IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark, and the HONORABLE NANCY ALLF, District Court Judge, Dept. 27,

Respondent,

AND

COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS & CLARK LTC RRG, INC.,

Real Party in Interest.

Supreme Court Case No.: 78301

REAL PARTY IN INTEREST'S ANSWERING BRIEF

FENNEMORE CRAIG, P.C.
James Wadhams (No. 1115)
Christopher H. Byrd (No. 1633)
Brenoch R. Wirthlin (No. 10282)
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
(702) 692-8000
Attorneys for Real Party in Interest
COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS & CLARK LTC RRG, INC.

DCEREGHI/14937134.2/037881.0001

NRAP 26.1 DISCLOSURE

The undersigned counsel of record for Real Party in Interest[1] certifies that the following are persons and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal:

- Commissioner of Insurance of the State of Nevada
- Fennemore Craig, P.C., including, but not limited to:
  - James Wadhams, Esq.;
  - Christopher Byrd, Esq.;
  - Scott Freeman, Esq.;
  - Brenoch Wirthlin, Esq.;
  - Daniel Cereghino, Esq.;
  - Brandi Planet, Esq.; and

/ / /

/ / /

/ / /

/ / /

[1] The Court's May 15, 2019 Order Directing Answer, n.1, clarified that the only "real party in interest" vis-à-vis this particular Petition for Writ of Mandamus is Commissioner of Insurance for the State of Nevada as Receiver of Lewis & Clark LTC RRG, Inc., the filer of this Answering Brief. See No. 19-21298.

- Chelsie Adams, Esq.

DATED this 12th day of June, 2019.

FENNEMORE CRAIG, P.C.

By: */s/ Brenoch R. Wirthlin, Esq.*
James Wadhams (No. 1115)
Christopher H. Byrd (No. 1633)
Brenoch R. Wirthlin (No. 10282)
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Phone: (702) 692-8000
Email: jwadhams@fclaw.com
cbyrd@fclaw.com
bwirthlin@fclaw.com

Attorneys for Real Party in Interest

ROUTING STATEMENT

Real Party in Interest does not dispute the end result of the routing analysis by Petitioners. Real Party in Interest does contend, however, that the most appropriate basis for such routing is that the Petition raises "a question of statewide public importance" (NRAP 17(a)(12)) as opposed to the other bases offered by Petitioners.[2]

DATED this 12th day of June, 2019.

FENNEMORE CRAIG, P.C.

By: */s/ Brenoch R. Wirthlin, Esq.*
James Wadhams (No. 1115)
Christopher H. Byrd (No. 1633)
Brenoch R. Wirthlin (No. 10282)
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Phone: (702) 692-8000
Email: jwadhams@fclaw.com
cbyrd@fclaw.com
bwirthlin@fclaw.com

Attorneys for Real Party in Interest

[2] Petitioners refer to NRAP 17(a)(10) and NRAP 17(b)(7), though such appear to be in error. Those rules do not correlate to Petitioners' described bases (cases originating from business court and questions of first impression). In addition, this is not a business court case (Case No. A-14-711535-**C**).

TABLE OF CONTENTS

		Page(s)
TABLE OF AUTHORITIES		vi
I.	INTRODUCTION AND RELIEF REQUESTED	1
II.	ISSUES PRESENTED	5
III.	STATEMENT OF THE CASE	5
a.	Party / Case Background	5
b.	The Directors file multiple NRCP 12(b)(5) motions	6
c.	Proceedings giving rise to the instant Petition	7
IV.	LEGAL ANALYSIS	8
a.	Judge Allf correctly denied the Directors' various Rule 12 motions	8
i.	There is no substantive difference between Nevada and Delaware law regarding pleading director liability	8
ii.	The TAC only needs to satisfy notice pleading standards	10
iii.	The TAC is sufficiently pleaded, even under the Directors' incorrect framing of the applicable test	13
1.	The TAC sufficiently pleads gross Negligence, which thereby rebuts the BJR	15
2.	The TAC sufficiently alleges the Directors	17

breached their fiduciary duty of care.

3. The TAC also sufficiently alleges the Directors' knowingly violated their duties, and thus, the law 18

iv. There is no requirement to plead either fraud or intentional misconduct 20

b. The Directors' Petition is also barred by laches 21

c. There is no basis for extraordinary relief because the Directors still have an adequate remedy at law 24

VI. CONCLUSION 28

VII. CERTIFICATE OF COMPLIANCE 30

VERIFICATION 32

PROOF OF SERVICE 33

TABLE OF AUTHORITIES

CASES	Page(s)
Advanced Countertop Design, Inc. v. Second Judicial Dist. Ct., 115 Nev. 258, 984 P.2d 756 (1999)	19, 27
Aronson v. Lewis, 473 A.2d 805 (Del. 1984)	8, 9
Brehm v. Eisner, 746 A.2d 244 (Del. 2000)	9
Building and Const. Trades Council of Northern Nevada v. State, 108 Nev. 605, 836 P.2d 633 (1992)	21, 22, 23
Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 62 P.3d 720 (2003)	17
Dushane v. Acosta, 2015 WL 9480185, *1 (Nev.App.)	19
F.D.I.C. v. Delaney, No. 2:13-CV-924-JCM (VCF), 2014 WL 3002005, *1 (D.Nev.)	10, 13, 14, 26
F.D.I.C. v. Jacobs, 3:13-CV-00084-RCJ, 2014 WL 5822873, at *4 (D.Nev.)	16, 20
F.D.I.C. v. Johnson, No. 2:12-CV-00209-KJD, 2012 WL 5818259, *6 (D.Nev.)	19
Gantler v. Stephens, 965 A.2d 695 (Del. 2009)	9
Harris Assoc. v. Clark County School District 119 Nev. 638, 81 P.3d 532 (2003).	21

CASES (Cont'd)	Page(s)
Hart v. Kline, 61 Nev. 96, 116 P.2d 672 (1941)	18
In re Agribiotech, Inc., 319 B.R. 216 (D.Nev. 2004)	14
In re KNH Aviation Servs., Inc. case, 549 B.R. 356 (Bankr. D.S.C. 2016)	10, 11, 12, 16
In re Newport Corp. Shareholder Litig., 2018 WL 1475469, *2 (Nev.Dist.Ct.)	20
In re Parametric Sound Corp. Shareholders' Litig., 2018 WL 1867909, *2 (Nev.Dist.Ct.)	20
In re Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del.Ch.2005)	8, 26
Jacobi v. Ergen, No. 2:12-cv-2075-JAD-GWF, 2015 WL 1442223, *4 (D.Nev.)	17, 20
Liston v. Las Vegas Metro. Police Dep't, 111 Nev. 1575, 908 P.2d 720 (1995)	10, 17, 27
NCS Healthcare, Inc. v. Candlewood Partners, LLC, 2005-Ohio-1669, ¶ 28, 160 Ohio App.3d 421 827 N.E.2d 797	15, 27
Okada v. Eighth Judicial Dist. Ct, -- P.3d --, 2018 WL 387927, at *2 (Nev. Jan. 11, 2018)	24
Ravera v. City of Reno, 100 Nev. 68, 675 P.2d 407 (1984)	10, 17
Round Hill General Improvement Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981)	27

CASES (Cont'd)	Page(s)
Shoen v. SAC Holding Corp., 122 Nev. 621, 137 P.3d 1171 (2006)	9, 16, 20
Smith v. Arthur Andersen LLP, 421 F.3d 989 (9th Cir.2005)	14
Smith v. Eighth Judicial Dist. Ct., 113 Nev. 1343, 950 P.2d 280 (1997)	27
Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)	9, 16, 17
State v. Eighth Judicial Dist. Ct., 118 Nev. 140, 42 P.3d 233 (2002)	26
Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334 (Nev. 2017)	9, 20

STATUTES AND RULES	Page(s)
NRCP 12(b)(5)	3, 6, 7
NRCP 12(c)	3, 7, 24
NRCP 56	25

OTHER AUTHORITIES	Page(s)
5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1367 (1969)	23

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND RELIEF REQUESTED

The central issue in this writ proceeding is whether the Third Amended Complaint ("TAC") sufficiently states a claim against the Directors for breach of fiduciary duty. Real Party in Interest Commissioner of Insurance, as Receiver for Lewis & Clark LTC RRG, Inc. ("L&C"), seeks to hold the directors of L&C ("Petitioners" or "Directors") personally liable for their gross negligence in breaching their fiduciary duty of care to L&C, which left the taxpayers of Nevada confronted with a multi-million dollar loss.

L&C alleges facts that demonstrate that the Directors were grossly negligent in carrying out their fiduciary duties owed to the corporation. The TAC sufficiently alleges facts that show the Directors: (1) were indifferent to their legal duty to act on an informed basis; (2) knew that information supplied to them was either inadequate or incomplete; (3) knew they failed to obtain readily available information before making certain, material business decisions; and (4) should have known, had they exercised even the slightest care, the truth about L&C's rapidly deteriorating financial condition (and the internal causes thereof). These

allegations are all that is required to overcome the business judgment rule and state a breach of the duty of care under NRS 78.138.

The Directors concede that the TAC sufficiently alleges facts of gross negligence and that pleading gross negligence is sufficient to overcome the business judgment rule codified in NRS 78.138. However, without any legal authority, the Directors argue that the TAC is still insufficient because NRS 78.138 also requires allegations of fraud or intentional misconduct to state a claim for breach of the fiduciary duty of care. Their interpretation of NRS 78.138 is wrong.

NRS 78.130 plainly indicates that fraud and intentional misconduct are not the only bases to hold a director accountable. Directors are also accountable for breaching a duty of care when there is a "knowing violation of the law", which includes their duty to act on an informed basis as required by NRS 78.138. The case law makes it clear that the same allegations of gross negligence, which is the test for and/or substantive equivalent of "knowing violation of the law" are sufficient to satisfy all of the elements of a claim under NRS 78.130.

Judge Allf has consistently applied NRS 78.138 and concluded on numerous occasions that the TAC's allegations are sufficient to both

initially overcome the business judgment rule ("BJR") and provide the Directors with appropriate notice of the claim(s) against them under NRS 78.138.[3] Notice pleading is all that is required under NRS 78.138.

The Directors criticize Judge Allf for an "inconsistent" decision, but without providing any explanation or legal citation that would demonstrate an error in her reasoning. To the contrary, the Directors ignore numerous authorities that directly undermine their position and support Judge Allf's repeated findings that the TAC states a claim against the Directors for breach of the duty of care.

The Petition's only purpose is to seek an escape from having to answer for their gross negligence without having to rebut the TAC's allegations with admissible evidence, either by a motion for summary judgment or at trial. Instead of sticking to the simple notice pleading analysis, the Directors urge a new, substantially broader interpretation of NRS 78.138 to preclude them from liability in spite of allegations

[3] The Directors filed two motions pursuant to NRCP 12 challenging the sufficiency of the TAC: (1) first, they filed an NRCP 12(b)(5) motion; and (2) they then filed an NRCP 12(c) motion years later. These two Rule 12 motions (and the subsequent Motion for Reconsideration) relating to the TAC followed an earlier Rule 12 motion with respect to Plaintiff's original Complaint. In other words, the Directors have gone to the Rule 12 well four (4) different times in this case.

demonstrating that they were grossly negligent. NRS 78.138 is not intended to exonerate the Directors from their gross negligence and the Directors have not cited any authority that would support such an interpretation.

Make no mistake, the Directors' misinterpretation of NRS 78.138 would permit directors to abdicate their duties in the absence of fraud or intentional misconduct without consequence. However, this is not the law in Nevada or any other jurisdiction. Such absolute protection has never been the purpose for the BJR, nor should it be the corporate policy of Nevada. Being business friendly is decidedly different from creating a haven for corporate abuse. If this Court adopts the Directors' interpretation of NRS 78.138, the State of Nevada and individual shareholders will ultimately bear the losses from the corporate abuses that are sure to follow.

As discussed more fully below, this Court should decline extraordinary relief and deny the Directors' Petition because:

1. Allegations of gross negligence sufficiently state a claim for breach of the duty of care under NRS 78.138;

2. The Directors delayed for 2 years before filing the Petition for

relief and such delay, for which they offer no explanation, constitutes laches and bars the relief sought; and

3. The Directors have an adequate remedy at law, either by way of summary judgment or appeal.

II. ISSUES PRESENTED

1. "Are allegations referencing (1) gross negligence; (2) uninformed decision-making; (3) lack of diligence and/or care; and/or (4) knowledge of adverse circumstances inconsistent with legal, fiduciary obligations as directors; sufficient to plead a claim for director liability for breach of the duty of care?"

2. Does the two year delay in bringing the Petition and the existence of other legal remedies bar the relief sought?

III. STATEMENT OF THE CASE

a. Party / Case Background

The Directors were the members of the board of directors for L&C, a Nevada risk retention group insuring long-term care facilities ("LTC's") around the country. See Petition, at p.4. L&C began operating in 2004. Because L&C had no employees of its own, it was operationally managed by the other defendants in this case, the Uni-Ter entities (whose parent

company, US RE Corp., provided reinsurance brokerage services to L&C). In 2010, the Nevada Division of Insurance ("DOI") admonished the Directors about L&C's material capital deterioration. The DOI again stated their growing concerns about capital deterioration in 2011. In 2012, L&C was placed into receivership and ultimately liquidated. See Petition, at p.4.

b. The Directors file multiple NRCP 12(b)(5) motions.

Plaintiff commenced this action on December 23, 2014. See Petition, at p.4.[4] In December 2015, the Directors moved to dismiss Plaintiff's original Complaint pursuant to NRCP 12(b)(5). See Petition, at p.4. The District Court granted in part and denied in part. See id.

On April 1, 2016, Plaintiff filed a First Amended Complaint, to which the Directors again filed another NRCP 12(b)(5) motion to dismiss. See Petition, at p.4. While that particular motion was still pending and undecided, Plaintiff filed: (1) a Second Amended Complaint (6/13/16); and (2) on August 5, 2016, the challenged TAC. See Petition, at p.5; 1 APP00037. Thus the TAC became the operative pleading with respect to

[4] On June 29, 2015, the Directors filed a Third-Party Complaint against two former Uni-Ter employees (Sanford "Sandy" Elsass and Donna Dalton), but they failed to properly serve or otherwise pursue that Third-Party Complaint. See **RPIA000048-60**, Third-Party Complaint.

the Directors' second 12(b)(5) motion. See Petition, at pp.5-6. The District Court denied that motion.

c. Proceedings giving rise to the instant Petition.

On August 14, 2018, almost two full years after the District Court denied their second 12(b)(5) motion (and close to four years into the overall case), the Directors tried the new approach of seeking NRCP 12(c) relief. See Petition, at p.6; 3 APP00607. The District Court considered those arguments to be duplicative and denied that motion. See 6 APP01379; see also Petition, at p.6. Three weeks later, the Directors filed a Motion for Reconsideration. See 6 APP01382. The District Court denied that motion. See 6 APP01429.

Meanwhile, the parties were conducting extensive discovery, including sets of written discovery requests (including related discovery dispute proceedings) and numerous out-of-state depositions (Oregon, Washington, California, and three (3) separate trips to New York).[5]

[5] These out-of-state depositions included:
(1) Director Steve Fogg (Oregon, Nov. 15, 2018);
(2) Director Eric Stickels (New York, Nov. 28, 2018);
(3) Director Jeff Marshall (Washington, Dec. 11 and 12, 2018);
(4) Director Dr. Carol Harter (California, Dec. 17, 2018);
(5) Director Robert Hurlbut (New York, Jan. 30, 2019);
(6) the NRCP 30(b)(6) designees for:

Writ proceedings were expressly discussed during the January 9, 2019 hearing on the Directors' Motion for Reconsideration. See **RPIA000107-125**, at 17:4-18:12.[6] The Directors nonetheless delayed filing the instant Petition until March 13, 2019.

IV. LEGAL ANALYSIS

a. Judge Allf correctly denied the Directors' various Rule 12 motions.

i. There is no substantive difference between Nevada and Delaware law regarding pleading director liability.

The Directors misunderstand both the BJR and the substantial overlap of Delaware and Nevada law on the issue. "The fiduciary duties owed by directors of a Delaware corporation are the duties of due care and loyalty." See In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 745 (Del.Ch.2005); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984),

---

(a) Uni-Ter Underwriting Management;
(b) Uni-Ter Claims Services; and
(c) US RE Corporation

(New York, Feb. 19 and 20, and Mar. 13 and 14, 2019, Joseph Fedor, Dick Davies, and Anthony Ciervo)

There were also depositions taken in Las Vegas, including: (1) the NRCP 30(b)(6) designee for the Receiver (Mr. Bob Greer, Nov 8, 2018); and (2) Ms. Constance Akridge, Esq. (percipient witness, Mar. 1, 2019).

[6] "MR. PEEK: And thank you, Your Honor, because you do anticipate a writ. THE COURT: I see the handwriting on the wall."

overruled on other grounds by Brehm v. Eisner, 746 A.2d 244 (Del. 2000) ("[The BJR] 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."); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985), overruled on other grounds by Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

For its part, NRS 78.138 tracks that exact language. See NRS 78.138(1) (The fiduciary duties of directors and officers are to exercise their respective powers in good faith and with a view to the interests of the corporation."), and NRS 78.138(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"); see also Shoen v. SAC Holding Corp., 122 Nev. 621, 636-38, 137 P.3d 1171, 1181-82 (2006) (discussing in depth and adopting Aronson); Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct., 399 P.3d 334, 342-43 (Nev. 2017) (also citing to Aronson). Therefore, there is no substantive difference between Nevada and Delaware law, which explains and supports the wholly appropriate and still viable reliance by Nevada courts

on Delaware authorities.

ii. The TAC only needs to satisfy notice pleading standards.

In resolving pleadings stage challenges, "[t]he test for determining whether the allegations of a cause of action are sufficient to assert a claim for relief is whether the allegations give **fair** notice of the nature of the basis of the claim and relief requested." See Ravera v. City of Reno, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984) (emphasis added); see also Liston v. Las Vegas Metro. Police Dep't, 111 Nev. 1575, 1578–79, 908 P.2d 720, 723 (1995) ("A plaintiff who fails to use the precise legalese … but who sets forth the facts which support his complaint thus satisfies the requisites of notice pleading."). In F.D.I.C. v. Delaney, No. 2:13-CV-924-JCM (VCF), 2014 WL 3002005, *1 (D.Nev.), the court applied FRCP 8, and only FRCP 8, with respect to the breach of fiduciary duty claim alleged under Nevada state law. See id. There is no obligation to give complete or perfect notice or otherwise satisfy hyper-technical language requirements. Traditional notice pleading sufficiency is all that was and is required of the TAC.

The In re KNH Aviation Servs., Inc. case, 549 B.R. 356, 362–63

(Bankr. D.S.C. 2016) (applying Delaware law), is particularly useful. Holding the subject complaint was sufficient, the court made the following remarks:

- "The amended complaint speaks in general terms of the alleged actions constituting a breach of fiduciary duty." See id.
- "A claim for breach of the duty of care requires a showing of gross negligence which generally 'requires directors and officers to fail to inform themselves fully and in a deliberate manner'." See id. (quoting Burtch v. Opus, LLC ("In re Opus East, LLC"), 528 B.R. 30, 66 (Bankr.D.Del.2015)).[7]

The In re KNH Aviation Servs. court then went on to evaluate the sufficiency of the allegations as to the fiduciary duty of care:

- The subject complaint "states that Defendants were 'grossly negligent in failing to recommend that the owners properly capitalize the Debtor in late 2010 and in each fiscal quarter thereafter'." See id.
- "It also states that Defendants 'failed to inform themselves, before

[7] The court here also quoted Mukamal v. Bakes, 378 Fed.Appx. 890, 901–02 (11th Cir.2010) (applying Delaware law) in stating: "Moreover, even upon insolvency, the duty of care to the corporation remains the same." See id.

making business decisions, of all material information reasonably available to them'." See id.

- "With respect to the breach of the duty of care, Plaintiff's amended complaint contains, among other relevant allegations, that [Defendants] 'failed to make properly informed management decisions and/or were grossly negligent in their failure to recommend to the owners that an infusion of additional capital was necessary or advisable'[.]" See id.
- The subject complaint also alleged the Defendants "abdicated their duty to be informed and/or were wholly disregarding the financial information to which they had access'[.]" See id.
- The subject complaint also alleged the Defendants "were grossly negligent in failing to inform themselves of all material information regarding repayment of insider loans and in creating and utilizing KNH Air Logistics, LLC[.]" See id.
- It also alleged that Defendants "were grossly negligent in allowing Debtor to continue in insolvency and in failing to inform themselves of all material information reasonably available to them[.]" See id.

These are virtually identical to the allegations made in the TAC. See e.g.,

1 APP00037, at ¶¶ 32, 34, 58, 59, 99, 105, 113, 117, 122, 126, 145, 146, 148, 153-55, 163, 164, 170, 192, 193, 220, 221, 226, 230-32

Moreover, the Delaney court plainly supports Plaintiff and fatally undermines the Directors' "plead and prove" argument:

> However, defendants misstate the BJR. The BJR does not "preclude" liability for a breach of fiduciary duty; it merely creates a presumption that directors act on an informed basis and in the best interest of the corporation. Although the BJR states that a claimant must prove that the breach of fiduciary duties involved intentional misconduct, fraud or knowing violation of the law, **such proof is not required at this stage of the proceedings**. The allegations set forth by the complaint are sufficient at this stage to rebut the presumption created by the BJR. While defendants may prevail under the BJR at the summary judgment stage or at trial, such a determination is inappropriate at this motion to dismiss stage.

See Delaney, 2014 WL 3002005, at *4 (emphasis added).

iii. The TAC is sufficiently pleaded, even under the Directors' incorrect framing of the applicable test.

The Directors posit that, instead of conducting the above type of analysis of the pertinent allegations, the District Court should have evaluated the TAC in light of the supposed "elements" set forth in NRS 78.138(7). See Petition, at § IV.C. Those three (3) putative "elements"

are: (1) rebuttal of the BJR (NRS 78.138(3)); (2) that the acts or omissions constitute a breach of fiduciary duty; and (3) that the acts or omissions are characterized by "fraud, intentional misconduct, or a knowing violation of the law." See id. The Directors are incorrect on each point.

The first "element" is rebuttal of the business judgment rule's ("BJR") protective presumption in NRS 78.138(3). The Directors concede the TAC's sufficiency in that regard. The second element is that the alleged acts or omissions constitute a breach of fiduciary duty. The TAC repeatedly alleges as much. Moreover, the test for whether there is a breach of the duty of care is gross negligence, which has also been expressly and repeatedly alleged in the TAC. But again, this is not actually an issue because the Directors concede that the TAC adequately pleads gross negligence. See 6 APP01382, at 11:21-12:2, and n.8, and at 5:7; see also Petition, at p.5, and p.14, n.3; **RPIA000085-106**, at 10:5-6; **RPIA000107-125**, at 8:10-16.[8] The third element requires the Directors to

[8] The Directors also admit the sufficiency of the TAC's allegations as to the deepening claim. See Petition, at p.5 (that the Directors failed "to take corrective actions *[which thereby]* prolonged L&C's operations such that [the Directors'] inaction increased L&C's insolvency"); see also Smith v. Arthur Andersen LLP, 421 F.3d 989, 1006 (9th Cir.2005) (recognizing validity of deepening of the insolvency claim); In re Agribiotech, Inc., 319 B.R. 216, 224 (D.Nev. 2004) (same).

have acted with either "fraud, intentional misconduct, or a knowing violation of the law." Again, the TAC repeatedly alleges the Directors knowingly violated the law by: (1) failing to properly inform themselves as to several decisions (as well as L&C's overall financial condition); and (2) unreasonably relying on the UniTer Defendants, especially following the Division of Insurance's ("DOI") warnings regarding L&C's capital deterioration.

1. The TAC sufficiently pleads gross negligence, which thereby rebuts the BJR.

This particular aspect of the analysis requires nothing more than resort to the Directors' own admissions that the TAC sufficiently pleads gross negligence. See 6 APP01382, at 11:21-12:2, and n.8, and at 5:7; see also Petition, at p.5, and p.14, n.3; **RPIA000085-106**, at 10:5-6; **RPIA000107-125**, at 8:10-16.

But besides the Directors' concessions, other courts considering allegations nearly identical to those in the TAC have concluded that such are sufficient to state a claim for breach of fiduciary duty. In NCS Healthcare, Inc. v. Candlewood Partners, LLC, 827 N.E.2d 797, 803, ¶¶ 28, 29, 160 Ohio App.3d 421, 429 (2005), the court held that had the plaintiff alleged that "the board failed to exert any deliberative effort in

making its decisions" or "were uninformed … or were grossly negligent," then the subject complaint would have sufficiently stated a claim for breach of fiduciary duty. See id. That comports exactly with the court's determination of sufficiency in the In re KNH Aviation Servs., Inc. case as discussed above. See id., 549 B.R. at 362–63; see also Van Gorkom, 488 A.2d at 873 ("While [there are] a variety of terms to describe the applicable standard of care, … under the business judgment rule director liability is predicated upon concepts of gross negligence.). To the same extent and effect, "[i]n Nevada, the business judgment rule defines the line between unactionable ordinary negligence and actionable gross negligence." See F.D.I.C. v. Jacobs, 3:13-CV-00084-RCJ, 2014 WL 5822873, at *4 (D.Nev.); see also Shoen, 122 Nev. at 639, 137 P.3d at 1184.

In this instance, the TAC repeatedly alleges both that the Directors were uninformed and grossly negligent. See 1 APP00037, at ¶¶ 32, 34, 58, 59, 99, 105, 113, 117, 122, 126, 145, 146, 148, 153-55, 163, 164, 170, 192, 193, 220, 221, 226, 230-32.[9] These allegations more than suffice to rebut

[9] The TAC's sufficiency is evaluated in its entirety and not merely by reference to the title given or specific few paragraphs related to a particular claim for relief. See 1 APP00037, at ¶ 217 (incorporating all

the BJR and give "fair notice" of Plaintiff's theory to the Directors. See Ravera, 100 Nev. at 70, 675 P.2d at 408; Liston, 111 Nev. at 1578–79, 908 P.2d at 723.[10]

2. The TAC sufficiently alleges the Directors breached their fiduciary duty of care.

The remaining analysis is in some respects circuitous. "[D]irector liability is predicated upon concepts of gross negligence." See Van Gorkom, 488 A.2d at 873. Nevada courts come to the same conclusion. See Jacobi v. Ergen, No. 2:12-cv-2075-JAD-GWF, 2015 WL 1442223, *4 (D.Nev.) ("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[.]"). In other words, allegations that sufficiently state gross negligence are by definition equally sufficient to satisfy the supposed second "element" of NRS 78.138.

The TAC repeatedly alleges that the Directors were uninformed,

---

other paragraphs); Cohen v. Mirage Resorts, Inc., 119 Nev. 1, 19-20, 62 P.3d 720, 732 (2003).

[10] This Court will also note that the Directors themselves advocated minimal pleading standards in their Third-Party Complaint. See e.g., **RPIA000048-60**, including at ¶ 38. The Directors nowhere explain why their own notice-pleading allegations suffice, whereas the TAC does not.

grossly negligent, and failed to exercise appropriate diligence and/or care. See e.g., 1 APP00037, at ¶¶ 32, 34, 58, 59, 99, 105, 113, 117, 122, 126, 145, 146, 148, 153-55, 163, 164, 170, 192, 193, 220, 221, 226, 230-32. Moreover, the Directors concede that the TAC adequately pleads gross negligence. See 6 APP01382, at 11:21-12:2, and n.8, and at 5:7 (calling gross negligence claim "viable"); see also Petition, at p.5 (reiterating that gross negligence claim is "viable"), and p.14, n.3; **RPIA000085-106**, at 10:5-6; **RPIA000107-125**, at 8:10-16.

3. The TAC also sufficiently alleges the Directors' knowingly violated their duties, and thus, the law.

But the circularity does not end there. Having conceded that the TC sufficiently pleads gross negligence, the Directors cannot claim that the TAC does not sufficiently also plead a knowing violation of the law.

Nevada case authorities define "gross negligence" in terms only of "indifference to legal duty" and expressly declare that it "falls short of … a willful and intentional wrong."[11] See Hart v. Kline, 61 Nev. 96, 116 P.2d

[11] Furthermore, in their own prior lawsuit against the Uni-Ter defendants (Case No. 5:13-cv-00746-MAD-ATB, Oneida Savings Bank, et al. v. Uni-Ter Underwriting Management Corp., et al.), the Directors themselves argued that a certain degree of recklessness constitutes "conscious

672, 674 (1941); see also Dushane v. Acosta, 2015 WL 9480185, *1 (Nev.App.); F.D.I.C. v. Johnson, No. 2:12-CV-00209-KJD, 2012 WL 5818259, *6 (D.Nev.). Had the Legislature intended only for actual fraud or intentional misconduct to trigger individual liability as the Directors contend, it easily could and would have said so. It did not. Rather, NRS 78.138(7)(b)(2) expressly and unambiguously includes the clause "or knowing violation of the law." The Directors do not even mention this (inconvenient) portion of the statute. Given the Directors' wholesale indifference to and abdication of their duties in this case, that language cannot simply be ignored as the Directors desire.

The TAC repeatedly and expressly alleges the Directors' knowing violations of their statutory duty to be informed. See e.g., 1 APP00037, at ¶¶ 104, 105, 117, 121, 122, 145, 230-32.[12] Thus, the TAC provides sufficient notice to the Directors of their "knowing violation of the law."

//

---

misconduct sufficient for the scienter aspects of a fraud-related claim." See id. [ECF. 45], **RPIA000001-47**, at RPIA000020, at ll.18-22.

[12] The Directors are charged with knowing their statutory duties. See Advanced Countertop Design, Inc. v. Second Judicial Dist. Ct., 115 Nev. 258, 272, 984 P.2d 756, 759 (1999).

iv. There is no requirement to plead either fraud or intentional misconduct.

The Directors' position that director liability requires "something more than gross negligence ... because NRS 78.138(7) says there must be more than gross negligence" is simply incorrect, as well as internally inconsistent. See **RPIA000085-106**, at 10:5-15; 6 APP01382, at 6:22-23.[13] This argument is directly counter to the Directors' own argument that NRS 78.138 must be strictly construed. See e.g., 6 APP01382, at 8:21-22 (arguing for strict construction of the conjunctive term "and" in the very same section, NRS 78.138(7)). In addition, the Directors' position is neither supported by any authorities in the Petition nor any rational public policy considerations. The plain language of NRS 78.138 plainly states that liability can be predicated merely on a "knowing violation of law," with no reference at all to either "fraud" or "intentional misconduct." See Shoen, 122 Nev. at 639, 137 P.3d at 1184; Wynn Resorts, 399 P.3d at 343; Jacobs, 2014 WL 5822873, at *4.

[13] But compare 6 APP01382, at 11:21-12:2 and n.8 ("[T]he 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."); Jacobs, 2014 WL 5822873, at *4; Shoen, 122 Nev. at 639, 137 P.3d at 1184; Wynn Resorts, 399 P.3d at 343; In re Newport Corp. Shareholder Litig., 2018 WL 1475469, *2 (Nev.Dist.Ct.); In re Parametric Sound Corp. Shareholders' Litig., 2018 WL 1867909, *2 (Nev.Dist.Ct.); Jacobi, 2015 WL 1442223, at *4.

This Court must give meaning and effect to all parts and words of the statute. See Harris Assoc. v. Clark County Sch. Dist., 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). However, the Directors' interpretation of NRS 78.138 ignores a significant part of the statute that deals with the precise situation presented by this case. By holding directors accountable for knowing violations of the law, corporations and their shareholders are protected from directors, such as these, who ignore their duties to be informed when making decisions. To only hold directors liable for intentional or fraudulent harm would be the demise of informed directors and the protections of corporations in Nevada. There must be some deterrent to shirking fiduciary duties. As stated before, being business friendly is different from allowing a system that encourages corporate mismanagement and losses to the public.

b. The Directors' Petition is also barred by laches.

The Petition should also be denied based on the Directors' unreasonable delay in seeking such relief from this Court. In Building and Const. Trades Council of Northern Nevada v. State, 108 Nev. 605, 610-12, 836 P.2d 633, 636-37 (1992), writ relief was denied based on a single

month's delay in seeking relief from this Court. See id.[14] This Court should do likewise in this case based on the Directors' far greater and more unreasonable delays.

This Court set forth three factors that weigh on the applicability of laches: (1) whether there was inexcusable delay in making the petition; (2) whether there is a waiver implied from the petitioner's acquiescence in existing conditions; and (3) whether there is prejudice to the responding parties. See id. at 611, 836 P.2d at 637. In this case, all three factors work against the Directors and compel the application of the doctrine to bar the requested relief.

The close of pleadings occurred in this case years ago, on October 21, 2016. See **RPIA000061-84**; see also 3 APP00607, at 4:15-17 ("The pleadings closed and discovery opened …").[15] "Ordinarily, a motion for

---

[14] In Building and Const. Trades, a public works project was bid pursuant to NRS 341. All bids came in above the appropriated budget, which mandated rejection of all bids and a project re-design / re-bid. See id. The public agency did not adhere to the statutory process and, instead, negotiated exclusively with the lowest original bidder. A competing bidder learned of those exclusive negotiations, as well as the awarded bidder's commencement of work, yet delayed one (1) month in seeking any legal or equitable relief from this Court. See id. at 611, 836 P.2d at 637.

[15] The various Uni-Ter defendants filed their Answers months earlier, in August 2016.

judgment on the pleadings should be made promptly after the close of the pleadings." See 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1367 (1969). The Directors, however, waited almost two years to file their 12(c) Motion. See 3 APP00607. After that dilatory 12(c) motion was denied, they elected to further delay by filing an unnecessary Motion for Reconsideration. See 6 APP01382. Then, the Directors again unreasonably delayed before filing their Petition.

In this case, all three factors bearing on the application of laches work against the Directors to bar the requested relief. See Building and Const. Trades, 108 Nev. at 611, 836 P.2d at 637. First, the Directors unreasonably and repeatedly delayed before seeking any relief from this Court. Second, the Directors waived the matter by their knowing acquiescence to existing conditions, meaning their continued presence in the litigation. The Directors knew back in 2016 of their potential recourse to this Court based on identical arguments. Their requested relief, the same as they requested in 2016, would obviously have a material impact on the litigation landscape, yet the Directors chose to do nothing for years in that regard. Third, Plaintiff has conducted extensive written and

deposition discovery since: (1) the 2016 denial of the Directors' 12(b)(5) Motion; and (2) the 2018 filing of the Directors' 12(c) Motion (and the related Motion for Reconsideration). Such discovery included numerous out-of-state depositions. See n.6 (pp.7-8), supra.

All of the factors supporting the application of the laches bar exist in this case. This Court should thus deny the Directors' Petition on this basis.

c. There is no basis for extraordinary relief because the Directors still have an adequate remedy at law.

Finally, extraordinary relief is available only when there is no "plain, speedy and adequate remedy in the ordinary course of law." See Okada v. Eighth Judicial Dist. Ct, -- P.3d --, 2018 WL 387927, at *2 (Nev. Jan. 11, 2018); see also Petition, at p.8. The Directors, however, fail to explain how they have no such plain, speedy and adequate remedy under the circumstances of this case. See generally, Petition. The real issue here is that the Directors have not availed themselves of the obvious and available procedures below, like summary judgment. Instead, the Directors seek an excuse from having to explain their failures and rebut the allegations that they breached their fiduciary duty via admissible evidence.

The Directors could have, at any time over the four (4) years of litigation, filed a motion for summary judgment. Doing so would have triggered Plaintiff's obligation to rebut the BJR via appropriate evidence (as opposed to simply allegations). See NRCP 56. They eschewed that obvious step in favor of: (1) doing nothing for years; and then (2) filing their NRCP 12(c) Motion (and subsequent Motion for Reconsideration). As will be discussed further herein, the reason for their choice is transparent; they know they cannot establish the condition precedent to the protections of the BJR (that they took good faith efforts to implement policies, procedures, and/or systems) and that, ultimately, they will be liable.

Even if the District Court denied such a motion for summary judgment, the Directors would still have a plain, speedy, and adequate remedy via a timely appeal following trial. However, the Directors conveniently ignore their various legal remedies and skip to the contentions that: (1) in this case, there is no factual dispute and the trial court ignored its statutory obligation to dismiss them; and/or (2) that "an important issue of law needs clarification." See Petition, at pp.8-9. Neither of these applies.

First, there is no "clear" statutory obligation to dismiss the action. See Petition, at p.9 (citing State v. Eighth Judicial Dist. Ct., 118 Nev. 140, 147, 42 P.3d 233, 238 (2002)). NRS 78.138 only creates a presumption upon which the Directors may rely conditioned on their ability to produce evidence that they acted on an informed basis. See Delaney, 2014 WL 3002005, at *4; In re Walt Disney, 907 A.2d 693, 747 (Del.Ch. Aug2005) ("Disney IV"). In other words, the determination of whether the BJR is even applied to provide any measure of protection at all is made at trial, a point the Directors actually concede. See NRS 78.138(7)(a) ("… [t]he **trier of fact** determines that the *[BJR]* presumption … has been rebutted" (emphasis added)). The Directors dance around that plain language in their Petition.

The Directors' authorities regarding extraordinary relief to rectify incorrect decisions on motions to dismiss are unhelpful to the Directors. For example, in State, 118 Nev. 140, there were numerous prior motions for summary judgment already granted in favor of various defendants at the time of decision on the challenged motion to dismiss. See id. at 148,

42 P.3d at 238.[16] In Smith v. Eighth Judicial Dist. Ct., 113 Nev. 1343, 950 P.2d 280 (1997), the issue was the legal effect of a plainly fugitive document. These cases present entirely different procedural postures and/or purely legal issues as compared against the case at bar.

Other cases, such as Round Hill General Improvement Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981), reveal that the narrow exception for extraordinary relief applies only to instances statutorily mandated action. See id. at 603-04, 637 P.2d at 536; see also Advanced Countertop Design, Inc. v. Second Judicial Dist. Ct., 115 Nev. 258, 270-71, 984 P.2d 756, 758-59 (1999). There simply is no action mandated in NRS 78.138, so these cases are distinguishable and inapposite.

Second, no "clarification" is necessary on the narrow point actually before this Court. All that is required of the TAC are normal, notice-pleading allegations. See e.g., Liston, 111 Nev. at 1578–79, 908 P.2d at 723; NCS Healthcare, Inc., 827 N.E.2d at 803, 160 Ohio App.3d at 429. This is a well-settled, and clearly and consistently stated principle. That the Directors dislike the District Court's rulings does not mean there is a lack of clarity or serve as a basis for extraordinary relief.

[16] This Court should also note Justice Shearing's dissent. See id. at 156, 42 P.3d at 243-44.

V. CONCLUSION

The bottom line is that the TAC sufficiently describes and alleges numerous variants of a claim for director liability. It expressly alleges gross negligence by the Directors in carrying out their duties to L&C. It expressly alleges the Directors failed to act on an informed basis. It expressly alleges the Directors failed to exercise appropriate diligence and/or care as to their duties to L&C. It expressly alleges the Directors knew of various circumstances impacting the execution of their legal duties to L&C and yet failed to alter their conduct appropriately. These all suffice to state a claim from breach of the fiduciary duty and survive any and all Rule 12 motions.

Moreover, the Directors have unreasonably slow-played this aspect of the litigation while watching Plaintiff (as well as the Uni-Ter defendants) expend much time and effort in both written and cross-country deposition discovery.

The Directors' Petition is a tactic to avoid having to ever present evidence as to what they did – or more accurately, failed to do – during their stewardship of L&C. Adopting the Directors' interpretation of NRS 78.138 would be to abandon the policy underlying the statute and be

dangerous for the state and people of Nevada.

For the reasons set forth above, this Court should deny the Directors' Petition and permit this action to proceed through the remaining discovery and to trial. At that time, the Directors will have an opportunity to explain themselves and defend against the claim they breached their fiduciary duty to L&C.

DATED this 12th day of June, 2019.

FENNEMORE CRAIG, P.C.

By: */s/ Brenoch R. Wirthlin, Esq.*
James Wadhams (No. 1115)
Christopher H. Byrd (No. 1633)
Brenoch R. Wirthlin (No. 10282)
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Phone: (702) 692-8000
Email: jwadhams@fclaw.com
cbyrd@fclaw.com
bwirthlin@fclaw.com

Attorneys for Real Party in Interest

CERTIFICATE OF COMPLIANCE

I hereby certify that I am counsel of record for Real Party in Interest / Plaintiff COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS & CLARK LTC RRG, INC. in this matter, that I have read the foregoing Answering Brief to Petition for Writ of Mandamus and that to the best of my knowledge, information, and belief, it is not frivolous or imposed for any improper purpose. I further certify that this Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Answering Brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

I hereby certify, pursuant to NRAP 32(a)(8), that this Answering Brief to Petition for Writ of Mandamus complies with formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and type style requirements of Rule 32(a)(6). This Answering Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/ / /

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 12th day of June, 2019.

FENNEMORE CRAIG, P.C.

By: */s/ Brenoch R. Wirthlin, Esq.*

James Wadhams (No. 1115)
Christopher H. Byrd (No. 1633)
Brenoch R. Wirthlin (No. 10282)
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Phone: (702) 692-8000
Email: jwadhams@fclaw.com
cbyrd@fclaw.com
bwirthlin@fclaw.com

Attorneys for Real Party in Interest

VERIFICATION

STATE OF NEVADA)

) ss

COUNTY OF CLARK)

Under penalty of perjury, undersigned counsel declares that: he is an attorney of record for Real Party in Interest / Plaintiff COMMISSIONER OF INSURANCE FOR THE STATE OF NEVADA AS RECEIVER OF LEWIS & CLARK LTC RRG, INC.; he has read the foregoing Memorandum of Points and Authorities in support of the Answering Brief to Petition for Writ of Mandamus and is familiar with its contents; the facts contained therein are within counsel's knowledge and are true of his own knowledge, except as to those matters which are stated upon information and belief, and as to those matters, he believes them to be true.

By: _____
Brenoch R. Wirthlin (No. 10282)

SUBSCRIBED AND SWORN TO ME THIS 12TH DAY OF JUNE, 2019.

CHERYL D LANDIS
NOTARY PUBLIC
STATE OF NEVADA
APPT. NO. 06-104456-1
MY APPT. EXPIRES APRIL 08, 2022

[NOTARY STAMP]

_____
Notary Public

PROOF OF SERVICE

I hereby certify that on the 12th day of June, 2019, I served a copy of the foregoing **REAL PARTY IN INTEREST'S ANSWERING BRIEF TO DIRECTORS' PETITION FOR WRIT OF MANDAMUS** upon the parties to this action by mailing a copy thereof, postage prepaid, via regular U.S. Mail, addressed as follows:

Honorable Nancy Allf
Regional Justice Center
200 Lewis Avenue, Dept. 27
Courtroom 3A
Las Vegas, NV 89155

Joseph P. Garin, Esq.
Angela T. Nakamura Ochoa, Esq.
LIPSON, NEILSON, P.C.
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144

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

George F. Ogilvie III, Esq.
McDonald Carano LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, NV 89102
gogilvie@mcdonaldcarano.com

Jon M. Wilson, Esq.
Kimberly Freedman, Esq.
Broad and Cassel
2 South Biscayne Blvd., 21st Floor
Miami, FL 33131

/s/ Morganne Westover
An Employee of Fennemore Craig, P.C.