand futility in a shareholder derivative action? *See Shoen*, 122 Nev. at 638, 137 P.3d at 1182.

Moreover, the cases that Plaintiff cites to support its reading of the *Shoen dictum*, *see* Opp. at 6, concern the pleadings required for demand futility in shareholder derivative actions, *see Jacobi v. Ergen*, 2015 WL 1442223, at *3-*4 (D. Nev. Mar. 30, 2015) (applying the *Rales* test for

[8]Plaintiff argues that this passage expresses the following logic: (1) gross negligence alone is sufficient to hold a director personally liable for a breach of her duty of care, because (2) only breaches of loyalty require intentional misconduct, fraud, or a knowing violation of the law. Plaintiff misreads this passage. The passage states (1) under the duty of care, the business judgment rule does not protect a director's gross negligence, but, nevertheless, (2) a director "*may only be found personally liable* for breaching [her] fiduciary duty of loyalty" anyway. *Shoen*, 122 Nev. at 640, 137 P.3d at 1184 (emphasis added). *Shoen*'s interpretation of NRS 78.138(7) that a director can only be personally liable for a breach of the duty of loyalty accords with other jurisdictions' understanding of similar exculpatory clauses. *See Gentile v. Rossette*, 2010 WL 2171613, at *12-*13 (Del. Ch. May 28, 2010).

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demand futility at the instruction of *Shoen*), or personal liability for gross negligence under 12 U.S.C. § 1821(k), *FDIC v. Jacobs*, 2014 WL 5822873, at *4 (evaluating a motion for summary judgment). Thus, for all its bluster about citing to the proper caselaw and distinguishing between pleading standards and evidentiary standards, Plaintiff actually commits the sins it condemns in the Director Defendants' Motion for Reconsideration.

Further still, Plaintiff relies on a Nevada Supreme Court from 1941 focusing on personal injury, not fiduciary malfeasance, to establish its definition for "gross negligence." *See Hart v. Kline*, 61 Nev. 96, 116 P.2d 672 (1941). Moreover, that case itself relies upon a Vermont state case to define "gross negligence" because, by the *Hart* Court's own admission, "[g]ross negligence cannot be precisely defined." 61 Nev. 96, 116 P.2d at 673-74 (relying on *Shaw v. Moore*, 104 Vt. 529, 162 A. 373, 374 (Vt. Sup. Ct. 1932)).

Nevertheless, Plaintiff's approach here reveals both the novelty of their legal argument and the troubling precedent this Court would set by adopting it. Because "gross negligence" remains incapable of being clearly defined, by allowing allegations of "gross negligence" to survive without any allegations to satisfy NRS 78.138(7), this Court would be striking a devastating blow to Nevada's statutory protections for directors because a would-be litigant would only have to muster up sufficiently vague and ominous allegations of "gross negligence" to preclude dismissal on the pleadings and cost any director dearly. This Court should reject this legally baseless and unprecedented course of action.

F. Plaintiff's TAC Does Not Meet the Heightened Pleading Standards Required to Show Intentional Misconduct, Fraud, or a Knowing Violation of Law

Plaintiff argues that, even if heightened pleading standards are required, its Third Amended Complaint ("TAC") satisfies those higher pleading standards. *See* Opp. at 12-13. Still, despite its representations, Plaintiff merely points back to its bloated, legally deficient allegations. *See id.*[9]

[9]For example, Plaintiff cites to paragraph 34 of the TAC, which reads: "*On information and belief*, the Defendants who were directors and officers of L&C ('Board') were aware at the time it retained Uni-Ter and its affiliates that they had only recently been formed and had limited operating history. Further, the Board understood that the Board members had not previously organized an insurance company. Thus, *on information and belief*, the Board placed undue reliance on Uni-Ter as its manager without properly informing itself of the information provided by Uni-Ter and its affiliates. Further, *on information and belief*, the Board continued to rely on information and recommendations from Uni-Ter despite clear indications that the information was incomplete and inaccurate and the recommendations

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Plaintiff does nothing to rebut the Director Defendants' arguments that, even if its other allegations are sufficient, its TAC does not contain sufficient allegations to plead intentional misconduct, fraud, or knowing violation of the law. *Compare* Opp. at 12-13, *with* Motion at 17.

G. Plaintiff's Deepening Insolvency Claim

Plaintiff argues that "deepening insolvency" is "not fraud-based" and "does not require intentional conduct." Opp. at 10-11. Nevertheless, as this Court has already decided, (Jan. 27, 2016 Tr. at 8:4-5), Plaintiff's "deepening insolvency" claim is collateral to and dependent upon its gross negligence claim. Plaintiff does not oppose this decision. *See* Opp. at 10-11. Thus, because Plaintiff's gross negligence claim is insufficient to survive the Director Defendants' 12(c) motion under the proper legal standard, Plaintiff's "deepening insolvency" claim must also fail, regardless of the proper pleading standard for making such a claim.

Furthermore, Plaintiff quotes without citation that the United States Court of Appeals for the Ninth Circuit suggested that "deepening insolvency" does not require intentional conduct. *See* Opp. at 11. Plaintiff's uncited quotation actually refers to a statement in a "Bankruptcy Service Current Awareness Alert." In particular, the Honorable Nancy C. Dreher wrote: "The Third Circuit also noted that the notion that negligence can suffice for deepening insolvency has some support. **For example, the Ninth Circuit Court of Appeals recently suggested that deepening insolvency does not require intentional conduct**." 2006 No. 7 Bankruptcy Service Current Awareness Alert 9. However, Plaintiff selectively omits the remainder of that report, which analyzed *In re CitX Corp., Inc.*, 448 F.3d 672 (3d Cir. 2006) and remarked, "[h]owever, the [*CitX*] Court read its decision in *Lafferty* to hold only that fraudulent conduct will suffice to support a deepening insolvency claim under Pennsylvania Law. The Court saw no reason to extend the scope of deepening insolvency beyond *Lafferty*'s limited holding." 2006 No. 7 Bankruptcy Service Current Awareness Alert 9.

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were ill advised, but the Board failed to exercise even slight diligence or care in verifying or correcting the misinformation provided by Uni-Ter, U.S. RE and others, and to take proper corrective action." TAC ¶ 34 (emphasis added).

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Besides, the Ninth Circuit case on which Plaintiff and this report rely to argue that deepening insolvency does not require fraud or intentional conduct at all, *Smith v. Arthur Andersen LLP*, 421 F.3d 989 (9th Cir. 2005), cites the Third Circuit case upon which *CitX* is based, *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340 (3d Cir. 2001), favorably. *See Arthur Andersen*, 421 F.3d at 1003-04 ("We . . . agree with the Third Circuit's observation in *Lafferty* that 'prolonging an insolvent corporation's life through bad debt may' dissipate corporate assets and thereby harm the value of corporate property." (quoting *Lafferty*, 267 F.3d at 350)). On this basis, the Court should reject Plaintiff's naked assertion that deepening insolvency is not based on fraud or intentional conduct.

III. CONCLUSION

NRS 78.138(7) governs the circumstances in which a director of a Nevada corporate entity may be found personally liable for his or her conduct as a director. NRS 78.138(7)(b) applies, without exception, to every claim that a director breached his or her fiduciary duties and should be personally liable for that breach. The plain language of NRS 78.138(7) does not exempt claims for breaches of the duty of care or claims involving "gross negligence." This Court unfortunately applied a legal standard that conflicts with the plain language of NRS 78.138(7) when it denied the Director Defendants' 12(c) motion. Thus, to rectify that error, this Court should grant the Director Defendants' Motion for Reconsideration.

IV. OPPOSITION TO COUNTERMOTION FOR ATTORNEY'S FEES

Plaintiff countermoves for attorney's fees under NRS 18.010(2)(b) because it argues that the Director Defendants had no legitimate basis for filing their Motion for Reconsideration. *See* Opp. at 13. Plaintiff characterizes the instant motion as the Director Defendants' "fourth bite at the apple meant to run up fees and costs for the Plaintiff so the Directors can continue to roll the dice and hope for a different result." [10] *Id.*

The Director Defendants filed their Motion for Reconsideration because they possess a good-faith belief based upon current caselaw and statutes that this Court applied the wrong legal

[10]Interestingly, the TAC is Plaintiff's fourth bite at the pleading apple and the Plaintiff still has it wrong despite having been given four times to properly plead a claim for relief based upon NRS 78.138(7).

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standard in dismissing the Director Defendants' good-faith 12(c) motion. In filing the instant Motion, the Director Defendants hope to advance, defend, and vindicate their legal rights by requesting that the proper, current legal standards are used to adjudicate their 12(c) motion. No matter the metaphors Plaintiff uses, the Director Defendants have no desire to inflict financial harm on Plaintiff, let alone a desire to cause this harm by gambling with a motion before the Court.

Because the Director Defendants possess a good-faith belief that this Court applied the wrong legal standard in denying their 12(c) motion, their Motion for Reconsideration has a legitimate basis. Thus, the Court should deny Plaintiff's countermotion for fees and costs.

DATED this 4th day of January, 2019

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s/ J. Stephen Peek

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January 2019, a true and correct copy of the foregoing **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION AND OPPOSITION TO COUNTERMOTION FOR ATTORNEY'S FEES** was served by the following method(s):

☑ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * *

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC. Plaintiff(s) vs. ROBERT CHUR, *et al.* Defendant(s)	CASE NO.: A-14-711535-C DEPARTMENT 27

NOTICE OF ENTRY OF DECISION AND ORDER

PLEASE TAKE NOTICE that a Decision and Order was entered in this action on or about February 7, 2019, a true and correct copy of which is attached hereto.

Dated February 7, 2019.

Nancy L Allf

NANCY L. ALLF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f) through the Eighth Judicial District Court's electronic filing system (with the date and time of the electronic service substituted for the date and place of deposit in the mail) and by email to:

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DEPT XXVII

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * *

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.

Plaintiff(s)

vs.

ROBERT CHUR, *et al.*

Defendant(s)

CASE NO.: A-14-711535-C

DEPARTMENT 27

DECISION AND ORDER

COURT FINDS after review that on August 14, 2018 Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels' Motion for Judgment on the Pleadings pursuant to NRCP 12(c) ("Motion for Judgment") was filed with the Court. On November 2, 2018 the Order Denying Director Defendants' Motion for Judgment on the Pleadings pursuant to NRCP 12(c) ("Order") was filed with the Court. The Notice of Entry of the Court's Order was filed on November 7, 2018.

COURT FURTHER FINDS after review that on November 29, 2018, Defendants' Motion for Reconsideration ("Motion for Reconsideration") was filed with the Court seeking reconsideration of the Order. On December 27, 2018, Plaintiff's Opposition to Director Defendants' Motion for Reconsideration and Countermotion for Attorney's Fees ("Countermotion") was filed with the Court.

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COURT FURTHER FINDS after review that the Court heard oral arguments on the Motion for Reconsideration and Countermotion on January 9, 2019 and took the matters under submission. A Status Check for the Court to issue its decision was set for January 29, 2019 on Chambers Calendar and thereafter continued to February 5, 2019.

COURT FURTHER FINDS after review "[t]he Court may only reconsider a previous decision if the moving party introduces 'substantially different evidence . . . or the decision is clearly erroneous.'" *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741 (1997). Further, "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted." *Moore v. City of Las Vegas*, 92 Nev. 402, 405 (1976).

COURT FURTHER FINDS after review that the Defendants' Motion for Reconsideration presents no new or substantially different evidence in support thereof.

COURT FURTHER FINDS after review that Defendants contend that the Court's Order is clearly erroneous due to its reliance upon dicta in *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640 (2006), which Defendants assert is a demand futility case and as such is inapplicable with respect to the pleading standard for imposition of individual liability on corporate directors.

COURT FURTHER FINDS after review 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, or involve 'intentional misconduct, fraud, or a knowing violation of the law,' to state a duty-of-loyalty claim." *Jacobi v. Ergen*, No. 2:12-CV-2075-JAD-GWF, 2015 WL 1442223, at *4 (D. Nev. Mar. 30, 2015), citing to *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640 (2006).

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COURT FURTHER FINDS after review that "[i]n Nevada, the business judgment rule defines the line between unactionable ordinary negligence and actionable gross negligence. Unlike other states, Nevada does not define the duty of care with an objective standard such as the standard of an ordinarily prudent person, but officers and directors must act on an informed basis." *F.D.I.C. v. Jacobs*, No. 3:13-CV-00084-RCJ, 2014 WL 5822873, at *4 (D. Nev. Nov. 10, 2014) (internal citations and quotations omitted).

COURT FURTHER FINDS after review that Plaintiff's Third Amended Complaint has pleaded sufficient facts to rebut the business judgment rule and to state a cause of action for a breach of the fiduciary duty of care pursuant to *Jacobi v. Ergen* and *F.D.I.C. v. Jacobs*.

COURT FURTHER FINDS after review that the Court recognizes the failure to act on deepening insolvency as a common law cause of action, even though such claim has not been expressly recognized in Nevada.

COURT FURTHER FINDS after review that a deepening of the insolvency is "accomplished by, among other things, misrepresenting (not necessarily intentionally) the firm's financial condition to its outside directors and investors who participated in the firm's various securities offerings." *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 995 (9th Cir. 2005).

COURT FURTHER FINDS after review that a cause of action for deepening of the insolvency is subject only to the notice pleading standard set forth in NRCP 8.

COURT FURTHER FINDS after review that Plaintiff's Third Amended Complaint has pleaded sufficient facts to state a cause of action for deepening of the insolvency pursuant to *Smith v. Arthur Andersen LLP* and NRCP 8.

COURT FURTHER FINDS after review that the Motion for Reconsideration has failed to establish that the Court's Order is clearly erroneous.

COURT FURTHER FINDS after review that "court may make an allowance of attorney's fees to a prevailing party... when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." NRS 18.010(2)(b).

COURT FURTHER FINDS after review that the Defendants brought the Motion for Reconsideration in good faith, with reasonable grounds and without any intention to harass Plaintiff.

THEREFORE, COURT ORDERS for good cause appearing and after review, pursuant to *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, the Motion for Reconsideration is hereby **DENIED**.

COURT FURTHER ORDERS for good cause appearing and after review that Plaintiff's Countermotion for Attorney's Fees is hereby **DENIED**. The Status Check set for February 5, 2019 is hereby **VACATED**.

DATED this 6 day of February, 2019.

Nancy L Allf

NANCY ALLF
DISTRICT COURT JUDGE

HONORABLE NANCY L. ALLF
DISTRICT COURT JUDGE
DEPT XXVII

Assemblywoman Krasner:
You are talking about a justice of the peace. In many counties here in Nevada the justice of the peace is a person who did not attend law school. Do you think that the justice of the peace, at that lower court level, can hear the constitutional issues and fairly decide on constitutional issues?

Sean Sullivan:
In my 14-year tenure as a Washoe County deputy public defender practicing in front of justices of the peace—who may be lay justices of the peace who have not gone to law school—particularly in Sparks Justice Court—I believe, based upon my practice and my tenure, that they are competent and able to look at constitutional issues. That is a duty that they must assume when they take the oath. They take the same oath that the district court judges do, to uphold and defend the *Nevada Constitution* and *U.S. Constitution*. I do think that they are fully capable and confident to look at these constitutional issues and decide if there are constitutional infirmities within evidence that may be presented by the state.

Assemblyman Pickard:
I am just curious. From a practical standpoint, if this bill were to go through as amended today, are you suggesting that this would preclude a justice of the peace from making a ruling at all on the evidence? Assemblyman Fumo just helped clarify this a little bit, but my understanding is that a justice of the peace is going to determine whether there is sufficient evidence to move forward. Would this preclude them from hearing the evidence on, not a formal motion to suppress, but would they be precluded from making a ruling on that basis anyway?

John Piro:
As I understand your question—and I just want to make sure I get it right—would this preclude them from ruling on that evidence?

Assemblyman Pickard:
Would this preclude them from considering whether the evidence was properly obtained in the context of a preliminary hearing?

John Piro:
Yes, it would preclude them from doing that.

Holly Welborn, Policy Director, American Civil Liberties Union of Nevada:
I am also apprehensive to be up here in opposition to this bill. I strongly supported it on the other side; in fact, it was an American Civil Liberties Union of Nevada scorecard bill. We cannot support the second reprint because of the Nevada Supreme Court case that was fought very hard to fight for suppressing certain evidence in preliminary hearings.

The *Utah v. Strieff* case, however, was a stain on Fourth Amendment jurisprudence. In the words of the U.S. Supreme Court Justice Sonia Sotomayor, "This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong." The legislative goal of this bill, though, has now turned from reinstituting the exclusionary rule and restoring its teeth—which is aimed at restoring a situation that would have prevailed if the government had, itself, obeyed the law. Allowing such evidence in a preliminary hearing is, in our eyes, contrary to the ultimate goals that Senator Ford was trying to achieve.

This body has looked at this issue multiple times: in the 74th Session and the 78th Session. Justice courts have express, inherent authority to suppress under NRS 189.120, which expressly envisions the appeal of suppression orders made during a preliminary hearing. That is seen in the laws in our books, currently, in the state of Nevada. Looking at *Strieff* again, the failure to apply the exclusionary rule to evidence seized under the circumstances in *Strieff* and in preliminary hearings will encourage the police to engage in random stops, in the hope of finding an outstanding warrant that will then be used as justification to engage in a search that would otherwise be impermissible.

At the time of the *Strieff* decision, the entire state of Utah had approximately 180,000 outstanding warrants on the books. In 2015, the City of Las Vegas alone had 120,000 outstanding warrants on the books; 44 percent were for minor traffic offenses or failure to pay a fine. The City of North Las Vegas reports that they serve 1,000 warrants a month and that people of color have more warrants than any other group.

We do support this bill, S.B. 368 (R2), as it was originally written, but we are opposing it today based on the revisions that were made in section 1 and section 3 of the bill.

Kevin Higgins, Justice of the Peace, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction:

I am the chief justice of the peace in the Sparks Justice Court. I am also here today on behalf of the Nevada Judges of Limited Jurisdiction—that is the association that represents the 93-plus municipal judges and justices of the peace in the state of Nevada.

I think you have heard from various testimonies that the justice court is the gatekeeper. We consider ourselves the gatekeeper of the cases that should go up to district court. Our function is to make sure only those cases based on sufficient evidence go up there. I have rarely had formal motions to suppress filed in my court. I think maybe that is a different practice in other courts, but I also think that the rules of evidence and the *Constitution* apply in justice court during preliminary hearings. The recent *Grace* case says that, and I do not think I can consider illegally obtained evidence in making a decision of whether to bind somebody over for trial. The process of having a motion to suppress filed would bring those issues to the front. People could litigate them; they could be briefed and those issues decided quickly. I think if somebody is sitting in jail, it is more important to decide those issues quickly and as soon as possible and, if there is illegally obtained evidence, to release them from custody.

We have avenues with which to follow up on this. The district attorney has various options to go back up to district court. There is a process called information by affidavit; you basically file a motion in district court that says that you disagree with the justice court's decision. If the district court agrees with you, they can file the information just as the complaint was, regardless of what the justice court decided down below. As a prosecutor, I did this more than once when I disagreed with a justice of the peace when he would not bind a case over; I filed the application for information by affidavit and the district court judge—not always, but sometimes—agreed with me.

Another avenue is the grand jury. In the *Grace* case, a writ was filed. I think the *Grace* case is important because it points out that the motion to suppress is based upon the rules of evidence in Nevada, as well as the *U.S. Constitution* and the *Nevada Constitution*. I took an oath to apply those in deciding evidence. Potentially, if the Legislature eliminates a formal motion to suppress, I do not think it resolves the issue. I think the unintended consequence is going to be that during preliminary hearings I will have a defense attorney say, "Your Honor, that is great; however, this case is based upon a stop where the state never articulated the reason for the stop, the officer never explained why the stop was made, and we are asking you not to bind over because there is no proof it was a constitutional stop." As a justice of the peace, I think I have to make a constitutional decision in that case.

In all fairness, not every justice of the peace agrees with me on this. I talked to two or three justices of the peace yesterday afternoon, after we became aware of this. There are many who think constitutional issues should be reserved to district court and that they should not be hearing motions to suppress. I disagree. The limitations of justice court have been batted back and forth for years. We know we are a court of limited jurisdiction. This body—the Legislature—decides what our jurisdiction is: what kind of cases we can hear, what our civil authority is. Preliminary hearings are a creation of the Legislature. They are not constitutionally mandated; they are a legislative function to screen the cases appropriately that should go up to district court.

I do not think whatever decision we make in these cases is constitutionally binding on the district court; I think these issues can be revisited in district court. The defense can revisit the issue; the state can revisit the issue. I think the function of the justice court should continue to be to screen the cases and not bind over inappropriate cases.

I wholeheartedly agree that these motions should be made in writing. I have had motions come up orally during preliminary hearings, "Move to suppress, Your Honor." "On what basis?" I ask. Clearly, counsel knew about this before the hearing started, so judges should not have to consider these because I think the rule requiring a written motion on a motion to suppress applies in justice court, and I will not consider it.

Those of us who are involved in the criminal justice process know the whole system is based on continuances. The statute says, right now, that once somebody is arraigned there should be a preliminary hearing within 15 days. I cannot tell you the last time I had a preliminary hearing within 15 days. They are continued for many reasons: for discussion, for discovery,

for negotiations, for waiting for the blood evidence. The whole process works on continuances happening over and over again. I think there is plenty of opportunity to write a written motion, and the defense is going to have to articulate a constitutional reason why the evidence should be suppressed.

I would hope that if I was ever accused of a crime—and the question was whether I get out of jail now or I get out of jail six months or a year from now when the district court hears the case—I would prefer that issue to be heard now, the question resolved, and maybe I get out of jail. I think it is important. I think I have an oath to apply that and I think the Supreme Court's argument in *Grace* is that is a constitutionally required function.

Several states have completely changed the way they do preliminary hearings. Oregon's preliminary hearings are completely based on hearsay evidence—the officer comes in and he reads his report, and the judge makes a decision based entirely on hearsay. It is a much more streamlined process, and I think that is a discussion that we could certainly have in the future if we want to change the way we do preliminary hearings. However, without changing the rules of evidence and our obligation to the *Constitution*, I think those issues still have to be resolved. Maybe there will not be a motion to suppress but I do not think that resolved the underlying question.

I would be happy to answer any questions the Committee has. Again, just as the other witnesses, I am reluctantly appearing here today, but I think I ought to represent my association.

Chairman Yeager:
Thank you, and for the lawyers on the Committee, it is not often we have a chance to ask a justice of the peace some questions of our own. Have you had a chance to take a look at the amendment that was proposed by the public defenders? If so, I would like to get your thoughts on it. If that amendment were to be adopted, would that change your position on the bill in any way, or would it stay the same?

Judge Higgins:
I have not had a chance. I only became aware of the amendment yesterday afternoon. I think, from what I heard from testimony, that it would resolve our issues.

Chairman Yeager:
I will not hold you to that. I will give you a chance to look at that amendment and digest it.

Assemblyman Watkins:
I listened to your testimony and I agree that preliminary hearings are statutorily created, but if we are going to ask a justice of the peace to hear evidence, then I have a hard time understanding how we are going to ask the same judge to ignore the *Constitution*. If this bill were to pass in its current form, what would be the process for you if a constitutional issue were in play in regards to the Fourth Amendment? Would you have to stop the hearing and

direct the parties to go to the district court? Would you hear other parts, or would you stop the entire hearing? Where would you go as a justice of the peace?

Judge Higgins:
I believe I can speak for myself, but I know other justices of the peace disagree with me about this. At the close of evidence, I think the defense attorney would tell me that I could not bind the case over because it was clear from the testimony, during cross-examination of the officer, that he did not have a valid constitutional reason to stop Assemblyman Pickard on the street to find something in his pocket. I think I would be told that I could not bind the case over on unconstitutionally obtained evidence.

If it were I, I would not stop and ask the district court to make that decision. The preliminary hearing is a much lower standard; it is probable cause—may a person have committed the crime? The U.S. Supreme Court says it is slight or marginal evidence, it is not proof beyond a reasonable doubt, and any inferences are drawn in favor of the state. It really is just a gatekeeping function, but I think my oath and what the Supreme Court has said about the *Constitution*—and the rules of evidence applying in justice court—I am going to have to make a constitutional decision on that. I think the unintended consequence is going to be that the state is not going to be advised of the motion to suppress issue until the middle of the preliminary hearing. If the state is aware of a motion prior to a hearing, they will have witnesses in court to cover the issue. If the state is not advised of that, there is the chance they would come to the preliminary hearing with only the witnesses on the very narrow bind-over question, but not have witnesses available on a potential question of constitutionality.

When I was a prosecutor I wanted to know everything in advance; I wanted to know what was going on when I walked into court. I cannot speak to that, however; that hat came off my head a long time ago. I would want to know in advance, but I think I now have to decide the issue. I think the argument will be that I cannot consider the stop because there was no reason to search the Assemblyman, and I would be asked to not bind over. There is a chance I would not bind it over. Now, district court could disagree with me, and I think there are avenues that relieve that. I hope I answered your question, Assemblyman Watkins.

Chairman Yeager:
I do not see any further questions. Thank you, again, for your testimony.

Assemblyman Elliot T. Anderson:
Is there anyone here from the Attorney General's Office? I had a question about the letter that was sent in (Exhibit E).

Chairman Yeager:
It does not appear that there is anyone here. I would invite you to follow up with them offline. I know there was a letter submitted by the Attorney General that is on the Nevada Electronic Legislative Information System (NELIS). Is there anyone else in opposition to the bill? [There was no one.] Is there any neutral testimony?

Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department:
I am neutral on the bill for two reasons, which I will explain. I am leaning towards support with the compromise bill that the District Attorney's Office and Senator Ford agreed upon. I also appreciate the many discussions Senator Ford has had with us regarding this bill, and looking at it from a law enforcement perspective, we certainly support the intent of what he is trying to do. We are very sensitive to the need to increase and maintain public trust, building relationships with the community—obviously illegal stops on our citizens erode that trust. At the Las Vegas Metropolitan Police Department, we train our officers about the exclusionary rule, and officers in the field know that if they make an illegal stop the evidence will be suppressed. That has been taught for years. When I went into the academy in the late 1980s, it was taught. That is not going to change.

As the District Attorney's Office spoke about, there are often gray areas in these cases. The case that resulted in the Supreme Court decision was a case where an officer saw someone who looked very young and who appeared to be intoxicated. When the officer approached and stopped the person, the person presented an identification card—I believe it was a California driver's license, if memory serves me correctly—and that identification card showed that they were actually over 21 years old. The officer went a step further because the fact of the matter is that people lie to the police. The officer ran the license through a computer to determine if it was valid or if the person was, in fact, over 21 years of age, and I think that is where the distinction and the gray area comes in. Theoretically, once the officer is presented with the driver's license, one could say that the officer has no further reason to detain that person, and detaining them past that point to run the license or verify information has now stepped into the realm of an unlawful stop.

I think unlawful stops are very rare. I know our men and women in uniform are out there every day with the intent of protecting the public and upholding justice, not with the intent of conducting illegal stops on the citizens in our communities. I think it is very rare that those stops are done intentionally, where an officer says, I am going to go out today and just stop somebody for no reason. I think 99 percent of the time it falls into that gray area.

The other reason that I am neutral is because I believe most of this bill falls within the realm of the courts; how a motion to suppress evidence is made and where that motion is heard is not really on the law enforcement side of things. It belongs to the courts. With that, I would be happy to answer any questions.

Corey Solferino, Sergeant, Legislative Liaison, Washoe County Sheriff's Office:
We come to the table neutral today, based upon the amendment provided by Senator Ford. I want to thank Senator Ford for working with us and addressing some of our concerns.

I wanted to start off by reading our mission statement. The Washoe County Sheriff's Office is, "Dedicated to preserving a safe and secure community with professionalism, respect, integrity and the highest commitment to equality." Our vision statement:

> . . . strives to ensure public safety by building trust and creating partnerships within the diverse communities in which we serve. We will promote the dignity of all people supported by our words and actions through our open communication while fostering an environment of professionalism, integrity, and mutual respect.

Our field training officer program and our academy are based on the tenets of lawful interactions with our public. Our officers act in good faith and ensure their transaction is lawful, based upon whether it is a call for service, reasonable articulable suspicion, or probable cause. Should an officer act in bad faith and outside that scope of the Fourth Amendment, the exclusionary rule has applied, will apply, and will continue to apply.

Chairman Yeager:
Is there anyone else who is neutral on the bill? [There was no one.] Senator Ford, I invite you back up to make concluding remarks.

Senator Ford:
I do not think it is a secret that one of my passions is criminal justice reform and making sure we have a fair criminal justice system that works for everybody. While the opposition may have been here saying that they were reluctant, I am back up here now saying that I feel sick. Contrary to the statement that legislative goals have changed with this bill, they have not. The legislative goal remains exactly the same. When I brought this bill, I never anticipated that there would be opposition to the original form because all I was saying with this bill was that we were going to continue to act like we have been acting for 50 years. That is all I am doing: restoring a law that has been in place for 50 years, that what you find from an unconstitutional stop is suppressed. It is an effort on my part to simply restore to your constituents their Fourth Amendment right to be free from unreasonable searches and seizures. I presented that argument to those who opposed the bill, and they were unpersuaded. They opposed the bill, and I began to look for a compromise, for a way to proceed with protecting the constitutional right under the Fourth Amendment, and at the same time appease what the opposition was in that regard.

I do not practice in this area of law so, Assemblyman Fumo, I have the utmost respect for your experience here because I viewed this as a simple trade. We are trading a constitutional protection under the Fourth Amendment for a procedural process in the courts on how we enforce that protection. That is what I viewed this as, as getting back to where we have a Fourth Amendment right to be free from unconstitutional searches and seizures, and the only thing we are changing is what the procedure looks like to assert that right in court.

Clearly, I am wrong about that. I think there is a lot of discussion going on back and forth that has me wondering if this is really the fairest trade. I have to place myself, at this juncture, at your mercy. I have to punt this decision to your Committee because if what I have brought before you right now is something that this Committee determines to be insufficient for the purposes of moving this ball forward, then I completely defer to you.

The amendment Mr. Piro brought is indeed unfriendly (Exhibit D), and it is because I gave my word to a colleague that I would not accept amendments on this bill. It is not because I disagree with the notion of drafting and filing a motion in justice court, but my word is what I gave to my colleague, and I am attempting to keep my word. Again, I am at your mercy at this juncture. Chairman Yeager, do with the bill as you see fit: if it is an amendment killing it, I do not know what else you could do. Again, I do not want the rhetoric on the court process to minimize what this bill was really about, which is a constitutional protection that we were trying to restore to your citizens.

Chairman Yeager:
Thank you, Senator Ford, for the presentation this morning, and thank you for your work on this measure. I know it is a delicate balance here, and we appreciate your efforts. I will go ahead and close the hearing on S.B. 368 (R2). I believe Senator Spearman has been waiting very patiently in the back, so we are going to go next to Senate Bill 488 (1st Reprint).

Senate Bill 488 (1st Reprint): Revises provisions relating to sexual offenses. (BDR 15-1086)

This bill revises provisions relating to sexual offenses. Thank you for your patience, this morning and welcome back to the Committee.

Senator Pat Spearman, Senate District No. 1:
Thank you, Chairman Yeager. I just received a really good education in criminal justice reform, so the wait was not in vain. I am here this morning to present S.B. 488 (1st Reprint), which revises provisions relating to sexual offenses.

According to federal law, human trafficking offenses are separated into two categories: commercial sex acts and involuntary servitude. Commercial sex acts are sex trafficking that is induced by force, fraud, or coercion, or in which the person who is induced to perform such an act has not attained the age of 18 years. Involuntary servitude is the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services using force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

According to the National Conference of State Legislators, approximately 293,000 children in the United States, mostly girls aged 12 to 14 years, are at risk of being exploited and sex-trafficked. An estimated 70 to 90 percent of youth victims of sex trafficking have histories of sexual abuse. According to the Nevada Department of Public Safety, in 2015 there were 165 cases of commercial sex acts and 2 cases of involuntary servitude that were not subsequently cleared. Based upon data and the finding that the state of Nevada is one of the states most affected by human trafficking, the Governor issued Executive Order 2016-14 to establish the Nevada Coalition to Prevent the Commercial Sexual Exploitation of Children. The Governor serves as chair of the coalition, and the Administrator of the Division of Child and Family Services of the Department of Health and Human Services (DHHS) serves as the co-chair. Among other duties, the

coalition is required to prepare comprehensive, statewide strategic plans with recommendations to address federal law related to sex trafficking. The coalition must also provide an annual report on or before October 1 of each year.

In a few minutes, you will hear the heart-wrenching testimony of one of the victims of this hideous act. Senate Bill 488 (1st Reprint) was amended in the Senate to make revisions to strengthen Nevada's laws relating to sex trafficking and to improve the quality of services to victims of sex trafficking, pursuant to *Nevada Revised Statutes* (NRS) 201.300.

Section 1, as amended in the Senate, expands the list of crimes to provide that a person is also guilty of sex trafficking if he or she facilitates, arranges, provides or pays for the transportation of a person to or within Nevada for the purpose of engaging in unlawful sexual conduct or prostitution, or if that person is a child engaging in certain acts relating to pornography involving minors; if the person advertises, sells, or offers to sell travel services that facilitate the travel of another person to Nevada with the knowledge that the person is traveling for the purpose of engaging in sexual conduct with a victim of sex trafficking, soliciting a child who is a victim of sex trafficking, or engaging in certain acts related to pornography involving minors; or travels to or within Nevada for the purpose of engaging in sexual conduct with a victim of sex trafficking with the knowledge that the victim is being compelled to engage in sexual conduct, prostitution, or certain acts relating to pornography involving minors.

Section 2 of the bill will assist victims of sexual trauma who are eligible for Medicaid by requiring DHHS to develop a Medicaid service package called the Sexual Trauma Services Guide. We know, historically, that people who have been in involuntary servitude frequently pay the price over and over again in their lives. We have not done enough, I do not believe, to help victims once they are liberated from that, to get back on their feet and to live a good quality of life. This bill provides for that. The information contained in the guide must be posted on the Department's website and be made available in writing upon request.

Finally, section 3 requires DHHS to hold periodic informational meetings to coordinate the efforts of key stakeholders to improve services for victims of sex trafficking and achieve the goals of the statewide strategic plan developed by the coalition.

I urge your support for this very important piece of legislation that will strengthen our laws concerning sex trafficking and will improve the quality of services to victims of sex trafficking. Recently in the Senate, I believe we heard an Assembly bill that would extend the time for which victims of sex trafficking could sue the perpetrator [Assembly Bill 145 (2nd Reprint)]. I believe S.B. 488 (R1) is a companion bill because, in my opinion, anyone who engages in this type of conduct—especially with a child. . . . I am just glad I am not God. With that, Chairman Yeager, I would like to turn the microphone over to Ms. Mull, who will tell you what it feels like and how much you have to struggle just to get over those heinous acts.

Chairman Yeager:
Thank you for your comments. Ms. Mull, please go ahead.

Kimberly Mull, Policy Specialist, Nevada Coalition to End Domestic and Sexual Violence:
I am here today in support of S.B. 488 (R1). At the beginning of session, at the first meeting of the Women's Legislative Caucus, afterwards Senator Spearman approached me and I shared a little bit of my story—30 seconds worth. She asked me what we really need in this state regarding sex trafficking. I honestly thought she was talking about next session.

Every year since 2011, states have been awarded a rating from Shared Hope International, which is the leader in policy relating to domestic minor sex trafficking. It is based off of several factors. States are scored on different laws and policies relating to different factors. In 2011, Nevada had an F; as of 2016, I am happy to report that we have a B-. We have made a lot of progress, especially compared to every other year. One area that we have a zero in—and have had, and continue to have—is sex tourism. That was what I felt was one of the main needs in Nevada, especially and probably because it related most specifically to me.

If you will bear with me, I am going to read from here on out so I can get through this. As I testified before this Committee in 2015, while touring the National Center for Missing and Exploited Children in Washington, D.C.,—which serves as the central repository in the United States for information relating to child victims depicted in sexually exploitive images and videos—I learned that the unit had reviewed more than 132 million images and videos since it began in 2002. Their focus is to assist federal and state law enforcement agencies and prosecutors with child pornography investigations, plus help law enforcement identify victims so that law enforcement can locate and rescue them from exploitative situations. These images include children from all around the world, including many in the United States and, most likely, images of myself between the ages of 11 and 13 years old, being sexually abused by multiple men. They are still floating around in cyberspace, and they are still being traded.

The notion that sexual exploitation is solely the result and responsibility of those partaking in the picture-taking or physical abuse is beyond me. Maybe it is because members of normal society can hardly wrap their minds around the act itself; the public cannot see how the abuse is fueled by those who only view child pornography. It is a dark world in its systems and hierarchies. The majority of those engaged in these clubs, rooms, societies, et cetera, participate in what is known as "pic for pic." In essence, it means, "I will trade you a picture of child pornography that I own for a picture that you own." This allows the members to screen for law enforcement and to see if new buyers have what they call "quality" images. Unfortunately, this fuels a cycle of violence because an image that is easily obtained by a new child pornography viewer is going to be old, out of date, and most likely already owned by other members. In my case, I became the way for one individual to have new photos that he could trade. Over time, it progressed and he went from trading pictures to trading me.

Not every member of these groups physically rapes you. Some watch. Some bring their own children so they can watch. Some facilitate, some organize, some transport. Some watch from webcams, some in the room. Some pay to ship victims to other events and some—like one individual in my case—drove across the country from the Nevada-Utah area to "meet" me. Let me be clear: in cases of both adult and child sex trafficking, those in this dark world who participate in and, specifically, those who facilitate sex tourism encourage the commercial sexual exploitation of children and adults and create incentives for traffickers and facilitators to increase profits. This furthers the underground nature of trafficking offenses by interfering with detection of trafficking crimes that are disguised as legitimate travel services, legitimate transportation or advertising other than the crimes that they actually are—trafficking.

Many people continue to believe that sex tourism only exploits children and victims overseas, but it is fueling demand for children and adult victims here in the United States, and specifically here in Nevada. Federal law already criminalizes child sex tourism, which is defined to include arranging, inducing, procuring and facilitating the travel, with knowledge that the traveler is traveling through interstate commerce or foreign commerce for the purposes of engaging in illicit sexual conduct, and the arranging was done for commercial advantage or private financial gain. Many states including Alabama, Alaska, Hawaii, Louisiana, Missouri, New York, Tennessee, and Washington, have expanded upon this to also protect adult victims who fall prey—not only to pimps—but also facilitators of their victimization. This is why it is so crucial for Nevada to join them with S.B. 488 (R1) and recognize that as a society, it is not only the stereotypical pimp or the individual locking girls in their basement who are traffickers. Those who facilitate, advertise and make arrangements for victims are more than bystanders; they are traffickers.

I am haunted every day by other children who are in those pictures with me. What happened to them? Did they make it, are they functioning, are they even alive? How are people still trading our pictures online? Please help me and others like me to take one more step to protect children and adult victims of sex trafficking by holding all involved in the process accountable. It is hard to express what it feels like to know that you have been bought and sold, but I can tell you that when survivors like me speak out, it is not because we want people to feel sorry for us or feel pity for us; it is because we want our stories to mean something. We need them to mean something. We need to know that what we went through—and continue to go through—when we share our stories matters. We need to protect those who come after us. Please help us today and vote S.B. 488 (R1) out of Committee favorably. Help stop another young girl from having to sit in this chair ten years from now.

Chairman Yeager:
Thank you for sharing your testimony this morning, Ms. Mull. Senator Spearman, did you have anyone else you wanted to present before I open the hearing up for questions?

Senator Spearman:
I think there may be others who want to come up and testify, and I just want to say thank you to the district attorney's office and to the public defenders for working with us to try to get this bill as good as we can and not waste one more year without protecting some of the most vulnerable members of our community. With that, I will step back, unless you have questions now.

Chairman Yeager:
I think we do have some questions or comments. I am not sure to whom they will be best addressed to, but we will go through the list and make that determination.

Assemblyman Watkins:
I have two questions, but I will try to be quick. The first one is a little more technical in nature. Section 1, subsection 2(a), subparagraph (6) says it would be a crime to travel "to or within this State by any means for the purpose of engaging in . . ." any of the prior paragraphs. The thought occurred to me, and I think that this is correct, that this would be a low standard that is not applied to any other crime. Travel is not a crime; you could travel to the state of Nevada for the intent of murdering somebody, but if you land in the state and do no other furtherance of that act, I do not think you would be guilty of attempted murder. If the intent truly is if you buy that plane ticket and jump on the plane with the idea of, "You know what? I think I am going to go engage in illegal prostitution or child pornography," but then you land in the state and you do nothing else, you would be guilty of this crime.

Senator Spearman:
Is that your question?

Assemblyman Watkins:
That is the question. Is that the intent?

Senator Spearman:
The intent is to make sure that all of the elements and all of the processes, all of the steps that these monsters do, are captured in law.

Assemblyman Watkins:
I appreciate that, and everybody wants that, but how far back can we go in time? If a person wakes up in the morning with the intent in their mind, have they now committed a crime? Is buying the plane ticket the crime? Where do we go in that chain? These monsters have these ill intents from the moment they wake up in the morning, but we cannot just go in and start arresting people for thoughts in their minds. We do not do that as a society. We do it based on actions, and buying a plane ticket is not a crime. Where do we balance constitutional protections and freedom of thought?

Senator Spearman:
I am not an attorney and I do not play one on television. I will not pretend to know the technical answer, but I will say to you that I worked on this bill along with Ms. Mull. To use your example, if someone gets on a plane with the intent to go and commit murder, getting on the plane is not a crime but the murder actually is. The consideration for the severity of the punishment would include the act of consciousness, would include premeditation, and that is what section 1, subsection 2(a), subparagraph (6) is addressing.

Assemblyman Watkins:
Ms. Mull, I received your email yesterday with many of your thoughts, and I really appreciate everything that you provided to the Committee in preparation for this hearing. What are your thoughts in regard to why everybody thinks Nevada is the epicenter for human trafficking? Do you think it is because, as some people describe, we are a house divided? We have prostitution that is legal in some areas and not legal in other areas. Do you think it would be better if it were illegal throughout the state? Do you think it would be better if it were legal throughout the state, or do you think that has no influence whatsoever on the fact that it is such a problem here?

Kimberly Mull:
Are you asking for my personal opinion? I believe that the perception from everywhere outside of Nevada is that prostitution is legal everywhere in Nevada. I think that causes a lot of issues. I know girls, personally, who still work in the lifestyle in Las Vegas and Reno and think that they are perfectly fine. Their pimps tell them it is legal here, and they do not even know that they are breaking the law until they are arrested. They are victims because they are being trafficked, but I think that also incites with buyers as well, who are also fueling that cycle. The studies that I am aware of in the state have shown that most buyers, or at least a large percentage of buyers of commercial sex in Nevada, are actually Nevadans. I believe they probably already know what the law is.

Personally, I feel that prostitution should be illegal; there should not be legalized prostitution. I feel that there is plenty of evidence from places such as Denmark—which has decriminalized prostitution as a country—to show that even though they have decriminalized prostitution they have four times the number of trafficking victims as Sweden—even though Sweden's population is 40 percent larger than Denmark's. This notion that, if we make it legal we make it better really just makes it so that traffickers do not have to hide and victims are less likely to be noticed as victims. If they are alongside other girls, people are not going to be asking the questions that they need to be asking to know that. That is my personal opinion.

Assemblywoman Jauregui:
I wanted to thank you for bringing the bill forward because this morning I read that, despite us having a B- now, Nevada still ranks eleventh in human trafficking and our case numbers are actually increasing. I read in the article this morning that, in 2015, we had 133 cases and

last year we had 166. I appreciate this bill, I want to thank you for bringing it forward and, contrary to my colleague, I think we do need to have stricter laws on those people who are coming to Nevada to commit crimes against a vulnerable population.

Assemblyman Pickard:
I agree. Thank you for bringing the bill and, Ms. Mull, I am constantly amazed at your bravery. There were two points where I think—even though I am very supportive of the bill in general—the language seemed to be really broad. I think we need to at least get on the record the bill's intent. We talked about travel already. The other concern I have is under section 1, subsection 2(a), subparagraph (4) where we are talking about a person who provides or pays for transportation, and the language uses "or." Any one of these will apply, "Causing the person to enter any place within this State in which prostitution is practiced, encouraged or allowed . . . ." That is really broad language, "any place." I wonder if you could articulate what the intent is for me. If they happen to drop someone off at a street corner completely unaware that it is a spot where prostitution takes place—I am thinking about someone who is not familiar with the Las Vegas Valley—this language might ensnare them. I want to make sure we are clear, on the record, what you intend by this.

Senator Spearman:
We went back and forth for two or three weeks trying to figure out how to get the language to a place where it would work. As you heard Ms. Mull say, the ways in which these people operate are usually under the radar because they generally follow what society considers to be "acceptable." The question about an unaware taxicab or Uber driver was raised when we were looking at the language. The crux of the problem is whether an individual knows. For the purposes of prosecution, I will go back to the example of someone who commits murder. Here is a more recent example: Two days ago in Manchester, England, a horrible crime was committed, and the brother of the coward said he knew that his brother was going to do this. He did not know when and he did not know where. I believe the authorities there are considering charges against the brother. The crux is, does the individual know?

Assemblyman Pickard:
I appreciate that, and I think that would be appropriate, but that is not what the language says. I am now looking specifically at the beginning of subparagraph (4), which only says "Facilitates, arranges, provides or pays for the transportation . . . for the purpose of causing a person to enter any place within this State in which prostitution is practiced . . . . This is a functional aspect; if the person merely facilitates or provides the transportation, if they are completely unknowing—and the Uber driver is exactly the one I was thinking of—now they are ensnared by this without any knowledge that this was going on in reality.

I am really concerned, and ultimately I am concerned about the constitutionality of this bill in that respect. I would hate to see this bill go down simply because the language was overbroad. I am wondering if maybe, through the process here, we can tighten it up and make the language so that it is defensible.

Senator Spearman:
As I said before, this was a part of our ongoing discussions. I would argue that whenever I go to a store there is usually a sign that says the store prosecutes shoplifters to the fullest extent of the law. I am not bothered by that, because I am not going in to shoplift—I really am not. If something were to fall and I picked it up and I put it back on the shelf but the camera did not see me put it back on the shelf, I think that it is plausible that they would understand that this was not a conscious act to commit a crime.

I want everybody on the Committee to understand that Ms. Mull said she was 11 years old. If an Uber driver takes an 11-year-old to their grandmother's house or something like that, that is fine. If, in the course of the investigation, the officers or the detectives find that this was part of the process, that there indeed is another element associated with this crime, if the Uber driver is part of the process, then they know. You only find that out during the investigation, so the language in this bill is not trying to cast a broad net that would ensnare innocent people; it is trying to make sure that we capture the people who are involved in the process. This bill seeks to capture not just the people taking the pictures, not just the people who are trading the pictures, but also the people who actually get the victims to where they are exploited.

Assemblyman Thompson:
I want to change gears a little bit and go to section 2, subsection 1, where it says that DHHS, "shall develop a Medicaid service package called the Sexual Trauma Services Guide. . . ." Is this a package with things that a 12- to 14-year-old would need, or is it merely a guide that says you can call this place, you can go here, et cetera? I just want to be clear on that. I may also have a follow-up question.

Senator Spearman:
This section is not either/or; it is both/and. Many of the victims who are liberated from the world of sex trafficking literally have nothing, no one, and no place to go. In conversation with DHHS, they actually suggested the idea that since this is available—but a lot of the victims do not know it—the act of giving that information to them and then helping walk them through the steps to obtain the services that they qualify for is part of the package. It is part of the guide. It is part of the entire schematic, if you will, to bring those victims back to the place where a decent quality of life is actually possible and they can see themselves moving forward.

Assemblyman Thompson:
In your opening statement, you mentioned that a lot of sex trafficking victims are preteens or teenagers. Is the guide something tangible or is it literally a web link or something? You have to realize that for teens and preteens, their world is more centered on electronics. You are also going to have to look at confidentiality and privacy because victims oftentimes do not want people to know. Is there going to be a link to those services or do they have to go to an office to physically pick up a package? Can you help me understand this?

Senator Spearman:
When someone who is 11 or 12 years old is liberated, they are then placed into a safe place, usually with social workers and a number of wraparound services that help them try to get back their life. Within that process, there are certain services that they are eligible for, but not everybody may know about. As a part of that process then, DHHS will have a packet or brochure that will say these are some of the things that you are eligible for, but the other thing that they will do is they will assist the victim in applying for and walking through the services to the greatest extent possible. Those who are underage will still be in a different type of environment than an adult.

For an adult, what you are really talking about, again, is educating the victim that the guide is part of what he or she is eligible for and this is how to go about applying. As I said, it is not an either/or, it is a both/and. Yes, there will be a written document. Yes, there will be something on the website, but there will also be procedures in place whereby employees of the Department can assist those victims with getting their life back on track.

Assemblyman Thompson:
Just to make it totally comprehensive, a big part of it has to be on the other end at the Department—whoever needs to be trained around this—because it looks like this is built around trust. A young girl is not going to trust adults. It has to also work on the end of the Department as well, instead of just saying, "Here is a brochure," there has to be some training if this is truly going to be effective. Just words of thought.

Senator Spearman:
Thank you, Assemblyman Thompson.

Assemblywoman Krasner:
Senator Spearman and Ms. Mull, I just want to thank you for bringing this important bill to protect children who are trafficked. We have to do everything we can to protect children, so thank you. Ms. Mull, you are so brave. Thank you so much for continuing to share your story with people who might not understand how real this is, and to people who maybe are in the room or watching on a video who can say, "Wow, look how brave she was. I can be brave and come forward too." Thank you for bringing this important bill to protect children.

Assemblywoman Cohen:
Thank you both for bringing the bill and being here today. I have a couple of questions having to do with hypotheticals. The first one—and I have mentioned this before during session so I just want to make sure we have covered this—is what happens when you have a head trafficker who has minors working for him, and the minors are facilitating some of the trafficking? Where does the minor fall under this?

Senator Spearman:
That is beyond my pay grade, and I will punt to someone who works in that area to tell you what will probably happen.

Assemblywoman Cohen:
My other question, and I think I may have mentioned this in 2013, is I know that we have people who come to work at the legal brothels. I had a client years ago who worked at the legal brothels every once in a while and she had a husband who kind of cajoled her into prostitution. He did not force her; he just was a scummy guy who pushed her along. I am especially looking at the amendment from the Nevada District Attorneys Association (Exhibit F) with the word "inducing." Where does a guy like that fall into this? He really did not make her, he did not force her, he did not traffic her, he just said, "Oh, honey, the bills are due; you really need to go do this." Is someone like this going to fall into this and end up doing time because of being a jerk and being a scumbag? How do you see someone like that playing into this bill?

Senator Spearman:
Again, I am not an expert in the law so I will not even attempt to answer the question. It would be my hope that if that scumbag was caught, that they would begin digging a special hole for him. I would just leave that to the experts though. I do not know the technical answer to that.

Assemblywoman Cohen, you bring up a good point. Part of wrestling with how to punish people that do these sorts of things is very difficult. They typically do things that people consider normal so as not to draw attention to themselves, but at the same time, they know exactly what they are doing. In some places, the language in the bill may seem very broad, but we really need to make sure that the guilty are prosecuted to the fullest extent of the law. Additionally, there is plausible reason to believe that persons who are innocent are innocent. We are really just trying to capture all of these steps.

Chairman Yeager, with your permission I would like to ask Ms. Mull to walk you through the steps of these crimes so you understand why we wrote the bill the way it was, and we have desperately tried, with all of the stakeholders, to make sure that it was something that everyone could agree with. If she can just walk you through the steps, you will understand why the bill is written the way it is, even with the amendments.

Assemblywoman Cohen:
Before you do that, I just want to put something on the record. While I certainly think that in my hypothetical scenario there is a special place in hell for that husband, I do not know if there is a special place in our prison system for him. I think we are dealing with people who are sometimes horrible people, but that does not mean that what they are doing is illegal. I just want to make sure we are putting that out there and that the language we are using is precise, to allow it to get at exactly what we want it to get at.

Kimberly Mull:
We are going to have district attorneys and defense attorneys speak about different aspects of this. As the Senator said, we have tried to work with everybody to make arrangements in the bill that will satisfy the stakeholders. I am not really sure that there is a way to walk everyone through every aspect of why this bill is written the way it is.

Assemblyman Watkins asked about a person who has traveled or is intending to travel to Nevada but has not actually done anything yet. I am the wrong person to talk to about that, because I wish to God that the man who traveled from the Nevada-Utah area to Texas when I was 13, that someone would have done something before it happened and not after. For that reason, I am a little jaded on that viewpoint.

I definitely feel that there needs to be clear intent. The last thing we want to do is to arrest people because they are completely oblivious to what is going on, but if someone knows or should know, then I think there is an intent aspect present, and I think that is what should be covered under this bill. My personal intention—and I believe the intention of most people in the process—was to make sure that those who are actively engaged in all aspects of trafficking are covered. The language and ideas were scripted from other states' laws. We are unique in Nevada in the respect that we do have legalized prostitution, and we made some tweaks with respect to that. From the research that we have done, other states have not had constitutional issues with these laws.

As far as husbands pushing wives or significant others into work in legal brothels, we do have pandering laws. Pandering is also a domestic violence issue under Nevada statute, although it is important to recognize that the federal and United Nations definition of trafficking includes, "force, fraud, or coercion." Coercion can include someone saying, "Hey, baby, we have to make rent this month. I hate to do this to you, and I would never ask this, but if you will sleep with my friend Johnny, he will pay our rent and cover it." So she does it that one time. The next month he comes back and says, "Hey, baby, I hate to do this to you, but construction has been slow and I do not have money to cover rent. I would hate for us to get put on the streets, so I need you to sleep with Johnny again." She says, "I am not a whore and I am not doing that." He tells her, "Well, you have already done it once so you are going to do it again." That is how the cycle starts. Before you know it, your husband or your boyfriend is now your pimp. Although it may seem like it was a small incident or just pushing, that is how the cycle starts.

No little girl grows up thinking that she wants to be a prostitute one day. None of us think that; it is something that happens to you and no matter whether you are a child or you are an adult, the more we can recognize as a society that there are individuals along that way who are making those little pushes, the better we can protect victims. It is coercion and it is fraud, not just force. The more we are able to step in and the more we are able to stop the abuse at the beginning, then the more victims we will be able to protect.

I realize that I did not really walk you through the steps of how the bill was written or how it was done. I think you are going to hear from more people today—some for the bill, some against—but that is the heart and the intent behind the bill and the heart and intention of why I feel the way I do, and those we worked with feel that this is an important piece of legislation.

Senator Spearman:
Chairman Yeager, I might add that when the bill was heard in the Senate, Mr. Vassiliadis testified that all of the airlines now have training for their employees so they can recognize when a passenger may be, unwittingly, a part of a sex-trafficking ring. Sex trafficking is not something that is localized. It is something that other industries recognize they have to do something about to help the victims of this crime. I urge your support, and I will step back, unless there are other questions from the Committee.

Chairman Yeager:
Thank you, Senator Spearman. I hate to do this because I know other members have questions, but at this point, we just have to move on. We have two other bills to get through today, so I will invite members to take questions offline. I will now open the meeting for testimony in support of S.B. 488 (R1). We have a number of people signed in to testify in support and I will ask, out of respect for others and the other two bills we are going to hear, to keep your comments as brief as possible.

John T. Jones, Jr., Chief Deputy District Attorney, Legislative Liaison, Clark County District Attorney's Office; and representing Nevada District Attorneys Association:
I am here on behalf of the Nevada District Attorneys Association in support of S.B. 488 (R1). I have two individuals with me down in Clark County: the Chief Deputy District Attorney of our Special Victims Unit, Jim Sweetin, and Chief Deputy District Attorney Sam Martinez, who handles these cases specifically. I do not know, Chairman Yeager, if you would like them to answer Assemblywoman Cohen's questions with respect to the husband-wife situation, because I know we are pressed for time.

Chairman Yeager:
That would be fine. We can go down south and take testimony, if you want to address the points that were raised. Again, I would just ask you to please keep your comments brief.

James R. Sweetin, Chief Deputy District Attorney, Clark County District Attorney's Office:
I will try to address Assemblywoman Cohen's issues. Mr. Martinez is also here; he knows these issues much better than I do, and can potentially give the Committee specific examples. Assemblywoman Cohen had a question about a situation where a husband or another individual was in some way talking to a victim of potential sex trafficking or prostitution, and suggesting to her to perform some sort of sexual act. Under the statute, that would essentially be an inducement. If there is force involved, that ultimately becomes sex trafficking. If there is a lack of force, then it is pandering.

I wanted to mention Assemblyman Watkins' question about section 2, subsection 2(a), subparagraph (6). I can understand where one would think that this statute might be criminalizing successive thoughts in the head, but it is really much more than that. There are many statutes in the law that are set up that essentially punish the actions leading up to a crime. The reason for that is we do not want the ultimate crime to happen. We see that in

conspiracy to commit murder, where individuals meet with each other to talk about potentially doing something that never happens. The crime occurs at the time they plan it. In our luring statute, we also have individuals who reach out to children many times—in a typical case—and talk to them about coming to meet them at some location. They might never have an intent to actually meet with the child, but the actual crime itself is making that call.

In this paragraph, we are talking about an individual who is traveling with the purpose of engaging in sexual conduct. There is an additional caveat in that statute with knowledge that such a person is compelled to engage in such sexual conduct or prostitution. I would submit that the only situation in which you are going to be able to prosecute this is when you have an individual who somehow communicates that he is clearly interested in having sexual conduct with an individual who is being submitted to him. He knows about that, there are conversations that document his intent, and then he takes the extra step of coming to the location to do this very thing. I think that is the conduct that this particular statute is criminalizing; it is not just sort of buying a plane ticket—as you indicated—but I can certainly understand where you might feel that way in an initial reading of the bill.

There was also a question about section 1, subsection 2(a), subparagraph (4)(II), that talks about a person who enters any place within the state in which prostitution is practiced. I can understand that a reading of just that portion of the bill would cause concern. It sounds as if an individual who just walks into a place without knowledge of this particular activity and they really are not culpable, but if you continue reading the statute, you see that it says "prostitution is practiced, encouraged, or allowed for the purpose of sexual conduct or prostitution in violation . . . ." Therefore, this language describes a situation where the person is not just innocently walking in; in order to violate that statute it would have to be demonstrated that the person actually had this purpose or intent of sexual conduct or prostitution.

Chairman Yeager:
Mr. Sweetin, could you address Assemblywoman Cohen's question? She had a question about whether other minors or juveniles would be prosecuted under this bill if they were involved in the trafficking of another minor or juvenile at the behest of the trafficker. Would they be wrapped up in prosecution under this bill?

James Sweetin:
We talked a little bit about gray areas. In the course of a police investigation or prosecution, you must determine who are the victims in a case and who are the perpetrators in a case. Is it possible that a juvenile would be a perpetrator in a case like this? Yes, that is possible. Is it possible that they might be prosecuted as a juvenile? Yes, that might be possible, but you would have to look at the totality of circumstances to make that determination of whether they are being coerced into this lifestyle or whether this is a conscious decision by them to go forward.

Chairman Yeager:
I do not want to hold you to that. That sounded like a pretty lawyerly answer, but was the answer: perhaps? What I heard you say is that there is not a categorical exclusion. The only reason why I really ask is that over the course of the last few sessions I know there has been a shift in this Legislature to make sure that juveniles who are being trafficked are no longer treated as criminals, but treated as victims. I just wonder how that interplays here, with that generally being the intent of the Legislature.

James Sweetin:
I think the legislative intent, essentially, is to stop the criminal conduct and to punish it. I would submit that that is the Legislature's intent in creating any law. I will tell you that in the prosecution of these cases, the Clark County District Attorney's Office embarks on a victim-centered approach. We endeavor to understand who the victim is in these cases, and it is never our intent to further victimize that individual. I think that through the legislation that we have, we have to have lines drawn in regard to criminal activity. If someone has the mens rea and is going forward with a particular criminal activity, then they might potentially be culpable. These cases, as we have talked about, these gray areas are many times very gray in regard to who the actual perpetrators are and who is being forced to conduct themselves in a manner that might be consistent with a perpetrator.

Chairman Yeager:
Mr. Martinez, did you want to add anything?

Samuel Martinez, Chief Deputy District Attorney, Clark County District Attorney's Office:
Just very briefly. Thank you for this opportunity. There was a question regarding the language of "causing" versus "inducing," in section 1, subsection 2(a), subparagraph (4). "Causing" suggests, as Mr. Sweetin was saying, that we do not want cases going all the way through the commission of a crime. The goal of this law is to prevent children—and adults—from having to go all the way through and being sexually victimized. That is why we have NRS 201.295, which defines "induce" as, "to persuade, encourage, inveigle, or entice," and is the precursor for NRS 201.300. When you have a trafficker or a pimp who is encouraging a minor using words of encouragement or making promises—making a particular victim feel comfortable in engaging in this horrific conduct—we do not want the horrific conduct to take place. That is why the crime is complete when the inducement takes place.

Subparagraph (4) (I) says, "Causing the person to engage in prostitution." I think the word "causing" suggests and maybe creates a loophole where the state or the prosecution would have to prove that a sexual act actually occurred. Very rarely, if ever, is there going to be a "John" and a victim caught in the very act. Oftentimes when undercover operations take place, the act stops before anything happens and the victim reports what occurs prior with the pimp, as far as the encouraging and things of that nature.

Section 1, subsection 2(a), subparagraph (5) (II) says, "Soliciting a child who is compelled. . . ." Again, as the law stands in Nevada right now, when we are dealing with children under the age of 18, there is no force, fraud, or coercion element required for the state to prove that a child has been trafficked. All that the state has to prove—and I agree with this wholeheartedly due to the nature of children—is encouragement, persuasion, or enticement. This section suggests—and I believe it is inconsistent—that soliciting a child who is compelled to engage in sexual conduct that is inconsistent with how the law currently is. That is why we believe, at the District Attorney's Office, that the compelled and the causing language should be consistent with what is currently the state of the law, which is inducing.

John Jones:
If I may piggyback off Mr. Sweetin and Mr. Martinez, the Nevada District Attorneys Association has proposed an amendment (Exhibit F) to S.B. 488 (R1) and I believe it has been accepted by Senator Spearman. I just wanted to point out to you that in *Ford v. State*, 127 Nev. Adv. Op. 55 (2011), compel is defined in the same case as to "cause or bring about by force, threats, or overwhelming pressure." Going to Mr. Martinez's point about why we do not want to use "compel" with respect to children, nowhere else in the sex trafficking statute does it require any type of force showing with respect to children.

There is also another amendment sponsored by the Nevada Coalition to End Domestic and Sexual Violence. I do not know if they want to speak to their amendment, but I do believe it has been accepted as friendly by the sponsor.

Chairman Yeager:
I do not want to make anyone do any additional work but, particularly for those of you who prosecute these cases, I think it would be helpful if you could provide the Committee some examples of real-life scenarios that you intend to capture by the language added to the bill. Perhaps you could include some examples of the hypotheticals you have heard today that are not intended to be captured by that language. I think that would be helpful for the Committee to better understand the intent of the language.

Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department:
I am here in support of this bill.

Brandi M. Planet, representing Dignity Health-St. Rose Dominican:
We submitted a letter in support of S.B. 488 (R1) (Exhibit G). I wanted to briefly note for the record that Dignity Health has invested more than $1 million to develop and implement its survivor-led Human Trafficking Response Program. As such, it supports all efforts that help victims of sex trafficking; especially those that will help ensure the victims get necessary services.

Marlene Lockard, representing Nevada Women's Lobby:
I very much want to thank the bill's sponsor, Senator Spearman, for bringing this bill forward. In addition, Ms. Mull had the courage to come and bring her story forward. I think it is so important for all of us to listen because we do not understand how it happens and how all of a sudden we are dealing with this huge issue in our state. Without first-account testimony, we do not know how to craft laws to try to prevent it. With that, we are strongly in support of S.B. 488 (R1).

Kerrie Kramer, representing The Cupcake Girls:
We are also in strong support of this and would like to thank Senator Spearman and Ms. Mull for bringing this piece of legislation forward.

Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association:
We would also like to thank Senator Spearman for bringing the bill forward. We strongly support it, and we agree with the comments about the courage shown by Ms. Mull in bringing this information forward. We thank them for their efforts.

Corey Solferino, Sergeant, Legislative Liaison, Washoe County Sheriff's Office:
We, too, are here in support. With your permission, I would like to read a three-sentence email response from one of our counterparts at the Reno-Tahoe International Airport. Assistant Federal Security Director (AFSD) Jim Dale could not be here today but he asked me to read on his behalf. It says:

> Based upon the information in S.B. 488 (R1) and work I have been doing with Awaken in providing assistance to victims of sex trafficking aboard aircraft, I would be in support of this initiative. Additionally, I have spoken with AFSD Chris Stack, who oversees our Transportation Security Administration workforce in Reno and the current Department of Homeland Security initiatives to combat sex traffickers. We are both in agreement and support of this measure. I will forward your response to the airport authority for their informational awareness.

Chairman Yeager:
Thank you for your testimony. Is there anyone else who is in support of S.B. 488 (R1) here in Carson City? If there is anyone else in Las Vegas who would like to testify in support and has not testified yet, please make your way to the table. [There was no one.] We will now take opposition testimony for S.B. 488 (R1). If there is anyone in Las Vegas in opposition please come to the table. We will take testimony in Carson City first.

John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office:
We are here in limited opposition to S.B. 488 (R1). There are many things that this bill is attempting to do that are really good and that this Legislature should do, including the designation of new crimes. Our limited opposition comes in the way that the crimes are structured and the language used.

I want to thank Senator Spearman and Senator Cannizzaro for meeting with us on more than one occasion to try to get this language right. Some of our amendments were accepted prior to this bill being passed out of the Senate committee, and then they were removed after this bill was passed out of committee. That is why we come up in limited opposition here. I think Assemblyman Pickard and Assemblyman Watkins hit the nail on the head when it comes to talking about the language being too broad, and the amendments that we had suggested imparting a specific intent that I think was necessary in this crime, because when courts look at this—or when we craft jury instructions—you are going to look at the plain language of the statute when we are moving forward in trial. Of course, no law is designed to capture the innocent, but when drawn too broadly you may capture the innocent or people that you do not intend to capture with the law.

I would like Chief Deputy Public Defender, Ms. Nadia Hojjat, who handles these cases to testify in Las Vegas. She also worked on this bill with me, along with Mr. Sullivan, Senator Spearman, and Senator Cannizzaro, to try to tailor the language to capture the people who we are actually trying to capture and make this bill a better version that will punish the truly bad actors. With your permission, I would like to let Ms. Hojjat testify.

Chairman Yeager:
Thank you and welcome, Ms. Hojjat. We will go ahead and take your testimony in Las Vegas.

Nadia Hojjat, Chief Deputy Public Defender, Clark County Public Defender's Office:
I would like to start, as Mr. Piro did, by thanking Senator Cannizzaro and Senator Spearman for working with us on some amendments to this bill. As Mr. Piro stated, we had some serious concerns with the original draft of S.B. 488 because the language is overbroad and does not include specific intent language. It really encompasses a lot of people that it does not necessarily intend to encompass. It casts a very wide net. As Mr. Piro stated, some of our amendments were removed after the bill was passed out of committee, specifically amendments relating to intent, and specifically amendments relating to placing language in the bill requiring that individuals act knowingly and intentionally. All of that language has now been stripped out of the bill. That is very concerning because I think there has been a lot of testimony so far about how broad this bill is. If we are not going to have "knowing" and "intentional" language in the bill, we are going to encompass a lot of individuals.

I wanted to address Assemblywoman Cohen's question specifically, because I thought it was a very good question about minors and whether the minors could be encompassed if there is a major trafficker and minors are working for that major trafficker. I can tell you that right now, if we have a major sex trafficker with many women who are engaging in prostitution—who are essentially being sex trafficked—that pimp often has a hierarchy within these situations. There is often one particular prostitute who will become the head henchman—there is a specific name for it, but it is not terribly polite for testimony. I can tell you that those women who started out very much as sex trafficking victims themselves—and have been induced into this lifestyle and living years and years under this emotional manipulation, physical harm, things of that nature—are now being charged. They are currently being

prosecuted. As far as whether minors can actually end up being prosecuted under this: I would say yes, absolutely, the way the language is right now. We are already seeing it happen with adult victims of sex trafficking.

Minors can be tried as adults. Just because an individual is a minor at the time that the crime occurred does not mean that they will end up being tried as a minor. There is a process by which the District Attorney's Office can certify these individuals up, and eventually a 15-year-old or a 16-year-old can end up being tried as an adult sex trafficker under the language of this bill.

Chairman Yeager:
Thank you, Ms. Hojjat, for your testimony. I appreciate it. We will come back to Carson City.

Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office:
I know time is short, so I will be brief. My concerns have already been addressed by Ms. Hojjat and Mr. Piro. I just wanted to point out one particular comment. In our country's history we have a long framework that we go by that says it is unjust to punish without proof of criminal intent. That is what we are all talking about this morning. Crimes that remove the intent, or the mens rea element, endanger the innocent. Mens rea remains important because we are creating so many new crimes in Nevada law, and as Justice Scalia once noted in *Sykes v. United States*, 564 U.S. 1 (2011):

> . . . as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the *Constitution* encourages imprecisions that violate the *Constitution.* Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation . . . ."

We do not want this. We want to get it right the first time so we can truly capture the bad actors. I, too, just want to express my appreciation for Senator Cannizzaro and Senator Spearman for giving up so much of their valuable time to get it right and truly get at the bad actors with this piece of legislation. For that, we are in limited opposition. We do agree with sections 2 and 3, but we still have concerns with section 1.

Chairman Yeager:
Thank you for your testimony. Is there anyone else in opposition to S.B. 488 (R1)? [There was no one.] Is there anyone in the neutral position? [There was no one.] Before we take any closing comments, we will go to Assemblyman Anderson.

Assemblyman Elliot T. Anderson:
I have been a bit frustrated listening to the record we are creating. In reference to the Uber driver scenario, in section 1, subsection 2(a), subparagraph (4), it talks about transporting a person to the state with the "purpose of." As I understand purpose—and I can leave this to legal counsel—purpose is another way to say "specific intent." Furthermore, there is the phrase "causing." I do not think an Uber driver is causing someone to go and be in these

situations. I think this bill contemplates somebody else causing them. If the Uber driver is the pimp actually making them go, then they would be "causing" them, but if they get a click on their app and they pick up this person, their purpose is not to cause an individual to engage in this activity. In this case, the Uber driver has no idea. That is a mens rea element itself. The bill does not say, "specifically intending," but that is what that means, legally. I see knowledge requirements everywhere in this bill. I am having a disconnect, legally, with some of the testimony. I do not think it is quite right, and I think that statement needs to be clear because I think this record really was not a good one.

Chairman Yeager:
At this time, I will invite our sponsors back up to the table to make concluding remarks. Thank you, again, for your patience this morning.

Kimberly Mull:
First, I just want to thank the Committee for putting up with me today. I am usually a little more put together. Second, I wanted to point out that in the amendment that the District Attorney's Office presented to you, we did ask them on our behalf, with the Nevada Coalition to End Domestic and Sexual Violence, to include one aspect, which adds a new section to the bill amending NRS 49.2544 (Exhibit F). The amendment adds "human trafficking" to the definition of "victim." In the NRS, it lists those victims, in the state of Nevada, who have the privilege of confidentiality with a victim advocate, and currently it includes victims of domestic violence and victims of sexual assault. We want to make sure that victims of human trafficking also have that same privilege of confidentiality. When it comes to human trafficking it is so important that victims know that when they confide in someone—or they share things that are going on with them or they reach out for help—that they do have that legal right to confidentiality with the advocate. Oftentimes, it can be a life-saving measure to reach out for help and because, unfortunately, they can sometimes be prosecuted under the law. It is important that victims know they have that confidentiality and they feel comfortable enough to reach out for help when they need it. We would really appreciate it if we could also get that section added.

Senator Spearman:
Thank you, Chairman Yeager, and members of the Committee for your indulgence. I was going to say a lot more, but I think Assemblyman Anderson captured it. With respect to the amendments that were suggested and not accepted, we ran those through our legal department, vetted them carefully, and in section 1, subsection 2 it says a person is guilty of sex trafficking if he or she, "facilitates, arranges, provides or pays for the transportation of a person to or within this State for the purpose of . . . ." As I understand it from our legal team, that shows intent, and everything else in the bill points back to that. To put that in every section or subsection of the bill would really be redundant. Once we stated it in section 1 that means it is true throughout the bill. We looked at the amendments, we looked at what was suggested, we sat down and talked with the public defenders with our legal team, and we are really comfortable that the intent of this bill is captured throughout. I would encourage a positive consideration of this bill. Ms. Mull was abused from the age of 11—remember that if you have a daughter, a niece, or a granddaughter. It is time. It is time.

Chairman Yeager:
Before we close the hearing, I wanted to go to Assemblywoman Tolles for a brief comment.

Assemblywoman Tolles:
I just wanted to thank you for this work. This is difficult work. Thank you for your testimony, thank you for your fight on this. In 2017, we take seriously people who sell other people's body parts for profit, as well as everyone who contributes to that. I thank you for that. I want to concur with my colleague, Assemblyman Anderson, in his analysis of the word "purpose" and showing intent. I also want to thank Ms. Mull for the example of someone who would travel from Utah to Texas to meet a 13-year-old, after watching her in an illegally obtained pornography of a child to meet her. I would think that that would be enough evidence to show intent of traveling to go engage in illegal prostitution with a minor.

[Additional exhibits include written testimony in support submitted by Kimberly Mull, Policy Specialist for Nevada Coalition to End Domestic and Sexual Violence (Exhibit H); and written testimony in support submitted by Tess Franzen, Policy Coordinator, FREE International (Exhibit I).]

Chairman Yeager:
Thank you, Assemblywoman Tolles, and thank you Senator Spearman and Ms. Mull for being here this morning and for your testimony. I will go ahead and close the hearing on S.B. 488 (R1). At this time, I will open the hearing on Senate Bill 361 (2nd Reprint), which revises provisions relating to domestic violence.

Senate Bill 361 (2nd Reprint): Revises provisions related to domestic violence. (BDR 53-775)

Senator Cannizzaro, thank you for your patience and welcome back to the Assembly Committee on Judiciary.

Senator Nicole J. Cannizzaro, Senate District No. 6:
I wanted to share a couple of things with the Committee that I had shared with my Senate colleagues this week as well, because I think it is important to illustrate why Senate Bill 361 (2nd Reprint) is such an important piece of legislation.

Twenty is the number of people, per minute, who are physically abused by an intimate partner in the United States. Ten million is the number of men and women who are abused each year in the United States. Twenty thousand is the average number of daily phone calls made to domestic violence hotlines. Three is the number of women killed every day, on average, as a result of domestic violence. Eight million is the number of paid days of work that victims of intimate partner violence lose each year, and $8.3 billion is the economic cost, per year, as a result of intimate partner violence. Twenty-one to sixty percent of domestic violence victims lose their jobs due to reasons stemming from domestic abuse.

I think these numbers are important because, when we talk about domestic violence, I think there is probably not a person in this room that would disagree that domestic violence is wrong. I think you would be hard-pressed to find someone that would argue that we should not be appropriately tackling the issue of domestic violence. I think sometimes putting numbers and quantifying exactly how large this problem is, both from an economic standpoint and from a victim standpoint, is especially important in illustrating why it is that I brought forth S.B. 361 (R2).

I want to talk a little bit about what other states have done in relation to the employment piece of S.B. 361 (R2). At least 18 states have passed laws requiring employers to provide domestic violence leave. These laws vary significantly in different details concerning everything from how much time off, reasons for leave, whether that time is paid or unpaid, notice and paperwork requirements, and the use of any leave and how that is done with different employers. By way of example, in Colorado, if an employer has 50 or more employees, up to 3 days of leave is authorized. In Massachusetts, employees must have up to 15 days for medical attention or to secure new housing, or to attend court proceedings, and other needs related to domestic violence. In Kansas, there are laws in place that provide that employers cannot discriminate against domestic violence victims who need time off. As you can see, this is an issue that is becoming readily apparent and being addressed by a number of states.

What does S.B. 361 (R2) do? Before I give a brief summary of the contents of the bill, I would like to first acknowledge and thank those—both supporters and those who were initially opposed to S.B. 361 in its original form—who have worked with me through several versions of this bill in order to craft what is before you today. We have had a number of working group meetings in talking with employers from all across the state, small and large, to come up with a way that this bill can both serve victims and also allow employers to maintain their business. I think that is important. I will note that I am grateful for everyone who came to the table and worked very hard in this working group, because I know that they are also concerned about domestic violence and how it affects their employees. I think that this bill would not be before you today without everyone acknowledging that this is something that we do want to work on. For those reasons, I wanted to thank everyone who has been so gracious to work with me on that. With all of that said, I think that there is now some broad support for this legislation, so I do want to walk you through some of those pieces so I can illustrate exactly what we are doing with S.B. 361 (R2).

Section 1 requires an employer to provide leave to an employee who has been employed for at least 90 days, and who is either a victim of domestic violence or whose family member or household member is a victim of domestic violence. The leave requirements are as follows: an employee is entitled to 160 hours of leave during a 12-month period; the leave may be paid or unpaid, and may be used consecutively or intermittently. The reason for that is that sometimes you may need to go to a court proceeding that might not happen until the

afternoon, or sometimes it will just take up part of the morning, so we wanted to ensure that employees would be able to take part of the day off to attend court proceedings without having to lose an entire day of work. We also wanted to allow them to take it as they saw fit, either for a whole day or perhaps for just a couple of hours. That is why we have talked about it being either consecutively or intermittently.

The leave must be used during the 12-month period immediately following the date on which the domestic violence incident occurred, and leave hours may only be used for matters related to that domestic violence situation such as a diagnosis, seeking medical care or treatment, attending counseling, attending court proceedings, or to establish a safety plan so that that individual can remove themselves from the situation. I think what is important to note at this point is that one of the most difficult things about domestic violence cases—and about domestic violence situations—is that it is predicated upon a cycle of violence. That cycle of violence perpetuates and oftentimes it perpetuates because it is very difficult for that victim to remove themselves from that situation. In other instances—robbery, for example—it is not hard to walk away from a robbery scene or to show up in court or to go to the doctor and seek medical treatment if you were badly injured. For domestic violence victims, however, the perpetrator is someone who is very close to them, often someone whom they felt they could trust, someone whom they loved, and it is very difficult to remove yourself from that situation. This leave could be used to help establish a safety plan so that individual can get out of the house, change residences, or get away from the situation entirely. I think that is an important thing to note.

An employee must give an employer at least 48 hours' notice in order to use additional hours beyond those that were used immediately after the initial event occurred. We recognized that when these events occur there may not be notice to an employer, but for subsequent court proceedings or follow-up medical appointments, the employee would likely have that information ahead of time and would just have to let their employer know.

If leave is used for a reason that is also covered under the federal Family and Medical Leave Act (FMLA), the days must be deducted from the days allowed by both this act and by federal law. If an employee is separated from employment but returns within the 12-month time period following the act of domestic violence, any unused days of leave must be reinstated. Employers are required to maintain a record of the days of leave used by each employee for a two-year period, and to make those records available for inspection by the Labor Commissioner. An employer may require documentation confirming or supporting the reasons for any leave request. The Labor Commissioner is required to prepare a bulletin setting forth the benefits and requires employers to post the bulletin in the workplace. That way, individuals who are in that workplace know that there is a mechanism for them to utilize in order to help them in these sorts of situations.

Section 4 of the measure authorizes the administrator of the Employment Security Division of the Department of Employment, Training and Rehabilitation (DETR) to request evidence from the person to support a claim for benefits. This section also prohibits the administrator of DETR from disqualifying a person from receiving unemployment compensation benefits

if the person left employment to protect himself or herself, or a family or household member from an act of domestic violence, and the person actively engaged in an effort to preserve employment.

Section 6 requires an employer to provide reasonable accommodations for an employee, as long as those accommodations do not create an undue hardship for the employer. In this section of the bill, what we want to get at is, for example, if there is someone who works at the front desk from time to time, but is in a situation that they are afraid their abuser may show up to the workplace and there is a way for that employer to move that employee to a desk that is farther back in the building to ensure that employee's safety, that is an accommodation that the employer would have to provide. We recognize that not every accommodation is going to be feasible for an employer, and that is the reason for the "undue hardship." If it poses an undue hardship, then that accommodation would not have to be made.

Section 7 prohibits an employer from conditioning employment or taking certain employment actions because the employee or the employee's family or household member is a victim of domestic violence. Again, we see that there are protections that are being put into place so that there cannot be discrimination simply because somebody is trying to address a domestic violence situation.

Section 8 starts to address some of the criminal penalties that are associated with these types of cases. Section 8 increases, specifically, the penalty for an intentional violation of a temporary or extended order for protection against domestic violence to a category C felony, and section 9 makes it a category B felony to commit a battery which constitutes domestic violence if the person has previously been convicted of a felony in this state for committing battery which constitutes domestic violence, or a violation of the law of any other jurisdiction that would prohibit the same type of conduct and that would also be a felony.

Sections 2, 3, 5, and 10, make conforming changes.

I wanted to make note of a couple of things. One of the reasons why I believe this bill is important, at least from the penalty standpoint, is that currently, if there is a violation of a protective order, it is a misdemeanor. For individuals who have been in a domestic violence situation and have gone through the process of applying for an order of protection against someone who is abusing them, they deserve to have security in knowing that they are going to be safe from their abuser. If that abuser continues to come to their place of employment, their house, continues to harass them and threaten them, then we are going to take that very seriously. These situations are not only the most dangerous for these victims—and lead to a number of homicides every year—but these are also the most dangerous situations for our law enforcement officers, and they are the most dangerous situations for employers to be involved in as well. This bill is an important step forward in ensuring that we are taking domestic violence cases seriously and properly addressing those threats.

Additionally, I think with respect to increasing the penalty if you have been convicted of a battery domestic violence, what I would note for this Committee is that that would require that you had actually been convicted three times of battery constituting domestic violence within a seven-year period. If you commit a fourth act of battery constituting domestic violence, you would currently be subject to a felony prosecution. I think that in and of itself, when you look at it, is excessive. We are not talking about somebody who gets into a fight with his or her husband or wife and slaps them once. This is somebody who is engaging in repetitive, domestic abuse, and I think that we have a duty to ensure that we are protecting those victims. I would also note that that would include if you were convicted of a battery constituting domestic violence strangulation. What I would note about strangulation is that it is one of the easiest ways to injure somebody severely or to kill them. That is an important aspect—we are not talking about somebody slapping someone in the face; we are talking about somebody who can die in a matter of moments.

I also have Marlene Lockard with me today. She is here to help testify on this bill as well, specifically with respect to the employment pieces, although we recognize that this is sort of a holistic approach to some issues that we currently see with domestic violence cases. I will also reiterate that one of the primary reasons why we see domestic violence victims—who I think are predominately female, but not always—unable to remove themselves from these very dangerous situations is because there is a lack of economic security. It is amazing to me how many times I have been with a victim and been told they could not leave because they would lose their job, or that they could not come to court because they would lose their job. They would say that they did not want to have to go to counseling or have to address the situation because they would lose their job, and their employer would not be okay with them asking for time off to address this issue. That is such a profound statement, and yet there is a solution to that; in order to give the ability for someone to remove themselves from the situation, I think that economic security piece is so important. Chairman Yeager, with your permission I would like for Ms. Lockard to illustrate some pieces from the employment part.

Chairman Yeager:
That would be fine.

Marlene Lockard, representing Nevada Women's Lobby:
I would like to thank Senator Cannizzaro for bringing this bill forward. It first came to our lobby's attention when U.S. Congresswoman Dina Titus sent legislation to us that, with your support and approval, will become Nevada's SAFE Act for women. That stands for economic security and safety of survivors of domestic violence, dating violence, sexual assault, or stalking. I have pages of testimony here that I will not subject you to. Our sponsor has done such a thorough job of presenting this very important legislation to us. It is the Nevada Women's Lobby's number one priority, and we were so grateful that Senator Cannizzaro decided to sponsor it for us. We feel it is critical that the economic protections for these victims are available so that no woman or man has to make the tragic choice of risking their safety or to protect their livelihood.

Assemblywoman Cohen:
Thank you for being here and bringing this legislation forward. I believe, Senator Cannizzaro, you said that 17 or 22 other states already passed similar legislation. Is that correct?

Senator Cannizzaro:
It is 18 other states, and they are not exact in nature to what is before you in S.B. 361 (R2). They vary across the board, but at least 18 states are considering different employment protections.

Assemblywoman Cohen:
Do we have any data about how businesses in those states are doing and what the results have been?

Senator Cannizzaro:
I do not have that data in front of me, but I am happy to work on getting it to you.

Assemblywoman Cohen:
Thank you, I appreciate that. I am sure the rest of the Committee would like to see it as well.

Assemblyman Pickard:
I like the idea of this bill, if only because I have heard the same kind of comments in a civil context. Where did you come up with 160 hours? Four weeks of leave to attend a hearing or to attend an appointment seems a little much. I am just wondering where that number came from.

Marlene Lockard:
That language came from the federal legislation, but the bill has been amended to say that an employer can allow paid time or unpaid time off. This is not a mandate of paid time in this bill. We have merged some of the paid leave bills that had been circulating in the Legislature this year, so the paid time is now included in Majority Leader Ford's Senate Bill 106.

Assemblyman Pickard:
My question was about how we came up with 160 hours, and if it is just because we are modeling or mirroring the federal legislation. Is there some substance behind that number or is it arbitrary?

Senator Cannizzaro:
That number comes from a couple of places. First, I would note that we were intending to give leave for a 12-month period. Sometimes court appearances initially occur within a few hours, but sometimes they are a few weeks later or months down the road in terms of a trial, or additional appearances may need to be made by that victim. In addition, we did not want to restrict the leave to only a few days because that would be insufficient to cover court appearances. We wanted to ensure that there was sufficient time for medical appointments. The time that it takes to get into a doctor's office, wait to be seen, be seen, make sure you can

follow up on any additional prescriptions, or if they are referred to a specialist for some reason. These situations range from minor in nature where maybe they only have one or two follow-up appointments, to individuals who are suffering from broken bones in the face and have to have surgery to reconstruct that. Different broken bones on the body can take significant amounts of time to heal. Additionally, this bill covers leave time to ensure removal from a home, which can take some time as well. That can often take up to a day or two. In addition, it includes things like counseling or victim advocacy services that might need to be utilized by the victim. We wanted to make sure that we gave a sufficient amount of time to the victim.

We initially talked about 30 days' leave, and we talked about paid time off. This bill has taken many forms, ultimately, because of the intermittent nature of when this time may need to be taken. We decided on 160 hours. If you divide that out by an eight-hour workday, it would be five days per week for four weeks, but it may be taken over the course of a year. Certainly, not every victim would use this. We wanted to make sure it was at least a sufficient amount of time to cover all of those uses for those instances where that may be needed.

Chairman Yeager:
Seeing no further questions, thank you for your presentation. I am going to invite additional testimony in support of S.B. 362 (R2) to come forward at this time. If there is anyone in Las Vegas, please make your way to the table as well. Seeing no one in Las Vegas, we will take testimony here in Carson City.

Kristy Oriol, Policy Coordinator, Nevada Coalition to End Domestic and Sexual Violence:
We want to thank Senator Cannizzaro as well as the Nevada Women's Lobby and Ms. Lockard for bringing this bill forward. I want to reiterate most of what Senator Cannizzaro said and just that we are in absolute support, especially of sections 1 through 7 of this bill. She has outlined the critical reasons why victims of domestic violence need to be able to take this time off. We have discussed a conceptual amendment with Senator Cannizzaro that would add victims of sexual assault to this portion of the statute. For all of these reasons, victims of domestic violence often need to leave work to obtain services; the same reasons apply for victims of sexual assault. We would encourage that that amendment be adopted.

We are also very supportive of section 9 of the bill. As Senator Cannizzaro mentioned, to elevate the crime of domestic violence to a felony in Nevada requires three convictions within seven years, or committing domestic violence by strangulation. These are very serious crimes. It is not simple to reach the felony level of domestic violence in this state and we wholeheartedly agree that, if this person was able to have that crime elevated to a felony, and then commits a subsequent offense after that, this should be a felony and not a misdemeanor after showing such a history of violence. We have seen such a high level of fatality in this state; we have consistently ranked number one, and in the top ten for the past decade, of women killed by men. It is simply time that we take this crime more seriously.

We do have some concerns with section 8 of the bill. I will not go into those right now because we are continuing our conversations with Senator Cannizzaro, and she has been open to our concerns. I will just say there are some unintended consequences of increasing the penalties for temporary protective order (TPO) violations. I am confident we can come to an agreement on those portions of the bill as we continue negotiating.

John T. Jones, Jr., Chief Deputy District Attorney, Legislative Liaison, Clark County District Attorney's Office; and representing Nevada District Attorneys Association:
I am here on behalf of the Nevada District Attorneys Association in support of S.B. 361 (R2). I want to thank Senator Cannizzaro for this complete, whole approach to combatting the domestic violence epidemic in Clark County. As you know, instances of domestic violence homicide have been on the rise in Clark County, and I think that this bill will take great strides in helping us with that epidemic.

With respect to section 9 and the third domestic violence conviction, I want to point out that prior to someone getting their third domestic violence conviction, they would have had to have gotten a first and then a second—two prior misdemeanor offenses. The penalties for the first misdemeanor offense include 6 months of domestic violence counselling, and part of the penalty of the second offense includes 12 months of domestic violence counselling. There are counselling components for the defendant who has been convicted of prior domestic violence.

Jim Sweetin is also with me down south. Mr. Sweetin is team chief of the Special Victims Unit. I will just make him available for any questions you might have specifically regarding domestic violence prosecutions, but if there are no questions, I believe I have taken up enough of your time this morning.

Chairman Yeager:
Thank you, Mr. Jones. I do not think there are any questions. We certainly have Mr. Sweetin signed in, in support of the bill, so that will be reflected on the record. Thank you for being here, Mr. Sweetin, to answer questions. We will take additional testimony here in Carson City.

Corey Solferino, Sergeant, Legislative Liaison, Washoe County Sheriff's Office:
We want to thank Senator Cannizzaro for this important measure and offer our full support.

Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association:
We are also in support of S.B. 361 (R2).

A.J. Delap, Government Liaison, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department:
We are also in support of this measure.

Chairman Yeager:
Is there anyone else in support of S.B. 361 (R2)? [There was no one.] We will now take opposition testimony. If there is anyone in Las Vegas who is opposed, please come to the table as well. We will begin with testimony in opposition here in Carson City.

Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office:
We are here, again, in limited opposition to the bill. We are opposed to the increase in penalties in sections 8 and 9.

I agree with the comments made this morning by Senator Cannizzaro; we need to appropriately tackle the issue of domestic violence and stop this cycle of abuse. It appears to be a cycle of abuse that the offender oftentimes learned at the hands of a parent or guardian—who may have suffered the same abuse. The only way we can end this cycle is with the appropriate treatment. We created DUI court under *Nevada Revised Statutes* (NRS) Chapter 484C for a person that has reached the first-time felony level. These individuals can petition to get into DUI court, and it is a three- to five-year, intense treatment program. We should consider creating the same type of program—a three- to five-year domestic violence treatment program—on the side of domestic violence, which would really stop the cycle of abuse and get at the core issue.

The next issue I want to address, briefly, is the ex post facto issue. I think if these increased penalties were to go through, I think you are going to see a lot of constitutional challenges under the ex post facto clause. When a person enters a plea to a domestic violence misdemeanor—first offense within seven years, second offense within seven years, and then the third offense—they are always canvassed by the judge, by the defense attorney, and oftentimes they have to fill out a constitutional waiver of rights form indicating that they understand that these penalties are increasing. They are advised for a first offense what the penalties are—minimum two days in jail and a maximum six months in jail—for the second offense a minimum ten days in jail and a maximum six months in jail, and third offense one to five years in prison. They are never advised that on a fourth-time domestic battery conviction these penalties are going to increase to a category B felony and 2 to 15 years mandatory prison sentence. With that, I think if these penalties are increased, we are going to see constitutional challenges. I would ask you to consider my comments this morning and I will not take up too much of your time.

John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office:
I wanted to talk about a few things that my colleague, Mr. Sullivan, has not yet covered. When we talk about domestic violence, we think of intimate partner domestic violence. In Nevada, for those in the room and the community who may not know, the definition of victim is quite expansive. It includes two roommates, a brother and a brother, a sister and a sister, a brother and a sister, a son and a mother, et cetera. These are family members who

are going through a traumatic situation and want it to stop so they call the police. The problem stops, but under our law the police have to arrest somebody. They are then thrust into the court system where they may not want to be; they just wanted that issue to stop and they wanted some help. The court system is not always the best place for people to get help.

On that note, I want to talk about point number two, the efficacy of treatment. Yes, people do go to these classes, but have we ever stopped and looked and asked if the classes are even effective in stopping the problem? If everybody is saying that we are still very high on the list, then they may not be. Maybe the Legislature might want to look at the efficacy of treatment and see if we can fix that problem, study that, or at least step back and take a cogent look at it and see if we can do better before hitting the same nail with the same hammer of increased penalties.

That being said, the third problem with expanding the increased penalties is that there are no jury trials for misdemeanor domestic violence. Where other states do have jury trials, we do not. I am not going to name names, but because lawyers advise their clients based on what the district attorneys and the judges say, domestic violence court in Clark County has become a plea factory. People may ratchet up a couple numbers before they are there, even if they would have fought the case had they had the opportunity at a jury trial.

In regards to temporary protection orders, ratcheting up the penalties on those are a little bit dangerous as well, because those who practice in the temporary protection order area—and those are tools of protection that should be used to protect victims—know that it is a rather informal process. Once these orders are issued, there is no defense to a violation of a temporary protective order. The law allows for no defense. It is a strict liability crime that we are now going to make a gross misdemeanor and a felony, without providing a defense for a violation of those. People should not be violating those because it is serious, but the process to get those things is rather informal as opposed to the process to go through a preliminary hearing, a trial, and things of that nature. To have a preliminary hearing and a trial based on a violation, without providing for a defense and basically allowing a strict liability crime, becomes rather problematic, in this country at least.

Assemblyman Elliot T. Anderson:
I do not really have a comment, substantively, on your concerns, but I did have a question as to the label that you just used. You used the phrase "plea factory." As I understand it, about 97 percent of cases plea out. Is it more of a plea factory than the rest of those cases?

John Piro:
I would submit, yes. You are correct on the plea numbers. Because of the low number of attorneys to handle cases, a lot of cases do plead out more than they should. In that court in particular, it is extremely high.

Assemblyman Elliot T. Anderson:
God help us if the criminal justice system stops pleading out, because then the amount of money we would have to spend would be crazy. I will just leave it at that.

John Piro:
I would say astronomical.

Chairman Yeager:
My recollection from the hearing on Assembly Bill 193 of the 78th Session was that there were approximately 40,000 felony cases filed in Clark County. I think they hold about 150 jury trials each year. My math is not good, but I think that is less than 1 percent and maybe less than one-half of 1 percent.

There was a question about ex post facto and the constitutionality of enhancing a felony crime that has not occurred because of a prior felony crime. I wondered if you had, or could obtain, any case law that talks about that issue because I know, for instance, in the DUI context, we have an enhanced penalty for prior felony convictions, but that admonishment form that you sign does say that on there. I would just be interested if anyone knows of any authority for this particular circumstance, or if a court has weighed in on whether you can essentially create a new crime or enhance the penalty based on conduct that happened before the effective date of the statute. I am sure nobody has that information with them right now, but if someone could get me any case law, I am sure others on the Committee—including Assemblyman Anderson—would like to look at that.

Is there any further testimony in opposition to S.B. 361 (R2)? Seeing no opposition, I will now take neutral testimony.

Misty Grimmer, representing Nevada Resort Association:
I am happy to testify on this bill in the neutral position. In its original form, the bill did have provisions that were burdensome to employers, but Senator Cannizzaro and I had several meetings, her door was always open, and she was very open-minded to the concerns of employers. She addressed all of our concerns, so now we get to be part of the solution for people who are having challenges. I just want to put on the record that one of the most significant changes Senator Cannizzaro agreed to was to put this benefit under the structure of the FMLA. This is something that all employers deal with already, so it made it a lot easier for employers to address because it is a structure that is already in place and it does not create a whole, entirely different system of record keeping or anything like that.

Paul J. Moradkhan, Vice President, Government Affairs, Las Vegas Metro Chamber of Commerce; and representing The Chamber, Reno-Sparks-Northern Nevada; and Nevada Federation of Independent Businesses:
I am also speaking on behalf of the Reno-Sparks Chamber of Commerce and the Nevada Federation of Businesses, who could not be here today. As Ms. Grimmer indicated, the Las Vegas Chamber was originally in opposition to this bill, but after working with Senator Cannizzaro the Chamber is pleased to be able to remove its opposition along with the

other groups I have mentioned. Our focus on this bill was sections 1 through 7. That was what we worked on with the Senator to address our concerns and the burdensome components on employers, but also finding the right balance to address the needs of employees when they are in these unfortunate situations. I just want to clarify, as we did in the Senate, that the Chamber had no issues with sections 8 and 9; that is out of our wheelhouse because we focus on employment issues. The Chamber is pleased to be able to remove its opposition from this bill on the second reprint.

Alexis Motarex, Government Affairs Coordinator, Nevada Chapter, The Associated General Contractors of America, Inc.:
We, too, are neutral on S.B. 361 (R2) and appreciate everything that Senator Cannizzaro has done to address our concerns. She has been a pleasure to work with. There is still one issue that we would like clarification on. I have talked to the Senator about it and she is amenable, but in section 7, subsection 1(d), it currently reads or could be interpreted that someone who commits an act of domestic violence in the workplace would be protected by this bill. I do not believe that is the intent, so we are proposing language to strike section 7(d) entirely as it is written and replace it with language that says that the act of violence is committed against an employee in the workplace of the employee. We want to make perfectly clear that we are protecting the employee.

Chairman Yeager:
Thank you for your testimony, and it is nice to see the three of you here in the Assembly Committee on Judiciary. We have ten days left and we have some new faces, so thank you for joining us this morning. Is there anyone else here in the neutral position?

Bryan Wachter, Senior Vice President, Public and Government Affairs, Retail Association of Nevada:
Today is day 110 and this is my first time in front of Judiciary, so I appreciate the opportunity. The Retail Association is now neutral on this bill. We are pleased, as well, to be able to take ourselves out of the opposition side. We would note that, with the late hour, any more substantial changes are going to make it difficult for us to maintain that neutrality with our position. As it stands now, in the second reprint, we are neutral.

Chairman Yeager:
Thank you, it was good to see you here in Judiciary. Is there anyone else in the neutral position? [There was no one.] Senator Cannizzaro, would you like to make any closing remarks?

Senator Cannizzaro:
I want to note a couple of things very quickly. With respect to the violation of the temporary protective order, I want to ensure that the Committee understands that this amendment is intended to address intentional violations. This is not an accidental, "I happened to be at Walmart and I ran into this person who I have a protective order against and I immediately walked away." This bill addresses an intentional violation where the violator is seeking someone out. That is where we are seeking to put this increased penalty. I disagree with

statements that this is a simply strict liability and that there are no defenses to this. I would note that in order for somebody to violate a protective order, they have to be properly noticed and served with that particular protective order, we have to show that there is proof of service, and for an intentional violation, we have to prove that that violation was intentional. Obviously, there has to be an actual violation of the protective order. There are defenses to this; maybe not in the same ways that there might be defenses to any number of crimes, but different crimes are defended differently, and there are definitely defenses to this.

I would also note, briefly, that I was trying to look up ex post facto laws per Chairman Yeager's request. We have certain crimes here in Nevada that are enhanceable, even based upon a prior conviction from another state. For example, a person commits the crime of burglary in another state and then commits the crime of burglary in Nevada. At the time that they were sentenced in the other state, they were not advised that if they ever traveled to the state of Nevada they may be convicted of an enhanced penalty; certainly, that does not violate ex post facto. My brief recollection of ex post facto—and I am happy to get additional information as I am sure everyone on this Committee will probably do the same—is that it definitely has to relate to conduct that occurred. We are talking about enhancing a penalty, which this Legislature does all the time. We would not be going back and saying for that previous crime that you committed, now we are going to retroactively enhance that penalty. The enhancement would only apply to a new crime that is committed. That is just my basic understanding of ex post facto; it has been a while since I have argued ex post facto laws, but in my recollection and brief research here, I do not know that this would necessarily violate that.

I am happy to continue to have those conversations, and I have spoken with Mr. Piro about some potential amendments to alleviate some concerns. We are going to try to work them out. I am hopeful that we will be able to do that in the next day or so and get those to you, Chairman Yeager. Again, I just want to thank this Committee for hearing this bill and for allowing me to be here to present with you. I am open to any questions you may have in the meantime.

Chairman Yeager:
Thank you for being here, Senator. Thank you for your patience. Obviously, as you know, time is running short, so please do try to get any additional amendments to me as quickly as you can.

[A letter in support of S.B. 361 (R2) was submitted by Aviva Gordon, Legislative Committee Chairwoman, Henderson Chamber of Commerce (Exhibit J).]

At this time, I am going to close the hearing on S.B. 361 (R2). We are going to open our hearing on the final bill on the agenda today, Senate Bill 203 (1st Reprint), which revises provisions relating to domestic corporations.

Senate Bill 203 (1st Reprint): Revises provisions relating to domestic corporations. (BDR 7-71)

Mr. Malkiewich, thank you so much for your patience this morning. I know these hearings took a bit longer than anticipated, but we are happy that you are here with us. Please proceed when you are ready.

Lorne Malkiewich, representing U-Haul International, Inc.:
We requested Senate Bill 203 (1st Reprint) through the Senate Committee on Judiciary about a year ago. I know that time is short, so I will get right to the point.

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. With the large amount of litigation coming out of Delaware, in which two-thirds of the Fortune 500 companies are incorporated, there may be a tendency to look to those laws or other laws instead.

There is a bill-drafting problem as far as how we want the laws, as written, to apply. With this bill, we have gone into two sections and tried to clarify and reinforce some basic principles. We focused on the liability of directors and officers to take over situations, and then put in a legislative declaration that says something that we do not believe is at all controversial, which is given a choice between the plain meaning of a Nevada statute and laws of another state, that the Legislature intends that plain meanings apply.

I want to thank the members of the Business Law Section of the State Bar of Nevada, particularly Albert Kovacs and Jeffery Zucker. If you have any questions concerning the bill's language, I suggest you ask them or the representatives of the Nevada Justice Association (NJA) who worked with us to generate the first reprint. That is one of the reasons we are a little late getting over here. The Speaker and the Majority Leader were kind enough to give us a waiver to allow us to work out that language so they are now in support of the bill and, Chairman Yeager, in the interest of time, I would be glad to talk to any of the Committee members who have any questions.

Assemblyman Elliot T. Anderson:
We talked in my office and there was one question I wanted to get on the record, just to make eminently clear that there is no intent here to stop courts from using persuasive authority to help explain the plain language in our laws. Is that correct?

Lorne Malkiewich:
Thank you for that question. I would like to answer that question and just one other. There is no question that people will continue to cite Delaware law. Again, if you look at Delaware and the annotations to *Nevada Revised Statutes* (NRS) Chapter 78, you will see that there just is not a lot of Nevada case law. I think that the Legislature establishing the business court is going to help greatly in the manner in which Nevada business laws are enforced. When someone comes to court, if you have a provision that has not been interpreted in Nevada, or for which persuasive authority from Delaware, or California, or any other state is helpful to the court, it should be cited. The point of the bill is if that authority is contrary to the statute, then the statute should control over case law from another state (Exhibit K).

The other point I wanted to put on the record is that there is no retroactive effect in this bill. There are no issues that I know of, or cases that point to the need to change. This bill simply looks forward and gives our courts direction that the Legislature intends that the statutes mean what they say. These statutes are very good ones, and corporations that are incorporated in Nevada should be able to rely on them.

Assemblywoman Cohen:
You are going to have to bear with me, sir, because aside from not having a background in business law, I also accidentally left my copy of the bill in my office and I do not have my notes. As I recall when I read this bill yesterday, there was a section that had to do with the responsibilities or liabilities of the officers and the directors and whether or not they are liable if they are working in good faith and they receive bad advice. I thought that was somewhat odd because, for instance, as a regular person in your daily life, if your certified public accountant (CPA) gives you bad advice and you file tax returns based on that, you are still liable. You cannot just use, "Well, my CPA said that was correct." If your lawyer gives you bad advice, you cannot use that as a defense. That struck me as odd, but is that common in business practice?

Lorne Malkiewich:
I do not believe that we have changed the law in that area. I think one of the concerns here is personal liability. I am not sure if you are talking about the business judgment section or the constituency statute. In section 4, subsection 3, "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." That is existing law. What we have done in clarification here is personal liability of the directors and officers is specified under subsection 7, "the trier of fact. . ."—and this is one of the things that we worked out with the NJA—"determines that the presumption. . . has been rebutted," and then the existing language, "The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties. . . and Such breach involved intentional misconduct, fraud, or a knowing violation of law." This is not changing the law; this is clarifying that for personal liability you need to show those additional items.

The business judgment rule is just a starting point. If you have the presumption overcome, then you still can say that we want to undo this action of the corporation, but you do not have the personal liability. This is important, because if a Nevada corporation wants to encourage the best directors and officers to serve, one of the things we can say is that we have a statute that so long as you act in good faith and do not engage in intentional misconduct, fraud or knowing violation of the law, you will not be personally liable. That, again, is current, existing law.

Assemblywoman Cohen:
Thank you. I just received my copy and yes, it is section 4 and it is the fiduciary duty section with the new language, if that helps. Section 4, subsection 1, the new language is the fiduciary duties of the directors.

Lorne Malkiewich:
I believe this was just trying to make the language of the statute consistent with corporate law. I believe this was actually a cleanup. We were working with the members of the Business Law Section, and the previous language, "the directors and officers shall exercise their respected powers in good faith with a view to the interests of the corporation." If anything, I believe this is indicating that they have a fiduciary duty to do, so I would think this would be strengthening the law in that regard. I apologize; this was not language that I had looked at as being significant.

Assemblywoman Cohen:
Okay, thank you.

Chairman Yeager:
Are there any other questions from Committee members? [There were none.] Is there anyone in support of S.B. 203 (R1)? If so, please come to the table here in Carson City or in Las Vegas.

Austin Slaughter, representing Las Vegas Metro Chamber of Commerce:
We wanted to be on record in support of this bill.

Chairman Yeager:
Thank you for your comments this morning. Is there anyone else in support of S.B. 203 (R1)? [There was no one.] Is there anyone opposed to the measure? [There was no one.] Is there anyone in the neutral position? [There was no one.] Mr. Malkiewich, do you have any concluding remarks? It looks like concluding remarks are waived. Thank you, again, for being here this morning and for your patience.

[A letter in support of S.B. 203 (R1) was submitted by Aviva Gordon, Legislative Committee Chairwoman, Henderson Chamber of Commerce (Exhibit L).]

I will go ahead and close the hearing on S.B. 203 (R1). Is there anyone who would like to give public comment, here in Carson City or down in Las Vegas? [There was no one.] I did want to note for the record that Assemblyman Hansen is absent and excused today. As you all may remember, his son is graduating from military school and Assemblyman Hansen is away on family business.

We do not have a meeting scheduled for tomorrow; we also do not have a meeting scheduled Monday. We do have a meeting scheduled Tuesday and as of now, we have one bill. Keep an eye out for what time the meeting will start on Tuesday; it depends on how many bills we have. We are adjourned [at 11:16 a.m.].

RESPECTFULLY SUBMITTED:

_____
Devon Isbell
Committee Secretary

APPROVED BY:

_____
Assemblyman Steve Yeager, Chairman

DATE: _____

EXHIBITS

Exhibit A is the Agenda.

Exhibit B is the Attendance Roster.

Exhibit C is a copy of a Nevada Supreme Court decision *LeCory L. Grace v. The Eighth Judicial District Court of the State of Nevada*, 375 P.3d 1017 (2016), presented by John T. Jones, Jr., Chief Deputy District Attorney, Legislative Liaison, Clark County District Attorney's Office; and representing Nevada District Attorneys Association.

Exhibit D is a proposed amendment to Senate Bill 368 (2nd Reprint), submitted by John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office.

Exhibit E is a letter dated May 23, 2017, in opposition to Senate Bill 368 (2nd Reprint) to Assemblyman Steve Yeager and members of the Assembly Committee on Judiciary, authored by Adam Paul Laxalt, Attorney General, Office of the Attorney General.

Exhibit F is a proposed amendment to Senate Bill 488 (1st Reprint), submitted by John T. Jones, Jr., Chief Deputy District Attorney, Legislative Liaison, Clark County District Attorney's Office; and representing Nevada District Attorneys Association.

Exhibit G is written testimony in support of Senate Bill 488 (1st Reprint), dated May 25, 2017, authored and submitted by Katie Ryan, Director, Communications and Public Policy, Dignity Health-St. Rose Dominican.

Exhibit H is a letter dated May 24, 2017, in support of Senate Bill 488 (1st Reprint) to Assemblyman Steve Yeager and members of the Assembly Committee on Judiciary, authored by Kimberly Mull, Policy Specialist, Nevada Coalition to End Domestic and Sexual Violence.

Exhibit I is written testimony in support of Senate Bill 488 (1st Reprint), submitted by Tess Franzen, Policy Coordinator, FREE International.

Exhibit J is a letter dated May 24, 2017, in support of Senate Bill 361 (2nd Reprint) to members of the Assembly Committee on Judiciary, authored by Aviva Gordon, Legislative Committee Chairwoman, and Amber Stidham, Director of Government Affairs, Henderson Chamber of Commerce.

Exhibit K is a document titled "Senate Bill 203 Clarifying Nevada Corporate Law," presented by Lorne Malkiewich, representing U-Haul International, Inc.

Exhibit L is a statement dated May 22, 2017, in support of Senate Bill 203 (1st Reprint) to members of the Assembly Committee on Judiciary, authored by Aviva Gordon, Legislative Committee Chairwoman, and Amber Stidham, Director of Government Affairs, Henderson Chamber of Commerce.

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK, Plaintiff(s), vs. ROBERT CHUR, Defendant(s).	CASE NO: A-14-711535-C DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 11, 2108

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: ALL PENDING MOTIONS

APPEARANCES:

For the Plaintiff(s): DANIEL S. CEREGHINO, ESQ.
BRENOCH R. WIRTHLIN, ESQ.

For the Defendant(s): J. WILLIAM "BILL" EBERT, ESQ.
ANGELA T. OCHOA, ESQ.
GEORGE F. OGILVIE III, ESQ.

RECORDED BY: BRYNN GRIFFITHS, COURT RECORDER

LAS VEGAS, NEVADA; THURSDAY, OCTOBER 11, 2018

[Proceedings commenced at 10:13 a.m.]

THE COURT: And I thank everyone for your patience. You were -- I wanted to give you guys the most time this morning because your legal issues were fairly meaty. So thank you for your patience in waiting.

Let's take appearances from the right -- your right to left.

MR. CEREGHINO: Good morning, Your Honor. Daniel Cereghino, 11534, on behalf of plaintiff.

THE COURT: Thank you.

MR. WIRTHLIN: Good morning, Your Honor. Brenoch Wirthlin on behalf of plaintiff.

THE COURT: Thank you.

MS. OCHOA: Good morning, Your Honor. Angela Ochoa on behalf of the Re Corp. defendants.

THE COURT: Thank you.

MR. EBERT: Good morning, Your Honor. Bill Ebert on behalf of the Re Corp. Defendants.

THE COURT: Thank you.

MR. OGILVIE: Good morning, Your Honor. George Ogilvie on behalf of the Uni-Ter defendants and U.S. Re.

THE COURT: Thank you very much. We --

MR. CEREGHINO: Real quick, Your Honor, if I could just get rid of my gum.

THE COURT: Yes, of course.

MR. CEREGHINO: Sorry. Thank you.

THE COURT: All right. Were there any other preliminary matters?

So this is -- first, we have the Board of Directors' Motion for Judgment on the Pleadings, then we have a countermotion by the plaintiff, and then a motion to strike. I think we can take them all together.

Ms. Ochoa, does that work for you or do you wish to take them separately?

MS. OCHOA: Your Honor, I wish to take them separately. I'd like to do the motion to strike first, then the motion for judgment on the pleadings, and then the motion for summary judgment.

THE COURT: Very good.

MS. OCHOA: I think if we do that, then, you know, if the motion to strike is granted, then the countermotion is moot.

THE COURT: Yeah.

MS. OCHOA: Okay.

THE COURT: So let's -- everyone in accord that we will take the motion to strike first?

No objection. Thank you.

MS. OCHOA: So, Your Honor, when I received the opposition and countermotion for the summary judgment, I wasn't particularly concerned. Yes, the subject matter on the countermotion did not cover the same topic subject as my motion,

and it irked me a little bit that here I was, with my motion for judgment on the pleadings, about a legal standard fairly short in length.

I gave the plaintiff two extensions, moved my hearing as a professional courtesy, and then I was slapped with a countermotion for summary judgment on issues of fact, where we were going to discuss facts. That's not the same topic. That's not the same subject as my motion.

But I was ready to proceed. It really -- I really didn't start thinking about this motion the strike until I noticed in the plaintiff's countermotion that there were Bates stamp numbers that they were referring to that I had never seen before, that just -- it -- I had to look for them, and they were nowhere to be found.

In the countermotion, it indicated that there were at least 8,000 pages that they were -- they had in their possession that had not been disclosed. And the subject of that countermotion was there is no evidence, Your Honor. There is no evidence to support the director defendant's position. Well, I don't know that. There's 8,000 pages that you haven't provided to us.

You know, it's not fair, it flies in the face of justice, and it's almost borderline fraud upon the court. In a recent case called Valley Health Systems v. The Estate of Jane Doe, and that's 134 Nev. Advanced Opinion 76 issued on September 27, 2018.

THE COURT: I'm familiar with it.

MS. OCHOA: Right. It states that if you come to this Court

and you say there's no evidence, but you've been withholding those documents, that's a fraud upon the Court.

Now, I don't know if that's what arises to an -- I don't believe that that's what's happening here. I don't know that, though. Because after I filed that motion to strike, I was served with 22,000 pages of documents that I had not yet received.

And that was just served last week Thursday. And so I haven't had a chance to look at them. I don't know if there's something in there that is evidence to support my director defendant's position, but all that aside, it is the plaintiff's burden to show that they complied with EDCR 2.20. And (f), we talked about how it's not the same topic; it's not the same subject as my motion.

EDCR 2.20(g) says that a movant must provide courtesy copies five days before the hearing. I'm sure they didn't do that, because (h) also says that a reply must be filed five days before the hearing.

Now, I know they filed a reply just yesterday. The rule also says that in order before -- in order to file an untimely reply, leave must first be granted, and that didn't happen here.

So, you know, the fact that a reply has to be filed to a countermotion just shows that this was not a proper countermotion. That's not what's contemplated in EDCR 2.20, and thus we request that the motion -- the countermotion for summary judgment be stricken altogether.

THE COURT: Thank you. And before I hear the

opposition, did any other defendant wish to weigh in?

MR. OGILVIE: No, Your Honor.

MR. EBERT: Your Honor, I'm co-counsel with Ms. Ochoa.

THE COURT: Very good.

Then the opposition, please.

MR. CEREGHINO: Thank you, Your Honor.

So real quick, the subject matter is not what defendants present. The subject matter is liability. So our countermotion is absolutely on the same subject as the 12(c) motion. To say that our countermotion has to be on specifically the legal standard, well, number one, it is, because it incorporates it into the discussion, but number two, that's called the opposition. So we did that. But so the real issue is the subject matter is liability, personal liability. It's not this narrow reading of 78.138. The broad issue is liability. So our position is it is on the same subject matter.

Having said that, we note that on the issue of time, we offered additional time for whatever opposition to our countermotion. It was rejected. So I don't think timing should be an argument. It's a little disingenuous when we, in fact, recognized, hey, countermotion here, there's a lot here, take whatever time you need. And they just say no. Well, that's the bed they chose. They can lay in it.

Now, with respect to documents, again, a little bit of a misleading position. The documents -- while the Bates number reference may have been to a set that wasn't produced, the

document itself was in their possession the whole time. And there have been many, many, many documents, millions produced in this case. So this notion after years of discovery that, oh, my gosh, we don't have this one document. We identify in our reply that, yes, in fact, they are -- or in the opposition to the motion to strike, yes, in fact, they've been produced elsewhere under different numbers. So mea culpa for not providing the right Bates number, but substantively, they have the document, and they have had it for years.

Now, finally, if Your Honor wants to give them additional time to go ahead and look through those documents, that's fine. So with that, thank you.

THE COURT: Thank you.

Mr. Wirthlin, did you have anything?

MR. WIRTHLIN: No, Your Honor. Thank you.

THE COURT: And the reply, please.

MS. OCHOA: Your Honor, there was never a request to see if this hearing would be moved. There's no email. I certainly didn't take a call. I did not have a call asking me if I wanted to move the motion for judgment on the pleadings. I think the Uni-Ter defendants asked me, but we have depositions coming forward and so I wanted to get this matter heard.

I did advise them that I thought the countermotion was improper at the time, but there was no one asking us to separate and parse out these issues. This idea that I've had 22,000 pages in my

possession this whole time, that's -- I don't know that to be true. I just got them last Thursday.

And this idea that somehow all of these emails that they're providing in their countermotion is something that I had in my possession, again, I just didn't have the time to look through them. You know, I think that's pretty disingenuous.

If you look at -- I want to say it was Exhibit 16 that they point to -- in order to say that I have Exhibit 16 in my possession, they took the body of an email from a U.S. Re production, and they took attachment from their production. So they took two separate documents, put them together, and said that's the same document that was in the Curtis Sitterson emails. It's just beyond the pale.

But, you know, if the Court -- I request that the Court strike the motion as previously.

THE COURT: Thank you.

The matter is submitted. This is the Board of Directors' Motion to Strike the Plaintiff's Countermotion for Summary Judgment, order [indiscernible] in time. I'm going to grant it for the following reasons: I take a dim view -- and it's not to be critical of anyone, but dispositive motions as a countermotion are very difficult to process for me. I'm concerned about the due process to all parties. And in this case, I don't take any offense to the fact that a countermotion is filed. But even if a motion for summary judgment had been filed and a late production was made after an opposition was due, I would consider under 56(f), the fairness to the responding

party. So I'm going to grant the motion to strike.

If the plaintiff believes you have the grounds for a summary judgment, then tee it up and give them the chance to respond, make sure they've had a chance to review all of the documents. But it's hard to ask the parties to respond in a vacuum. So I'm going to go ahead and grant the motion to strike, without taking -- without any criticism of the fact that a countermotion was made, because very often in summary judgment motions, if it is based on the law and the facts are determined, one side is entitled to win. And I understand that. This isn't one of those, in my opinion, with regard to this issue. So I'll go ahead and grant the motion to strike.

Where does that take us now?

MS. OCHOA: The Motion for Judgment on the Pleadings, Your Honor.

THE COURT: Very good.

MS. OCHOA: The -- so this is your -- this is our Motion for Judgment on the Pleadings. In 2017, the legislature clarified NRS 78.138 by way of its preambles to be clear to the courts that they must apply the statute as written and the Courts can no longer look to other jurisdictions to supplant the plain language of NRS 78.138.

Now, the plain language states that in order for a director or officer to be personally liable for breaching his or her fiduciary duties, he or she must have committed an intentional misconduct, fraud, or a knowing violation of the law.

The motion -- thus, the plaintiffs must prove that the director defendants are not just protected by the business judgment rule or not protected by the business judgment rule, but they also committed that fraud. This is something more than gross negligence, and gross negligence is all that is pled in the third amended complaint. This motion is not about the business judgment rule. We are not seeking for this Court to make a determination that the business judgment rule protects our clients. And for purposes of this motion, we can also assume that the director defendants committed gross negligence. We are asking for this Court to look at the pleadings, and assuming all of the facts to be true, to determine that as a matter of law, my clients cannot be personally liable for their alleged errors and omissions. And that's because NRS 78.1387 says there must be more than gross negligence.

My clients must have done something that arose to fraud, intentional misconduct, or knowing violation of the law. Nothing is pled to support any of that. There's no cause of action called fraud. There's no cause of action called intentional misrepresentation. There's no facts that arise to the level of fraud or intentional misconduct. There's not even conclusory allegations where you see the word fraud, intentional misrepresentation, or anything like that in the third amended complaint.

What there is, is conclusory allegations of gross negligence, but that's not sufficient to trigger a personal liability.

The policy behind NRS 78.138 is clear, and that is to provide more protections to officers and directors in Nevada. And the legislature history is also clear that the intent of the 2017 amendments is not to undo existing case law, but to make sure that courts do not overstep and create law inconsistent with the plain language of the statute.

The plaintiff has not come to this court with any case law indicating that courts since 2017 have read the amendment in anything less than how it has been presented to you by us.

What they have done, again, is to try to confuse and mishmash the business judgment rule with the personal liability rule by presenting you cases where there's a discussion of the application of the business judgment rule, but that's not what we're talking about here.

Like the Wynn case we presented, that case is solely about whether a court must look at the substance of the advice or the information. It was about whether you could breach the attorney/client privilege when the business judgment rule is asserted. It does not interpret the personal liability aspect of 78.1387.

The plaintiff makes another argument. It sounds like they're conceding that under 78.1387 that they have to plead a knowing violation of the law. And they said that they did that. But -- and they also said, but we don't have to plead that with specificity. But that's not really correct.

If you look at the third amended complaint, again, there is

no reference to a knowing violation of the law, and in In Re: Amerco Derivative Litigation, it specifically says, In claims where the breach of fiduciary duty is pled, because the plaintiff must also prove intentional misconduct, fraud, or knowing violation of law, the fraud must be pled with particularity pursuant to NRCP 9(b).

Plaintiff also makes this argument that fraud, intentional misconduct, only apply to the breach of duty of loyalty. But that is also wrong. If you look at In Re: Amerco Derivative Litigation, it specifically acknowledges that pursuant to NRS 78.1387, to show that a director breached his or her fiduciary duty, a shareholder must prove that the Directors' act or failure to act constituted a breach of his or her fiduciary duties, and that involved a knowing violation of the law, intentional misconduct. The Court does not confine it just to the breach of the duty of loyalty. It's not specific. It's duties, plural. And that's what the plain language of 78.1387 says as well.

There's some really irrelevant arguments and comments. And I think I adequately address them in the briefs, but if you have any questions, I'm happy to take them now.

THE COURT: I don't. Thank you.

Anything from other defendants before I hear the opposition?

MR. OGILVIE: No, Your Honor.

THE COURT: The opposition, please.

MR. WIRTHLIN: Thank you, Your Honor. I'd like to tell the Court basically -- and I appreciate the Court allowing us to go last, to

have a little bit of time to address these issues.

THE COURT: Well, it turned out that some of the other matters were lengthy. I thought I was doing you a favor, so --

MR. WIRTHLIN: That's okay. No, that's fine. We appreciate that.

I just want to hear three main points, in addition to what we put in the pleadings. The first is this Court has addressed the issues related to the business judgment rule a couple of times already, and we amended our complaint. We have a third amended complaint on file.

But the sole basis for their motion, as I understand it, is the -- an amendment in 2017. First of all, that amendment is not retroactive, and we'll show that. Secondly, even if it was retroactive, which it isn't, it doesn't address this issue with respect to liability, personal liability, directors and officers for the breach of the duty of care.

And the Nevada Supreme Court in Shoen, as well as additional Nevada case law passed that point, as well as reaffirming case law after 2017 has all affirmed that for personal liability to be in effect for directors and officers for breach of the duty of care, that standard is different.

And finally, Your Honor, we do allege -- and opposing counsel mentioned this, that we've made this argument -- we do allege in our complaint that there was no knowing violation of law by the directors and officers.

We had certainly -- and I'll get to those in a minute, but just briefly, with respect to the fact that the statute is not retroactive, Your Honor, we would point to the legislative history, which is instructive -- and the directors opened the door to that and mentioned the legislative history, and it's perfectly appropriate to that.

The Nevada Supreme Court has determined that State v. Pullin, 188 P.3d 1079, you could absolutely look at this -- at the legislative history. In this case, Your Honor, I want to quote just one brief quote here, quote: The other point that I want to put on the record is that there is no retroactive effect in this bill. There are no issues that I know of or cases that point to the need to change. This bill simply looks forward, end quote. And those were in the May 25th, 2017, assembly judiciary committee minutes.

In addition to that, Your Honor, the Nevada law is very clear that statutes should be construed, prospective only -- prospectively only unless the language employed conclusively negatively negates that construction -- that's Clark City v. Roosevelt, 80 Nev. 530.

The language they cite to, and we'll get to this a little bit, isn't even about the amendment -- or rather the amendment that they address doesn't even touch on this specific issue, personal liability of directors and officers. It relates to other things, and really isn't a substantive amendment to any degree. So frankly, Your Honor, we submit the motion must be denied on that ground

alone.

Even if the statute or the amendment was retroactive, which it wasn't, it doesn't say what they say it does. There's a couple of cases that they cite, and those cases quote portions of the statute directly. And they say, well, that supports our interpretation of the statute. We would submit, Your Honor, it -- they do not. Parametric and Newport are the two cases that they rely on. And those were motions to dismiss -- where motions to dismiss were denied to try to knock out director and officer liability. Shoen in the law in Nevada and effectively what they're asking this Court to do is overrule Shoen. Shoen says, With -- With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers. Then it distinguishes: 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 knowing violation of the law.

FDIC v. Johnson, Your Honor, in case there was any doubt, the federal district of Nevada says very clearly, quotes that language from Shoen and then says, However Shoen -- let me put it -- one sentence before that -- "The business judgment rule -- they're talking about duty of care -- The business judgment rule typically requires -- excuse me -- back up -- one fiduciary duty of directors and officers is the duty of care. With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers, citing to Shoen.

Then it says, The business judgment rule typically requires that breach of fiduciary duty involve intentional misconduct, fraud, or knowing violation of the law. However, Shoen makes clear that gross negligence suffices and further [indiscernible] is not required.

And Your Honor, I have a handout. I think we asked the Court to take judicial notice of it, but I didn't specifically include it as an exhibit, I believe. If the Court would like to look at it or I could just read it into the record.

THE COURT: What is it?

MR. WIRTHLIN: It's -- Your Honor, I apologize. It is Senate Committee Minutes from April 10, 2017. May I approach?

THE COURT: No. But you can read it into the record.

MR. WIRTHLIN: Just read it? Okay.

That basically says very clearly on page 3, there was a proposed amendment to state the following: Simple negligence alone is insufficient to rebut this presumption -- business judgment rule -- as provided in subsection 6 rebuttal of this presumption alone is also insufficient to establish the individual liability of a director or officer. That language was stricken.

So there was an attempt to change that, based on Shoen. And I think it's probably fair to say, as the directors point out, there were some individuals who were upset about the language in Shoen, but that is the law in Nevada. And it has survived the amendment, as we point out in Wynn, Your Honor. Wynn resorts case, which is postamendment, where the Court says very clearly,

quote: Either that decision was the product -- in other words, you can find liability -- either that decision was the product of fraud or self-interest or that the director failed to exercise due care in reaching that decision.

And effectively, from a practical standpoint, if you look at what their argument is, as I understand it, and I'm sincerely trying to give it a fair reading, that if we -- a director officer could be entirely grossly negligent, do absolutely nothing, and liability would increase due to their lack of compliance with the duty of care until they reached a point of ignorance where they literally can't know what their duties were, and then they would somehow be absolved of liability.

Your Honor, that's not what the statute says or what the Nevada Supreme Court has held.

And finally, even if we were required to comply with that standard, Your Honor, we would submit that the complaint very clearly and with substantial specificity does make those allegations. And I would like to read just a few brief quotes from the complaint. These are certainly not an exhaustive list. Paragraph 104, on information and belief at this time the board knew that reliance on information presented to it by or at the direction of Uni-Ter/U.S. Re could not be relied on.

Your Honor, NRS 78.1382 states specifically that a director officer cannot and is not entitled to rely on information when it has reason to know that reliance is inappropriate. That is a knowing

violation of the law. Paragraph 105: Despite this knowledge regarding the board -- of the board, regarding the wholly inadequate and inaccurate information provided by Uni-Ter, paragraph 121, 145. And then the claims themselves, paragraph 228: Further, the board was again made aware of the dire financial position it allows the LLC to reach due to its failure to exercise a slight degree of care.

Paragraph 30, we allege it multiple times: The board was in a position to see this information and knew that it had an obligation to do so. Further, it knew that the information provided by Uni-Ter U.S. Re and others is incomplete and inaccurate. It also knew that on at least several occasions that it was not receiving sufficient information.

It goes on, Your Honor, paragraph 232, as well alleges those actions that constitute knowing violation of the law.

So we would certainly -- if the Court felt that it was an appropriate request and reserve the right to amend, that deadline has not passed. If the Court felt like it was a close question, we would submit that the Court would defer it until trial under NRCP 58, but Your Honor, I don't think that needs to happen here. I think it's clear that and incorporating the papers, the duty of care has been adequately pled -- a breach of that duty by the directors and officers.

And we would ask in denying the Directors' motion, Your Honor, that Your Honor can put this issue to bed in the sense that it make a ruling that -- which I believe has inherently already been made, but expressly, that if the facts alleged in the third

amended complaint are proven at trial, the directors and officers are personally liable.

Thank you, Your Honor.

THE COURT: And the reply, please.

MS. OCHOA: Yes, Your Honor.

Do you want to take this?

MR. WIRTHLIN: Oh, thank you.

MS. OCHOA: Your Honor, on this issue of Shoen, if you look specifically -- this idea that Shoen says that the fiduciary duty of loyalty is the only duty that the plaintiff must show is also subject to intentional misconduct, fraud, or knowing violation of the law, that's not what it says.

It says, With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers. It doesn't say that they're personally liable.

In our interpretation of 78.138, it says you breach the fiduciary duty, plus you must show fraud, intentional misconduct. That's not what Shoen is saying. Shoen is just saying that gross negligence overcomes the breach of the fiduciary duty.

So again, Shoen is not on point to what -- to the interpretation of what we're seeking. And even if you wanted to look at what the Court was looking at in Shoen -- if you notice in 2 -- this case was from 2006, but if you look at the footnote, Footnote 60 --

THE COURT: I just pulled it up.

MS. OCHOA: -- what they're talking about --

THE COURT: So I'll take -- give me a minute, and I'll take a look at that. 60?

MS. OCHOA: Footnote 60. They're actually talking about the amendments from 2001. They're looking at 78.1387, while -- and the operative language is, while this section applies only to claims arising after June 15, 2001.

Since 2003, that statute has been amended twice, 2003 amendments and the 2017 amendments. And they all say, Since October of 2003, this is the standard that you apply. So we don't think that state -- that Shoen is on point.

Your Honor, again, so the only knowing violation that I heard is this -- is the alleged you weren't supposed to rely on your experts, that you knew your experts are wrong. Well, that's just built into the same 78.138, but you're not supposed to breach your fiduciary duty. I'm sure that's not what the knowing violation of the law was intended to be. So for those bases, we think that the motion should be granted.

THE COURT: Thank you.

This is the Board of Directors Defendants' Motion for Judgment on the Pleadings pursuant to NRS -- I'm sorry -- NRCP 12(c), the motion will be denied for the following reasons: This is the same issue I looked at in 2016. And while I realize that 78.138 was amended in 19 -- or 2017, I believe that the Shoen v. SAC is still the controlling law, and that's even with the decision that came down in 2017, Wynn Resorts v. Eighth Judicial District Court, 399 Pacific 3rd

334.

So there's -- in my mind there's no new analysis.

Did you have something to add?

MS. OCHOA: Oh, no, no, Your Honor.

MR. EBERT: Beg your pardon, Your Honor.

THE COURT: All right. So the same analysis that I used previously, I believe still is the applicable analysis. So the motion will be denied for the reason that we've already looked at it. So --

Did you have something to say, you guys?

MS. OCHOA: No, no.

THE COURT: No. Okay. Very good.

MR. WIRTHLIN: Thank you, Your Honor.

THE COURT: So Mr. Cereghino and Mr. Wirthlin, if you would prepare the order, I think actually Mr. Wirthlin --

MR. WIRTHLIN: Yes, Your Honor.

THE COURT: And with regard to the motion the strike, Ms. Ochoa, all I don't have you make sure that everyone has the ability to review and approve the form of those orders. And I see that you guys are set for trial next year. Would it do any good to send you to a settlement conference, guys?

MR. WIRTHLIN: We --

MR. CEREGHINO: We've tried.

MR. WIRTHLIN: Yeah. We -- we're certainly open to whatever defendants would like to address. We did do a mediation in July, I believe, and weren't able to resolve it. But that may

change. We'll see.

THE COURT: Yeah. Thank you all.

MR. WIRTHLIN: Thank you, Your Honor.

MR. CEREGHINO: Thank you, Your Honor.

THE COURT: Let me ask one last thing, there was a motion to associate on the 16th of October. If there's not going to be an opposition, I can go ahead and grant that and vacate to the [indiscernible].

MR. WIRTHLIN: No opposition, Your Honor.

MS. OCHOA: There's no opposition from us.

THE COURT: All right. So go ahead. The motion to associate will be granted. The heairing on October 16th, well, it's in chambers, but it'll be vacated. Go ahead and submit an order to that effect.

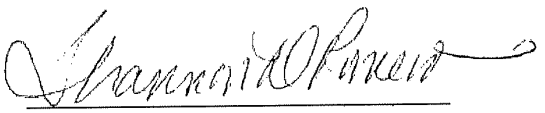
MR. WIRTHLIN: Thank you, Your Honor.

THE COURT: Thank you, both.

[Proceedings adjourned at 10:43 a.m.]

* * * * * * * *

ATTEST: Pursuant to Rule 3C (d) of the Nevada Rules of Appellate Procedure, I acknowledge that this is a rough draft transcript, expeditiously prepared, not proofread, corrected, or certified to be an accurate transcript.



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DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Plaintiff, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION; DOES 1-50, inclusive; and ROES 51-100, inclusive; Defendants.	Case No.: A-14-711535-C Dept No.: 27 **NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an Order Denying Director Defendants' Motion for Judgment on the Pleadings Pursuant to NRCP 12(c), was entered by the Court on November 2, 2018. A copy of which is attached hereto.

DATED this 7th day of November, 2018. **FENNEMORE CRAIG, P.C.**

By: */s/ Brenoch R. Wirthlin*
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Attorneys for Plaintiff Commissioner of Insurance For the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Fennemore Craig, P.C. and that on November 7, 2018, service of the foregoing **NOTICE OF ENTRY OF ORDER** was made on the following counsel of record and/or parties via the Court's electronic filing system as follows:

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DISTRICT COURT OF NEVADA

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Plaintiff, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION,; DOES 1-50, inclusive; and ROES 51-100, inclusive; Defendants.	Case No.: A-14-711535-C Dept. No.: XXVII **ORDER DENYING DIRECTOR DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO NRCP 12(c)** **Date of Hearing: October 11, 2018** **Time of Hearing: 9:30 a.m.**

This matter came before the Court for hearing on October 11, 2018; Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall and Eric Stickels' (collectively, the "Directors" or "Director Defendants") having filed their Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) ("Motion") on August 14, 2018; Plaintiff having filed its opposition to the Motion on September 19, 2018; the Director Defendants having filed their reply in support of the Motion on October 4, 2018; J. William Ebert, Esq., and Angela T. Ochoa, Esq., having appeared on behalf of the Director Defendants;

Brenoch Wirthlin and Dan Cereghino having appeared on behalf of the Plaintiff; George Ogilvie having made an appearance on behalf of defendants Uni-ter Underwriting management Corp., Uni-ter Claims Services Corp., and U.S. Re Corp., the Court having read and considered all filed pleadings regarding the Motion, having heard argument regarding the Motion, and being fully advised regarding the same, good cause appearing,

IT IS HEREBY ORDERED that the Director Defendants' Motion for Judgment on the Pleadings pursuant to NRCP 12(c) is DENIED. The Court finds the Motion deals with the same issue the Court addressed in 2016. And while the Court recognizes that NRS 78.138 was amended in 2017, the Court believes that *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006) is still the controlling law regarding Directors' personal liability, even with the additional case law that has come down from the Nevada Supreme Court in 2017, including *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334 (Nev. 2017).

DATED this 31 day of October, 2018.

Nancy L Allf
HONORABLE JUDGE NANCY ALLF

Submitted by:
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Brenoch Wirthlin and Dan Cereghino having appeared on behalf of the Plaintiff; George Ogilvie having made an appearance on behalf of defendants Uni-ter Underwriting management Corp., Uni-ter Claims Services Corp., and U.S. Re Corp.; the Court having read and considered all filed pleadings regarding the Motion, having heard argument regarding the Motion, and being fully advised regarding the same, good cause appearing,

IT IS HEREBY ORDERED that the Director Defendants' Motion for Judgment on the Pleadings pursuant to NRCP 12(c) is DENIED. The Court finds the Motion deals with the same issue the Court addressed in 2016. And while the Court recognizes that NRS 78.138 was amended in 2017, the Court believes that *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006) is still the controlling law regarding Directors' personal liability, even with the additional case law that has come down from the Nevada Supreme Court in 2017, including *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 399 P.3d 334 (Nev. 2017).

DATED this _____ day of October, 2018.

_____
HONORABLE JUDGE NANCY ALLF

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DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC.,

Plaintiff,

v.

ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION,; DOES 1-50, inclusive; and ROES 51-100, inclusive;

Defendants.

Case No. A-14-711535-C
Dept. No. XXVII

MOTION FOR RECONSIDERATION

Defendants, Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels (the "Director Defendants") by and through their undersigned counsel of record hereby move the Court pursuant to EDCR 2.24 for reconsideration from the Court's November 7, 2018 Order Denying Director Defendants' Motion for Judgment on the Pleadings Pursuant to NRCP 12(c) ("Order").

This Motion is made pursuant to EDCR 2.24 and is based on the attached Memorandum of Points and Authorities, all papers and pleadings on file in this action, and any oral argument this Court may allow.

DATED this 29th day of November, 2018

HOLLAND & HART LLP

/s/ J. Stephen Peek, Esq.

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Attorneys for Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL:

PLEASE TAKE NOTICE that the foregoing **MOTION FOR RECONSIDERATION** will be brought before Department XXVII of the above-entitled Court on the 8 day of January, 2019, ~~2018~~, at _____ ~~a.m./p.m.~~ In Chambers.

DATED this 29th day of November 2018

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Commissioner of Insurance for the State of Nevada, a receiver for Lewis & Clark, LTC Risk Retention Group, Inc. ("L&C"), asserted that a single piece of *dicta* from a 2006 Nevada Supreme Court case concerning demand futility creates a new claim for relief and undermines and overrides the plain language of NRS 78.138(7). Unfortunately, Plaintiff's overly simplistic argument invoked a red herring that distracted the Court from the real legal issue, which led to application of an erroneous legal standard for determining whether Plaintiff's Third Amended Complaint could survive a motion for judgment on the pleadings. The Court's Order denying the 12(c) Motion for Judgment on the Pleadings ("12(c) Motion") renders NRS 78.138(7) meaningless. Accordingly, the Court should exercise its discretion to rectify the error caused by Plaintiff's misrepresentations and grant the 12(c) Motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

Director Defendants 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, Plaintiff, as receiver for L&C, filed a complaint against the Director Defendants (among others), alleging gross negligence and deepening insolvency.

On December 11, 2015, the Director Defendants filed a 12(b)(5) Motion to Dismiss the claims against them based on the fact that the complaint failed to state allegations sufficient to hold the Director Defendants individually liable under NRS 78.138(7) (i.e., that the Director Defendants had committed a breach of fiduciary duty arising out of intentional misconduct, fraud, or knowing violation of the law). This Court granted in part and denied in part the Motion. The Court dismissed the gross negligence claim with leave to amend on the basis that the factual allegations supported only simple negligence, not gross negligence. Presumably recognizing the requirements of NRS 78.138(7), the Court further stated that "[i]ntentional conduct[1] would have

[1] The Director Defendants are uncertain as to whether the Court was referring to the requirement to plead "particularized facts" to support a claim for breach of fiduciary duty or that it is a

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to be pled in order to proceed on that gross negligence cause of action." (Jan. 27, 2016 Tr. at 7:22-24). The 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." (*Id.* at 8:4-5).

On April 1, 2016, Plaintiff filed the First Amended Complaint. On April 18, 2016, the Director Defendants 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. While that Motion was pending, Plaintiff filed both a Second Amended Complaint and a Third Amended Complaint. The Director Defendants supplemented their briefing on the Motion, and a hearing was held on September 15, 2016 to decide the Motion, which was then deemed directed against the operative Third Amended Complaint. Having found that Plaintiff stated a claim for gross negligence, the Court summarily denied the Motion.

On October 21, 2016, the Director Defendants filed their Answer to the Third Amended Complaint and on August 14, 2018, filed the 12(c) Motion, which argued that, even accepting the allegations in the Third Amended Complaint as true, Plaintiff could prove no set of facts sufficient to hold the Director Defendants individually liable for gross negligence. Relying on the same analysis that it employed in 2016, although without reference to its prior statement that intentional conduct must be pleaded for the gross negligence claim to survive, this Court denied the 12(c) Motion.

This Motion for Reconsideration requests the Court to reconsider its denial of the Director Defendants 12(c) Motion based on a misinterpretation of the applicable statutory and case law.

III. ARGUMENT

A. Legal Standard

Although the granting of a motion for reconsideration is appropriate "in very narrow circumstances," *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976), under EDCR 2.24, "a district court may reconsider a previously decided issue if substantially different

transcription error and should read "intentional misconduct" in recognition that any claim for breach of fiduciary duty requires a plaintiff to plead intentional misconduct.

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evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolley, Urga & Wirth*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). *See, e.g., Schueler v. Mgm Grand Hotel*, 2018 Nev. Dist. LEXIS 275 (Nev. Dist. Ct. Mar. 23, 2018) (granting motion for reconsideration of order denying motion for summary judgment).

B. The Court's Order Was Clearly Erroneous and Merits Reconsideration

Respectfully, the Court's Order denying Director Defendants' 12(c) Motion was clearly erroneous, as it misapprehended the law regarding the pleading standard for imposition of individual liability on corporate officers and directors. This misapprehension of the law is evident from the Court's statement at the October 11, 2018 hearing that "*Shoen v. SAC* is still the controlling law" with respect to pleading standards for individual director liability and likely stems from Plaintiff's repeated misinterpretation and misrepresentation of a single piece of *dicta* from the Nevada Supreme Court's decision in *Shoen*, a demand futility case. 122 Nev. 621, 137 P.3d 1171 (2006). *Shoen*, in turn, relied on a Delaware Supreme Court case which likewise involved the proper standard to demonstrate demand futility, *Aronson v. Lewis*, 473 A.2d 805 (Del. 1983). Neither *Shoen* nor *Aronson* addressed whatsoever the pleading standard for imposition of individual liability on corporate directors, and therefore *Shoen* simply cannot be controlling law on the subject nor can any *dicta* in *Shoen* create a new theory of liability contrary to the plain language of NRS 78.138(7). Whatever limited relevance the *Shoen dicta* could potentially have is eviscerated by the plain, unambiguous language of the statute governing imposition of individual liability on directors, NRS 78.138(7).

When properly analyzed in light of the standard enunciated in NRS 78.138(7) and Nevada and Delaware case law in the post-*Shoen*, post-*Aronson* world, it is clear that Nevada law requires more than allegations of gross negligence or deepening insolvency to support individual liability of the Director Defendants. Plaintiff's Third Amended Complaint wholly fails to allege facts sufficient to support a finding of individual liability and should be dismissed as related to claims against the Director Defendants.[2]

[2] This applies equally to both Claim One for Gross Negligence and Claim Two for Deepening Insolvency. First, unlike some courts, Nevada courts have not affirmatively recognized an independent cause of action for "deepening insolvency." What's more, those courts that do

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1. NRS 78.138(7) unambiguously requires that a plaintiff plead intentional misconduct, fraud, or knowing violation of the law to proceed against corporate directors individually

NRS 78.138 broadly relates to the fiduciary duties of corporate officers and directors without distinction between the duty of care and the duty of loyalty. Subsection (7) of the statute provides the clear standard for individual liability on corporate directors or officers for an act or failure to act, beginning with the default proposition that "in each case filed on or after October 1, 2003," a corporate director "is **not individually liable** . . . **unless**" three conditions are met. (Emphasis added).

First, the trier of fact must determine "that the presumption established by subsection 3 [the business judgment rule presumption] has been rebutted." NRS 78.138(7)(a). Subsection (3) states, in relevant part,

> [D]irectors 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. **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 except under circumstances described in subsection 7**.

(Emphasis added). Similarly, a plaintiff must plead with particularized facts that the defendants are not entitled to the protection of the business judgment rule. *See McFarland v. Long*, 2017 U.S. Dist. LEXIS 168998 at *12 (D. Nev. Oct. 6, 2017) ("To overcome the presumptions afforded by the Nevada business judgment rule, shareholders must plead particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decisions.") (Internal quotation marks and

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affirmatively recognize a claim for deepening insolvency maintain that only "fraudulent conduct will suffice to support a deepening-insolvency claim" and "negligence cannot sustain a deepening-insolvency cause of action." *In re CitX Corp., Inc.*, 448 F.3d 672, 681 (3d Cir. 2006). Moreover, even if deepening insolvency were a cause of action in Nevada, it exists as "a collateral cause of action" to Plaintiff's Gross Negligence claim, as the Court recognized in the January 27th, 2016 hearing. (Jan. 27, 2016 Tr. at 8:4-5). Thus, if Plaintiff's Gross Negligence claim fails, so too must their claim for Deepening Insolvency. Finally, assuming for the sake of argument that deepening insolvency were an independent cause of action that can be maintained separate and apart from any other claim, Plaintiff must still rebut the business judgment rule and satisfy NRS 78.138(7)(b) in order to bring a claim of deepening insolvency against the Director Defendants in their individual capacities. *See infra* 5-7. Plaintiff has failed to do so and thus both claims fail as a matter of law.

citation omitted). Notably, the bolded portion above was added to subsection (3) in the 2017 amendments to NRS 78.138 not to change existing law but to make it clear that even if the business judgment rule presumption is overcome, the remaining requirements of subsection (7) must be met to hold a director or officer individually liable.[3] The underlined portion above unambiguously provides that such requirements apply not only to an officer's or director's act, but also his or her failure to act.

Second, the plaintiff must prove that the director's "**act or failure to act** constituted a breach of his or her **fiduciary duties** . . . ." NRS 78.138(7)(b)(1) (emphasis added). This subsection of the statute again makes it clear that it applies to both an act and a failure to act. Further, the statute requires pleading and proof that such act or failure to act constitutes a breach of fiduciary duty without differentiating between the various types of breach of fiduciary duty (i.e., the duty of loyalty and the duty of care).

Third, the plaintiff must plead and prove that the breach of fiduciary duty "involved intentional misconduct, fraud or a knowing violation of the law." NRS 78.138(7)(b)(2). Each of these involves a level of *scienter* higher than and distinct from the *scienter* required to plead and prove gross negligence and must be plead by particularized facts. *See Israni v. Bittman*, 473 Fed. Appx. 548 (9th Cir. 2012) (recognizing NRS 78.138(7)'s requirement that a complaint contain "particularized facts showing . . . intentional misconduct, fraud or a knowing violation of the law.").

Importantly, all three of these conditions must be met in order for individual liability to be imposed. *See generally* NRS 78.138(7) (using the conjunctive "and" between subsection 7(a), 7(b)(1), and (7)(b)(2)). At the pleading stage, a plaintiff is thus required to plead factual allegations sufficient to support all three conditions. *See Bratcher v. City of Las Vegas*, 113 Nev. 502, 507, 937 P.2d 485, 489 (1997) (under 12(b)(5) or 12(c), a complaint will be dismissed if "it appears

[3] The lack of change in existing law was recognized by the Nevada Supreme Court in *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.*, 2017 Nev. LEXIS at *20, 399 P.3d 334, 342 n.5 (2017) ("the amendments to NRS 78.138 do not change our conclusions."), and by this Court at the October 11, 2018 hearing, Oct. 11, 2018 Tr. at 20:19-21:8 (recognizing that the 2017 amendments did not change the Court's prior analysis).

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beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief.") (Internal citations omitted).

2. The Director Defendants' 12(c) Motion was meritorious and should be granted

Director Defendants' 12(c) Motion is grounded on the fact that, even taking Plaintiff's allegations in the Third Amended Complaint as true, as this Court is required to do, Plaintiff failed to make any allegations, let alone sufficient allegations, to support an ultimate finding of breach of fiduciary duty coupled with intentional misconduct, fraud, or knowing violation of the law. *See generally* 12(c) Motion. Rather, Plaintiff's Third Amended Complaint is replete with bloated, conclusory allegations based solely on "information and belief" and speculation[4] rather than particularized facts necessary to support a breach of fiduciary duty claim arising from intentional misconduct, fraud, or knowing violation of the law under NRS 78.138(7), *see In re Citigroup Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 125 (Del. Ch. 2009) (standard for assessing oversight liability and duty of care requires "properly alleging particularized facts that show that a director *consciously* disregarded an obligation to be reasonably informed about the business and its risks or *consciously* disregarded the duty to monitor and oversee the business.").[5]

Plaintiff's arguments in opposition to the 12(c) Motion are essentially threefold: (a) the 2017 amendments to NRS 78.138 were not retroactive; (b) allegations of gross negligence can overcome the business judgment rule presumption, which, in its duty of care case, is sufficient to impose individual liability without additional allegations of breach of fiduciary duty and

[4] See, for example, paragraph 154 of the Third Amended Complaint, which alleges that at a February 2, 2012 Board meeting, the Director Defendants approved $480,000 in capital contributions based on a report of favorable claims activity from the President of Uni-Ter UMC, a third-party advisor to L&C. The Third Amended Complaint takes issue with the fact that "[t]he Minutes do not say what the alleged favorable claims activity was," and allege "[o]n information and belief, the Board failed to exercise the slightest degree of diligence and care [e.g., the Board was negligent] regarding this information and did not verify whether the report by [Uni-Ter UMC's President] regarding alleged 'favorable claims activity' was accurate or complete." The Third Amended Complaint is rife with similar allegations that fail to allege any meaningful breach of any duty owed to the corporation that would rise to the level of intentional misconduct, fraud, or knowing violation of the law.

[5] *Citigroup* has been favorably cited in Nevada. *See, e.g., In re Las Vegas Sands Corp. Deriv. Litig.*, 2009 WL 6038660 at *21-22 (Nev. Dist. Ct. Nov. 4, 2009) (citing *Citigroup* for the proposition that a showing of bad faith is a necessary condition to director oversight liability); *In re AMERCO Deriv. Litig.*, 127 Nev. 196, 232, 252 P.3d 681, 705-06 (2011) (citing to *Citigroup* for unrelated standard involving matters entrusted to corporate directors).

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intentional misconduct, fraud, or knowing violation of the law; and (c) even if allegations of breach of fiduciary duty and intentional misconduct, fraud, or knowing violation of the law were required, the Third Amended Complaint sufficiently pleads such allegations. Each of these arguments misses the mark and is a misstatement of the law and revisionism of the facts pled in the Third Amended Complaint.

a. NRS 78.138(7)'s requirements unambiguously apply in this case, regardless of retroactive effect of the 2017 amendments

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 of Nev.*, 2017 Nev. LEXIS at *20, 399 P.3d 334, 344 (2017). The Nevada Supreme Court has previously determined that "NRS 78.138 is unambiguous." *Id.* (interpreting interplay of business judgment rule and attorney-client privilege). Likewise, here, the plain language of the statute is clear and unambiguous: in any case filed after October 1, 2003, a plaintiff must plead and prove each of the three elements of NRS 78.138(7)(a)-(b) in order to hold a corporate officer or director individually liable. Resort to legislative history to explain the purpose or effects of the 2017 amendments is thus both unnecessary and forbidden by Supreme Court mandate. *See id.*[6]

Plaintiff's Opposition to the 12(c) Motion ignores the plain language of NRS 78.138(7) and cherry picks a single piece of legislative history – a statement by legislative lobbyist Lorne Malkiewich in the May 25, 2017 minutes – to support the claim that the 2017 amendments to the statute do not apply in this case, which was filed in 2014. (Opposition at p. 8). Mr. Malkiewich's statement that 2017 Nev. SB 203 had no retroactive effect cannot serve to override the clear language of the statute that it applies to "each case filed on or after October 1, 2003." This date-restrictive language existed in the pre-2017 version of the statute and survived the 2017 amendments. Had the Legislature wished to change the applicability of the statute to cases filed after its effective date, it could have done so. The fact that it did not leads to one clear conclusion:

[6] Director Defendants' 12(c) Motion included a section titled "A Brief Legislative History of NRS 78.138" to place the statute in context. Nothing in this section was intended to supplant the clear statutory language of NRS 78.138.

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the statute means what it says and applies in all cases filed on or after October 1, 2003, including this case.[7]

b. Allegations of gross negligence may be sufficient to overcome the business judgment rule presumption but are insufficient alone to support individual liability

In the Opposition briefing, Plaintiff overtly and intentionally collapses the three requirements to impose individual liability of officers and directors into a single requirement – "whether the subject board is even capable of raising the BJR's protections in the first place." (Opposition at p. 4). According to Plaintiff, in duty of care cases, if an officer or director has abdicated his or her responsibility to the corporation, the business judgment rule presumption does not apply, and the inquiry ends; individual liability is appropriate simply by virtue of the inapplicability of the business judgment rule presumption.

To support this assertion, Plaintiff relies on a single piece of *dicta* from the *Shoen* case:

> 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.

Shoen, 122 Nev. at 639, 137 P.3d at 1184 (citing *Aronson*, 473 A.2d at 812). Plaintiff's insistence that this excerpt from *Shoen* controls the pleading standard for imposition of individual liability on the Director Defendants is largely responsible for creating confusion for the Court that led to the Court's misapprehension of the law and its adoption of a clearly erroneous pleading standard.

With respect to the first sentence of the above-quoted passage, for purposes of this Motion, the Director Defendants do not dispute that, at the pleading stage, allegations of gross negligence

[7] Even if the statute had no retroactive effect, a careful reading of the plain language reveals that, particularly with respect to the requirements of subsection (7), the state of the law was not substantively changed by the 2017 amendments, but rather was amended to clarify that the business judgment rule presumption found in subsection (3) must be rebutted in addition to the further requirements of subsection (7) (proof of breach of fiduciary duty and proof of intentional misconduct, fraud, or knowing violation of the law). *See also* 2017 Nev. SB 203, Sec. 2(1) (noting the importance of ensuring the corporate laws of Nevada are "clear and comprehensible"). The requirements of subsection (7)(b) (as amended) did not change under the 2017 amendments. Thus, practically speaking, NRS 78.183 continued to operate in the same manner before and after the 2017 amendments. *See Wynn Resorts*, 399 P.3d at 342 n.5 ("the amendments to NRS 78.138 do not change our conclusions.").

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involving inattention and lack of diligence on the part of officers and directors, when taken in the light most favorable to the plaintiff, may be sufficient to plead rebuttal of the presumption.[8] However, to then determine that, because the business judgment rule does not apply (i.e., the rebuttal of the presumption has been plead pursuant to subsection 7(a)), individual liability is automatically appropriate without consideration of the elements required by subsection 7(b), is a logical leap that is directly contrary to the unambiguous language of the statute and unsupported by case law. Such an interpretation would swallow the rule that requires intentional misconduct, fraud, or a knowing violation of the law in order to hold directors or officers individually liable.

This Court appeared to recognize the requirements of subsection 7(b) in its granting of the Director Defendants' 12(b)(5) Motion to Dismiss Plaintiff's initial complaint. At the January 27, 2016 hearing on that Motion, the Court noted that Plaintiff's allegations were insufficient to plead gross negligence, the business judgment rule applied, and "**[i]ntentional conduct would have to be pled in order to proceed on that gross negligence claim.**" (Jan. 27, 2016 Tr. at 7:20-24). The Court was correct in its statement at that time and Plaintiff was on notice of the requirement to plead intentional misconduct (or fraud or knowing violation of the law). Yet Plaintiff failed to so plead and instead presented the Court with a further tortured interpretation of the *Shoen dicta*. In reconsideration of its denial of the 12(c) Motion, the Court should reaffirm the requirement that Plaintiff plead in accordance with subsection 7(b)(2) and dismiss the Third Amended Complaint.[9]

To the extent Plaintiff and this Court interpret the second sentence of the *Shoen dicta*, which recites the standard for individual liability for breach of fiduciary duty of **loyalty**, to imply anything about the fiduciary duty of **care**, that reasoning is logically flawed. Simply because the initial premise – that a breach of duty of loyalty requires a showing of intentional misconduct, fraud, or knowing violation of the law – is true, does not mean that the transpositive – that a breach **other** than the duty of loyalty (e.g., a breach of the duty of care) does **not** require a showing of

[8] Pursuant to NRS 78.183(7)(a), of course, at a later stage in the proceedings, the trier of fact must determine that the presumption has in fact been rebutted.

[9] Plaintiff should not be granted leave to amend as it has had four bites at the pleading apple and is the victim of its own doing in misrepresenting to the court an erroneous pleading standard not supported by the law.

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intentional misconduct, fraud, or knowing violation of the law – is necessarily true.[10]

Indeed, *Shoen* said nothing about what is required to hold directors and officers liable for a breach of the duty of care, because that issue was not before the court. Rather, *Shoen* involved consideration only of "when the demand for corrective action that a shareholder must make upon a company's board of directors before filing a derivative suit may be excused as futile." *Shoen*, 122 Nev. at 626. Likewise, *Aronson*, the Delaware Supreme Court case on which *Shoen* relies for the proposition cited, was a demand futility case and did not directly address pleading standards for individual liability of officers and directors, let alone a distinction among pleading standards in duty of care and duty of loyalty cases.[11] Thus, even if the second sentence of the *Shoen* passage meant what Plaintiff says it does, its value is limited outside the context of demand futility case law.

This is particularly so in light of both Nevada and Delaware case law addressing duty of care standards in the post-*Shoen*, post-*Aronson* world. First, in *Citigroup*, the Delaware Court of Chancery addressed defendant corporate officers and directors' motion to dismiss for failure to state a claim or to properly plead demand futility. 964 A.2d 106. The shareholders alleged, in relevant part, that defendants breached their fiduciary duties by failing to properly monitor and manage risks and ignoring red flags in the subprime lending market and by failing to properly disclose the corporate exposure to subprime assets. The *Citigroup* court analyzed the plaintiffs' claims as alleging a breach of the duty of oversight – a subset of the duty of loyalty and "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Id.* at 122, 126 (quoting *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 967 (Del. Ch.

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[10] To put it in simpler terms, the logical fallacy of improper transposition is shown in the following example: "If there is smoke, then there is fire. Therefore, if there is not smoke, then there is not fire." Clearly, the transposed version of the otherwise true premise is not logically sound, because there can be fire without smoke. The same is true in the duty of loyalty/duty of care example above.

[11] Even if *Aronson* had directly addressed the relevant issue, the Delaware Supreme Court's holding and reasoning would have only persuasive value to Nevada courts, and the plain language of relevant Nevada statutory law would override any contrary pronouncements from a foreign jurisdiction.

1996)[12]). However, the court noted the "similarity between the standard for assessing oversight liability and the standard for assessing a disinterested director's decision under the duty of care when the company has adopted an exculpatory provision" relieving the director of personal liability for violations of fiduciary duty except in limited circumstances.[13] *Citigroup*, 964 A.2d at 125.

Notably, *Citigroup* states that, in both duty of oversight and duty of care cases, a plaintiff can show that director defendants will be liable "if their acts or omissions constitute bad faith." *Id.* at 125. Bad faith can be shown by "properly alleging **particularized facts** that show that a director *consciously* disregarded an obligation to be reasonably informed about the business and its risks or *consciously* disregarded the duty to monitor and oversee the business." *Id.* (bold emphasis added). The court made clear that the existence of these duties "does not eviscerate the core protections of the business judgment rule . . . ." *Id.* While the court acknowledged that a plaintiff could overcome the protections of the business judgment rule by showing gross negligence, it commented that such showing is "a difficult one," but that "the burden to show bad faith is even higher." *Id.* Accordingly, in duty of care cases, as in duty of oversight cases, the Delaware Court of Chancery, writing post-*Aronson*, acknowledged that a plaintiff must make a showing of **both** gross negligence to overcome the business judgment rule presumption **and** a showing of bad faith to establish personal liability of directors. The court found the plaintiffs'

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[12] Although Nevada has not expressly adopted the *Caremark* standard, as the seminal Delaware case on the standard for director oversight liability, *Caremark* is instructive in assessing the burden of pleading and proof on plaintiffs in duty of oversight and duty of care cases, particularly because the standard may be arguably less onerous than that required by NRS 78.138(2)(b)(2). Under the *Caremark* standard, directors of a corporation may be held liable for a judgment against the corporation only if the directors act in bad faith by (a) consciously disregarding "red flags" that the corporation is violating the law or (b) utterly failing to implement any information and reporting system to detect such violations. *See Horman v. Abney*, 2017 WL 242571 at *18-19 (Del. Ch. Jan. 19, 2017). Neither prong of the *Caremark* standard may be met by negligence, even gross negligence; a plaintiff must establish "that the directors **knew** that they were not discharging their fiduciary obligations." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (emphasis added).

[13] In *Citigroup*, the company had adopted an exculpatory provision relieving directors of personal liability for breach of fiduciary duty except for breaches, acts, or omissions "not in good faith or that involve intentional misconduct or knowing violation of law." This is substantially similar to the exculpatory provision by which the Director Defendants are protected. *See* Exhibit A to Director Defendants' 12(c) Motion for Judgment on the Pleadings ("The personal liability of the directors of the corporation is hereby eliminated to the fullest extent permitted by the General Corporation Law of the State of Nevada, as the same may be amended and supplemented.").

allegations too conclusory to state a claim for oversight liability that would give rise to a substantial likelihood of personal liability, since that would require "particularized factual allegations demonstrating bad faith by the director defendants." *Id.* at 127. Accordingly, the plaintiffs' claims for breach of fiduciary duty were dismissed for failure to state a claim.

The *Citigroup* court's logic was adopted several months later by Nevada District Court Judge Earl in a written decision on a motion to dismiss under both NRCP 23.1 and NRCP 12(b)(5). *In re Las Vegas Sands Corp. Derivative Litig.*, 2009 WL 6038660 (Nev. Dist. Ct. Nov. 4, 2009). In addressing the plaintiffs' allegations of breach of the duty of oversight in his NRCP 23.1 analysis, Judge Earl quoted *Citigroup* for the proposition that to establish oversight liability, "a plaintiff must show that the directors **knew** they were not discharging their fiduciary obligations or that the directors demonstrated a **conscious disregard** for their responsibilities . . . ."[14] *Id.* at *7 (emphasis added). Judge Earl went on to reference *Citigroup*'s finding that "a showing of gross negligence [is] required to rebut a presumption of the Business Judgment Rule and the burden to establish bad faith is even higher than that of a showing of gross negligence." *Id.* Judge Earl ultimately determined that the plaintiffs' allegations were insufficient to adequately plead demand futility under NRCP 23.1.

In turning to the defendants' 12(b)(5) motion to dismiss for failure to state a claim, Judge Earl noted that the burden on the plaintiffs was "particularly difficult" given the wording of NRS 78.138(7), which required at the time (and still requires today) a showing of (a) breach of fiduciary duty, and (b) intentional misconduct, fraud, or a knowing violation of the law. *Id.* at *9-10. Judge Earl then found that "[t]here is nothing in the Plaintiffs' Amended Complaint that directly alleges fraud or knowing violation of the law on the part of the Defendant Directors," and that allegations of intentional misconduct were "hollow," and thus insufficient. *Id.* at *10. Finally, because the

[14] While Plaintiff characterizes the Third Amended Complaint's claim for gross negligence against the Director Defendants as one for breach of the duty of care, *Citigroup* made clear that the pleadings required for a breach of the duty of care are similar to those required for claims predicated upon breaches of other fiduciary duties, such as the duty of oversight, in that it requires a showing of bad faith. *See Citigroup*, 964 A.2d at 125. Because Plaintiff has not alleged any facts to demonstrate bad faith, Plaintiff has failed to make sufficient allegations to state a breach of fiduciary duty under any theory.

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Las Vegas Sands Corp. Charter had adopted broad exculpatory provisions for individual liability of officers and directors, the defendants were afforded additional protection. *Id.*

In sum, Judge Earl held:

> Insofar as general oversight liability is concerned, the provisions of NRS 78.138(7), the provisions of the exculpatory clause in the Las Vegas Sands Corp. Charter and the provisions of the Business Judgment Rule (see NRS 78.138(3)) all combined to provide a protection against individual director responsibility/liability insofar as the Defendants in this shareholder derivative action are concerned. **Without liability, the Plaintiffs' causes of action cannot survive**.

Id. (emphasis added).[15]

The lesson of *Citigroup* and *Sands* is that both Delaware and Nevada courts recognize that *Aronson* and *Shoen* did not alter the landscape of officer and director liability in duty of care and duty of oversight cases. A plaintiff must still plead and prove, first, rebuttal of the business judgment rule presumption, second, breach of fiduciary duty, and third, bad faith (under Delaware law) or intentional misconduct, fraud, or knowing violation of the law (under Nevada law).[16] If a plaintiff fails to plead or prove these three things, individual liability cannot be imposed on directors or officers and the plaintiff's claims must be dismissed.

Here, Plaintiff utterly failed to allege anything more than gross negligence and thus failed to meet the pleading requirements of NRS 78.138(7). Thus, even if all of Plaintiff's bloated, conclusory allegations are taken as true, Plaintiff can ultimately plead no set of facts entitling it to judgment. Because Plaintiff's allegations are insufficient under clear statutory law to impose individual liability on the Director Defendants, the causes of action against the Director Defendants must be dismissed.

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[15] Judge Earl also briefly addressed the plaintiffs' cause of action for "gross mismanagement," a cause of action that does not exist in Nevada and found that such allegations did not show a breach of the overall fiduciary duty of care and loyalty. *Sands*, 2009 WL 6038660 at *9.

[16] Other jurisdictions apply similar standards for imposition of individual liability on directors. *See, e.g., L.B. Indus., Inc. v. Smith*, 817 F.2d 69, 71 (9th Cir. 1987) (Under Idaho law, "to be held liable a corporate director must specifically direct, actively participate in, or knowingly acquiesce in the fraud or other wrongdoing of the corporation or its officers."); *see also Teachers' Ret. Sys. v. Welch*, 664 N.Y.S.2d 38, 39 (N.Y. App. Div. 1997) (stating New York law "shields GE's directors for negligent acts or omissions incurring in their capacity as directors, with certain exceptions (intentional misconduct, bad faith, knowing violation of the law)").

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c. The Third Amended Complaint contains no allegations of intentional misconduct, fraud, or knowing violation of the law

Finally, in the Opposition briefing, Plaintiff claims that even if the Court were to analyze the allegations of the Third Amended Complaint under the Director Defendants' standard (i.e., the proper standard), "the allegations (and facts) are more than sufficient for purposes of the 'intentional misconduct, fraud or a knowing violation of the law' language." (Opposition at p. 6). However, Plaintiff does not provide any citation to its Third Amended Complaint to support this wholly conclusory statement.[17] Plaintiff misrepresented to the Court that the Third Amended Complaint contained allegations that the Director Defendants acted with "conscious – meaning 'knowing' and 'appreciated' disregard for and total abdication of their duties to L&C," (*id.*), but again fails to provide citation. Indeed, the words "conscious," "disregard," and "abdication," appear nowhere in the Third Amended Complaint. In any event, even if Plaintiff could successfully convince the Court, by some strained interpretation of the allegations, that the Third Amended Complaint had alleged "conscious disregard" and "total abdication of their duties" to the company, such allegations would remain insufficient under NRS 78.138(7)(b)(2)'s requirement to plead intentional misconduct, fraud, or knowing violation of the law, such allegations would remain insufficient under the requirement that a plaintiff allege "particularized facts" showing conscious disregard. *See Citigroup*, 964 A.2d at 125.

IV. CONCLUSION

Despite paying lip-service to the "two-step process" contained in NRS 78.138(7) (Opposition at p. 4), Plaintiff's argument collapses the individual liability inquiry into a single step

[17] At the October 11, 2018 hearing on the Director Defendants' 12(c) Motion, Plaintiff's counsel attempted to point to several paragraphs of the Third Amended Complaint as pleading knowing violation of the law. Oct. 11, 2018 Tr. at 17:15-18:14 (citing paragraphs 104, 105, 121, 145, 228, [2]30, and 232). However, these paragraphs, the majority of which make allegations "on information and belief," largely contain allegations of "gross negligence," or lack of exercise of "slight diligence or scant care." At most, these paragraphs allege that the Director Defendants knew they had a duty to the company and knew they could not rely upon the information provided by the company's advisors. These allegations could arguably be sufficient to demonstrate that the Director Defendants were not entitled to rely on third-party advice or counsel under NRS 78.138(2), but they are insufficient to support a claim of intentional misconduct, fraud, or knowing violation **of the law** as required by NRS 78.138(7)(2)(b).

to consider only the applicability of the business judgment rule presumption. This argument is misguided and directly contrary to both clear statutory law and case law. The irrelevant *dicta* in *Shoen* does nothing to save Plaintiff's Third Amended Complaint. To the extent Plaintiff's position continues to be accepted by this Court, and to the extent this Court's decision denying the 12(c) Motion stands, NRS 78.138(7)(b) is rendered meaningless[18] and Nevada's protections for corporate officers and directors are severely limited. Such a result is untenable. Reconsideration is warranted under the circumstances to correct the Court's error of law and to grant the Director Defendants' 12(c) Motion with prejudice and without leave to amend.

DATED this 29th day of November 2018

HOLLAND & HART LLP

/s/ J. Stephen Peek, Esq.

J. Stephen Peek, Esq.
Jessica E. Whelan, Esq.
Ryan A. Semerad, Esq.
9555 Hillwood Dr. 2nd Floor
Las Vegas, NV 89134

Joseph P. Garin, Esq.
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9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144

Attorneys for Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

[18] It is a bedrock principle of statutory interpretation that courts should interpret a statute so that no part is rendered meaningless. *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003).

HOLLAND & HART LLP
9555 HILLWOOD DRIVE
2ND FLOOR
LAS VEGAS, NV 89134

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November 2018, a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION** was served by the following method(s):

☑ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

James L. Wadhams, Esq.
Brenoch Wirthlin, Esq.
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Las Vegas, NV 89101

Attorneys for Plaintiff

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Attorneys for Defendants Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation

/s/ Valerie Larsen
An Employee of Holland & Hart LLP

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9555 HILLWOOD DRIVE
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LAS VEGAS, NV 89134

FENNEMORE CRAIG, P.C.
JAMES L. WADHAMS, ESQ.
Nevada Bar No. 1115
BRENOCH WIRTHLIN, ESQ.
Nevada Bar No. 10282
300 South Fourth Street, Suite 1400
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Jwadhams@fclaw.com
bwirthlin@fclaw.com
Attorneys for Plaintiff

DISTRICT COURT OF NEVADA

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Plaintiff, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION,; DOES 1-50, inclusive; and ROES 51-100, inclusive; Defendants.	Case No.: A-14-711535-C Dept. No.: XXVII **PLAINTIFF'S OPPOSITION TO DIRECTOR DEFENDANTS' MOTION FOR RECONSIDERATION** **-AND-** **COUNTERMOTION FOR ATTORNEY'S FEES** **Date of Hearing: January 10, 2019** **Time of Hearing: 9:30 a.m.**

Plaintiff, Commissioner of Insurance for the State of Nevada as Receiver of Lewis & Clark LTC Risk Retention Group, Inc. ("Plaintiff"), by and through its counsel of record, Fennemore Craig, P.C., hereby submits its Opposition to the Directors' Motion for Reconsideration.

This Opposition is based on the attached Memorandum of Points and Authorities, all

///

///

papers and pleadings on file in this action, and any oral argument this court may allow.

DATED this 27th day of December, 2018.

FENNEMORE CRAIG, P.C.

By: _____
JAMES L. WADHAMS, ESQ.
Nevada Bar No. 1115
BRENOCH WIRTHLIN, ESQ.
Nevada Bar No. 10282
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court has already decided the issue raised in the Motion for Reconsideration on three (3) prior occasions. The Directors'[1] repackaging of the same erroneous arguments does not now, by magic, change the outcome. The Directors continue to ignore this Court's prior rulings and controlling legal authorities from the Supreme Court of Nevada regarding the business judgment rule ("BJR") as codified at NRS 78.138. The bottom line is that Plaintiff has more than adequately pleaded its claims in this case and, therefore, the Motion to Reconsider must be denied.

II. LEGAL ANALYSIS

A. Applicable standards

1. Motion for Reconsideration

EDCR 2.24 provides that a party may seek "reconsideration of a ruling of the court." If the court decides to rehear the matter, it may – but is not required to – hold a subsequent hearing. *See* EDCR 2.24(b). "Only in **very rare** instances in which new issues of fact or law are raised … should a motion for rehearing be granted." *See Moore v. City of Las Vegas*, 92 Nev. 402, 405,

[1] The terms "Directors" or "Director Defendants" refer to defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels.

551 P.2d 244, 246 (1976) (emphasis added). The Directors concede this exceedingly high hurdle to their request for relief. *See* Directors' Motion for Reconsideration, at 5:24-6:1 (*citing Moore*, 92 Nev. 402, 551 P.2d 244) ("Although the granting of a motion for reconsideration is appropriate 'in **very narrow** circumstances,' …" (emphasis added)). The relief requested by the Directors is only appropriate when "substantially different evidence is subsequently introduced or the decision is clearly erroneous." *See id.*; *see also Masonry & Tile Contrs. V. Jolley, Urga & Wirth, Ass'n*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). In this particular instance, the Directors do not assert any new facts, so the only available basis is that this Court somehow made a "clearly erroneous" application of the law. As set forth herein, the Court has correctly applied the law as set forth by the Supreme Court of Nevada. Accordingly, the Directors' Motion for Reconsideration must be denied.

2. The Directors' underlying Motion for Judgment on the Pleadings

NRCP 12(c) allows for a motion for judgment on the pleadings, "[a]fter the pleadings are closed but within such time as not to delay the trial[.]" *See id.* "Ordinarily, a motion for judgment on the pleadings should be made promptly after the close of the pleadings" and not years thereafter. *See* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1367 (1969) (emphasis added); Plaintiff's Third Amended Complaint was filed August 5, 2016 ("TAC") and Defendants answered on October 21, 2016. Defendants provide no explanation or excuse for waiting more than two years to seek relief based upon an alleged pleading defect in the TAC..

The court decides a NRCP 12(c) motion "essentially in the same manner as a motion to dismiss … for failure to state a claim[.]" *See Gumpad v. Comm'r of Soc. Sec. Admin.*, 19 F. Supp. 3d 325, 328 (D.D.C. 2014); *see also Sadler v. PacifiCare of Nev.*, 130 Nev. Adv. Op. 98, 340 P.3d 1264, 1266–67 (2014). As part of their NRCP 12(c) motion, the Directors conceded both the truth and sufficiency of the factual allegations. *See Howell v. Lodge*, No. 69578, 2016 WL 4579086, at *1 (Nev. App.); *see also* Directors' 12(c) Motion, at 4:13-14 (admitting this Court already decided Plaintiff adequately pleaded gross negligence). Defendants are bound to the same concession inthis Motion for Reconsideration of their 12(c) Motion. *See id.*

"[A] defendant will not succeed on a motion under Rule 12(c) if there are allegations in the plaintiff's pleadings that, if proved, would permit recovery." *See Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135–36, 734 P.2d 1238, 1241 (1987) (citing favorably, 5 C. Wright & A. Miller, at § 1368) (emphasis added). In other words, the Directors' 12(c) Motion can raise only pleading issues, not evidentiary issues and the Motion for Reconsideration is bound by the same limitations.[2]

B. Procedural defects with the Directors' Motion for Reconsideration.

1. The Motion does not raise "new issues of ... law."

A motion for reconsideration is not meant as a vehicle to supplement prior arguments with materials or articulations voluntarily omitted from the underlying substantive motion. Rather, they are only meant to address the narrow and "very rare instances in which new issues of ... law are raised[.]" *See Moore*, 92 Nev. at 405, 551 P.2d at 246 (emphasis added). As the Court in *Moore* recognized, "citation of additional authorities" which could have been cited in the original motion does not constitute a new issue of law being raised. *Id.* Here, the Directors cite decisions from other jurisdictions which at best, do not set forth the controlling law in Nevada. Instead, the cases cited by the Directors stand for the simple proposition that duty of loyalty and shareholder derivative suits are subject to NRCP 9(b) and NRCP 23.1's express requirements of particularized pleading. But this case is not a duty of loyalty case, nor a shareholder derivative action. Accordingly, the Directors' authorities are inapposite and the Motion for Reconsideration must be denied.

C. Substantive defects with the Directors' Motion for Reconsideration.

1. The Directors improperly conflate the pleadings and evidentiary stages.

A most basic aspect of litigation is that the pleading stage is separate and distinct from the evidentiary stage. This is most obviously evidenced by various procedural rules. *See e.g.* NRCP

[2] In addition, to the extent the Directors continue to argue any changes to NRS 78.138 apply retroactively, their arguments are contrary to Nevada law. *See Rice v. Wadkins*, 92 Nev. 631, 632, 555 P.2d 1232, 1233 (1976) (holding that "we have long held that courts will not give retrospective interpretation to statutes unless the legislative intent that they do so is clearly manifested in the statute.")

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78301

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

PETITIONER'S APPENDIX
(VOLUME VI OF VI)
(APP01201 – APP01433)

HOLLAND & HART LLP
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Las Vegas, Nevada 89144

Attorneys for Petitioners

INDEX TO APPENDIX IN CHRONOLOGICAL ORDER

DATE	EXHIBIT DESCRIPTION	VOLUME	PAGE NOS.
2016-01-27	Transcript of Defendant Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbra Lumpkin, Jeff Marshall and Eric Stickels' Motion to Dismiss	I	APP00001 – APP00009
2016-04-18	Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbra Lumpkin, Jeff Marshall and Eric Stickels Motion to Dismiss First Amended Complaint	I	APP00010 – APP00036
2016-08-05	Third Amended Complaint	I - III	APP00037 – APP00565
2016-09-15	Defendant Uni-Ter Underwriting Management Corp's Motion to Dismiss Negligent Misrepresentation Claim of Third Party Complaint Defendant's Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels Motion to Dismiss First Amended Complaint – Hearing Transcript	III	APP00566 – APP00601
2016-10-10	Notice of Entry of Order Denying Defendant Uni-Ter Underwriting Management Corp.'s Motion to Dismiss Negligent Misrepresentation Claim of Third Amended Complaint	III	APP00602 – APP00606
2018-08-14	Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbra Lumpkin, Jeff Marshall and Eric Stickels' Motion for Judgment on the Pleadings Pursuant to NRCP 12(C)	III - IV	APP00607 – APP00886

2018-09-19	Plaintiff's (1) Opposition to Director Defendants' Motion for Judgment on the Pleadings And (2) Countermotion for Summary Judgment as to Liability Only	IV - VI	APP00887 – APP01238
2018-10-04	Reply in Support of Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbra Lumpkin, Jeff Marshall and Eric Stickels; Motion for Judgment on the Pleadings Pursuant to NRCP 12(C)	VI	APP01239 – APP01354
2018-10-11	Transcript of Proceedings Re: All Pending Motions	VI	APP01355 – APP01376
2018-11-07	Notice of Entry of Order	VI	APP01377 – APP01381
208-11-29	Motion for Reconsideration	VI	APP01382– APP01400
2018-12-27	Plaintiff's Opposition to Director Defendants' Motion for Reconsideration – and – Countermotion for Attorney's Fees	VI	APP01401 – APP01414
2019-01-04	Reply In Support of Motion for Reconsideration and Opposition to Countermotion for Attorney's Fees	VI	APP01415 – APP01428
2019-02-11	Notice of Entry of Decision and Order	VI	APP01429 – APP01433

INDEX TO APPENDIX IN ALPHABETICAL ORDER

DATE	EXHIBIT DESCRIPTION	VOLUME	PAGE NOS.
2016-04-18	Defendants Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbra Lumpkin, Jeff Marshall and Eric Stickels Motion to Dismiss First Amended Complaint	I	APP00010 – APP00036
2016-09-15	Defendant Uni-Ter Underwriting Management Corp's Motion to Dismiss Negligent Misrepresentation Claim of Third Party Complaint Defendant's Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels Motion to Dismiss First Amended Complaint – Hearing Transcript	III	APP00566 – APP00601
2018-11-29	Motion for Reconsideration	VI	APP01382– APP01400
2019-02-11	Notice of Entry of Decision and Order	VI	APP01429 – APP01433
2018-11-07	Notice of Entry of Order	VI	APP01377 – APP01381
2016-10-10	Notice of Entry of Order Denying Defendant Uni-Ter Underwriting Management Corp.'s Motion to Dismiss Negligent Misrepresentation Claim of Third Amended Complaint	III	APP00602 – APP00606
2018-09-19	Plaintiff's (1) Opposition to Director Defendants' Motion for Judgment on the Pleadings And (2) Countermotion for Summary Judgment as to Liability Only	IV - VI	APP00887 – APP01238

2018-12-27	Plaintiff's Opposition to Director Defendants' Motion for Reconsideration – and – Countermotion for Attorney's Fees	VI	APP01401 – APP01414
2019-01-04	Reply In Support of Motion for Reconsideration and Opposition to Countermotion for Attorney's Fees	VI	APP01415 – APP01428
2018-10-04	Reply in Support of Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbra Lumpkin, Jeff Marshall and Eric Stickels; Motion for Judgment on the Pleadings Pursuant to NRCP 12(C)	VI	APP01239 – APP01354
2018-08-14	Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbra Lumpkin, Jeff Marshall and Eric Stickels' Motion for Judgment on the Pleadings Pursuant to NRCP 12(C)	III - IV	APP00607 – APP00886
2016-08-05	Third Amended Complaint	I - III	APP00037 – APP00565
2016-01-27	Transcript of Defendant Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbra Lumpkin, Jeff Marshall and Eric Stickels' Motion to Dismiss	I	APP00001 – APP00009
2018-10-11	Transcript of Proceedings Re: All Pending Motions	VI	APP01355 – APP01376

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 **PETITIONER'S APPENDIX (VOLUME VI OF VI) (APP01201 – APP01433)** properly addressed to the following:

James L. Wadhams, Esq.
Brenoch Wirthlin, Esq.
FENNEMORE CRAIG, P.C.
300 South Fourth Street, Suite 1400
Las Vegas, NV 89101

Attorneys for Commissioner of Insurance for the State of Nevda as Receiver of Lewis and Clark LTC Risk Retention Group, Inc.

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Kimberly Freedman, Esq.
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NELSON MULLINS BROAD AND CASSEL
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Miami, FL 33131

Attorneys for Uni-Ter Underwriting Management Corp., Uni-Ter Claims Services Corp., and U.S. RE Corporation

SERVED VIA U.S. MAIL:

The Honorable Nancy L. Allf,
District Court, Department 27
Regional Justice Center
200 S. Lewis Ave.
Las Vegas, NV 89155

/s/ Valerie Larsen
An Employee of Holland & Hart LLP

SECOND AMENDMENT TO MANAGEMENT AGREEMENT

THIS SECOND AMENDMENT TO MANAGEMENT AGREEMENT dated January 1, 2011 (the "Management Agreement") is made between LEWIS & CLARK LTC RISK RETENTION GROUP, INC., a Nevada corporation ("L&C"), and UNI-TER UNDERWRITING MANAGEMENT CORPORATION, a Delaware corporation ("Manager"), effective as of November 15, 2011.

For good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree that the following sentence shall be added at the end of Article IV, Section D.:

> For so long as any amounts are outstanding and unpaid to the holders of Surplus Subordinated Debentures of L&C issued in 2011 and the first quarter of 2012, the profit sharing bonus payable to Manager may be accrued in the normal course, but not paid.

In all other respects, the Management Agreement, as amended from time to time, remains in full force and effect.

LEWIS & CLARK LTC RISK RETENTION GROUP, INC.

By: _____
Name: Jeff C. Marshall
Title: President

UNI-TER UNDERWRITING MANAGEMENT CORPORATION

By: _____
Name: Sanford Elsass
Title: President

#1253264 v1

SECOND AMENDMENT TO MANAGEMENT AGREEMENT

THIS SECOND AMENDMENT TO MANAGEMENT AGREEMENT dated January 1, 2011 (the "Management Agreement") is made between LEWIS & CLARK LTC RISK RETENTION GROUP, INC., a Nevada corporation ("L&C"), and UNI-TER UNDERWRITING MANAGEMENT CORPORATION, a Delaware corporation ("Manager"), effective as of November 15, 2011.

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In all other respects, the Management Agreement, as amended from time to time, remains in full force and effect.

LEWIS & CLARK LTC RISK RETENTION GROUP, INC.

By:_____
Name: Jeff C. Marshall
Title: President

UNI-TER UNDERWRITING MANAGEMENT CORPORATION

By: Donna K. Dalton
Name: ~~Sanford Elsass~~ Donna Dalton
Title: ~~President~~ COO/CFO

#1253264 v1

THIRD AMENDMENT TO MANAGEMENT AGREEMENT

THIS THIRD AMENDMENT TO MANAGEMENT AGREEMENT dated December 31, 2011 (the "Management Agreement") is made between LEWIS & CLARK LTC RISK RETENTION GROUP, INC., a Nevada corporation ("L&C"), and UNI-TER UNDERWRITING MANAGEMENT CORPORATION, a Delaware corporation ("Manager"), effective as of December 31, 2011.

For good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

The parties agree that under Article IV Section D of the Agreement, no profit sharing bonus shall be accrued or paid with respect to the 2008 calendar year, absent mutual agreement otherwise.

In all other respects, the Management Agreement, as amended from time to time, remains in full force and effect.

LEWIS & CLARK LTC RISK RETENTION GROUP, INC.

By: _____
Name: Jeff D. Marshall
Title: President

UNI-TER UNDERWRITING MANAGEMENT CORPORATION

By: _____
Name: Sanford Elsass
Title: President

#1531192 v1

THIRD AMENDMENT TO
MANAGEMENT AGREEMENT

THIS THIRD AMENDMENT TO MANAGEMENT AGREEMENT dated December 31, 2011 (the "Management Agreement") is made between LEWIS & CLARK LTC RISK RETENTION GROUP, INC., a Nevada corporation ("L&C"), and UNI-TER UNDERWRITING MANAGEMENT CORPORATION, a Delaware corporation ("Manager"), effective as of December 31, 2011.

For good and valuable consideration, the receipt of which is hereby acknowledged, the parties hereto agree as follows:

The parties agree that under Article IV Section D of the Agreement, no profit sharing bonus shall be accrued or paid with respect to the 2008 calendar year, absent mutual agreement otherwise.

In all other respects, the Management Agreement, as amended from time to time, remains in full force and effect.

LEWIS & CLARK LTC RISK RETENTION GROUP, INC.

By:_____
Name: Jeff C. Marshall
Title: President

UNI-TER UNDERWRITING MANAGEMENT CORPORATION

By:_____
Name: Sanford Elsass
Title: President

#1531192 v1

EXHIBIT 24

From: Elsass, Sandy [selsass@usre.com]
Sent: 7/26/2011 7:06:31 AM
To: Dugan, Tonya [tdugan@uni-ter.com]
CC: Chamberlain, Dwain [dchamberlain@uni-ter.com]; Wood-Clater, Nadeene [nwood-clater@uni-ter.com]; Curtis Sitterson [CSitterson@stearnsweaver.com]
Subject: Re: July 25 2011 update CV

I don't want a lot of detail and no critical comments about Garcia. Curtis may want to opine? I think we told the board they left. What the board wants to see is the economics of how much was lost, or not, for the 2 years and projected ultimate.

From: Dugan, Tonya
To: Elsass, Sandy
Cc: Chamberlain, Dwain; Wood-Clater, Nadeene
Sent: Mon Jul 25 11:37:48 2011
Subject: FW: July 25 2011 update CV

Sandy,

In preparation for the various board meetings, do you want to include in the board materials the chronological order of events leading up to CV's decision to non-renew, including subsequent activities (their claim dumping letter and our responses/correspondences back and forth). I wasn't sure if you wanted it to be as formal as a document that is included with the board materials or just something we create separate as an outline for discussion purposes.

PLEASE NOTE OUR NEW ADDRESS BELOW. PHONE & FAX NUMBERS REMAIN UNCHANGED.

Tonya M. Dugan, CIC
Sr. Vice President - Underwriting
Uni-Ter Underwriting Management Corp.
3655 Brookside Parkway, Suite 200
Alpharetta, GA 30022

678-781-2400 **Main**
678-781-2374 **Direct**
678-781-2450 **Fax**
678-524-8066 **Cell**
tdugan@uni-ter.com

From: Miller, Jonna
Sent: Monday, July 25, 2011 11:34 AM
To: Elsass, Sandy; Dugan, Tonya; Chamberlain, Dwain
Subject: July 25 2011 update CV

Attached is the most recent update and my thoughts on each file's reserves.
FYI, Garcia's bills for last month were over 120k, averaging $10,364/file. I'm reviewing them now.

Jonna Miller ARM
VP Claims
Uni-Ter Group
jmiller@uni-ter.com
678 781 2427
678 781 2450 fax

3655 Brookside Parkway, Suite 200
Alpharetta, Georgia 30022

From:	CSitterson@stearnsweaver.com [CSitterson@stearnsweaver.com]
Sent:	9/29/2011 7:09:24 PM
To:	eaglechalet@hotmail.com; sfogg@marquiscompanies.com; markgarber@pinnacle-healthcare.com; rwhurlbut@rohmservices.com; carol.harter@unlv.edu; rstick@oneidabank.com; rchur@elderwood.com; Barbara_Lumpkin@bellsouth.net
CC:	ddalton@uni-ter.com; selsass@usre.com
Subject:	Lewis & Clark
Attachments:	Lewis & Clark Capital Increase.DOC

USRE has indicated that it wants to contribute $300,000 now. Its remaining $200,000 would be parri passu to the possible contribution of $350,000 by the 5 facilities, based upon 4th quarter requirements, if any. Thus, 20/55 would come from USRE and 35/55 from the facilities, subject to a gross cap of $550,000. The third quarter increase of $2,150,000 has apparently been ok'd by Demotech. Additionally, Uni-Ter has determined that the projected loss of $300,000 plus in the fourth quarter may be booked in the third quarter (in lieu of the 4th).

I have prepared the terms accordingly in the attached memo. If any of you wish to discuss this as a group, please advise so that we can schedule a board call. If you have questions, please call me directly. If acceptable, please affirm by e-mail no later than tomorrow the following:

(1) Your entity's commitment to the contribution in Section 1 under the terms specified in Section 2.

(2) Your agreement as a Board member to such contribution, subject to your abstention on any item involving your entity. I will prepare Board minutes in due course.

Curtis H. Sitterson

Stearns Weaver Miller Weissler

Alhadeff & Sitterson, P.A.

150 W. Flagler Street

Suite 2200, Museum Tower

Miami, FL 33130

PH (Direct): 305-789-3550

PH (Main): 305-789-3200

FAX (Direct) 305-789-2667

csitterson@stearnsweaver.com

www.stearnsweaver.com

(See attached file: Lewis & Clark Capital Increase.DOC)

From: CSitterson@stearnsweaver.com [CSitterson@stearnsweaver.com]
Sent: 9/30/2011 3:43:58 PM
To: eaglechalet@hotmail.com; sfogg@marquiscompanies.com; markgarber@pinnacle-healthcare.com; rwhurlbut@rohmservices.com; carol.harter@unlv.edu; rstick@oneidabank.com; rchur@elderwood.com; Barbara_Lumpkin@bellsouth.net; ddavies@usre.com; tpiccione@usre.com
CC: ddalton@uni-ter.com; selsass@usre.com
Subject: Lewis & Clark
Attachments: Lewis & Clark Capital Increase (Redline).DOC; Lewis & Clark Capital Increase.DOC

Attached is the revised memo (and a redline) per Steve Fogg's comments.

Curtis H. Sitterson

Stearns Weaver Miller Weissler

Alhadeff & Sitterson, P.A.

150 W. Flagler Street

Suite 2200, Museum Tower

Miami, FL 33130

PH (Direct): 305-789-3550

PH (Main): 305-789-3200

FAX (Direct) 305-789-2667

csitterson@stearnsweaver.com

www.stearnsweaver.com

(See attached file: Lewis & Clark Capital Increase.DOC)(See attached file: Lewis & Clark Capital Increase (Redline).DOC)

Lewis & Clark Capital Increase – 9/28/11

1. Aggregate cash contributions of $2,150,000 to be made on or before 11/15/11 in exchange for surplus notes by the following persons:

    a. Oneida Bank - $750,000
    b. Eagle Healthcare - $220,000
    c. Pinnacle Healthcare - $220,000
    d. Marquis Companies - $220,000
    e. Elderwood Senior Care - $220,000
    f. Rohm Services - $220,000
    g. USRE - $300,000

2. Surplus notes will be generally in the same form as the current Oneida surplus note. Term will be 3 years, with interest payable annually at prime + 2%. All surplus notes will be pari passu as to repayment. Each surplus note will be convertible into common stock at any time on or before the end of the 3 year term, based upon the GAAP book value of the common stock as of ~~the end of the most recent month before the date of conversion~~9/30/11. In the case of Oneida and USRE, such conversion can only be made if L&C ceases to be a Risk Retention Group. Prior to repayment of the new surplus notes, any profit sharing bonus payable to Uni-Ter may be accrued in the ordinary course, but not paid.

3. Depending upon the requirements of the business in the 4th quarter 2011, as determined by the Board, the above parties (other than Oneida) would commit to make additional commitments, in exchange for surplus notes, in the aggregate amount of $550,000 in the 4th quarter 2011 or 1st quarter 2012 in the following proportions:

    a. Eagle, Pinnacle, Marquis, Elderwood and Rohm — 7/55 each
    b. USRE — 20/55

4. The Board reaffirms L&C's underwriting philosophy as discussed at the last Board meeting.

5. The Board requests more frequent financial reporting to the Board as discussed at the last meeting, preferably monthly.

Comparison Details	
Title	**pdfDocs compareDocs Comparison Results**
Date & Time	9/30/2011 11:40:02 AM
Comparison Time	1.40 seconds
compareDocs version	v3.4.4.54

Sources	
Original Document	[#1242091] [v3] Lewis & Clark Capital Increase.doc
Modified Document	[#1242091] [v4] Lewis & Clark Capital Increase.doc

Comparison Statistics	
Insertions	1
Deletions	1
Changes	1
Moves	0
TOTAL CHANGES	3

Word Rendering Set Markup Options	
Name	Standard
Insertions	
~~Deletions~~	
Moves / ~~Moves~~	
Inserted cells	
Deleted cells	
Merged cells	
Formatting	Color only.
Changed lines	Mark left border.
Comments color	ByAuthor
Balloons	False

compareDocs Settings Used	Category	Option Selected
Open Comparison Report after Saving	General	Always
Report Type	Word	Formatting
Character Level	Word	False
Include Headers / Footers	Word	True
Include Footnotes / Endnotes	Word	True
Include List Numbers	Word	False
Include Tables	Word	True
Include Field Codes	Word	True
Include Moves	Word	False
Show Track Changes Toolbar	Word	True
Show Reviewing Pane	Word	True
Update Automatic Links at Open	Word	False
Summary Report	Word	End
Include Change Detail Report	Word	Separate
Document View	Word	Print
Remove Personal Information	Word	False

From: CSitterson@stearnsweaver.com [CSitterson@stearnsweaver.com]
Sent: 10/4/2011 5:04:45 PM
To: sfogg@marquiscompanies.com; eaglechalet@hotmail.com; markgarber@pinnacle-healthcare.com; rwhurlbut@rohmservices.com; carol.harter@unlv.edu; rstick@oneidabank.com; rchur@elderwood.com; Barbara_Lumpkin@bellsouth.net; selsass@usre.com; ddalton@uni-ter.com; CAkridge@jonesvargas.com
Subject: RE: Surplus Note

I agree on your first point and will add language. On your second point, I am somewhat concerned about adding to an argument from any side in the future that the exercise price should have been higher or lower because the book value could or should have been set differently. The theory will be in the Board minutes, so I suppose someone could try to argue it anyway. In my view, the Company relies on accounting professionals to prepare financials and is selecting a set price based upon reported but unaudited book value, but it's set regardless of hindsight or results of future audit. That said, I'm happy to add language if that's preferred.

Curtis H. Sitterson

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A

150 W. Flagler St., Suite 2200

Miami, FL 33130

Direct: (305) 789-3550

Main: (305) 789-3200

Fax: (305) 789-2667

csitterson@stearnsweaver.com

www.stearnsweaver.com

From: Steve Fogg [mailto:sfogg@marquiscompanies.com]
Sent: Tuesday, October 04, 2011 12:31 PM
To: Curtis Sitterson; eaglechalet@hotmail.com; markgarber@pinnacle-healthcare.com; rwhurlbut@rohmservices.com; carol.harter@unlv.edu; rstick@oneidabank.com; rchur@elderwood.com; Barbara_Lumpkin@bellsouth.net; Sandy Elsass; Donna Dalton; Akridge, Constance
Subject: RE: Surplus Note

Curtis, I only have a couple "minor" suggested changes. 1) Section 8 d iv - Termination of accrued interest - when I read this section it is not 100% clear as to what date the Accrued interest actually stops. Intuitively I read it to be the date notice to convert is received by Company. That said, it seems open for interpretation. Can you add some verbiage that actually states the date interest stops accruing? 2) on the Conversion Price amount – while it is blank now since we haven't yet posted the Book value per share as of 9/30/2011, does it make sense to actually state that the amount is based off of the 09/30/11 book value per share, in addition to placing the amount in there once we know it? Seems to add additional clarity as to theory in setting that amount.

All else looks good to me.

Thanks,

Steve

From: Curtis Sitterson [mailto:CSitterson@stearnsweaver.com]
Sent: Tuesday, October 04, 2011 7:50 AM
To: 'eaglechalet@hotmail.com'; Steve Fogg; 'markgarber@pinnacle-healthcare.com'; 'rwhurlbut@rohmservices.com'; 'carol.harter@unlv.edu'; 'rstick@oneidabank.com'; 'rchur@elderwood.com'; 'Barbara_Lumpkin@bellsouth.net'; Sandy Elsass; Donna Dalton; 'Akridge, Constance'
Subject: FW: Surplus Note

Correction: the first paragraph, second sentence of my cover e-mail should read…."The form would be the same for the others, except the second ***sentence*** of Section 8.b. would be deleted for the facilities."

Curtis H. Sitterson

Stearns Weaver Miller Weissler

Alhadeff & Sitterson, P.A.

150 W. Flagler Street

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PH (Direct): 305-789-3550

PH (Main): 305-789-3200

FAX (Direct) 305-789-2667

csitterson@stearnsweaver.com

www.stearnsweaver.com

From: Curtis Sitterson
Sent: Tuesday, October 04, 2011 10:38 AM
To: 'eaglechalet@hotmail.com'; 'sfogg@marquiscompanies.com'; 'markgarber@pinnacle-healthcare.com';

'rwhurlbut@rohmservices.com'; 'carol.harter@unlv.edu'; 'rstick@oneidabank.com'; 'rchur@elderwood.com'; 'Barbara_Lumpkin@bellsouth.net'; Sandy Elsass; Donna Dalton; 'Akridge, Constance'
Subject: Surplus Note

Enclosed is a draft of the Surplus Note for Oneida. The form would be the same for the others, except the second section of Section 8.b. would be deleted for the facilities.

I have redlined this form against the latest note held by Oneida for JMW, as this was the most recent on our system. The terms of this form is the same for the current outstanding $1.0M L&C note.

Please review and comment so that we can submit the forms to the Nevada DOI.

Curtis H. Sitterson

Stearns Weaver Miller Weissler

Alhadeff & Sitterson, P.A.

150 W. Flagler Street

Suite 2200, Museum Tower

Miami, FL 33130

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communication is strictly prohibited. If you have received this communication in error, please contact the sender by reply E-mail and destroy all copies of the original message. Thank you.

CIRCULAR 230 DISCLOSURE: To ensure compliance with recently-enacted U.S. Treasury Department Regulations, we are now required to advise you that, unless otherwise expressly indicated, any federal tax advice contained in this communication, including any attachments, is not intended or written by us to be used, and cannot be used, by anyone for the purpose of avoiding federal tax penalties that may be imposed by the federal government or for promoting, marketing or recommending to another party any tax-related matters addressed herein.

Lewis & Clark Capital Increase – 9/28/11

1. Aggregate cash contributions of $2,150,000 to be made on or before 11/15/11 in exchange for surplus notes by the following persons:

    a. Oneida Bank - $750,000
    b. Eagle Healthcare - $220,000
    c. Pinnacle Healthcare - $220,000
    d. Marquis Companies - $220,000
    e. Elderwood Senior Care - $220,000
    f. Rohm Services - $220,000
    g. USRE - $300,000

2. Surplus notes will be generally in the same form as the current Oneida surplus note. Term will be 3 years, with interest payable annually at prime + 2%. All surplus notes will be pari passu as to repayment. Each surplus note will be convertible into common stock at any time on or before the end of the 3 year term, based upon the GAAP bank value of the common stock as of the end of the most recent month before the date of conversion. In the case of Oneida and USRE, such conversion can only be made if L&C ceases to be a Risk Retention Group. Prior to repayment of the new surplus notes, any profit sharing bonus payable to Uni-Ter may be accrued in the ordinary course, but not paid.

3. Depending upon the requirements of the business in the 4th quarter 2011, as determined by the Board, the above parties (other than Oneida) would commit to make additional commitments, in exchange for surplus notes, in the aggregate amount of $550,000 in the 4th quarter 2011 or 1st quarter 2012 in the following proportions:

    a. Eagle, Pinnacle, Marquis, Elderwood and Rohm — 7/55 each
    b. USRE — 20/55

4. The Board reaffirms L&C's underwriting philosophy as discussed at the last Board meeting.

5. The Board requests more frequent financial reporting to the Board as discussed at the last meeting, preferably monthly.

ACTION BY UNANIMOUS WRITTEN CONSENT

OF THE BOARD OF DIRECTORS OF

LEWIS & CLARK LTC RISK RETENTION GROUP, INC.

IN LIEU OF A SPECIAL MEETING

The undersigned, being all of the members of the Board of Directors (the "Board") of LEWIS & CLARK LTC RISK RETENTION GROUP, INC., a Nevada corporation (the "Corporation"), do hereby adopt the following resolutions by written consent (with each Board member abstaining with respect to matters involving his affiliated entity) in lieu of a special meeting.

A. RESOLVED, that the Board approves of a plan to increase the capital of the Corporation as follows:

1. Aggregate cash contributions of $2,150,000 are to be made on or before 11/15/11 in exchange for surplus notes by the following persons:

   a) Oneida Bank - $750,000
   b) Eagle Healthcare - $220,000
   c) Pinnacle Healthcare - $220,000
   d) Marquis Companies - $220,000
   e) Elderwood Senior Care - $220,000
   f) Rohm Services - $220,000
   g) Uni-Ter - $300,000

2. Surplus notes will be generally in the same form as the current Oneida surplus note. Term will be 3 years, with interest payable annually at prime + 2%. All surplus notes will be pari passu as to repayment. Each surplus note will be convertible into common stock at any time on or before the end of the 3 year term, based upon the unaudited reported GAAP book value of the common stock as of 9/30/11 of $17.52 per share. Such conversion price shall be so set, and shall not be subject to adjustment based upon future audit or review of the 9/30/11 financials. In the case of Oneida and Uni-Ter, such conversion can only be made if L&C ceases to be a Risk Retention Group. Prior to repayment of the new surplus notes, any profit sharing bonus payable to Uni-Ter may be accrued in the ordinary course, but not paid.

3. Depending upon the requirements of the business in the 4th quarter 2011, as determined by the Board, the above parties (other than Oneida) would commit to make additional commitments, in exchange for surplus notes, in the aggregate amount of $550,000 in the 4th quarter 2011 or 1st quarter 2012 in the following proportions:

a. Eagle, Pinnacle, Marquis, Elderwood and Rohm	7/55 each
b. ~~OSREUA~~	20/55

B. RESOLVED, that the Board reaffirms the Corporation's underwriting philosophy as discussed at the last Board meeting.

C. RESOLVED, that the Board requests more frequent financial reporting to the Board as discussed at the last meeting, preferably monthly.

IN WITNESS WHEREOF the undersigned being all of the members of the Board of Directors have executed this Unanimous Written Consent as of the 5th day of October, 2011.

BOARD OF DIRECTORS:

Jeff C. Marshall

Steven Charles Fogg

Mark S. Garber

Robert Hurlbut

Carol C. Harter, Ph.D.

Eric Stickels

Robert M. Chur

Barbara Lumpkin, RN

3. Depending upon the requirements of the business in the 4th quarter 2011, as determined by the Board, the above parties (other than Oneida) would commit to make additional commitments, in exchange for surplus notes, in the aggregate amount of $550,000 in the 4th quarter 2011 or 1st quarter 2012 in the following proportions:

a. Eagle, Pinnacle, Marquis, Elderwood and Rohm	7/55 each
b. ~~USRE~~ Unite	20/55

B. RESOLVED, that the Board reaffirms the Corporation's underwriting philosophy as discussed at the last Board meeting.

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IN WITNESS WHEREOF the undersigned being all of the members of the Board of Directors have executed this Unanimous Written Consent as of the ____ day of October, 2011.

BOARD OF DIRECTORS:

Jeff C. Marshall	Steven Charles Fogg
Mark S. Garber	Robert W. Hurlbut
Carol C. Harter, Ph.D.	Eric Stickels
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BOARD OF DIRECTORS:

Jeff C. Marshall	Steven Charles Fogg
Mark S. Garber	Robert W. Hurlbut
Carol C. Harter, Ph.D.	Eric Stickels
Robert M. Chur	Barbara Lumpkin, RN

EXHIBIT 25

BRIAN SANDOVAL
Governor

STATE OF NEVADA

TERRY JOHNSON
Director

AMY L. PARKS
Acting Commissioner

DEPARTMENT OF BUSINESS AND INDUSTRY
DIVISION OF INSURANCE
1818 East College Pkwy., Suite 103
Carson City, Nevada 89706
(775) 687-0700 • Fax (775) 687-0787
Website: doi.nv.gov
E-mail: insinfo@doi.state.nv.us

September 23, 2011

Jeff C. Marshall, President
Lewis & Clark LTC Risk Retention Group, Inc.
3655 Brookside Parkway, Suite 200
Alpharetta, GA 30022

RE: June 30, 2011 Lewis & Clark Deteriorating Financial Condition

Claims developing more than entire company paid in prior, combined

Dear President Marshall:

The Division's review of the June 30, 2011 financial statement of the above risk retention group revealed a deteriorating financial condition which the company's management must address. A prior letter advised the Board of Directors of deteriorating financial condition and admonished the Board and management to consider a correction plan. The Board and management must now prepare a short-term (3 month) action plan and based on this action plan how they forecast their 12/31/2011 statement to appear.

No long tail Capital Solution

The following must be considered:

- Of particular concern is the Combined ratio which has increased since prior year-end from 99.4% to 153.9% - a 54.8% increase – post-merger.
- A major concern is Risk Based Capital ("RBC") = 208.8%. This RBC calculation results from year-end 2010 financial statement. The RBC is now well below that level considering the reserve (Liability) increases and net loss reducing policyholder surplus by 40.3% for only one-half (Six Months) of a year of operating activity.
- Reserves = 428.8% of policyholder surplus
- Liquidity = 148.7%
- Net loss ratio = 114.4%
- Expense ratio = 39.6%
- Net underwriting loss has deteriorated to $3.1 million
- Net loss = $1.8 million

- Net Premiums Written = 499.9% of policyholder surplus

Qtr 2 2011: Since prior year-end, policyholder surplus has declined by 40.3%. Company is experiencing adverse claims Development and is becoming extremely leveraged. Total Liabilities have increased by 26.5% primarily due to a 28.0% Reserve increase which now represent 428.8% of policyholder surplus. Net Loss is $1.8 million, a result of $3.1 million net underwriting loss for six months and $1.7 million underwriting loss for just the second quarter. Unassigned Funds have deteriorated further to a negative ($1.4 million). Since prior year-to-date, net premiums earned have improved nominally by 5.8% while net losses incurred has increased by 117.6% causing a net loss ratio of 114.4% and resulting in a 153.9% combined ratio. Company is highly leveraged. Cash and invested assets only represent 59.2% of total assets resulting in a 148.7% liquidity ratio coupled with gross premiums written representing 571.6% of policyholder surplus and net premiums written representing 499.9% of policyholder surplus. Due to profit sharing agreement with the reinsurer, like last year, these results may be cyclical. However one of the 2010 year-end transactions was a one-time event, so only the year-end profit sharing transaction may be inadequate to compensate for the poor earnings.

We are available for a conference call at the below telephone number.

John C. Marshall, CFIE
Management Analyst III
Phone: (775) 434-9821
Fax: (775) 687-3937
jcmarshall@doi.state.nv.us

Cc: Company file
Deputy Commissioner Lynch
Enc

EXHIBIT 26

From: Akridge, Constance [cakridge@jonesvargas.com]
Sent: 1/11/2012 2:32:49 AM
To: Steve Fogg [sfogg@marquiscompanies.com]; Curtis Sitterson [CSitterson@stearnsweaver.com]; Elsass, Sandy [selsass@usre.com]; Dalton, Donna [ddalton@uni-ter.com]; rchur@elderwood.com; Jeff Marshall [eaglechalet@hotmail.com]; rwhurlbut@hurlbutcare.com
Subject: FW: Lewis & Clark Qtr 3 Analysis Results

[redacted]

From: John Marshall [mailto:jcmarshall@doi.state.nv.us]
Sent: Tuesday, January 10, 2012 4:22 PM
To: Akridge, Constance
Cc: Bill McCune; 'Dalton, Donna'
Subject: RE: Lewis & Clark Qtr 3 Analysis Results

Connie,

Per our telephone conversation this afternoon, Lewis & Clark management response is extended to Tuesday, January 17, 2011.

John Marshall, CFIE
Management Analyst III
Corporate and Financial Section
Nevada Division of Insurance
1818 E College Pkwy, Suite 103
Carson City, NV 89706
Phone: 775-687-0751

If you're an insurer doing business in Nevada, visit: http://www.doi.nv.gov/insurers.aspx for financial statement checklists, FAQs, renewal requirements and much more. Thank you!

From: John Marshall
Sent: Tuesday, January 10, 2012 9:37 AM
To: 'Akridge, Constance'
Cc: Bill McCune; 'Dalton, Donna'
Subject: RE: Lewis & Clark Qtr 3 Analysis Results

Connie,

Wouldn't you folks rather have this discussion completed before a 3-day week-end?

John Marshall, CFIE
Management Analyst III
Corporate and Financial Section
Nevada Division of Insurance
1818 E College Pkwy, Suite 103
Carson City, NV 89706
Phone: 775-687-0751

If you're an insurer doing business in Nevada, visit: http://www.doi.nv.gov/insurers.aspx for financial statement checklists, FAQs, renewal requirements and much more. Thank you!

From: Akridge, Constance [mailto:cakridge@jonesvargas.com]
Sent: Monday, January 09, 2012 10:59 AM
To: John Marshall
Subject: RE: Lewis & Clark Qtr 3 Analysis Results

Hi John,

Can we further extend this to Tuesday January 17 due to the MLK holiday weekend?

Thanks,

Connie

From: John Marshall [mailto:jcmarshall@doi.state.nv.us]
Sent: Wednesday, December 21, 2011 8:29 AM
To: 'Dalton, Donna'
Cc: Curtis Sitterson; Akridge, Constance; Elsass, Sandy; Bill McCune; Michael Lynch
Subject: RE: Lewis & Clark Qtr 3 Analysis Results

Uh oh!

We can postpone the response until Friday, Jan 13.

John Marshall, CFIE
Management Analyst III
Corporate and Financial Section
Nevada Division of Insurance
1818 E College Pkwy, Suite 103
Carson City, NV 89706
Phone: 775-687-0751

If you're an insurer doing business in Nevada, visit: http://www.doi.nv.gov/insurers.aspx for financial statement checklists, FAQs, renewal requirements and much more. Thank you!

From: Dalton, Donna [mailto:ddalton@uni-ter.com]
Sent: Tuesday, December 20, 2011 5:44 PM
To: John Marshall
Cc: Curtis Sitterson; Akridge, Constance; Elsass, Sandy
Subject: FW: Lewis & Clark Qtr 3 Analysis Results

Good Evening John,

To properly respond to your letter of September 23rd, I respectfully request an extension to the second week in January. Lewis & Clark has experienced additional adverse development therefore, we have engaged a consultant to come to Uni-ter the first week in January to review the claims files and the claims handling processes.

Please feel free to contact Sandy Elsass or myself regarding this.

Thank you.

Donna Dalton
COO/CFO
Uni-ter Underwriting Management Corp.
3655 Brookside Parkway, Suite 200
Alpharetta, GA 30022
(678) 781-2444
(678) 781-2450 fax

From: John Marshall [mailto:jcmarshall@doi.state.nv.us]
Sent: Friday, December 02, 2011 5:27 PM
To: Dalton, Donna; Elsass, Sandy
Cc: Peggy Willard-Ross; Bill McCune
Subject: Lewis & Clark Qtr 3 Analysis Results

Attached are questions and concerns regarding the above. Despite the addition of $2.15 million in capital, capital still declined 20% in the 3rd Quarter and losses continue to increase.

Please respond in writing within 10 business days to the first paragraph of the attached September 23, 2011 letter which was sent as a result of the Qtr 2 2011 Financial Statement.

John Marshall, CFIE
Management Analyst III
Corporate and Financial Section
Nevada Division of Insurance
1818 E College Pkwy, Suite 103
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EXHIBIT 27

From: Robert W. Hurlbut (RS) [rwhurlbut@hurlbutcare.com]
Sent: 12/31/2011 12:17:20 AM
To: Curtis Sitterson [CSitterson@stearnsweaver.com]
CC: carol.harter@unlv.edu; Barbara Lumpkin [barbara_lumpkin@bellsouth.net]; Steve Fogg [sfogg@marquiscompanies.com]; Jeff Marshall [eaglechalet@hotmail.com]; Mark Garber [markgarber@pinnacle-healthcare.com]; Bob Chur [rchur@elderwood.com]; Rick Stickels [rick@oneidabank.com]; Constance Akridge [cakridge@jonesvargas.com]
Subject: Re: Uni-Ter/Lewis & Clark

The 11th is fine with me. I will be out of town and I will call in. Happy New Year everybody!

On Dec 30, 2011, at 6:15 PM, "Curtis Sitterson" <CSitterson@stearnsweaver.com> wrote:

> Sounds like Jan 11 is best. How about 2 pm EST? Once we figure out what the lines of communication will be to UniTer, we can figure out who, if anyone, from UniTer will be on the call, and for what portions.
> _____
> From: carol.harter@unlv.edu [carol.harter@unlv.edu]
> Sent: Friday, December 30, 2011 5:43 PM
> To: Curtis Sitterson; 'Barbara Lumpkin'
> Cc: Steve Fogg; Jeff Marshall; Mark Garber; Bob Chur; Robert Hurlbut; Rick Stickels; Constance Akridge
> Subject: Re: Uni-Ter/Lewis & Clark
>
> Got it. But we must schedule the call as I know many folks in addition to me have issues with commitments that will need to be re-arranged. Do you have enough input to know what time and day is best?
>
> _____
>
> From: Curtis Sitterson [CSitterson@stearnsweaver.com]
> Sent: 12/30/2011 05:30 PM EST
> To: "'Barbara Lumpkin'" <barbara_lumpkin@bellsouth.net>; Carol Harter
> Cc: Steve Fogg <sfogg@marquiscompanies.com>; Jeff Marshall <eaglechalet@hotmail.com>; Mark Garber <markgarber@pinnacle-healthcare.com>; Bob Chur <rchur@elderwood.com>; Robert Hurlbut <rwhurlbut@rohmservices.com>; Rick Stickels <rstick@oneidabank.com>; Constance Akridge <cakridge@jonesvargas.com>
> Subject: RE: Uni-Ter/Lewis & Clark
>
> Here is their letter. While I am not sure, it looks like the lawyers have Tal backing off on cancellations.That hopefully is a good sign. While the posturing may bother some of you, they could have tried much worse, so I wouldn' t lose sleep over it. Happy New Year to every one.
>
> Curtis H. Sitterson
> Stearns Weaver Miller Weissler
> Alhadeff & Sitterson, P.A.
> 150 W. Flagler St.
> Miami, FL 33130
> Direct: (305) 789-3550
> Main: (305) 789-3200
> Direct Fax: (305) 789-2667
> csitterson@stearnsweaver.com<mailto:csitterson@stearnsweaver.com>
> www.stearnsweaver.com<http://www.stearnsweaver.com/>
>
> From: Barbara Lumpkin [mailto:barbara_lumpkin@bellsouth.net]
> Sent: Friday, December 30, 2011 3:57 PM
> To: carol.harter@unlv.edu
> Cc: Steve Fogg; Jeff Marshall; Curtis Sitterson; Mark Garber; Bob Chur; Robert Hurlbut; Rick Stickels; Constance Akridge
> Subject: Re: Uni-Ter/Lewis & Clark
>
> At this point it is difficult to have any confidence in data/info we get. Hopefully hy the time we have the call we will have good info at least from Fishlinger. Hope you all have a Happy and safe Holiday. Jeff I know this must have dampened your vacation. Yes, the road to Hana is a challenge for cell phones!
> Barbara
>
> Sent from my iPad
>
> On Dec 30, 2011, at 2:41 PM, carol.harter@unlv.edu<mailto:carol.harter@unlv.edu> wrote:
>

> Steve is right. I was shocked when Donna denied awareness of what we were sent and refused to answer Steve's perfectly legitimate questions. There appears to be lots of CYA in River City.. Curtis, perhaps you could press that issue with Sandy, assuming you regularly talk to him...
>
> _____
>
> From: Steve Fogg [sfogg@marquiscompanies.com<mailto:sfogg@marquiscompanies.com>]
> Sent: 12/30/2011 10:17 AM PST
> To: Jeff Marshall <eaglechalet@hotmail.com<mailto:eaglechalet@hotmail.com>>; Curtis Sitterson <csitterson@stearnsweaver.com<mailto:csitterson@stearnsweaver.com>>; Mark Garber <markgarber@pinnacle-healthcare.com<mailto:markgarber@pinnacle-healthcare.com>>; Bob Chur <rchur@elderwood.com<mailto:rchur@elderwood.com>>; Robert Hurlbut <rwhurlbut@rohmservices.com<mailto:rwhurlbut@rohmservices.com>>; Rick Stickels <rstick@oneidabank.com<mailto:rstick@oneidabank.com>>; Carol Harter; Barbara Lumpkin <barbara_lumpkin@bellsouth.net<mailto:barbara_lumpkin@bellsouth.net>>; Constance Akridge <cakridge@jonesvargas.com<mailto:cakridge@jonesvargas.com>>
> Subject: RE: Uni-Ter/Lewis & Clark
>
> I will say it again, if only their ability to manage/assess claims /claims reserve levels was as timely/aggressive as their recent efforts in trying to minimize legal exposure.....
>
> Curtis, on another issue, in a prior email from Donna, she claims that she is not certain/aware of a 12/31/11 financial pro-forma going to the board. So, from that, I' m guessing Sandy sent the pro-forma we received yesterday w/out Donna being aware. Regardless of this issue, I would certainly appreciate answers to my questions, and the request for an additional pro-forma based on a different loss pick. I have listed those questions again below. Would it be possible for you to communicate with Sandy/Donna and a) clear up this issue of what exactly was sent to us yesterday, so that all parties are on the same page, and b) get Donna to respond to my requests.
>
> Thanks much,
> Steve
>
> Sandy/Donna, thanks for sending this projection @ 12/31/11. It is very helpful. If I may, I have a few questions, that will add clarity for the board related to this information:
>
>
> 1. Why has the "policy acquisition cost" expense increased as a % of Gross premiums written for 3rd and 4th qtrs 2011 (29%) -vs- 1 and 2nd qtrs (21%)???? Is that because of the increased commission paid to brokers once they reach certain levels of premium business generated (and if so, does this increase tie out to what seems accurate??) ? Or other reasons?
>
> 2. Can you confirm that with the Unpaid losses/loss expense liability at 12/31/11 of $15,656,574 - this assumes that we have booked additional loss expense up to what is the Praxis report loss levels????? Plus I assume this includes any changes in loss reserve amounts that have been incurred after the Praxis report (positive or negative)?
>
> 3. Sandy had mentioned in our original call prior to Christmas, that there may be as much as $500,000 in legal fee recoveries from CA attorney. Also, if I recall, that these fees had not yet been paid, but are expensed (confirm that?). Can you confirm for me that if in fact we do decide to fight this, and are successful, that this would be a net positive to the PL and the Equity/Capital position of up to this $500K?
>
> 4. For the sake of comparison, and to give us this info earlier than waiting for Fishlinger report, can you have another Pro-Forma prepared that assumes that the Praxis report came in and suggested that we need to adjust reserves $3.5M instead of $5.2M.....(please be sure to consider all PL related items that may be affected due to this (ie: would our IBNR amount be reduced as well because of this???/ other???)
>
> 5. From what you know right now, and other than the loss pick, what would be the next three items in this pro-forma that would have the potential of changing with the greatest magnitude, and what might that dollar range be??? (please don' t get hung up on being 100% accurate on this, just trying to gain a sense as to the sensitive variables here) (example: are there any 1/1/12 renewals assumed/reflected in this pro-forma? If so, seems like with our recent decision to require monthly premium payment on these renewals, we need to understand this exposure to our financials, should we lose any customers)
>
> 6. Are we current with all claims in booking deductible recoveries from policyholders in these financials? I know that recently we (Marquis) received bills for the claims we have, but was curious if that has happened across the claims spectrum and is booked appropriately?
>
> That is all I have. I think most of these are likely quick/easy answers , short of the request for another Pro-Forma on a different loss pick.

>
> Look forward to the answers/info and let me know if you have any questions.
>
> Steve
>
>
> From: Jeff Marshall [mailto:eaglechalet@hotmail.com]
> Sent: Friday, December 30, 2011 10:06 AM
> To: Curtis Sitterson; Mark Garber; Steve Fogg; Bob Chur; Robert Hurlbut; Rick Stickels; Carol Harter; Barbara Lumpkin; Constance Akridge
> Subject: RE: Uni-Ter/Lewis & Clark
>
> Guess we'll await their collective response to your letter.
>
> _____
> From: CSitterson@stearnsweaver.com<mailto:CSitterson@stearnsweaver.com>
> To: eaglechalet@hotmail.com<mailto:eaglechalet@hotmail.com>; markgarber@pinnacle-healthcare.com<mailto:markgarber@pinnacle-healthcare.com>; sfogg@marquiscompanies.com<mailto:sfogg@marquiscompanies.com>; rchur@elderwood.com<mailto:rchur@elderwood.com>; rwhurlbut@rohmservices.com<mailto:rwhurlbut@rohmservices.com>; rstick@oneidabank.com<mailto:rstick@oneidabank.com>; carol.harter@unlv.edu<mailto:carol.harter@unlv.edu>; barbara_lumpkin@bellsouth.net<mailto:barbara_lumpkin@bellsouth.net>; CAkridge@jonesvargas.com<mailto:CAkridge@jonesvargas.com>
> Date: Fri, 30 Dec 2011 11:10:40 -0500
> Subject: FW: Uni-Ter/Lewis & Clark
> See below
>
> Curtis H. Sitterson
> Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
> 150 W. Flagler St., Suite 2200
> Miami, FL 33130
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> csitterson@stearnsweaver.com<mailto:csitterson@stearnsweaver.com>
> www.stearnsweaver.com<http://www.stearnsweaver.com>
>
> From: Bush, Walter H. [mailto:wbush@carltonfields.com]
> Sent: Friday, December 30, 2011 10:48 AM
> To: Curtis Sitterson
> Cc: Doliner, Nathaniel L.; Vecchioli, Beth
> Subject: Uni-Ter/Lewis & Clark
>
> Dear Curtis my partner Nat Doliner and I just left a voice mail for you at your office. As you probably are aware, Carlton Fields is representing Uni-Ter in the above matter. We called both to introduce ourselves, and to provide contact information. We understand you will be sending a letter this morning to Uni-Ter on behalf of Lewis & Clark. We would appreciate your copying us electronically on such correspondence. We look forward to discussing this matter with you, and working together for a successful conclusion. If you wish to speak with us in the interim, please call Nat' s direct line, which is 813.229.4208.
>
> [cid:image001.jpg@01CCC718.A8C2E830]
> Walter H. Bush
> Attorney at Law
>
> One Atlantic Center
> 1201 West Peachtree Street, Suite 3000
> Atlanta, Georgia 30309-3455
>
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> bio<http://www.carltonfields.com/wbush>
> vcard<http://www.carltonfields.com/attorneys/AttorneyVCard.aspx?id=0218afd9-dec3-48e8-b24d-be77795878d7>
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Attorneys for Defendants/Third-Party Plaintiffs Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels

DISTRICT COURT

CLARK COUNTY, NEVADA

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS AND CLARK LTC RISK RETENTION GROUP, INC., Plaintiff, vs. ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, ERIC STICKELS, UNI-TER UNDERWRITING MANAGEMENT CORP., UNI-TER CLAIMS SERVICES CORP., and U.S. RE CORPORATION; DOES 1-50, inclusive; and ROES 51-100, inclusive, Defendants.	CASE NO.: A-14-711535-C DEPT. NO.: 27 **REPLY IN SUPPORT OF ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO NRCP 12(C)** Date of Hearing: October 11, 2018 Time of Hearing: 9:30 a.m.

Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels by and through their counsel, Lipson Neilson, P.C. hereby file their Reply in Support of Motion for Judgment on the Pleadings,

pursuant to NRCP 12(c).[1]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

As amended in 2017, NRS 78.138 expressly provides that in any case filed after October 1, 2013, a Nevada director can be personally liable for an alleged breach of fiduciary duty only when such director engaged intentional misconduct, fraud, or a knowing violation of the law. Because Plaintiff filed this case in 2014 and the Third Amended Complaint ("TAC") accuses the Directors of gross negligence (not intentional misconduct, fraud, or a knowing violation of the law), the Directors moved for judgment as a matter of law, pursuant to NRCP 12(c).

Plaintiff opposes the Director's motion by mischaracterizing the applicable case law, the legislative record, a securities fraud complaint filed in New York, and, amazingly, the TAC itself. Plaintiff does not, however, explain how the TAC meets the requirements of NRS 78.138 to impose personal liability on the Directors.

At most, and through reference to Delaware law (which NRS 78.138 prohibits) and by misreading Nevada law, Plaintiff argues that gross negligence is sufficient to rebut the business judgment rule's presumption of good faith established in NRS 78.138(3). This misses the point. To impose personal liability of the Directors, NRS 78.138(7) requires Plaintiff to (1) rebut the business judgment rule's presumption of good faith; *and* (2) prove the Directors breached their fiduciary duties through intentional misconduct, fraud or a knowing violation of law. Because the TAC alleges gross negligence (and not intentional misconduct, fraud or a knowing violation of law), it is irrelevant whether the presumption of good faith has been rebutted; Plaintiff cannot meet her burden under 78.138(7) and the Directors are entitled to judgment.

[1] Plaintiff filed a Countermotion, which the Directors have filed a Motion to Strike on. The opposition date to the Countermotion is October 8, 2018. Out of an abundance of caution, the Directors will file their Opposition on October 8, 2018.

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II. LEGAL ARGUMENT REGARDING THE APPLICABLITY OF NRS 78.138

A. The 2017 Amendments to NRS 78.138 Apply to this Lawsuit

At the outset, the Directors address Plaintiff's contention that the 2017 Amendments to NRS 78.138 do not apply to this case. In support of her contention, Plaintiff selectively quotes from the 2017 legislative record and states that NRS 78.138 "[does not] make any reference to retroactive application." *See* Opp'n at 8:4 - 13. Plaintiff is wrong. NRS 78.138 expressly provides that:

> 7. Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, **in each case filed on or after October 1, 2013**, provide for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless...

NRS 78.138(7) (emphasis added). Moreover, Plaintiff's citations to the 2017 legislative record in this regard are completely misleading, which the Directors discuss more fully in Section F below. In any event, nothing in the legislative record can alter the unambiguous terms of NRS 78.138. *See* 2017 Legislative Minutes on Senate Bill 203. Plaintiff filed this case in 2014 and the 2017 Amendments to NRS 78.138 apply.

B. Plaintiff Improperly Conflates NRS 78.138(3) and NRS 78.138(7)

NRS 78.138(3) establishes an initial presumption that every Nevada director acts in good faith, on an informed basis and with a view to the interests of the corporation:

> Except as otherwise provided in subsection 1 of NRS 78.139, 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. 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.

A plaintiff must rebut this business judgment rule presumption in order to challenge a director's decision, even when the plaintiff is not seeking to impose personal liability on that director. Classic examples of when this may be necessary are when a shareholder challenges a director's consideration of a derivative demand (see *In re Parametric Sound Corp. Shareholder's Litigation*, 2018 WL 1867909 (2018), and *Matter of DISH*

Network Derivative Litigation, 407 P.3d 1081 (2017)) or when a shareholder challenges a director's decision to vote in favor of redeeming certain shares (*see Wynn Resorts, Ltd.*, 399 P.3d 334 (2017)).

NRS 78.138(7), however, serves a very different purpose; it limits a Nevada director's personal liability for his/her decisions. To impose personal liability on a Nevada director, a plaintiff must do much more than rebut the business judgment rule's initial presumption:

> Except as otherwise provided in NRS 35.230, 90.660, 91.250, 452.200, 452.270, 668.045 and 694A.030, or unless the articles of incorporation or an amendment thereto, in each case filed on or after October 1, 2003 provided for greater individual liability, a director or officer is not individually liable to the corporation or its stockholders or creditors for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless:
>
> (a) The trier of fact determines that the presumption established by subsection 3 has been rebutted; **and**
>
> (b) **it is proven that**:
>
> (1) The 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**
>
> (2) Such breach involved intentional misconduct, fraud or a knowing violation of law.

NRS 78.138(7). (Emphasis added.) The following comment by the corporate director proponent for the 2017 Amendments underscores the distinction:

> The business judgment rule is just a starting point. If you have the presumption overcome, then you still can say that we want to undo this action of the corporation, but you do not have the personal liability. This is important, because if a Nevada corporation wants to encourage the best directors and officers to serve, one of the things we can say is that we have a statute that so long as you act in good faith and do not engage in intentional misconduct, fraud or knowing violation of the law, you will not be personally liable. That, again, is current, existing law.

May 25, 2017 Assembly Judiciary Committee Minutes, at P. 54.

In her opposition, Plaintiff conflates NRS 78.138(3) with NRS 78.138(7) to suggest that personal liability will attach as soon as a plaintiff rebuts the business judgment rule presumption. This flawed understanding of NRS 78.138 is evident from

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Plaintiff's discussion of *Shoen* (which discusses how the business judgment rule presumption works), *see* Opp'n at 4:4 – 20, and of *In re Newport Corp. Shareholder Litigation* and *Parametric Sound Corp. Shareholder's Litigation* (which discuss how a plaintiff can rebut the business judgment rule presumption) *see* Opp'n at 9:15 – 20.

Of the four cases cited in Plaintiff's opposition that were decided after the 2017 Amendment to NRS 78.138, three cite directly to NRS 78.138(7) in holding that, when it comes to imposing personal liability on a Nevada director, a plaintiff must show: (1) the business judgment rule has been rebutted; (2) the director breached his or her Fiduciary duty; ***and*** (3) the director's breach involved intentional misconduct, fraud or a knowing violation of law. *In re Parametric Sound Corp. Shareholders' Litigation*, 2018 WL 1867909, at *2 (Nev.Dist.Ct. Mar. 27, 2018); *In re Newport Corp. Shareholder Litigation*, 2018 WL 1475469, at *2 (Nev.Dist.Ct. Jan. 05, 2018); and *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 399 P.3d 334, 342 (Nev. 2017).

The fourth case, *Matter of Dish Network Derivative Litigation*, 401 P.3d 1081 (2017), does not mention NRS 78.138(7) because that case did not involve a personal liability claim against Nevada directors. *Matter of Dish Network* involved a different issue – whether the business judgment rule applied to a special litigation committee's decision not to pursue a derivative demand. *Dish Network* discusses the business judgment rule's presumptions without also discussing NRS 78.138(7) because determining when a director's decisions are protected under the business judgment rule's presumption is not the same as determining whether a director can be personally liable for such decision. This case involves the latter, yet all of Plaintiff's arguments regard the former.

The business judgment rule presumption under NRS 78.138(3) is not the issue. The TAC seeks to impose personal liability on the Directors but does not allege that the Directors engaged in intentional misconduct, fraud or a knowing violation of law. Therefore, under NRS 78.138(7), the TAC fails as a matter of law, whether or not the business judgment rule presumption also applies.

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C. NRS 78.138(7)(b) Applies to the Duty of Care and the Duty of Loyalty

Plaintiff next argues that NRS 78.138(7) only applies to alleged breaches of the duty of loyalty and does not apply to alleged breaches of the duty of care. *See* Opp'n at 6:13-15. Plaintiff does not cite to NRS 78.138(7) for this proposition; that is because NRS 78.138(7) makes no distinction between the duty of loyalty and the duty of care. Instead, Plaintiff cites to a selective quotation from *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006), as well as the following: *Wynn Resorts*, 399 P.3d at 343; *Matter of DISH Network Derivative Litig.*, 401 P.3d at 1092 and *Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720 (2003).

The difference between the duty of care and duty of loyalty might be a key distinction in some cases, but there is no distinction when it comes to NRS 78.138(7). The protections afforded under NRS 78.138(7) to Nevada directors apply equally to alleged breaches of the duty of care and loyalty. *In re Amerco Derivative Litig.*, 127 Nev. 196, 223, 252 P.3d 681, 700 (2011);[2] see also *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 399 P.3d 334, 342 (2017) ("... a director will not be liable for damages based on a business decision unless it can be shown that the director breached his fiduciary duties and that such breach involved intentional misconduct, fraud, or a knowing violation of the law").

The Directors have reviewed each of Plaintiff's citations in this regard and <u>none</u> of them hold (or even imply) that a Nevada director can be personally liable for breaching the duty of care through grossly negligent conduct, despite the statutory protections afforded by NRS 78.138(7). To be blunt, Plaintiff's argument appears cut from whole cloth.

[2] The Court stated that "Pursuant to NRS 78.138(7), to show that a director breached his or her fiduciary duty, a shareholder must prove that the director's 'act or failure to act constituted a breach of his or her **fiduciary duties**' and that the 'breach of those **duties** involved intentional misconduct, fraud or a knowing violation of the law.' (emphasis added). It did not confine this standard to one specific type of fiduciary duty.

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D. The TAC Alleges Gross Negligence, Not a "Knowing Violation of Law"

Plaintiff also attempts to argue, without any citation or discussion of specific allegations, that the TAC does in fact allege a "knowing violation of law." *See* Opp'n at 5:22-6:4.[3] Because Plaintiff has failed to identify such allegations, it remains entirely unclear what Plaintiff believes them to be. Nonetheless, even if the TAC did contain such allegations, they would need to be pled with specificity, as set forth in section E below. Allegations the Plaintiff cannot identify with specificity certainly are not allegations pled with specificity. To the contrary, the TAC alleges nothing more then that the Directors "failed to exercise even slight diligence" in various ways. *See*, e.g., TAC, p. 39-43.

E. Plaintiff Must Plead Claims for Breach of Fiduciary Duty With Particularity

Plaintiff cites *Cohen v. Mirage Resorts*, 119 Nev. 1, 62 P.3d 720 (2003) for the proposition that she does not need to plead any claims under NRS 78.138 with particularity. *See* Opp'n at 5:8-15. This is a red herring. The issue is not whether the TAC alleges fraud or intentional misconduct *with particularity*. The issue is that the TAC does not allege fraud or intentional misconduct at all. Nevertheless, a couple of points bear mentioning on this issue.

First, *Cohen* is inapposite. *Cohen* involved dissenting shareholders attacking the validity of a merger under NRS 92A.300 to 92A.500. In examining the dissenting shareholders' claims, the Court noted that "the term 'fraudulent,' as used in the Model Act, encompasses a variety of acts involving breach of fiduciary duties imposed upon corporate officers, directors, or majority shareholders," and then concluded that the term "fraudulent" as used in NRS 92A.380(2) has a "similar scope." *Id* at 729. The Court did not analyze or even mention NRS 78.138; it simply clarified that the term "fraudulent,"

[3] In this same section, Plaintiff contends that Directors' "legally incorrect approach" has been "rejected numerous times by the Supreme Court of Nevada," yet amazingly fails to cite to a single one of these purported cases.

as used in the Model Act, could encompass a "variety of acts involving breach of fiduciary duties," but did not state that such acts were exempt from the particular pleading requirements of NRCP 9(b). *Id.*

Indeed, the Nevada Supreme Court has expressly confirmed that claims for breach of fiduciary duties are subject to the heightened pleading standard. *In re Amerco Derivative Litigation*, 127 Nev. 196, 252 P.3d 681 (2011). In *Amerco*, the plaintiffs brought claims for breach of fiduciary duties, aiding and abetting breach of fiduciary duties, usurpation of corporate opportunities, and unjust enrichment. *Amerco*, 127 Nev. at 222. The Court noted that, to assert a breach of fiduciary duties under NRS 78.138(7), a plaintiff must prove fraud or intentional misconduct, and specifically held that the plaintiffs' claims for breach of fiduciary duty must satisfy the heightened pleading requirement of NRCP 9(b). *Id.* Consequently, Plaintiff's argument that it is somehow excused from pleading with particularity or demonstrating a particular state of mind is wholly without merit.

F. NRS 78.138 Must be Applied as Written

When a statute is unambiguous, courts must apply the statute as written. *Williams v. United Parcel Servs.*, 129 Nev. 386, 391; 302 P.3d 1144, 1147 (2013) ("In the absence of an ambiguity, we do not resort to other sources, *such as legislative history*, in ascertaining that statute's meaning") (emphasis added). The Nevada Supreme Court has held that NRS 78.138 is "unambiguous." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 399 P.3d 334, 344 (Nev. 2017) (stating that "NRS 78.138 is unambiguous"). Therefore, Plaintiff's arguments based on the 2017 legislative history are improper, and Directors assert the following counterarguments only out of an abundance of caution.

1. Plaintiff's Discussion of 2017 Legislative History is Irrelevant

Plaintiff makes much ado of the fact that in their Motion, the Directors discussed the 2001 legislative history of NRS 78.138 but not the 2017 legislative history, even going so far as to assert that this "omission is glaring and undercuts [Director

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Defendants'] Motion entirely." *See* Opp'n at 6:24-27. However, the Motion is not undercut in the least by this "omission" because the Motion is not actually premised on any legislative history. The Motion's reference to the 2001 legislative history of NRS 78.138 is merely a backdrop to the subsequent discussion of the current statute's text, as should have been apparent by the heading under which this discussion falls: "A Brief Legislative History of NRS 78.138." *See* Motion at 6:26. Directors specifically maintained in the Motion – and now again in the Reply – that the text of NRS 78.138 is clear and unambiguous, and that this Court accordingly must apply the statute as written. To then make arguments that this Court should look beyond the statute to the 2017 legislative history would be nonsensical and cut against this entirely. Thus, not only does the absence of the 2017 legislative history *not* undercut the Motion, it is in fact logical and expected given the Directors' arguments.

At any rate, Plaintiff's discussion of the 2017 legislative history is misleading and inaccurate. Plaintiff quotes an excerpt of Mr. Malkiewich's commentary form the April 10, 2017 minutes that "there is no case we are seeking to overturn." *See* Opp'n at 8:4-5. However, a review of the entire comment, as well as Mr. Malkiewich's proceeding comment on page 40, indicates that he was stating that the bill was not seeking to "overturn" a pre-existing case and cause it to be re-litigated, but to ensure that courts would base decisions on the underlying controlling statute and apply it as written.[4] Similarly, Plaintiff mischaracterizes and quotes an excerpt by Mr. Malkiewich in the May 25, 2017 minutes that "there is no retroactive effect to this bill" to argue that the 2017 amendments to NRS 78.138 are not retroactive. *See* Opp'n at 8: 9-12. A review of the entire comment from Mr. Malkiewich indicates he was clarifying that the point of the bill was not to stop courts from using persuasive authority where helpful, but to set forth that the statute should control over persuasive authority when that authority is contrary

[4] See April 10, 2017 Senate Judiciary Minutes, attached hereto as **Exhibit A**, p.39-40.

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to the statute.[5] In a subsequent comment on the same page, Mr. Malkiewich confirms that the bill is not changing the law, but simply clarifying that, in addition to rebutting the business judgment rule, a plaintiff must also establish a breach of fiduciary duties that involved intentional misconduct or fraud.[6]

It should be no surprise that in appearing before the Senate Committee on Judiciary to clarify NRS 78.138, Mr. Malkiewich was representing U-Haul. It should be of even less surprise that he was lobbying and expressing his concern with language from the *Shoen v. SAC Holding Corp* case from 2006, since the Court nearly crossed into the territory of judicial activism with its advisory opinion.[7] Although relying on legislative history in interpreting NRS 78.138 is improper, doing so does not change the analysis: to impose liability, Plaintiff must not only rebut the business judgment rule, but also show a breach of fiduciary duties through fraud, intentional misconduct, or a knowing violation of the law.

2. Plaintiff's Arguments Based on Case law Are Irrelevant

In addition to legislative history, Plaintiff also mischaracterizes case law to support her position. Specifically, Plaintiff cites to a footnote in *Wynn Resorts* wherein the court states that the 2017 amendment to NRS 78.138 "does not change [its] conclusions" to argue that the 2017 amendments are not retroactive. *See* Opp'n at 8:12-13. However, this footnote pertains to the *Wynn Resorts* court's analysis of an entirely different issue; namely, whether Wynn Resorts waived the attorney-client privilege as to certain documents by asserting the business judgment rule. *Wynn Resorts*, 399 P.3d at 341-342. The court's comment that the 2017 amendments do not impact their conclusions with respect to this issue has no bearing on the retroactivity of the statute

[5] See May 25, 2017 Assembly Judiciary Minutes, attached hereto as **Exhibit B**, p.54-55.

[6] *Id*, p.55.

[7] Exhibit A, p.36 ("Lorne Malkiewich (U-Haul International, Inc.)" & 39 ("These cases from the past are just examples of why there is a concern. The language that I was referring to was from a 2006 case"). *See also Shoen v. SAC Holding Corp.*, 122 Nev. 621 (2006).

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and the application of the same to the instant matter. Dismissal is appropriate.

G. Plaintiff's Additional Arguments

Plaintiff's opposition is littered with numerous misleading quotations and red herrings intended to distract from sole dispositive issue: whether dismissal of the TAC is warranted under NRS 78.138(7) given Plaintiff's failure to allege intentional or fraudulent conduct. Directors respond to these distractions out of an abundance of caution, simply to avoid any potential waiver argument.

1. Estoppel

Plaintiff contends that "in their own action against the UniTer Defendants, the Directors themselves" made certain arguments in a pending case in New York which judicially estop them from seeking dismissal here of Plaintiff's TAC for failure to plead intentional misconduct. *See* Opp'n, 5:16-22. This is simply not true. The plaintiffs in the New York action are *not* the Director Defendants, but the companies for which Director Defendants work. Moreover, nothing in the New York action is an admission that the Directors "totally abdicated their functions to the UniTer defendants." *See* Opp'n at 4:24-26. The four paragraphs cited by Plaintiff in this regard (¶¶ 28, 45 and 48 of Exhibit 2-A) do not even come close to such an admission (by the Directors or otherwise) and are presented to the Court entirely out of context.[8] The pleadings and motion practice of the New York action are wholly irrelevant to the instant matter.

2. Inability to Assert the Business Judgment Rule

Plaintiff claims that the Directors "are not capable of ever invoking the BJR because they admit (and the evidence shows) that they totally abdicated their functions to the UniTer Defendants." *See* Opp'n at 4:24-26. Again, the Directors have made no

[8] A simple analysis of the elements of judicial estoppel show that in no uncertain circumstances, Plaintiff's argument is meritless. To establish judicial estoppel, a party must establish the following: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. *Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996,* 133 Nev. 8, 390 P.3d 646, 652 (2017).

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such admission; moreover, Plaintiff's so-called "evidence" consists of citations to the Complaint and Opposition in the New York action. In any event, Plaintiff's argument is entirely irrelevant. Whether the Directors have the right to assert the business judgment rule (which they do) is not the issue here; the issue is whether the TAC fails as a matter of law because it alleges only gross negligence.

III. CONCLUSION: DIRECTOR DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW

To impose liability on the Directors, NRS 78.138(7) requires the Plaintiff to (1) rebut the business judgment rule; and (2) prove a breach of fiduciary duty through intentional misconduct, fraud, or a knowing violation of the law. Taking all of the allegations in the TAC as true, judgment must be entered in favor of the Directors, Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels, as the TAC alleges nothing more than gross negligence and does not allege intentional misconduct, fraud or knowing violation of the law.

Based thereon, Robert Chur, Steve Fogg, Mark Garber, Carol Harter, Robert Hurlbut, Barbara Lumpkin, Jeff Marshall, and Eric Stickels respectfully request the court grant their Motion for Judgment on the Pleadings.

Dated this 4th day of October, 2018.

LIPSON NEILSON, P.C.

By: _____

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and Administrative Order 14-2, I certify that on the 4th day of October, 2018, I electronically transmitted the foregoing **REPLY IN SUPPORT OF ROBERT CHUR, STEVE FOGG, MARK GARBER, CAROL HARTER, ROBERT HURLBUT, BARBARA LUMPKIN, JEFF MARSHALL, AND ERIC STICKELS' MOTION FOR JUDGMENT ON THE PLEADINGS PURSUANT TO NRCP 12(c)** to the Clerk's Office using the Odyssey E-File & Serve System for filing and transmittal to the following Odyssey E-File & Serve registrants:

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EXHIBIT "A"

EXHIBIT "A"

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-ninth Session
April 10, 2017

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 1:18 p.m. on Monday, April 10, 2017, in Room 2134 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Nicole J. Cannizzaro, Vice Chair
Senator Moises Denis
Senator Aaron D. Ford
Senator Don Gustavson
Senator Michael Roberson
Senator Becky Harris

STAFF MEMBERS PRESENT:

Patrick Guinan, Policy Analyst
Nick Anthony, Counsel
Connie Westadt, Committee Secretary

OTHERS PRESENT:

John Cahill, Public Administrator, Clark County
Steven R. Scow
Preston Cochrane, American Research Bureau
The Honorable James W. Hardesty, Justice, Nevada Supreme Court
James E. Dzurenda, Director, Department of Corrections
Chuck Callaway, Las Vegas Metropolitan Police Department
Holly Welborn, American Civil Liberties Union of Nevada
Eric Spratley, Washoe County Sheriff's Office
Jennifer Noble, Nevada District Attorneys Association

Julie Butler, Division Administrator, General Services Division, Department of Public Safety
Jon Sasser, Washoe Legal Services; Legal Aid Center of Southern Nevada
Aaron D. MacDonald, Consumer Rights Project, Legal Aid Center of Southern Nevada
Malcolm Doctors
Michael R. Brooks, United Trustees Association
Greg Gemignani, Nevada Credit Union League
John J. Piro, Deputy Public Defender, Office of the Public Defender, Clark County
John T. Jones, Jr., Nevada District Attorneys Association
Lorne Malkiewich, U-Haul International Inc.

CHAIR SEGERBLOM:
I will open the hearing on Senate Bill (S.B.) 376.

SENATE BILL 376: Revises provisions relating to certain agreements between heir finders and apparent heirs. (BDR 12-480)

JOHN CAHILL (Public Administrator, Clark County):
Nevada Revised Statutes (NRS) 139.135 was added to the NRS during the Seventy-sixth Session in 2011. It provides that an agreement between an heir finder and an apparent heir to locate, recover or assist in the recovery of an estate for which the public administrator has petitioned for letters of administration is void and unenforceable if the agreement is entered into during the period beginning with the death of the person whose estate is in probate until 90 days thereafter. Senate Bill 376 would change the period from 90 days to 1 year. I have provided written testimony and exhibits (Exhibit C).

Since the enactment of NRS 139.135, the Clark County Public Administrator has not had a case that excluded an heir-hunting firm under the timelines set forth in section 1, subsection 1 of S.B. 376. The Public Administrators in both Clark and Washoe Counties investigate, secure assets, locate assets and file for legal status. Performing these tasks takes many months.

You will hear opposition testimony from Steven Scow that a year is too long. Mr. Scow uses the example that probate could be opened, heard by the court and assets distributed within less than one year thereby precluding the use of an heir finder. Mr. Scow's position is that if the distribution were incorrect,

there would be no way to correct the erroneous distribution. I want to remind the Committee that this bill is exclusively for Nevada's Public Administrators. Our offices do not work with the kind of speed that would allow final distribution in less than one year. I wish we could. I wish we had the resources to do it faster.

In the example used by Mr. Scow, the individual died on March 17, 2013. I received the referral in September 2013. The letters of administration were issued with special status in September 2014. The estate was converted to a general status in April 2015. We searched for heirs. We secured assets. Mr. Scow brought us the heirs in July 2015. Had the one year been in place, the heir finder would have been prevented from being involved.

CHAIR SEGERBLOM:
When does the period start?

MR. CAHILL:
The period starts on the date of death.

CHAIR SEGERBLOM:
The case you just referred to took more than one year to administer.

MR. CAHILL:
Yes.

CHAIR SEGERBLOM:
We understand your position. You would like to increase the 90 days to 1 year. You do not want to have heir finders getting money that they do not deserve.

STEVEN R. SCOW:
I am an attorney, and over a period of approximately 20 years, I represented beneficiaries in estates in a dozen cases. It is my understanding that the Public Administrator wants to change the restriction period for heir finders in Public Administrator cases from 90 days to 1 year. I do not doubt his good faith. I do not doubt his sincerity. My concern is the unintended consequences. The Public Administrator typically hires an heir finder on an hourly basis. I am familiar with the one the Public Administrator uses in Clark County. He is a good researcher. He often finds the people. In the case we are talking about, he did not. It is possible to have a final distribution of an estate within one year. It is

also possible that some, but not all, heirs would be found prior to final distribution. The typical administration of an estate takes six to eight months.

CHAIR SEGERBLOM:
You prefer 90 days to 1 year.

MR. SCOW:
The 90 days needs to stay. Without the shorter time, you lose the check and balance.

CHAIR SEGERBLOM:
What are you paid? Do you get a percentage of the heir's distribution?

MR. SCOW:
No. I am paid strictly as an attorney through the arrangements I have with my clients.

CHAIR SEGERBLOM:
Are your clients heir-finders firms or heirs?

MR. SCOW:
My clients are the heirs. I represent the beneficiaries.

CHAIR SEGERBLOM:
Do your clients have a contract with an heir finder too?

MR. SCOW:
Yes. The beneficiaries have their own contract with the heir hunter.

CHAIR SEGERBLOM:
Do heir finders charge a percentage or by the hour?

MR. SCOW:
The check and balance takes place when an heir finder is taking a free look at every case filed. No one is charging, but the facts are being double-checked. Many times, even when one brother says he is the only heir, there are others. One brother does not identify his own brothers. That is where there is benefit from having someone take a look, whether it is a public administrator case or not.

CHAIR SEGERBLOM:
Will heir finders sign a contract that provides that they will not take a percentage until after the one-year period is over?

MR. SCOW:
The law is that no one can enter into a contract in a public administrator case during the 90-day period following the date of death.

CHAIR SEGERBLOM:
If the period were extended to 1 year, could the heir finder sign the contract after 90 days but not actually collect until the 1-year period had expired?

MR. SCOW:
No. My understanding is that the heir finder could not legally sign a contract until after the one-year period.

CHAIR SEGERBLOM:
Senate Bill 376 could be amended to do that.

PRESTON COCHRANE (American Research Bureau):
We oppose S.B. 376. We have been researching estates for over 82 years. We work in many states throughout the Country and throughout the world. Heir finders provide a critical check and balance to the probate process. Nevada is the only state with a law that has a time-period prohibition. Assembly Bill No. 291 of the 76th Session proposed 1 year. After several hearings, a compromise was reached on the 90 days. Nothing has changed since then to justify one year. We believe 90 days is sufficient. Increasing the requirement from 90 days to 1 year would erode consumer protections, increase staff workloads, which Mr. Cahill indicated he does not have the resources to do, and exacerbate government inefficiencies. In addition, the typical estate is distributed in six to eight months. If the one-year prohibition was put in place, it could put many estates into the distribution category without any double-check from a professional heir finder.

We are professionals. We are professional genealogists. We have the resources to locate heirs worldwide, not just within the U.S., to confirm who the proper heirs are. In the case Mr. Scow referred to, we found the additional heirs. If it were not for us, they would not have been notified or known that they were entitled to a share of their inheritance. The one-year period would open the door

for potential fraudulent claims from unlawful claimants. It would add further delays for aging beneficiaries, and it would deny legitimate heirs their constitutional right to a speedy trial.

Legitimate heirs should not have to wait 12 months before they have any influence on estate assets that by law they are entitled to receive. We respect and appreciate the role that public administrators play in the process. We continue to support them in their jobs, which they are elected and entrusted to do. That is why we work together. We never try to take the administration of an estate away from the public administrator. We are in support of a more reasonable solution.

CHAIR SEGERBLOM:
Do you sign a contract with potential heirs?

MR. COCHRANE:
Yes. Heirs sign contracts with us. Sometimes, public administrators hire us. Sometimes, financial institutions or insurance companies hire us. Sometimes, we locate individuals who would not otherwise know about an estate to which they are entitled.

CHAIR SEGERBLOM:
Do you see that someone has died and start looking before you sign a contract?

MR. COCHRANE:
No. We would have to know there had been a death.

CHAIR SEGERBLOM:
You look at the obituaries. You know someone has died. Do you start researching to see if that person has heirs?

MR. COCHRANE:
No. We do not look at obituaries.

CHAIR SEGERBLOM:
Do you have a signed contract before you start looking?

MR. COCHRANE:
No. We start looking beforehand. We do all the research beforehand to identify if there are missing or unknown heirs to an estate.

CHAIR SEGERBLOM:
Do you find potential heirs?

MR. COCHRANE:
Yes.

CHAIR SEGERBLOM:
What does your contract with the heir say?

MR. COCHRANE:
The contract can range from an hourly fee to a contingency fee. It is a competitive industry. Contingency fees can vary from 5 percent up to 33.33 percent depending on the complexity or difficulty of the case.

CHAIR SEGERBLOM:
You find out someone has died. You start looking for heirs. Can you wait one year to sign a contract? You could be looking during that year.

MR. COCHRANE:
We could not enter into a contract with that individual during the one-year prohibition. We could do all the work. Then the estate may distribute assets before the one year is up.

CHAIR SEGERBLOM:
Mr. Cahill just said they never distribute before the year is up.

MR. SCOW:
In general, the typical administration of an estate can easily be six to eight months. Is it often six to eight months? Yes. In my experience, it is. Is it always six to eight months? No.

CHAIR SEGERBLOM:
Is that true of probate? Is it true when the public administrator is involved?

MR. SCOW:
Yes. The statutory requirement for probate is five months. The procedural requirements can be met in five months.

CHAIR SEGERBLOM:
The question is whether in Clark County the probate office closes an estate in less than one year.

MR. SCOW:
Are you asking about the probate administrator?

CHAIR SEGERBLOM:
I am asking about the public administrator.

MR. CAHILL:
Not once in the ten years that I have been Public Administrator have we finished an estate in six to eight months. The statute allows 18 months for a general administration. We rarely make that. We keep the court notified. We file the annual accountings. If I send the distribution to the State Treasurer as unclaimed property, NRS 120A.740 says that any agreement with a property owner entered into during the period commencing on the date the property was presumed to be abandoned and extending to a time that is 24 months after the date the property is paid or delivered to the Administrator is void and unenforceable. Compensation is limited to 10 percent of the total value of the property. The agreement is between the person claiming ownership and the heir finder. The State Treasurer sends the check to the person claiming ownership, and then it is up to the heir finder or asset hunter to collect and enforce the contract.

You should ask those testifying in opposition what would happen if they signed one heir up and then found another heir who does not sign a contract. If I find the second heir, the first heir will want to get out of his or her heir-finder contract because the second heir will not have to pay the heir-finder's fee.

CHAIR SEGERBLOM:
I will close the hearing on S.B. 376 and open the hearing on S.B. 277 and S.B. 451.

SENATE BILL 277: Revises provisions relating to criminal justice information. (BDR 14-1004)

SENATE BILL 451: Makes various changes relating to criminal justice. (BDR 14-1007)

THE HONORABLE JAMES W. HARDESTY (Justice, Nevada Supreme Court):
I am here to report to you on the recommendations of the Advisory Commission on the Administration of Justice. *The Advisory Commission on the Administration of Justice Final Report February 2017* is available at <https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/9887>.

I want to express my sincere appreciation to Counsel Nick Anthony for his research and assistance to the Advisory Commission. Policy Analyst Patrick Guinan also provided support to the Advisory Commission. We are grateful to the Legislative Counsel Bureau staff for assisting this important Commission.

I have provided the Committee a presentation (Exhibit D) and a Summary of Final Recommendations of the Advisory Commission (Exhibit E). Pages 2 and 3 of Exhibit D list the 18 members of the Advisory Commission. It was a diverse group with strong opinions on the various topics with which the Advisory Commission was charged. I want to thank all of these people. All attended all of the meetings. There were eight meetings and many went most of the day. We had thorough discussions and debates.

The statutory duties assigned to the Advisory Commission are listed on pages 4 and 5 of Exhibit D. The list of responsibilities statutorily placed on the Advisory Commission exceeds its capacity to reasonably produce a good work product in in the time allotted and with the staff provided. Some of these responsibilities should be eliminated either because they no longer exist or because they are irrelevant to the primary mission established in 1995 of truth in sentencing. Since that time, a potpourri of subject matters has been placed on the agenda of the Advisory Commission. I would be happy to share my personal recommendation of which duties could be eliminated.

CHAIR SEGERBLOM:
If you would send an email to the Committee, we will have a bill draft request tomorrow.

JUSTICE HARDESTY:
Page 6 of Exhibit D lists the subcommittees the Advisory Commission has established pursuant to statutory requirements to study various issues. I would draw your attention to the Subcommittee on Juvenile Justice. There is a plethora of juvenile justice committees. The Legislature has a Juvenile Justice Committee. There is a Subcommittee on Juvenile Justice within the Advisory Committee. Assembly Bill (A.B.) 472, proposed this Session by a task force chaired by First Lady Kathleen Sandoval and retired Supreme Court Justice Nancy Saitta, creates a Statewide Juvenile Justice Oversight Commission. This subcommittee should be eliminated.

ASSEMBLY BILL 472: Establishes policies for reducing recidivism rates and improving other outcomes for youth in the juvenile justice system. (BDR 5-918)

The Advisory Commission also has a statutorily required Subcommittee to Review Arrestee DNA. This subcommittee was created following the enactment of S.B. No. 243 of the 77th Session, known as Brianna's Law. That issue has been mostly resolved. The law is in place. There is no necessity for this subcommittee. While it is important to maintain the Subcommittee on Victims of Crime because that perspective is critical to the Advisory Commission, the Subcommittee on Medical Use of Marijuana has no business being in the Advisory Commission.

CHAIR SEGERBLOM:
I agree.

JUSTICE HARDESTY:
The Advisory Commission conducted eight substantive meetings from February to November 2016. The meetings addressed the Advisory Commission's statutory duties, subcommittees were appointed and recommendations were made in certain areas. The topics covered in the eight meetings are listed on page 7 of Exhibit D.

Early on, at the urging of Advisory Commission member Chuck Callaway, we discussed how to approach this rather significant agenda. We agreed to focus on where we could target a systematic change in the criminal justice process. That resulted in essentially seven recommendations for legislative changes. A couple are small, and a couple are big and critical to the future of the State.

Senate Bill 277 reflects two of the recommendations made by the Advisory Commission. At pages 122 and 123 of the *Final Report*, there is a summary of the first recommendation made by the Advisory Commission. This recommendation is section 3 of S.B. 277. The recommendation was to provide notification on medical marijuana. Commissioner Jorge Pierrott, a representative from the Division of Parole and Probation of the Department of Public Safety, requested this. The Parole and Probation sought legislation to amend NRS 453A.700 to allow the Division of Public and Behavioral Health of the Department of Health and Human Services to provide information to Parole and Probation when requested for the purpose of determining whether someone under supervision in the criminal justice system either by way of parole or probation was seeking a medical marijuana registry identification card. The information is not necessarily being sought to find a violation or punishment but rather to reconcile that use with prohibitions against the use of a controlled substance as a condition of parole or probation.

CHAIR SEGERBLOM:
Did Parole and Probation specifically say that it wanted to be sure that, if someone tested positive, it was all right?

JUSTICE HARDESTY:
Precisely. The report says that Commissioner Pierrott clarified that Parole and Probation is requesting notification so that it can speak with the offender and, if need be, refer the offender back to the court or to the Board of Parole Commissioners. If the use is consistent with Nevada law and the offender has a card, then Parole and Probation would work that out with the offender. If on the other hand controlled substance use constitutes a violation because the quantities are too high, the offender does not possess a card or does not qualify for a card, that would be a different story. This increases information sharing between Parole and Probation and Public and Behavioral Health.

Sections 1 and 2 of S.B. 277 are discussed at pages 123 and 125 of the *Final Report*. Senate Bill 35 creates a Subcommittee on Criminal Justice Information Sharing of the Advisory Commission on the Administration of Justice.

SENATE BILL 35: Creates the Subcommittee on Criminal Justice Information Sharing of the Advisory Commission on the Administration of Justice. (BDR 14-261)

The provisions in S.B. 35 are consistent with the provisions of S.B. 277 with two exceptions. Senate Bill 35 creates the same Subcommittee recommended by the Advisory Commission and sets up the same structure. There are two areas contained in section 1 of S.B. 277, subsection 4, paragraphs (a) and (b) that are critical to the Advisory Commission's consideration of information sharing reform in this State. We urge that these two paragraphs be included as part of whichever bill is adopted.

The Advisory Commission received important testimony regarding significant weaknesses in Nevada's criminal history information sharing systems. As discussed on page 124 of the *Final Report*, the Advisory Commission identified a number of issues. For example, there are multiple criminal justice information systems being used throughout the State. A reasonable person would ask if this is economically effective. There are potential overlaps and, more significantly, loopholes in services within each of the three primary information exchange services. There is a backlog of reported dispositions. This Legislature and prior Legislatures have had to address this issue from an economic standpoint to eliminate the backlog. Arrest records in criminal justice reports are also delayed and backlogged. Because of all of these issues, one of the most significant recommendations made by the Advisory Commission was to create this Subcommittee to study the issues raised in section 1, subsection 4 of S.B. 277.

Why do not these criminal justice information systems talk to one another? What information is available to the beat cop on the street about the person he or she has pulled over at 2:00 a.m.? If our criminal history information is not sufficient to be able to tell the beat cop about that person, that is a problem. We need to get this fixed, and we need to get it fixed in the next two years.

How can the State make effective criminal justice decisions if the criminal history systems have weaknesses that create problems? There are three independent systems for criminal justice information: the Central Repository for Nevada Records of Criminal History, Shared Computer Operations for Protection and Enforcement (SCOPE), and Tiberon. These systems need to be connected and to work together. This will provide both information and economic benefit. Senate Bill 277 and S.B. 35 are similar and I ask that they be reconciled.

The work of the Subcommittee must have a deadline. A work product needs to be produced. The Subcommittee needs to be compelled to produce

recommendations, not just drag things on so that ten Legislative Sessions from now somebody is still talking about what the Subcommittee is supposed to study.

Senate Bill 451 contains three recommendations from the Advisory Commission. The first is in sections 2, 13, 14, 15 and 16. For those of you who were involved in the Seventy-eighth Session, this bill represents a recommendation regarding the right of defendants to pay for their own DNA testing through postconviction relief. This was requested by Denise Brown and a majority of the Advisory Commission endorsed her request. That is what is contained in these sections.

I would like to discuss Advisory Commission recommendations 5 and 7 in Exhibit E. Recommendation 5 asks the Legislature to adopt a set of policies and principles from the "Report of the National Conference of State Legislatures Sentencing and Corrections Work Group" from August 2011 which outlines seven principles of effective state sentencing and corrections policy. Nevada does not have a set of policies that give guidance to the Legislature for assessing the variety of topics that should be considered when developing an approach to determine whether to criminalize and punish something. One of the things always missing is an assessment of fiscal impact.

The 2011 Report was presented to the Advisory Commission. It is the work product of an 18-member group that worked with the Pew Research Center. Seven principles were developed to guide the decision making of state lawmakers as they review and enact policies and make budgetary decisions that affect community safety, management of criminal offenders and allocation of correction resources. We urge the adoption of section 3 of S.B. 451, which are policies refined by the Advisory Commission to guide future decisions by the Legislature regarding criminal justice policy. Three examples are of this are: one, sentencing and corrections policies should embody fairness, consistency, proportionality and opportunity; two, a continuum of sentencing and corrections options should be available with imprisonment reserved for the most serious offenders and adequate community programs for diversion and supervision of other offenders; and three, criminal justice information should be a foundation for effective data-driven sentencing and correction policies. What we hope to achieve is true truth in sentencing.

The next and perhaps the most important recommendation of the Advisory Commission is a proposal to create the Nevada Sentencing Commission. This recommendation is No. 7 on page 2 of Exhibit E and in the *Final Report* on pages 128 to 131. It is contained in sections 4 through 12 and 17 and 18 of S.B. 451.

CHAIR SEGERBLOM:
If we adopt this recommendation, could we find funding through the Pew Research Center, the National Conference of State Legislatures or the Council of State Governments?

JUSTICE HARDESTY:
Perhaps. We will certainly make that request. The bill provides that the Sentencing Commission can receive such grants. I believe that you will hear from others that states undertaking sentencing commissions have done it on their own. The resources we have available in our State would allow us to accomplish many of the objectives of the Sentencing Commission without assistance from outside agencies.

I refer the Committee to the summary pages contained in the *Final Report* that explain what a sentencing commission is. It is not a new animal. It is present in 20 states. There are different permutations. The one before you is the one the Advisory Commission unanimously recommends. Nevada has five categories of crimes, A through E. Tell me what the definitions are for those categories. No one on the Advisory Commission was able to define these five categories. When these categories were first developed, they were supposed to range from the least problematic crime to the most egregious. So what are the differences? What are the separations? Over time, these distinctions have been completely lost. The point of the categories has been completely lost as we criminalized behavior over the past two decades since truth in sentencing was enacted.

In order to deal with prison overcrowding, we have to address credits. Assembly Bill No. 510 of the 74th Session created credits, this kind of credit and that kind of credit. The purpose of credits was to deal with prison overcrowding, which is costing this State a lot. The State is facing prison overcrowding again. Are these credits diminishing truth in sentencing when a judge sentences somebody to prison and the prosecutor, the victim and the defendant do not know how credits are calculated or when the defendant will actually be eligible to get out of prison or to apply for parole?

Length of stay is a huge issue when dealing with prison overcrowding and when dealing with prison budgets. We have a wide disparity in the sentencing practices of the district judges across the State. Some judges will sentence a certain percentage of offenders charged with the same or similar offense with similar criminal histories at a higher rate. Other judges will sentence at a lower rate. The differences will be prison versus probation. Category B sentences account for two-thirds of the prison population; however, the sentencing ranges within Category B offenses are all over the map. They range from one-to-six to life. Such a disparity makes no sense. Nevada's criminal justice sentencing practices using five undefined categories is not working. This is why the Advisory Commission studied quite thoroughly the use of sentencing commissions.

Sentencing commissions have been successful in the states where they have been enacted. What are the primary objectives of sentencing commissions? One, they achieve certainty in sentencing. When someone gets a sentence, he or she knows what the sentence is and everyone in court knows what the sentence is as well. Two, it promotes fairness. Three, it reduces disparity. Four, it secures public safety by retaining the people that should stay in prison and providing for community services and probation for those who are rehabilitatable. Five, it helps the Department of Corrections manage the correctional capacity.

How does a sentencing commission work? The Sentencing Commission would look at every crime in our criminal code. The sentencing ranges for each crime would be examined. Based on a study of defendants sentenced for each particular crime, their criminal histories and backgrounds, the Sentencing Commission would establish sentencing guidelines and ranges. Some states develop sentencing grids. Other states develop ranges within ranges based on criminal history or the nature of the offense. A judge is provided with the recommended sentence based on the guidelines. The judge can deviate, but if he or she does, a statement is placed on the record of the basis for the deviation. The deviation would be subject to review on appeal.

We do not have this process in Nevada. If a sentence is imposed that fits within a sentencing range of one to ten years, for example, that sentence is not reversed unless there is a consideration by the trial judge of impalpable or extrinsic evidence outside the nature of the crime. Sentencing guidelines would stabilize the sentencing process and lengths of stay. Sentencing guidelines

would have the effect of reducing the population of the prison rather than increasing it and would assist in helping Legislators develop a better understanding of how to approach the prison population from a financial and fiscal standpoint.

The Sentencing Commission proposed in S.B. 451 is put on a strict leash. It would start right after July 1, and it must provide recommendations through the one bill draft afforded to it establishing a set of guidelines that would be adopted by the 2019 Legislature. It is a broad-based representative Commission. It has prosecutors, defense lawyers, victims' advocates and the like.

CHAIR SEGERBLOM:
We are going to pass it.

JUSTICE HARDESTY:
I would ask the Committee to hear from the Director of Corrections, James E. Dzurenda, who is familiar with the sentencing commission operation in Connecticut. Connecticut is the state from which we modeled our proposed legislation.

CHAIR SEGERBLOM:
My concern is that when you do this, you will find out there is a lot of money saved but that money does not go back into corrections. I wondered if you have thought about having language in the legislation requiring part of the money saved go back to the Department of Corrections or to other underfunded functions.

JUSTICE HARDESTY:
The sentencing commission experience in other states has produced some savings. That is not the most important reason why we should do this. One savings that has occurred in several states is the complete abolition of the parole board. I do not know what that number is, but it is probably $3 million or $4 million. A parole board is not needed when you have a sentencing commission. We are a long way away from that decision. State Board of Parole Commission Chair Connie Bisbee is a supporter of this initiative.

JAMES E. DZURENDA (Director, Department of Corrections):
Connecticut had significant savings directly related to its sentencing commission. All those savings were directly assigned and reinvested into community wraparound services for addiction, mental health and other services lacking in the community. More savings are created by reducing recidivism.

The Department of Corrections is neutral on S.B. 451. I want to address the Advisory Commission's recommendation No. 7 to create a sentencing commission. My experience while serving as a legislatively appointed member of the Sentencing Commission in the State of Connecticut may help in understanding the benefits derived from a state sentencing commission.

I have submitted written testimony (Exhibit F). I have included in Exhibit F a copy of minutes from the Connecticut Sentencing Commission dated June 20, 2013. This is a sample of what is discussed and done by a sentencing commission. There is a difference between advisory commissions and sentencing commissions. The advisory commission in Connecticut is called the Criminal Justice Policy Advisory Commission. The difference between it and the Connecticut Sentencing Commission is that one develops and discusses policies and procedures and the other discusses matters directly related to sentencing.

Bail was included in sentencing in Connecticut. What is the appropriate bail amount for a lower economic society that will not exceed that which obviously cannot be afforded? What is the appropriate length of sentences for juveniles as they move from being treated as juveniles to adults? These matters were discussed in the Connecticut Sentencing Commission.

The Connecticut Criminal Justice Policy Advisory Commission discussed policies. It established statewide policies on matters such as the appropriate length of time for a police chase based on public safety. Other areas such as DNA consistency were defined so that all cities and towns acted in a consistent manner.

The Connecticut statutory language is also included in Exhibit F. It gives the purpose, mission and vision of the Connecticut Sentencing Commission as well as its mandatory members. Not only does the Connecticut Sentencing Commission evaluate existing statutes, policies and practices, it also develops and maintains a statewide sentencing database in collaboration with state and local agencies to provide a cost-benefit analysis identifying positive and negative

trends in the community related to crime. The Connecticut Sentencing Commission also preserves judicial discretion, provides individualized sentencing and evaluates the impact of pretrial, sentence diversion, incarceration and postrelease supervision programs.

The Connecticut Sentencing Commission identifies potential areas of sentencing disparity related to racial, ethnic, gender and socioeconomic status. The Connecticut Sentencing Commission is deemed a Criminal Justice Agency allowing it to serve warrants, meet quarterly and produce reports directly to the governor, legislature and supreme court.

JUSTICE HARDESTY:
I would like to read from Mr. Dzurenda's statement to the Advisory Commission at our November 1, 2016, meeting.

> In 2011, when I was Deputy Commissioner for the Connecticut Department of Corrections, the prison population was about 19,000 inmates. Today, based on the change of statutes relating to the recommendations of the Sentencing Commission, the population is about the same as Nevada's is now, having dropped by 5,000 offenders in less than 5 years.

CHAIR SEGERBLOM:
That is huge, and I am sure we can do it too. You have our commitment. We are going to pass this bill.

SENATOR GUSTAVSON:
You mentioned in your testimony that you would like to see this not only pass but be implemented as soon as possible. The way the bill is written, there is a two-year term for each Commission member. Members may be reappointed for an additional term of two years. I did not see a date by which the Commission must act, but there is a biennial report to be given to the Legislative Counsel Bureau on odd-numbered years. Do you have any idea how long it will take to complete the studies?

JUSTICE HARDESTY:
Section 17 of S.B. 451 provides:

> For a regular session, the Nevada Sentencing Commission created by section 5 of this act may request the drafting of not more than 1 legislative measure which relates to matters within the scope of the Commission. The request must be submitted to the Legislative Counsel on or before September 1 preceding the regular session.

There are other provisions about the legislative measure. The expectation is that the 2019 Legislature will receive a bill draft request (BDR) with the sentencing guideline work product of the Commission. Any Senator serving here who does not get that BDR should ask the chair of the Sentencing Commission where it is.

SENATOR CANNIZZARO:
You mentioned that there would be an appeal of any sentencing deviation. The trial court judge that sits through an entire trial has an understanding of everything that happened in the case, why the jury came to the decision it did and what sorts of factors are relevant in sentencing. Our caselaw establishes that sentencing judges have wide discretion based on facts and circumstances. How will that change with this appellate process, and do you worry that this will create frivolous appeals? How will we ensure our trial court judges have discretion to make these kinds of decisions?

JUSTICE HARDESTY:
Nothing in the Sentencing Commission guidelines changes the fact that these are recommendations. What does change is that the judge, if he or she is going to deviate from the recommendations, has to put on the record the reason for the deviation. Unfortunately, in many instances when a sentence is too long or too short, there is no explanation whatsoever. If the sentence is within the range, the victim and the defendant are deprived of an explanation. The standard of review is that, if the sentence is within the range, deference is given to the judge. Senate Bill 451 changes that. From a legislative standpoint, I think the question is, should we sentence people who commit the same or similar offense whose criminal history is the same or similar to the same length of sentence?

What we found in a study done by the Advisory Commission in 2011 is that there are judges sentencing two-thirds of the cases they hear to prison. Other judges sentence at a rate of 30 percent. The net effect on the prison is a substantial length of incarceration for people for the same crime with the same criminal history as someone who is given probation. This system flattens that

out. It at least provides some level of review. As for the workload of the appellate courts, so be it. To me that is justice. Why should we not expect defendants to be treated fairly and equally and victims to expect the same thing from the system?

SENATOR CANNIZZARO:
I appreciate that. I know exactly what you are talking about. There can be very different ranges. My concern is that we are going to be second-guessing every decision made by a trial court judge versus giving him or her discretion that, unless abused, would not result in an appeal. Can the State appeal if it believes the sentence is too low?

JUSTICE HARDESTY:
That is something the Sentencing Commission will have to talk about.

CHUCK CALLAWAY (Las Vegas Metropolitan Police Department):
We support S.B. 277. Information sharing is exactly as described by Justice Hardesty. It is the ability of a police officer in the field 24/7 on a highway between Ely and Elko to get information real time. We talk about the three primary systems: the Central Repository for Nevada Records of Criminal History, SCOPE and Tiberon. Three independent systems have criminal justice information. The analogy I use are iBooks on an iPad versus the library. You may have the same book in the library as you have on your iPad, but you cannot go into the library at 2:00 a.m. and read the book. You can read it on your iPad. There is redundancy and overlap. The creation of a subcommittee to look at these issues and provide recommendations on how we can all be on the same page and how these systems can communicate with each other for officer safety in the field is critical.

With regard to S.B. 451, we support the Sentencing Commission. There are a number of unanswered questions. For example, if the Sentencing Commission determines that certain crimes should be Category C, but a bill is introduced recommending that these crimes be Category B, how is that reconciled? I would like to see a member from the Las Vegas Metropolitan Police Department (LVMPD) added to the Sentencing Commission. The Sheriffs' and Chief's Association has a member. The Advisory Commission has members from both of the Sheriff's and Chiefs' Association and LVMPD because the Sheriffs' and Chiefs' Association represents 17 predominantly rural counties whereas the LVMPD represents the urban areas.

We oppose the first part of S.B. 451. We oppose the DNA testing portion of the bill. It is the same language included in A.B. 268 sponsored by Assemblyman Justin Watkins, Assembly District No. 35.

ASSEMBLY BILL 268: Authorizes certain persons to file a postconviction petition to pay the cost of a genetic marker analysis. (BDR 14-638)

There is a system in place that allows petitions to be filed with the court to review potential DNA evidence that might be relevant to a case but is untested. The process outlined in the bill creates a system in which, if you have money, you can have DNA tested, but if you are indigent, you cannot. It will impact our laboratories. We already have several bills this Session which will impact our laboratories for the testing of sexual assault kits. Throw into the mix allowing offenders to petition and fish for evidence.

For example, a person murders his wife, and during the murder, he gets blood and DNA on his fingernails and shirt. He runs out of the house with the murder weapon, witnesses see him, he jumps in a car, flees and is caught. He is convicted, but there was a cigarette butt in the front yard of that house dropped by someone walking a dog. Now the defendant, even though all the evidence that convicted him was shown to the jury, petitions the court to have the cigarette butt tested so that his attorney can find some reasonable doubt to get him out of prison. This will create a lot of work for the crime laboratories when there is a system already in place that works. I know of no evidence that the system does not work.

SENATOR ROBERSON:
Chair Segerblom, I have heard similar concerns from the District Attorneys Association. Are you willing to accommodate those concerns in this bill?

CHAIR SEGERBLOM:
I had not heard this last concern until now. I am willing to add LVMPD to the Advisory Committee.

SENATOR ROBERSON:
All the concerns.

CHAIR SEGERBLOM:
I had not thought about this DNA issue. Mr. Callaway said there is another bill coming from the Assembly. We can take it out of S.B. 451 and let this issue be heard in Assembly Bill 268.

SENATOR FORD:
We will take the DNA component out of S.B. 451, and we can pass the Sentencing Commission with the addition of the LVMPD member.

HOLLY WELBORN (American Civil Liberties Union of Nevada):
The Sentencing Commission is the single most important piece of legislation this Session. The ACLU has been advocating for proportionate, individualized assessments for sentencing forever. It is critical that this legislation be enacted. The Sentencing Commission can decide many of the concerns raised. Last Session, 71 bills were passed providing for increased penalties or sentence enhancements without any guidance on appropriate proportionate sentencing. Bills have been heard this Session imposing heftier sentences on money laundering than sex trafficking.

We are neutral on section 3 of S.B. 277 now that it is clear that the intent on accessing the information for patients with medical marijuana cards is to establish whether a person has a lawful license. If the intent was to determine whether the offender or parolee was violating a condition of parole, it would not likely hold up in court. In Arizona, there was a case under its medical marijuana law that prohibited parole and probation from being able to access that information. A California case was decided under patient privacy laws.

SENATOR FORD:
I want to acknowledge Justice Hardesty for leading the Advisory Commission during the Interim. He has done a yeoman's job bringing this all together to ensure that we could make unanimous recommendations to this Legislative Body. I have been known to say that criminal justice reform has become a bipartisan issue. I am looking forward to working with my colleagues to ensure that things like this are done.

I agree the Sentencing Commission is the most important piece of criminal justice reform legislation we are passing this Session. It will ensure that we are fair, not just to those who are currently incarcerated but to those who will go into the system. The issue about similarly situated individuals being charged

with the same crime but getting a disproportionately different sentence is something we all can understand, acknowledge and appreciate. We need to fix that. This is an opportunity to do that. I support Mr. Callaway's recommendation to add the LVMPD to the Sentencing Commission. I want to remove any impediment to our ability to proceed with this.

ERIC SPRATLEY (Washoe County Sheriff's Office):
I am a commissioner on the Advisory Commission. I echo the comments of Mr. Callaway in support for S.B. 277. With Senator Ford's comments that the DNA petition process will be removed, we support S.B. 451.

JENNIFER NOBLE (Nevada District Attorneys Association):
With the understanding that the DNA testing will be removed, we support S.B. 451.

JULIE BUTLER (Division Administrator, General Services Division, Department of Public Safety):
The Central Repository for Nevada Records of Criminal History prefers S.B. 35 to S.B. 277 because S.B. 35 includes provision for the Criminal History Repository's local-user community working groups. They give us input into our system's design, which is critical to our operations. Senate Bill 277 does not include this provision. Further, S.B. 35 would include a member of the Central Repository on the Advisory Commission for the Administration of Justice. That is important if our advisory group is reconstituted as a subcommittee. We are open to amending either S.B. 35 or S.B. 277.

CHAIR SEGERBLOM:
I would like to hear a motion on S.B. 451.

> SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 451 BY ADDING THE LVMPD TO THE SENTENCING COMMISSION AND STRIKING SECTIONS 1, 2, 14 AND 15.

SENATOR CANNIZZARO:
I would like clarification that we are striking the portions of S.B. 451 that deal with genetic marking.

NICK ANTHONY (Counsel):
The amendment would strike sections 1, 2, 14 and 15 that relate to genetic marker analysis. The Las Vegas Metropolitan Police Department would be added as a member to the Nevada Sentencing Commission.

SENATOR DENIS SECONDED THE MOTION.

SENATOR ROBERSON:
I think Republicans would be willing to vote in favor of S.B. 451, but we would like to see the amendment. There were many changes discussed today. There is no reason to vote today and make it partisan. Give it a day or so. Let us see the proposed language, and you will probably get a unanimous vote. Mr. Chair, you can have a partisan vote today, or you can have a unanimous vote if you wait so we can see the changes. It is your call.

SENATOR FORD:
I will, contrary to what has been done in the past, acquiesce to the request for an additional day, and we can bring this back for a work session. I withdraw my motion.

SENATOR DENIS:
I withdraw my second.

CHAIR SEGERBLOM:
The motion is withdrawn. I will close the hearing on S.B. 277 and S.B. 451. I will open the work session on S.B. 10.

SENATE BILL 10: Revises provisions governing the publication of information concerning unclaimed and abandoned property. (BDR 10-407)

PATRICK GUINAN (Policy Analyst):
The work session document (Exhibit G) summarizes S.B. 10 and the proposed amendments.

SENATOR HARRIS MOVED TO AMEND AND DO PASS AS AMENDED S.B. 10.

SENATOR FORD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR SEGERBLOM:
I will open the work session on S.B. 230.

SENATE BILL 230: Makes various changes relating to judgments. (BDR 2-512)

MR. GUINAN:
The work session document (Exhibit H) summarizes S.B. 230.

SENATOR FORD MOVED TO DO PASS S.B. 230.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR GUSTAVSON VOTED NO.)

*****

CHAIR SEGERBLOM:
I will open the work session on S.B. 255.

SENATE BILL 255: Revises provisions relating to common-interest communities. (BDR 10-789)

MR. GUINAN:
The work session document (Exhibit I) summarizes S.B. 255 and the proposed amendment.

SENATOR DENIS MOVED TO AMEND AND DO PASS AS AMENDED S.B. 255.

SENATOR FORD SECONDED THE MOTION.

SENATOR HARRIS:
I was not able to be here for the Committee hearing since I was testifying on another bill. I want to be sure that everyone is comfortable with cancellation by

email. Did you discuss what happened if it went into spam or for some other reason the intended recipient did not receive the electronic communication?

SENATOR DENIS:
The discussion was that email is allowed on other business transactions. Cancellation was the one thing that required hand delivery or mailing. Removing the hand delivery or mailing requirement for notice of cancellation made it consistent with all of the other electronic transactions. We did not talk about any specifics. Those provisions are there for other things already.

SENATOR HARRIS:
Are there consumer protections provisions somewhere for when an electronic notice does not reach where it needs to go? That is a hefty consequence.

SENATOR DENIS:
We did not have that discussion. I know that for the other electronic transactions there are those provisions.

SENATOR HARRIS:
I am going to vote yes today and follow up with the realtors about what their customary practices are to make sure there are consumer protections in place. I will let you know if I change my mind.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIR SEGERBLOM:
I will open the work session on S.B. 264.

SENATE BILL 264: Revises various provisions relating to business entities. (BDR 7-479)

MR. GUINAN:
The work session document (Exhibit J) summarizes S.B. 264 and the amendments.

CHAIR SEGERBLOM:
Senator Harris has an issue with this bill. We will take no action on S.B. 264 today. I will close the work session on S.B. 264 and open the work session on S.B. 267.

SENATE BILL 267: Revises provisions governing the expedited process for the foreclosure of abandoned residential property. (BDR S-822)

MR. GUINAN:
The work session document (Exhibit K) summarizes S.B. 267 and the proposed amendments.

SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 267.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

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CHAIR SEGERBLOM:
I will open the work session on S.B. 306.

SENATE BILL 306: Revises provisions relating to offenders. (BDR 16-298)

MR. GUINAN:
The work session document (Exhibit L) summarizes S.B. 306 and the proposed amendments.

SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 306.

SENATOR CANNIZZARO SECONDED THE MOTION.

THE MOTION CARRIED. (SENATOR GUSTAVSON VOTED NO.)

*****

CHAIR SEGERBLOM:
I will open the work session on S.B. 398.

SENATE BILL 398: Establishes various provisions relating to the use of blockchain technology. (BDR 59-158)

MR. GUINAN:
The work session document (Exhibit M) summarizes S.B. 398 and the proposed amendments.

SENATOR HARRIS MOVED TO AMEND AND DO PASS AS AMENDED S.B. 398.

SENATOR DENIS SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

*****

CHAIR SEGERBLOM:
I will open the work session on S.B. 438.

SENATE BILL 438: Revises provisions relating to time-shares. (BDR 10-992)

MR. GUINAN:
The work session document (Exhibit N) summarizes S.B. 438 and a proposed amendment.

SENATOR HARRIS:
I have consulted with legal counsel, and it has been determined that inducement or solicitation more accurately captures this activity as opposed to marketing. I propose to the Committee changing "marketing" to "inducement and solicitation."

CHAIR SEGERBLOM:
Mr. Callaway, can you arrest somebody for inducement and solicitation, or is this more complicated than that? The current language would prohibit marketing. It has been proposed to change "marketing" to "inducement and solicitation."

MR. CALLAWAY:
I cannot answer that question. I do not believe that was the intent of the proposal.

SENATOR HARRIS:
The reason for the language change is that legal counsel pointed out the term inducement and solicitation is more in alignment with the way the statute is currently written. "Sales" was the wrong word in the original bill. The sponsor proposed to change "sales" to "marketing." I think that "inducement" is certainly something that was contemplated. "Solicitation" may not be the correct word since it implies sales. Do you have other language to suggest?

MR. CALLAWAY:
Brian O'Callaghan and my office worked on the language for this bill. I was not at the hearing. I can find out if there is a better word to insert.

CHAIR SEGERBLOM:
We will talk about this some more. We will close the work session on S.B. 438 and open the hearing on S.B. 490.

SENATE BILL 490: Revises provisions relating to the Foreclosure Mediation Program. (BDR 9-488)

SENATOR HARRIS:
Senate Bill 490 is a bill to revive the Foreclosure Mediation Program with several differences. The first difference is that the Foreclosure Mediation Program will be moved from the Administrative Office of the Courts to the Housing Division of the Department of Business and Industry. Notices and the administration of the program would go through the Housing Division. Rather than have the Housing Division run the entire program, a petition will be filed with the district court. There will be a $25 filing fee. The matter will be assigned to a senior justice, judge, hearing master or other designee. It is anticipated that with funds left over from the program, an electronic system will be adopted so that all filings can be done electronically. That will save money because it eliminates the cost of staff and personnel to hand file and review all records. There will be an electronic Bate stamp when documents are exchanged in order to know of the exchange in real time. A district court judge will supervise the program. Another change is the mediation services costs will increase from $400 to $600. The money collected will only be expended for program purposes.

CHAIR SEGERBLOM:
How hard would it be to open this program to second and third mortgages?

SENATOR HARRIS:
There is a reluctance to deal with second mortgages because of the complexity of lien priorities. I think a process could be developed. It would have to address whether to mediate one or all mortgages, and what happens if there is a loan modification on the first mortgage but not on the second, but it is the second that is making the property unaffordable.

CHAIR SEGERBLOM:
I am thinking out loud. Many ten-year loans are resetting. The first mortgage is relatively low, but when the second resets, it can be dramatic.

SENATOR HARRIS:
I completely understand the concern and share it. I see people in my law practice with that problem. More thought needs to go into addressing that problem.

CHAIR SEGERBLOM:
I have been told that the mortgage crisis is over. Is it still a serious issue?

SENATOR HARRIS:
It is still a serious issue. Testimony has been presented this Session that Nevada is the fifth-highest state in terms of residential mortgage foreclosures. People are still struggling with housing stability. I will provide the number of foreclosures statewide.

CHAIR SEGERBLOM:
I was surprised by how few foreclosures the credit unions are experiencing. They are asking to be excluded from the program.

SENATOR HARRIS:
There are more foreclosures statewide than the credit unions are experiencing.

CHAIR SEGERBLOM:
Do credit unions have to pay to participate? Is there an annual fee?

SENATOR HARRIS:
If a homeowner elects mediation, the fee is $200 and the lender pays $200.

CHAIR SEGERBLOM:
Would the credit unions have to pay any sort of annual fee?

SENATOR HARRIS:
This bill changes the lender fee to $300.

CHAIR SEGERBLOM:
Do the credit unions pay only if called into court?

SENATOR HARRIS:
The credit union would pay only if the homeowner elects foreclosure mediation. While the program has been successful, we do not have even 50 percent participation of all homeowners that are in foreclosure. The last numbers I heard were around 18 percent. Not every homeowner who qualifies for foreclosure mediation is electing to participate in the program. Looking at this another way, banks and credit unions are not required to participate in foreclosure mediation for 80 percent of the foreclosures.

JON SASSER (Washoe Legal Services; Legal Aid Center of Southern Nevada):
Is the Foreclosure Mediation Program still needed? Yes. Is it needed at the same volume it was during the height of the housing crisis? No. There were some 80,000 notices of default in 2010. The number of defaults projected for 2017 is down to 6,305. Obviously, the volume is far less. On the other hand, the program ends on June 30. We are in the second half of the year of the program winding down. During the first half of the last year of the program, there were 662 mediations. That means that we have 600 or 700 homeowners electing mediation. The program remains valuable to them going forward.

Nevada is still No. 1 in terms of the percentage of underwater households. In addition, there are a number of loans scheduled to reset over the next four years. The question is whether the program is bringing in enough money to sustain itself. I think the answer is potentially yes. I assume that if you are interested in passing this bill, it would move on to the Senate Finance Committee for a detailed analysis of its financial feasibility. The program is financed by a couple of charges. Every notice of default issued—6,305 for 2017—pays a $45 Notice of Default fee. That goes to the administrative cost of

the program. I understand that there is $500,018 left over that would revert to the State General Fund and could be reappropriated to restart the program and develop the portal.

SENATOR HARRIS:
There is transitional language in the bill to allow those funds to travel to the administrative agency that would oversee the program. The starting balance would be about $500,000.

MR. SASSER:
The rest of the financing is in the bill. There is a $25 district court filing fee. The district court would oversee the mediation. The state agency would oversee the administrative part of the program. The mediators would be paid with the $300 paid by the homeowner and the lender.

AARON D. MACDONALD (Consumer Rights Project, Legal Aid Center of Southern Nevada):
I have provided a letter of support (Exhibit O). Homeowners need the Foreclosure Mediation Program. In my experience as a staff attorney at Nevada Legal Services and at Legal Aid Center of Southern Nevada, I have personally represented hundreds of homeowners in the Foreclosure Mediation Program. I have observed firsthand the success the program had in bringing the lender and the homeowner to the bargaining table. This program was designed to help distressed homeowners by having a person with decision-making authority present at the mediation table. We are looking for alternatives to having the homeowner being foreclosed on and thrown out in the street. The mediation program has been successful in preventing that outcome.

In my experience, it is exceptionally difficult to discuss loan modification or foreclosure alternatives with the bank representatives when you call outside of mediation. Typically, bank representatives have no decision-making authority, they lose documents, they misstate available relief or even outright lie to the homeowner. The Foreclosure Mediation Program remedies these issues by requiring the lender to have someone with decision-making authority present at mediation. It requires good-faith negotiation. Without the Foreclosure Mediation Program, homeowners have no redress.

CHAIR SEGERBLOM:
Is there one district court judge who would be assigned to this program?

SENATOR HARRIS:
Based on conversations I have had with Justice Hardesty and Barbara Buckley, it is anticipated that it would be spread across all the judges' dockets. At most, each district court judge would have one or two cases at a time.

CHAIR SEGERBLOM:
If there is a mediation and the bank does not come with the documents, can the homeowner go to the judge?

SENATOR HARRIS:
Yes. That is the point of filing with the district court.

MALCOM DOCTORS:
I am a Senior Certified Mediator. I have provided written testimony (Exhibit P). I am not an attorney, which is probably a good thing. I have been with the Foreclosure Mediation Program since its inception. I was with it until its demise at the end of the year. I also served on the program's Advisory Committee since its inception.

CHAIR SEGERBLOM:
Do you support S.B. 490?

MR. DOCTORS:
Yes.

MICHAEL R. BROOKS (United Trustees Association):
The United Trustees Association is neutral on S.B. 490 and has provided written testimony (Exhibit Q).

GREG GEMIGNANI (Nevada Credit Union League):
The Nevada Credit Union League has provided a proposed amendment (Exhibit R). We oppose S.B. 490.

CHAIR SEGERBLOM:
I will close the hearing on S.B. 490 and open the hearing on S.B. 453.

SENATE BILL 453: Revises provisions relating to criminal procedure. (BDR 14-84)

JOHN J. PIRO (Deputy Public Defender, Office of the Public Defender, Clark County):
I will discuss the key provisions of the bill and the Nevada District Attorneys Association proposed amendments (Exhibit S).

CHAIR SEGERBLOM:
Do you agree with the proposed amendments?

MR. PIRO:
I imagine amending the bill would be the best way to get support.

Section 1, subsection 3 of S.B. 453 uses the term "dishonorable discharge." This is a key provision that would make a huge difference in the sealing of records. Normally, when defendants are dishonorably discharged, even if 20 years have passed and they have totally changed their lives, they are unable to seal their records.

CHAIR SEGERBLOM:
Could a dishonorable discharge be the result of failing to pay a court fee or something like that?

MR. PIRO:
Yes. This is a big change that the district attorneys (DAs) support it. Section 3 of S.B. 453 declares that the public policy of this State is to favor the giving of second chances. Section 4, subsection 1 creates a presumption. On page 3 of Exhibit S, the DAs change the presumption to a rebuttable presumption. That language is the result of debates in the Assembly on a similar bill, A.B. 327, sponsored by Assemblyman William McCurdy II, Assembly District No. 6.

ASSEMBLY BILL 327: Revises provisions relating to records of criminal history. (BDR 14-658)

CHAIR SEGERBLOM:
Is there anything in S.B. 453 that is not in A.B. 327? What is the status of the Assembly bill?

MR. PIRO:
Assembly Bill 327 has not had a work session yet. I think it does have wide support. Much of the language in S.B. 453 mirrors A.B. 327. Language similar

to that in sections 13 and 15 of S.B 453 was stripped from A.B. 327 because of the burden it would place on the Criminal History Repository. The language in sections 13 and 15 would put a fiscal note on S.B. 453. There are differences between S.B. 453 and A.B. 327; however, the DAs' proposals in Exhibit S mirror all of the accepted changes to A.B. 327.

CHAIR SEGERBLOM:
Ms. Butler, did you put a fiscal note on S.B. 453?

MS. BUTLER:
We put a fiscal note on A.B. 327. We did not put a fiscal note on S.B. 453. The fiscal note on A.B. 327 was $30,983. The concern was based on language identical to that in S.B. 453.

CHAIR SEGERBLOM:
Would S.B. 453 have the same impact?

MS. BUTLER:
Yes.

CHAIR SEGERBLOM:
How long would it take you to put a fiscal note on S.B. 453?

MS. BUTLER:
It has already been prepared.

Senator Harris:
Are the sealed record time frames in Exhibit S the same as those in S.B. 125?

SENATE BILL 125: Revises provisions governing the restoration of certain civil rights for ex-felons. (BDR 14-20)

JOHN T. JONES, JR. (Nevada District Attorneys Association):
Yes.

SENATOR HARRIS:
Do the felony penalty reduction from 5 years to 1 year and the misdemeanor reduction from 2 years to 1 year in section 7 mirror S.B. 125?

MR. JONES:
Yes. Exhibit S also includes the City of Henderson's amendment to S.B. 125. They are all combined into S.B. 453.

CHAIR SEGERBLOM:
I will ask for a motion to amend and re-refer to the Senate Committee on Finance.

> SENATOR FORD MOVED TO AMEND AND RE-REFER AS AMENDED S.B.453 TO THE SENATE COMMITTEE ON FINANCE.
>
> SENATOR CANNIZZARO SECONDED THE MOTION.
>
> THE MOTION CARRIED. (SENATORS GUSTAVSON AND HARRIS VOTED NO.)

*****

CHAIR SEGERBLOM:
I will open the hearing on S.B. 203.

SENATE BILL 203: Revises provisions relating to domestic corporations. (BDR 7-71)

LORNE MALKIEWICH (U-Haul International Inc.):
U-Haul has been incorporated in Nevada since July 1990. Senate Bill 203 presents a unique drafting challenge. How does the Legislature say that it really means it? We seek to clarify the Nevada statutes and express the legislative intent that statutory law be followed. Nevada corporations should be governed by Nevada law. It is important that the businesses that have chosen to incorporate in Nevada be able to rely on Nevada law. We will be proposing an amendment to S.B. 203. We are working with interested parties to develop a consensus amendment.

CHAIR SEGERBLOM:
Friday is the deadline. The bill is quite simple. It raises some flags with me with regard to telling the Supreme Court what to do.

MR. MALKIEWICH:
The intent of S.B. 203 is to clarify the law to state that the laws of the State must govern the incorporation and internal affairs of a domestic corporation. We will work on the tone of the bill to make sure it is appropriate.

Section 2, subsections 1 to 6, of S.B. 203 is the declaration of legislative intent. The intent is that statutory law adopted by the Legislature should control over conflicting caselaw from other jurisdictions.

SENATOR FORD:
I have some heartburn about the legislative intent component. The general rule is that, if the Legislature puts something in a statute, it will be interpreted by our courts as the prevailing law. I would strongly encourage you to reconsider, especially with the strong language included in the bill. I am not comfortable with the way it is set up.

MR. MALKIEWICH:
Our dilemma is how to draft "and we really mean it" when you have the Legislature adopting statutes in response to cases but cannot rely on the court to apply the applicable law. Our intent is simply to clarify that Nevada law applies to Nevada corporations.

SENATOR HARRIS:
Is it the intent of S.B. 203 to supersede operating agreements, bylaws, etc., wherein companies validly contract to incorporate a different jurisdiction's laws or to be liable to suit in other jurisdictions?

MR. MALKIEWICH:
No, that is not the intent. There are two provisions in the bill that use the "except as otherwise provided in subsection 1 of NRS 78.139" language, which provides an exception for what is otherwise provided in the articles of incorporation. Our concern is with statutes that say this is the law with respect to the duties of an officer or director and litigation results in a reliance on a line of cases from another state that provide different duties.

SENATOR HARRIS:
Is it your intent to create a fallback framework, but parties are free to contract differently if that is what they want to do? If the bylaws, operating agreement, etc., are silent, is the default to Nevada law?

MR. MALKIEWICH:
That is my understanding. I am a bill drafter, not a corporate law expert. It is not the intent in the bill drafting to supersede any contracts.

SENATOR FORD:
Is there a case this bill is trying to overturn?

MR. MALKIEWICH:
There are a few cases that are examples. For example, there is a case concerning the constituency statute, *Hilton Hotels Corp. v. ITT Corp.*, 962 F.Supp. 1309 (D.Nev.1997). In 1999, the Legislature adopted S.B. No. 61 of the 70th Session adding what is now section 4, subsection 5 of NRS 78.138. That provision says directors and officers are not required to consider the effect of a proposed corporate action upon any particular group having an interest in the corporation as a dominant factor. The *Hilton* case held that the interests of the stockholders needed to have priority even though our constituency statute allows various interests to be considered. Subsection 5 was adopted to try to make it clear that the directors and officers are not required to treat any particular interest as a dominant factor, but we still see language in cases that says the shareholders' best interest must be considered over the interests of anyone else.

We are trying to make the law clearer, and through the declaration, point to the statute and say the statute should control. The statute clearly allows directors and officers to consider other factors. Section 4, subsection 4 of NRS 78.138 says directors and officers are allowed to consider the economy of the State and the Nation, the interests of the community and society, the interests of the corporation's employees, suppliers and customers and the long-term and short-term interests of the corporation and its stockholders. The officers and directors are permitted to weigh these factors. There are a few other examples. The general idea is to emphasize that the statutes control. When the Nevada Legislature adopts a statute, that is the law. That seems like an obvious concept.

SENATOR FORD:
I hear what you are saying and you cited a 1997 case. Section 1, subsection 5 of S.B. 203 references cases out of Delaware that "have been, and are hereby, rejected by the Legislature." What is the most recent case in Nevada that you are attempting to address? What I have seen done, and I am not suggesting that

I am amenable to doing this either, is a specific mention of a case that we want to overturn by legislation. If there is such a case, I would like to know what it is so that I can get a better understanding, as opposed to this roundabout way of declaring legislative intent in a way that does in fact poke the Supreme Court in the eye. If there is a case, I would like to know what it is, or if there are cases, let me know what they are, so we can give those consideration as you are considering amendments with the interested parties.

MR. MALKIEWICH:
There is no case we are seeking to overturn. These decisions are over and done. There is nothing pending. The interest is to ensure that Nevada corporations in the future can rely upon statutes. These cases from the past are just examples of why there is a concern. The language I was referring to was from a 2006 case. The statute was first changed in 1997. There are other more recent examples of cases, but the intent of S.B. 203 is not to undo a particular case. The intent is simply to say that the Nevada statutes be applied whatever decision results from that application. The concern is that if the Legislature has adopted a statute, such as NRS 78.139, that conflicts with the cases mentioned in section 1, subsection 5 of S.B. 203, NRS 78.139 should be applied by the court—not Delaware cases that reflect a different law.

SENATOR FORD:
I would still recommend getting that point across without the declaration in this bill. I am not too keen on it.

MR. MALKIEWICH:
Section 3 of S.B. 203 is a verification requiring that that people have actually read the laws. Section 4 amends NRS 78.138 and clarifies the business judgment rule that simple negligence is not enough to rebut a presumption that directors and officers acted in good faith for purposes of personal liability. Personal liability requires particular bad acts. The constituency statute is also clarified. The combination of the constituency statute and the personal liability statute allow directors and officers to act in the best interest of the corporation without concern that they are going to be personally liable because someone disagreed with their decision.

Section 5 amends the rules concerning change of control. Little is changed. Subsection 4 of section 5 refers back to the constituency statute and clarifies that the directors have flexibility to consider any of the listed factors in a

change of control situation. *Nevada Revised Statutes* 78.139 is the change of control statute.

SENATOR HARRIS:
Section 3 requires the reading of particular statutes before commencing litigation. What is the reasoning behind this provision?

MR. MALKIEWICH:
Our concern is, if you have cases in which decisions are made, doctrines are adopted and there is no reference in the cases to the underlying controlling statute, perhaps it is because the statute was not brought to the court's attention. The court may be looking at a brief that says here is a case from another state that applies to this situation, and no one cites to the relevant Nevada law. Section 3 just says, if you are going to file a suit that involves NRS 78.138 and 78.139, each plaintiff must aver to having read these statutes and section 2 of S.B. 203.

SENATOR HARRIS:
Do you have an amendment?

MR. MALKIEWICH:
We are still working on a proposed amendment.

Remainder of page intentionally left blank; signature page to follow.

CHAIR SEGERBLOM:
I will close the hearing on S.B. 203. The hearing is adjourned at 3:31 p.m.

RESPECTFULLY SUBMITTED:

_____
Connie Westadt,
Committee Secretary

APPROVED BY:

_____
Senator Tick Segerblom, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	2		Agenda
	B	8		Attendance Roster
S.B. 376	C	49	John Cahill / Clark County	Written Testimony and Exhibits
S.B. 277 and S.B. 451	D	14	James W. Hardesty / Advisory Commission on the Administration of Justice	Presentation
S.B. 277 and S.B. 451	E	4	James W. Hardesty / Advisory Commission on the Administration of Justice	Summary of Recommendations
S.B. 451	F	10	James E. Dzurenda / Department of Corrections	Written Testimony
S.B. 10	G	2	Patrick Guinan	Work Session Document
S.B. 230	H	1	Patrick Guinan	Work Session Document
S.B. 255	I	2	Patrick Guinan	Work Session Document
S.B. 264	J	21	Patrick Guinan	Work Session Document
S.B. 267	K	2	Patrick Guinan	Work Session Document
S.B. 306	L	1	Patrick Guinan	Work Session Document
S.B. 398	M	5	Patrick Guinan	Work Session Document
S.B. 438	N	1	Patrick Guinan	Work Session Document
S.B. 490	O	3	Aaron D. MacDonald	Letter of Support
S.B. 490	P	2	Malcom Doctors	Written Testimony
S.B. 490	Q	17	Michael R. Brooks / United Trustees Association	Written Testimony
S.B. 490	R	3	Greg Gemignani / Nevada Credit Union League	Proposed Amendment
S.B. 453	S	17	John T. Jones, Jr. / Nevada District Attorneys Association	Proposed Amendment

EXHIBIT "B"

EXHIBIT "B"

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Ninth Session
May 25, 2017

The Committee on Judiciary was called to order by Chairman Steve Yeager at 8:05 a.m. on Thursday, May 25, 2017, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda (Exhibit A), the Attendance Roster (Exhibit B), and other substantive exhibits, are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at www.leg.state.nv.us/App/NELIS/REL/79th2017.

COMMITTEE MEMBERS PRESENT:

Assemblyman Steve Yeager, Chairman
Assemblyman Elliot T. Anderson
Assemblywoman Lesley E. Cohen
Assemblyman Ozzie Fumo
Assemblywoman Sandra Jauregui
Assemblywoman Lisa Krasner
Assemblywoman Brittney Miller
Assemblyman Keith Pickard
Assemblyman Tyrone Thompson
Assemblywoman Jill Tolles
Assemblyman Justin Watkins
Assemblyman Jim Wheeler

COMMITTEE MEMBERS ABSENT:

Assemblyman Ira Hansen (excused)
Assemblyman James Ohrenschall, Vice Chairman (excused)

GUEST LEGISLATORS PRESENT:

Senator Aaron D. Ford, Senate District No. 11
Senator Pat Spearman, Senate District No. 1
Senator Nicole J. Cannizzaro, Senate District No. 6

STAFF MEMBERS PRESENT:

Diane C. Thornton, Committee Policy Analyst
Brad Wilkinson, Committee Counsel
Devon Isbell, Committee Secretary
Melissa Loomis, Committee Assistant

OTHERS PRESENT:

John T. Jones, Jr., Chief Deputy District Attorney, Legislative Liaison, Clark County District Attorney's Office; and representing Nevada District Attorneys Association
Wendy Stolyarov, Legislative Director, Libertarian Party of Nevada
John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office
Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office
Holly Welborn, Policy Director, American Civil Liberties Union of Nevada
Kevin Higgins, Justice of the Peace, Sparks Justice Court; and representing Nevada Judges of Limited Jurisdiction
Chuck Callaway, Police Director, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department
Corey Solferino, Sergeant, Legislative Liaison, Washoe County Sheriff's Office
Kimberly Mull, Policy Specialist, Nevada Coalition to End Domestic and Sexual Violence
James R. Sweetin, Chief Deputy District Attorney, Clark County District Attorney's Office
Samuel Martinez, Chief Deputy District Attorney, Clark County District Attorney's Office
Brandi M. Planet, representing Dignity Health-St. Rose Dominican
Marlene Lockard, representing Nevada Women's Lobby
Kerrie Kramer, representing The Cupcake Girls
Robert Roshak, Executive Director, Nevada Sheriffs' and Chiefs' Association
Nadia Hojjat, Chief Deputy Public Defender, Clark County Public Defender's Office
Kristy Oriol, Policy Coordinator, Nevada Coalition to End Domestic and Sexual Violence
A.J. Delap, Government Liaison, Office of Intergovernmental Services, Las Vegas Metropolitan Police Department
Misty Grimmer, representing Nevada Resort Association
Paul J. Moradkhan, Vice President, Government Affairs, Las Vegas Metro Chamber of Commerce; and representing The Chamber, Reno-Sparks-Northern Nevada; and Nevada Federation of Independent Businesses
Alexis Motarex, Government Affairs Coordinator, Nevada Chapter, The Associated General Contractors of America, Inc.
Bryan Wachter, Senior Vice President, Public and Government Affairs, Retail Association of Nevada

Lorne Malkiewich, representing U-Haul International, Inc.
Austin Slaughter, representing Las Vegas Metro Chamber of Commerce

Chairman Yeager:
[Roll was called and protocol was explained.] We have four bills on the agenda today, and we will take them out of order. We are going to start with Senate Bill 368 (2nd Reprint). At this time, I will go ahead and formally open the hearing on S.B. 368 (R2), which revises provisions relating to criminal procedure.

Senate Bill 368 (2nd Reprint): Revises provisions relating to criminal procedure. (BDR 14-113)

Senator Aaron D. Ford, Senate District No. 11:
Thank you, Chairman Yeager and members of the Committee; it is great to see you this morning. I have written comments that I was going to go through, but I am going to ask that you allow me to be a little nontraditional with this presentation. I want to cut to the chase for you and explain to you what I was trying to do with this bill.

If you have ever watched *Law and Order*, you have heard them say, "You cannot use that—that is fruit of the poisonous tree." What they are talking about is evidence that a cop or a district attorney wants to use against a defendant in court when that evidence was obtained unconstitutionally or illegally. You were unconstitutionally stopped, Assemblyman Pickard, for no reason at all while you were walking down the street, and the police found a crack pipe in your pocket. They want to use that crack pipe as evidence, but they had no reason to stop you in the first place. The courts protect you through the Fourth Amendment, when it says that cops cannot stop you for no reason because there is a constitutional prohibition against unreasonable searches and seizures. Police have to have a reason to stop somebody; they cannot just be walking down the street.

For 50 years or so, that "fruit of the poisonous tree" doctrine has evolved and it has included certain exceptions. Let us say they would have inevitably found that crack pipe because you happened to pull it out and started smoking on it afterwards. If the police would have inevitably found the evidence, then they can still use it in court. There are other exceptions that have evolved as well.

Last summer the U.S. Supreme Court issued a ruling that said they were going to change this "fruit of the poisonous tree" doctrine such that if a cop unconstitutionally stops someone for no reason—he did not have a constitutional reason to stop the individual—they can still use the fact that they have a warrant against the person to justify the stop. That, to me, sounds ridiculous. That, to me, sounds unfair. That, to me, sounds like it gives rise to the opportunity for people to have their Fourth Amendment right to be free from unreasonable searches and seizures violated and then justifiably violated. It can be said to have been justifiably violated if you happen to have a warrant out against you.

Now, when people hear the word "warrant," they immediately jump to the worst kinds of warrants out there. You have a warrant for your arrest because you murdered somebody or because you burgled a house or something. Let me give you an example of what Justice Sotomayor said in her dissent in this case. She happened to talk about Ferguson, Missouri. She gave the example of Ferguson, Missouri, having 21,000 residents with 16,000 of them having warrants out for their arrest. Some of those warrants related to your grass being too high, jaywalking, and other minor offenses that you sometimes just forget about. You forget to pay a parking ticket and you have a warrant out for your arrest on a parking ticket. The question becomes: Do we want to continue to provide the same protection that cops and district attorneys have operated under for 50 years? Do we want to restore that to what it was just one year ago? I think the answer to that is yes. This bill was brought in an effort to do exactly that.

To be sure, there are other problems that come up with unconstitutional searches and seizures and the ability to stop someone without having a reason to do so. We do not have to get into those unless the questioning gets to that point. The bottom line is that everyone on this dais—and all of your constituents—should be able to feel free to walk down the street without worrying about being stopped by the police when they are not doing anything wrong. That is why I brought this bill.

I brought this bill because the Nevada Supreme Court, after 50 years, instituted the fruit of the poisonous tree doctrine. Our state Supreme Court, in *Torres* [*Torres v. State of Nevada*, 131 Nev. Adv. Op. 2 (2015)], reiterated that that is the state law in our state as well, that you should feel free to walk down the street without being unreasonable searched and seized—but it had to reverse itself because of a U.S. Supreme Court case [*Utah v. Strieff*, 579 U.S. 136 S. Ct. 2056 (2016)]. Some of you may wonder how we are going to change the law when the U.S. Supreme Court has spoken. There is a general rule of law that says states can always provide more protections for citizens than the *United States Constitution* requires—that is a baseline. We can do this and we can do it in a way that shows our citizens that we protect not just the Second Amendment, not just the right to vote, not just the First Amendment, but also the Fourth Amendment, which says citizens should be free from unreasonable searches and seizures.

When I initially brought the bill, there was a lot of opposition from law enforcement and the district attorneys because they did not want to go back to what they had been doing for 50 years. I worked with Senator Cannizzaro, who is a district attorney, and we found a compromise. She would allow me to proceed with the concept that I came up with if we were to make a procedural change. Currently, if a district attorney is told that he or she cannot use evidence, they have to make a motion in court. That motion is called a motion to suppress. Typically, that motion to suppress takes place in justice court as opposed to district court. The district attorneys would prefer that kind of motion to be taking place in district court, not in justice court, because there are different standards of proof associated with moving your case forward through the various courts. We agreed to a compromise where the motion would be made in district court and the motion would be made in writing. That, to me, seemed to be a fair exchange because it does not ultimately deprive

the defendant of the right to suppress the evidence; it just does it later in the process and it does it with more of an opportunity for the district attorney and/or the criminal defense attorney to work out the issue and try to get it addressed. That was the compromise we came up with. We would allow the restoration of the 50-year-old rule related to unreasonable searches and seizures in exchange for a motion to suppress being brought in district court, in writing.

That is what the bill does, Chairman Yeager, and I ask for your support. I think you will hear from the district attorneys who are here supporting it. You are now going to have opposition from the public defenders. They initially supported the idea; now they do not because of the compromise. You will also hear, I learned today, from a judges' association that also disagrees with the proposition I am putting forth. I wanted to lay it out to you the way I just did so the Committee could understand where my heart is on this. This bill is an effort, again, to preserve our Fourth Amendment right to be free from unreasonable searches and seizures. I am happy to answer any questions you may have.

Assemblyman Elliot T. Anderson:
I wanted to direct your attention to section 1, subsection 4(e), which talks about a person being aggrieved by a seizure. Are you contemplating the traditional Fourth Amendment standing analysis to bring a motion as to property, or is that something else?

Senator Ford:
No, it is the exact same standard that existed before the *Strieff* case in the U.S. Supreme Court, and before *Torres*, which was the Nevada Supreme Court case that was overruled. Senate Bill 368 (2nd Reprint) does not look to augment anything that existed prior to the *Strieff* decision out of the U.S. Supreme Court.

Assemblyman Elliot T. Anderson:
I just wanted to clarify because "aggrieved" might mean more than one thing to different people, so I just wanted to make sure we had a clear record that it is just the traditional Fourth Amendment standing analysis to bring a motion to suppress for property.

Senator Ford:
Yes, it is.

Assemblywoman Krasner:
How do you get around the *Terry* stop on this one? Would *Terry v. Ohio,* 392. U.S. 1 (1968) allow for police to do that search if they thought that the person might have a weapon?

Senator Ford:
The *Terry* stop approach is the standard of reasonable suspicion, which S.B. 368 (R2) does not address. If the police have reasonable suspicion to stop someone, then that is something that is constitutionally permitted. I am talking about a context where police do not even have reasonable suspicion to suspect someone of a crime. I am talking about a situation where a person is walking down the street, minding their business, looking a certain way, acting

a certain way, but not acting suspiciously. A reasonable suspicion perspective says that a *Terry* stop would not apply, but the police still stop them and they still search them, and they happen to find some paraphernalia or they happen to find a warrant because the person had a parking ticket that was three months old and they forgot to pay it. That is the problem that this bill addresses. If the stop is unconstitutional in the first place, as Justice Sotomayor says, two wrongs do not make a right. Just because it turned out there was a warrant out for you does not mean that the unconstitutional stop should be ruled constitutional as a result.

Chairman Yeager:
Are there any further questions for Senator Ford? [There were none.] Thank you for the presentation, Senator Ford. I will open it up now for testimony in support of S.B. 368 (R2). If anyone would like to testify in support, please make your way to the table. It does not look like there is anyone coming to the table in Las Vegas so, Mr. Jones, we will take your testimony here in Carson City.

John T. Jones, Jr., Chief Deputy District Attorney, Legislative Liaison, Clark County District Attorney's Office; and representing Nevada District Attorneys Association:
I am here on behalf of the Nevada District Attorneys Association in support of S.B. 368 (R2). I want to start off by thanking Senate Majority Leader Ford and Senator Cannizzaro for working with us on this bill. I am sure many of you are reading portions of this bill and wondering why the Nevada District Attorneys Association is in support. Our association did start off adamantly opposed to this bill, but through the process of negotiations, we have come to an agreement that both parties can support. The crux of our support lies in section 1 and section 3 of this bill, which state that motions to suppress evidence should only be heard in district court.

I want to take you back to the beginning of session when we had our criminal justice day, when we came to present to you about how the criminal justice system works in Nevada. If you recall, felony and gross misdemeanor cases start off in justice court. A justice of the peace initially has jurisdiction over that case to determine whether there is probable cause that a crime was committed and that the defendant was the one who committed it. If a justice of the peace makes that determination, then the case is transferred to the district court where the trial ultimately occurs. The Nevada District Attorneys Association's position is that any motion to suppress should be held in the district court where the trial is to occur.

I do understand, and the public defenders have submitted to you a U.S. Supreme Court case, *Grace v. the Eighth Judicial District Court of the State of Nevada*, 375 P.3d 1017 (2016), saying that justices of the peace do have both express and implied authority to hear motions to suppress (Exhibit C). Just as S.B. 368 (R2) is legislatively overriding the *Streiff* decision of the U.S. Supreme Court, we are seeking a legislative override of the *Grace* decision of the Nevada Supreme Court. Both sides are getting something that they like in this bill.

It is the position of our Association that the role of the justice of the peace at the preliminary examination is limited specifically to deciding whether, based on the evidence presented, probable cause exists to hold the defendant to answer in district court. The issue of a defendant's guilt or innocence, or any specific defenses that might be presented, are irrelevant at a preliminary hearing. In other words, the Association is opposed to preliminary hearings becoming mini trials. The case law is clear that preliminary hearings are not mini trials—and they are not expected to be mini trials—but what we have seen in our jurisdictions is preliminary hearings increasingly becoming mini trials where we are testing defenses and dealing with motions to suppress.

I know people are going to come up here and say that a judge cannot just ignore blatantly unconstitutional evidence if that comes before them. I want to make two points with respect to that. One, district attorneys take oaths to uphold the *U.S. Constitution*, so if blatantly unconstitutional evidence is being presented, there are ramifications for district attorneys. Senate Bill 186 of the 78th Session, sponsored by Senator Brower, added *Nevada Revised Statutes* (NRS) 41.0393, which says that if a district attorney acts in a vexatious, frivolous way or in bad faith, then a court may award attorney's fees to that defendant. I would submit to you that a district attorney who is admitting blatantly illegal evidence in a preliminary hearing is subjecting themselves, potentially, to an award of the defendant for attorney's fees. There are provisions in statute to keep district attorneys from just blatantly admitting evidence that violates someone's rights. Typically, however, what we see in these Fourth Amendment cases is much grayer. When we talk about issues in this gray area, it is our position that those cases should be litigated in district court.

The second point I want to make is that justice courts are not without remedy in terms of what they see as unconstitutional violations during a preliminary hearing. They can always release the defendant. If they are so offended by the evidence that the state is presenting at a preliminary hearing, a justice of the peace may release the defendant. If they are so offended by the evidence, justices of the peace can determine what weight to give that evidence in terms of the preliminary hearing. If they want to give evidence no weight, then they can do that, as long as they make the finding. What we are talking about in this bill is specific motions to suppress in justice court.

There are other issues that the Nevada Supreme Court has said are beyond the jurisdiction of the justice of the peace. I want to point out to you the issue of whether a prior conviction is constitutionally valid. That is not the role of the justice of the peace to decide, so if I have a case that is enhanced by a prior conviction, the question of whether or not that prior conviction is constitutionally valid is left for the district court. Further, competency is another issue that is not for the justice court. There are issues of constitutional import that are inappropriate for a justice of the peace to get involved with. This is not unique in our system in Nevada.

With that, Chairman Yeager, I am available to answer any questions. Again, we are in support of this bill. I want to thank Senate Majority Leader Ford and Senator Cannizzaro for working with us.

Assemblyman Pickard:
Thank you, Mr. Jones. I appreciate the clarity of your response. I think you answered my question, but I want to make sure I am clear on something, as I do not practice in this area of law. If, as Senator Ford suggests, I am walking down the road with a crack pipe—for the record, I would not—what are the boundaries of the motion going to be? As I understood it, prior to the U.S. Supreme Court decision, if there was a drug deal that went bad and police were investigating it and I am in the neighborhood, that might give reasonable suspicion for the stop. If I am just walking down the Strip and there is nothing going on and the police just happen to see me—and for whatever reason they are concerned—so they stop me. I do not have to talk to them, so if they decide to push that a little bit further, and then they find out I have a warrant, would that not be grounds—even with the U.S. Supreme Court decision—to contest that? Help me understand where that boundary is.

John Jones:
The *Strieff* case, just like every other case based on the Fourth Amendment, is one based on "reasonableness." The *Streiff* decision itself outlined three standards that a court is to look at with respect to whether or not a search is reasonable. One of those factors is the flagrancy of the police misconduct. If you are literally just walking down the street—even with the *Strieff* decision—and there is no other articulable fact that an officer can say you were doing wrong, then I think that under the *Strieff* decision that evidence is going to be suppressed. I hope that answers your question. Again, the Fourth Amendment has always been and is still based on reasonableness. When you look at the *Strieff* decision, what the U.S. Supreme Court did is a balancing test between the violation of the Fourth Amendment and the cost of the exclusion of the evidence. The outcome was that the costs were too high in this case to exclude the evidence. As I said earlier, when we deal with Fourth Amendment violations, there is rarely a big, bright line. We are always dealing with shades of gray with respect to search and seizure.

Assemblyman Pickard:
As I understand it then, this law does not really reset anything, it just clarifies where we are and makes it easier for the court to make the determination based on the evidence presented at the motion. Am I correct?

John Jones:
I would say S.B. 368 (R2) just makes clear that the *Torres* decision by the Nevada Supreme Court is the law in this state. I think that is the best, most succinct way to put it.

Assemblyman Watkins:
Part of your testimony struck me in that there are ramifications for district attorneys who knowingly—or let us use a gross negligence sort of standard—violate constitutional rights of the accused and that there are ramifications for that. Do we have any examples, in recent history, of any district attorney having any ramifications placed upon them for violating any rights—constitutional or otherwise—of anybody that is being charged?

John Jones:
The words used in the statute, from S.B. 186 of the 78th Session, were "vexatious, frivolous or in bad faith." It is a new statute. I am not aware of anybody yet even seeking any awards under this statute, but I would argue that is because district attorneys typically act in appropriate ways. That is not to say that we are not taking positions that a defense attorney disagrees with, or even maybe that a judge ultimately disagrees with, but they are not vexatious, frivolous, or in bad faith. In other words, we have an articulable reason why we are making or taking that particular stance.

Assemblyman Watkins:
Before the 2015 statute came into place, however, I guess the only remedy for somebody who felt that their constitutional rights had been violated by a prosecutor would have been to sue the state or the county. Are you aware of any of those instances happening in the recent past? I ask because something gave rise to the 2015 legislation. I am trying to get to the heart of what that something was.

John Jones:
I am not aware of any, Assemblyman Watkins. I know that Senator Brower did have his reasons for bringing that bill forward, but I would leave that for him to articulate.

Chairman Yeager:
I do not have S.B. 186 of the 78th Session in front of me, but it was my recollection that that bill did not apply to any defendants who had free legal counsel who were deemed indigent. I just wanted to put that on the record. I think the remedy in that bill was only available to those who had paid out of pocket to retain private counsel. Is that your recollection as well?

John Jones:
That is correct.

Assemblyman Elliot T. Anderson:
I was thinking about the same thing that you already mentioned. You mentioned that a justice of the peace could determine the weight of evidence in any way that he wanted. That got me thinking: as a district attorney, do you have the right to appeal a finding of weight after a preliminary hearing? Is that a reviewable decision?

John Jones:
There are ways that we could have that decision reviewed.

Assemblyman Fumo:
Mr. Jones, you and I discussed this a little bit yesterday and you know how I feel, but I just wanted to put it on the record. The Clark County Detention Center is at critical mass. The fact that a justice of the peace—as the initial gatekeeper when this case goes forward at a preliminary hearing—cannot weigh that evidence, I think the district attorney's office is taking away their ability to weigh that evidence and judge the case. Although justice court can release the person, as you said, most of the time they will not do that because there are

other factors involved too. A justice of the peace has a legitimate motion to suppress; if the state feels they could make the wrong decision, they can appeal it up to the district court. With the jails being so full, having this first opportunity for a justice of the peace to make that decision, I think, is critical. I would support the bill if your amendment were not there.

John Jones:
Assemblyman Fumo, you surprised me because I thought you would have the first question with respect to this bill. My argument is that our current practice actually extends peoples' stay in detention because we are arguing the same issue twice. In other words, a defendant would make a motion to suppress in justice court. Oftentimes judges do give us opportunities to brief the issue, prolonging a defendant's stay in justice court, only for us to then go to district court and relitigate the same issue. What we are trying to do is just streamline the process. The judge that hears the trial should be the one to determine whether the evidence is constitutionally sufficient to be heard at trial.

Again, I think our Supreme Court has stated many times that the justice of the peace is limited to determining probable cause, that defenses and those types of issues are best left for trial. Again, I cannot stress this enough. Preliminary hearings are not trials. They should not be trials, and it is our position that they are becoming mini trials, which is prolonging peoples' stay in jail and making an inefficient system.

Assemblywoman Krasner:
I think you touched on my question, but could you extrapolate a little bit for me as to why you think constitutional issues should be heard in district court?

John Jones:
I think I have been arguing a few reasons why. First, it is for judicial economy and efficiency. I think having a motion to suppress heard in one particular court—the court that is actually going to hear the trial—is the most efficient way to do things. Having two separate judges who could have two separate opinions on the same issue—we are talking about trial and justice courts—is inefficient. Second, preliminary hearings are not mini trials. They are not meant to be trials; they are just where the state makes some showing that evidence exists to have the defendant answer to the actual charges in district court. Again, I want to point out *Marcum v. Sheriff, Clark County*, 451 P.2d 845 (1969), which says a full and complete examination or exploration of all facets of a case is reserved for trial, and a trial is held in district court. That is where the full and complete review of the case should be held.

Chairman Yeager:
Committee, we are going to move on to additional testimony in the interest of time. Mr. Jones, I want to thank you again. Is there anyone else in support of S.B. 368 (R2)?

Wendy Stolyarov, Legislative Director, Libertarian Party of Nevada:
I prepared this statement before being aware of the amendment. I still generally support this bill, and I will share my statement with the Committee.

The Libertarian Party of Nevada believes that all people have the Fourth Amendment right to be secure in their property and persons from unreasonable searches and seizures. As Americans, the right to privacy is one of our most essential and treasured principles.

Utah v. Strieff fundamentally altered police officers' incentives. They now have no reason not to search anyone in dehumanizing and frequently racially-motivated fishing expeditions. The state has no right to strip its citizens of dignity and bodily autonomy without probable cause, and implicit bias and racial profiling do not qualify.

We would strongly advise the state of Nevada to refrain from tasting the fruit of the poisonous tree. It may no longer be legally tainted, but it remains ethically and morally tainted. We would like to thank Senator Ford, Assemblyman McCurdy, and the other cosponsors for bringing this bill forward. The Libertarian Party of Nevada supports it and urges you to do the same. However, I will note once again that we are not entirely happy with the amendment.

Chairman Yeager:
Thank you for your comments. Is there any additional testimony in support of S.B. 368 (R2)? [There was none.] Is there anyone opposed to the bill? Please come forward. If there is anyone in Las Vegas who is opposed, please go to the table as well. I do not see anyone in Las Vegas so we will start up here in Carson City.

John J. Piro, Deputy Public Defender, Legislative Liaison, Clark County Public Defender's Office:
It feels very strange to be up here opposing this bill. I will say that we were initially in support of S.B. 368 (R2), prior to this amendment being put on this bill.

I want to give the Committee some history on this amendment and what it looks like. This amendment is an attempt by the Nevada District Attorneys Association to get something that they have been trying to get from this Legislature for years. In 1969, with the 55th Legislature in session, on Assembly Bill 641 of the 55th Session, this Legislature found that justice courts did have the power to hear and suppress evidence. Issuing NRS 189.120 at that time, the legislative history demonstrated that justice courts have the power to suppress unlawfully obtained evidence. The district attorneys tried to take that power away in 2007 with Assembly Bill 65 of the 74th Session, and again in 2015 with Assembly Bill 193 of the 78th Session.

Being unable to win those battles in the Legislature, the district attorneys sought to go to the Nevada Supreme Court. Just last year they took *Grace v. the Eighth Judicial District Court* to the Nevada Supreme Court where a district court judge bit on their motion to not allow justices of the peace to suppress evidence (Exhibit C). There, again, the district attorneys lost that battle, and the Nevada Supreme Court recognized that the justice courts had power to suppress illegally obtained evidence.

Why is that important? Although Mr. Jones stated several times in his testimony that preliminary hearings are not mini trials, they do serve an important function, and that is to test the evidence prior to taking somebody to trial. Senate Bill 368 (2nd Reprint), on its own prior to this amendment, is a good bill but what would happen is that people will wait longer to get unlawfully obtained evidence suppressed. With the scenario that Senator Ford suggested with Assemblyman Pickard walking down the street and being found with a crack pipe on him, we would not be able to suppress that evidence at the justice court level. Assemblyman Pickard would ostensibly sit in jail longer waiting to go to district court. Then, if it did not get suppressed at the district court level, he would have to hope that the Nevada Supreme Court would do the right thing and suppress that unlawfully obtained evidence while sitting in prison for that conviction.

This amendment seeks to prolong the period of time that people are sitting and waiting in custody. The amendment is not going to speed up the process. It also allows the district attorneys to have two bites at the apple while taking away a chance for a defendant to challenge the evidence. Let me elaborate on that. We do have a chance to have that evidence suppressed at a preliminary hearing now, under current law. If we win that motion to suppress, the district attorney has the opportunity to appeal that to the district court. It is not something that just goes away. It is not like a not guilty verdict; they have another chance to take on that evidence. What they are trying to do is take that chance away from the defense, to get rid of a case before a case lasts too long and before it ruins somebody's life. Sometimes we can cure the ills that were done prior to a preliminary hearing at that stage, by suppressing that evidence before somebody has to deal with the expense, the length of time in jail, and all of those other things that a trial brings up.

This amendment would hurt criminal defendants in the long run, and it would take away from the ruling that was just made last year. It would be a third attempt by the Nevada District Attorneys Association to take this power away from justice courts. I also want to say that S.B. 368 (R2) without the amendment is good law.

Chairman Yeager:
Mr. Piro, may I clarify something? You are saying "without the amendment." Are you referring to your amendment that you proposed? I just want to make sure the record is clear. Which amendment are you referring to when you say "the bill, as amended?"

John Piro:
We did propose an amendment (Exhibit D), and I am sorry that I did not bring that up. I think our amendment would be a fair solution. I am talking about the proposed amendment that came out of the Senate side. Right now, our amendment is standing as an unfriendly amendment. Our amendment, though, balances the need to have motions to suppress in writing while also allowing the justice courts to still decide those things.

Justices of the peace are lawyers. They are duly elected. They do take the same oath that district court judges take to uphold the law, and under our rules of evidence, they are not allowed to consider unlawfully obtained evidence. Again, this bill, with the amendment that came from the Senate side, brings up a conflict in the statutes.

I would urge the Committee—and I hate to say this—to not support this bill without either removing the amendment that came from the Senate side or allowing our amendment that at least allows motions to suppress to be heard in justice court but requires they be made in writing rather than orally. It also allows the parties a chance to respond, which I think is a fair compromise in this case. I think we will be doing a grave injustice to the gains that were made from *Grace* and to defendants in the state of Nevada if we are to not allow motions to suppress to be done at the justice court level.

I want to say just one more thing. Yes, the proof to bind a case up in justice court to district court is less—which benefits the district attorney. However, the proof on a motion to suppress is not less. That is not different proof. It is the same standard of law, so it is not being suppressed on a lesser standard of proof. It is being suppressed on the same standard that any judge in any court would use.

Assemblyman Fumo:
Mr. Piro, can you speak to the fact that not only will this amendment fly in the face of what the Nevada Supreme Court has already done, but also, if a case gets dismissed by a justice of the peace in justice court, does the district attorney's office not have another avenue they can go by way of grand jury to get the case forwarded to district court as well?

John Piro:
I want to make sure I understand your question correctly. Are you saying that they would be able to indict a person based on that?

Assemblyman Fumo:
Yes.

John Piro:
They may be able to do that, but they would also have to bring up, during that indictment process, that there was evidence suppressed and other things of that nature.

Assemblyman Fumo:
However, they do get the second bite at the apple. Does the defense have that opportunity once it is bound up?

John Piro:
We do not.

Chairman Yeager:
We will go ahead and take some additional testimony up here in Carson City.

Sean B. Sullivan, Deputy Public Defender, Washoe County Public Defender's Office:
I agree with everything that was stated by my colleague, Mr. Piro, and I do not relish being up here in limited opposition today to S.B. 368 (R2). I have certainly had conversations with Senator Ford and all of the other stakeholders concerning section 1. We cannot support S.B. 368 (R2) with section 1 being within the language. We could support it if that section was removed or if this Committee decided to adopt the unfriendly amendment proposed by the Clark County Public Defender's Office (Exhibit D).

John Jones made a comment that I wanted to briefly touch upon about prior convictions. He said that a justice of the peace would not consider the constitutionality of a prior conviction, and that was the basis of his argument. I respectfully disagree with that. I think there are times when justices of the peace are tasked with looking at the constitutionality of a certain piece of evidence, even a prior conviction, to see if there are constitutional infirmities. If something is blatant on its face, then the justice of the peace is not going to simply just kick it up to district court and say, Go ahead, file that motion to strike the prior conviction in district court. They are going to look, based upon other Nevada Supreme Court cases like *Koening v. State*, 672 P. 2d 37 (1983) and *Pettipas v. State*, Nev. 794 P. 2d 705 (1990), to see if that prior conviction satisfies constitutional muster, so I simply disagree with that argument. I think that the justice of the peace has a duty to look at evidence and see if it satisfies constitutional muster. Looking at the *Grace* decision, when read together in conjunction with NRS 48.025 and NRS 47.020, the *United States Constitution* and the *Nevada Constitution* give the justice courts the right to suppress illegally obtained evidence during a preliminary hearing.

For that, we simply cannot abide by the amendment contained in section 1. We could support it if our amendment was adopted or section 1 was simply removed from the bill. With that, I agree with everything that Mr. Piro said, and I will leave it at that.

Chairman Yeager:
We have a couple of quick questions.