IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA GUZMAN, on behalf of herself and all Others Similarly Situated,

Appellant,

vs.

ROBERT L. JOHNSON, MIGUEL PENELLA, JOHN HSU, ARLENE MANOS, H. VAN SINCLAIR, ANDOR M. LASZLO, SCOTT ROYSTER, DAYTON JUDD, JOHN ZIEGELMAN, AMC NETWORK, INC., DIGITAL ENTRTAINMENT HOLDINGS, LLC, and RIVER MERGER SUB, INC, DOES 1 through 100, inclusive, and ROE CORPORTAIONS 1 through 100, inclusive,

Respondents.

Supreme Court No. 79818

Appeal from Judgment After Hearing on Motion to Dismiss, Eighth Judicial District Court, Clark County, State of Nevada, Honorable Elizabeth Gonzalez, District Judge

APPELLANT'S OPENING BRIEF

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as 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.

Appellant Lisa Guzman is a natural person.

Appellant Lisa Guzman is represented by the law firm of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and KAHN, SWICK & FOTI, LLC, and MONTEVERDE & ASSOCIATES PC.

DATED this 16th day of March, 2020.

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I. JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered by the district court on a motion to dismiss. The judgment was entered on September 12, 2019. Written notice of entry was served on September 12, 2019. The notice of appeal was filed on October 11, 2019. Accordingly, this Court has jurisdiction pursuant to NRAP 3A(b)(1), and the appeal is timely under NRAP 4(a)(1).

II. ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court pursuant to Nev. R. App. P. 17(a)(9), (a)(11), and (a)(12). This case originated in business court and raises as a principal issue a question of first impression regarding the "inherent fairness" standard recognized by this Court in *Foster v. Arata*, 74 Nev. 143, 155 (1958) and *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640 n.61 (2006).[1] It also raises as a principal issue a question of statewide public importance: the reach and operation of NRS 78.138 in the context of a challenge to a buyout by a controlling stockholder.

[1] Unless otherwise noted, all emphasis is added and all citations are omitted.

III. STATEMENT OF THE ISSUES

1. Whether the business judgment rule is rebutted as a matter of law and the burden is placed on the fiduciary to "show good faith and the transaction's fairness" when an interested fiduciary's transactions with the corporation are challenged, as recognized in Foster, 74 Nev. 143 at 155; *Shoen*, 122 Nev. at 640 n.61;

2. Even if the business judgment rule is not rebutted as a matter of law when an interested fiduciary's transactions with the corporation are challenged, whether Appellant nevertheless pled facts sufficient to rebut the business judgment rule presumption afforded to the former members of the RLJ Board pursuant to NRS 78.138;

3. Whether a controlling shareholder is entitled to the protections of NRS 78.138 even though the statute plainly states that it only applies to directors and officers; and

4. Whether Appellant adequately pleads that RLJ's controlling shareholder breached the fiduciary duties it owed to RLJ's minority shareholders in connection with the Merger.

IV. STATEMENT OF THE CASE

This case arises from the buyout of RLJ Entertainment, Inc. ("RLJ or the "Company") by Respondents AMC Network, Inc., its subsidiary, Digital Entertainment Holdings LLC ("Digital"), and its subsidiary, River Merger Sub Inc. (collectively, "AMC") for millions of dollars less than RLJ was worth (the "Merger").

By exploiting a combination of its holdings at multiple levels of RLJ's capital structure, a web of contractual rights, representation on the Board (defined below), its close relationships with Company insiders, and the Company's dwindling cash reserves, AMC – RLJ's *de facto* and *de jure* controlling stockholder – forced the Board to sell the Company to it and to Respondent Robert L. Johnson ("Johnson") (RLJ's founder and namesake) for an unfair price, pursuant to an unfair process, and on terms that provided AMC and Johnson with unique benefits not shared by common stockholders.

Appellant filed suit on October 30, 2018, prior to the closing of the Merger, on behalf of herself and all others similarly situated. In the Complaint, Appellant asserts two distinct causes of action. The first is against the members of the Board for breaching the fiduciary duties they owed to Appellant and the Class as officers and directors of AMC. The second is against AMC for breaching the fiduciary duties it owed Appellant and the Class as RLJ's controlling stockholder. Appellant sought to enjoin the then-proposed Merger or, in the event the Merger was consummated (which it was), to recover damages for the breaches of fiduciary duties.

AMC and the members of the Board (collectively, "Respondents") filed a motion to dismiss the Complaint (the "Motion to Dismiss") on December 18, 2018, arguing that Nevada's business judgment rule, Nev. Rev. Stat. Ann. §78.138 ("Section 78.138"), mandated dismissal of both causes of action. A hearing was held

by the district court (Honorable Elizabeth Gonzalez) on June 17, 2019. The Court summarily found that the allegations in the Complaint fail to state a claim upon which relief could be granted, for the reasons set forth in the pleadings and in the argument of counsel, and granted the Motion to Dismiss in its entirety. This appeal ensued.

V. STATEMENT OF THE FACTS

A. The Relevant Parties

Respondents Johnson, Miguel Penella, John Hsu, Arlene Manos, H. Van Sinclair, Andor M. Laszlo, Scott Royster, Dayton Judd, and John Ziegelman are the former members of the RLJ Board of Directors (collectively, the "Board" or "Director Defendants"). JA-1:5-8 (¶¶10-19). Johnson was also the founder of RLJ and served as the Board's Chairman, and Penella served as RLJ's Chief Executive Officer ("CEO"). JA-1:5-6 (¶¶10-11). Hsu and Manos served as AMC's director designees on the Board pursuant to the Investment Agreement (defined below) between RLJ and AMC. JA-1:6-7 (¶¶12-13).

While on the Board, the principal source of income for Sinclair, Royster, and Penella was derived from RLJ or its affiliates. JA-1:46-47 (¶112). Sinclair made his living as outside counsel to the Company and to Johnson, and nearly all of his professional work was tied to RLJ and its affiliates. JA-1:46-47 (¶112). Indeed, since 2003, Sinclair has served as president, chief executive officer, and general counsel

of the RLJ Companies, a group of companies owned by Johnson. JA-1:7 (¶14), 46-47 (¶112). Royster's only apparent current source of income not involving RLJ or its affiliates comes from his service as CFO of a not-for-profit. JA-1:46-47 (¶112). And director Penella has been CEO of RLJ since 2013 and a director since 2012. JA-1:6 (¶11), 46-47 (¶112). In addition to RLJ, Judd, Laszlo, and Ziegelman all served on the boards of private or publicly-traded companies or work for financial management vehicles that regularly advise buyers and sellers in public mergers and acquisitions matters. *See* JA-1:46 (¶111).

Until the Merger, RLJ was a subscription-based digital channel company. JA-1:13 (¶35). AMC owns and operates cable television brands. JA-1:13-14 (¶36). AMC was, at all relevant times, the *de facto* and *de jure* controlling stockholder of RLJ, beneficially owning a majority of AMC's stock.[2] JA-1:8-9 (¶20), 17 (¶43).

B. Background to the Merger

On August 19, 2016, RLJ entered into a strategic partnership (the "Investment Agreement") with Digital (AMC's subsidiary), pursuant to which Digital, in a separate credit agreement (the "Credit Agreement"), agreed to provide RLJ with a $60 million seven-year term loan and a $5 million one-year term loan

[2] The Proxy provides conflicting accounts of AMC's beneficial ownership, with amounts ranging from 51.9% to 70.6% of RLJ's stock. JA-1:8-9 (¶¶20-21 & n.7), 17 (¶43 & n.8).

and RLJ issued warrants to Digital to purchase AMC stock (the "AMC Warrants"). JA-1:14 (¶37). The AMC Warrants were exercisable at any time in AMC's discretion and, if exercised in full, would provide Digital with at least 50.1% of RLJ's stock and thus a majority of its voting power. JA-1:14 (¶37). Pursuant to the Investment Agreement, for as long as Digital owned the AMC Warrants, or any amounts remained outstanding in respect of the term loans, AMC had the right to designate two directors to the Board,[3] and, upon the exercise of the AMC Warrants in full, AMC had the right to designate a majority of the Board. JA-1:14 (¶37).

The Investment Agreement also prohibited RLJ from entertaining any acquisition proposal not approved by AMC (the "No-Shop Provision"). JA-1:14-15 (¶¶38-39). Thus, the Board had no ability to – and, in fact, did not – solicit proposals from or negotiate with any entities other than AMC. JA-1:15 (¶39). Indeed, the Company conceded in the Form DEFM14A Definitive Proxy Statement (the "Proxy") filed in connection with the Merger that this was one of the "risks and potentially negative factors in deliberations concerning the merger." JA-1:15 (¶39).

In connection with the Investment Agreement, on August 19, 2016, Johnson, RLJ SPAC Acquisition LLC, Peter Edwards, Morris Goldfarb (the "Principal Stockholders") and the Company also entered into a Stockholders' Agreement with

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[3] Two such director designees of AMC – Hsu and Manos – served on the Board at all relevant times. JA-1:14 (¶37), 42-43 (¶ 105).

Digital, pursuant to which (i) the Principal Stockholders granted Digital certain rights of first refusal with respect to the transfer of RLJ securities, (ii) the parties granted each other certain "tag-along" rights and "drag-along" rights with respect to certain sales by them of RLJ securities, and (iii) the Company granted the Principal Stockholders and Digital certain preemptive rights to purchase RLJ equity securities in certain future offerings. JA-1:5-6 (¶¶10), 16 (¶41).

As a result of these various agreements, from October 2016 to August 2018, Digital (1) was issued millions of RLJ shares as interest payments on the Investment Agreement loans, (2) purchased millions of RLJ shares, preferred securities that were convertible into shares, and warrants, and (3) exercised millions of the AMC Warrants. JA-1:16-17 (¶42). As a result, from the time that AMC approached the Board to begin the merger process through the execution of the Merger Agreement (defined below), AMC beneficially owned between 51.9% and 70.6% of RLJ's stock. *Supra* n. 2.

C. The Merger Process

On February 26, 2018, AMC proposed to acquire the shares of RLJ it did not yet own for $4.25 per share (the "Initial Proposal"). JA-1:18 (¶45). In this letter, AMC made clear that it would "not sell [its] stake in [RLJ], or be part of any other process." JA-1:18 (¶45). AMC had the ability to follow through with this threat because (1) it held enough warrants to take majority control of RLJ at any time and

thus force a sale to itself or stop a sale to anyone else and (2) the Investment Agreement prohibited RLJ from entertaining any acquisition proposal not approved by AMC. JA-1:14-15 (¶¶37-39). AMC made clear that it would not waive this prohibition; indeed, to deter other bidders, it repeatedly stated both publicly and privately that "it was only a buyer (and not a seller) of the Company and would not vote for or otherwise support a transaction to sell the Company to any party, ***at any price***, or support any other alternative strategic transaction involving the Company." JA-1:15 (¶39), 18 (¶45), 20-21 (¶¶52-53), 28-29 (¶71).

Before delivering the Initial Proposal to the Board, AMC secured the support of Johnson. Specifically, on February 26, 2018, Johnson publicly revealed that he had ***already*** negotiated the terms of his continuing employment with, and equity in, the post-Merger combined company; in fact, by this time, negotiations had progressed to the point where he and AMC had already reached an "agreement-in-principle" with respect to liquidity and corporate governance matters, as well as Johnson's role at the post-Merger company. JA-1:18 (¶46). The Proxy provides absolutely no detail or disclosure regarding these communications or negotiations. JA-1:18 (¶46).

In response to the Initial Proposal, the Board formed a two-member special committee (the "Committee") consisting of directors Laszlo and Royster – who, as admitted in the Proxy, were apparently the only members of the Board that

purportedly "had no commercial, financial or business affiliations or relationships with any of AMC, [ ] Johnson or any of their respective affiliates . . . ." JA-1:18-19 (¶47). While the Committee was given the authority to evaluate the Initial Proposal, to negotiate directly with AMC and the holders of Preferred Stock and warrants with respect to the Initial Proposal, and to approve any transaction proposed by AMC, it was ***not*** given authority to consider bids from, or negotiate with, any potential buyers other than AMC. JA-1:18-19 (¶47), 25 (¶62).

Thereafter, the Committee engaged Greenberg Traurig, LLP ("Greenberg") and Allen & Company LLC ("Allen.") as its legal and financial advisors. JA-1:19 (¶48). Notably, Greenberg previously represented RLJ Acquisition, Inc., a company controlled by Johnson, in connection with a 2012 transaction that resulted in the creation of RLJ. JA-1:19 (¶48).

On March 16, 2018, the Committee sought to obtain authority from the Board to explore alternative strategic transactions, including soliciting potential third-party buyers *other than AMC*. JA-1:19-21 (¶¶49, 52). In response, director Hsu, *on behalf of AMC*, sent a letter to the Committee reiterating that AMC would not support a sale to *any* party, at *any* price, or support *any* other strategic transaction involving RLJ other than a sale to AMC. JA-1:20-21 (¶52). Hsu also warned that, if the Committee were to explore other alternatives, it "would be an exercise in futility" given AMC's beneficial ownership of more than 50% of RLJ's voting power, the

No-Shop Provision, and AMC's status as lender for all of RLJ's outstanding senior debt. JA-1:20-21 (¶52), 42 (¶104). The Board declined to allow the Committee to shop the Company or pursue alternatives. JA-1:22 (¶54).

On April 2, 2018, the Committee determined that the Initial Proposal was "materially inadequate and not a sufficient basis" upon which to negotiate. JA-1:21 (¶53). Nevertheless, it directed Allen to conduct a valuation of RLJ and to thereafter grant AMC full due diligence. JA-1:21 (¶53), 24 (¶59). The Committee also determined that "it would not be productive to conduct a market check of the Company." JA-1:21 (¶53).

The Committee also began the process of revising management's five-year base case financial forecasts (the "Initial Base Case") downward by applying more conservative assumptions. JA-1:22-23 (¶56). Notably, AMC's designated directors (including Hsu) received and reviewed the Initial Base Case before the Committee reduced these forecasts. JA-1:22 (¶55).

The purported reason for the downward adjustment was that the Committee had "concerns" that the growth projections might be hard to achieve on the anticipated timelines. JA-1:22-23 (¶56). Yet the Proxy is silent as to whether any members of management shared these "concerns." JA-1:23 (¶57). To the contrary, just two weeks earlier, members of management made public comments that were contrary to these alleged new concerns. On March 15, 2018, Penella, the CEO, in

discussing the Company's fourth quarter and full year 2017 results, remarked that "2017 was an instrumental year of strategic, financial and operating achievement, benchmarking well against our long-term strategic growth plan." JA-1:40 (¶99). In fact, for the full year 2017, *gross profit had increased 40.7%*. JA-1:40 (¶96). The Company's fourth quarter results were even stronger, reflecting a *52% increase year-over-year in gross profit*. JA-1:40 (¶97). In that same March 15, 2018 announcement, Johnson commented: "[W]e expect the Company's timely strategy of increasing investments to drive accelerating value creation for subscribers and investors." JA-1:40 (¶98). And then-CFO Nazim Rostom remarked: "[W]e enter 2018 with strong momentum to deliver another year of growth in revenue, gross margin and bottom-line profitability." JA-1:41 (¶100). That day, RLJ's common stock set a new 52-week high. JA-1:41 (¶101).

Just a few days after the Committee directed management to reduce the Company's projections, then-CFO Rostom suddenly announced that he was leaving the Company. JA-1:23-24 (¶58), 49 (n.10). Although RLJ stated that it had initiated a search for his replacement, no CFO was ever appointed during the process leading up to the Merger. JA-1:23-24 (¶58), 49 (n.10).

On April 14, 2018, Allen delivered to Citigroup Global Markets Inc. ("Citi"), AMC's financial advisor, a five-year base case forecast prepared by Company management (the "Revised Forecast"). JA-1:25 (¶63). Allen subsequently delivered

to Citi an updated base case forecast (the "Updated Base Case") JA-1:25 (¶63). The Proxy does not disclose how the Revised or Updated Base Case Forecast differed from the Initial Base Case. JA-1:25 (¶63).

Thereafter, on May 2, 2018, AMC presented a revised proposal to acquire the non-affiliate shares for $4.92 per share (the "Second Proposal"). JA-1:26 (¶65). Although the Committee determined that the Second Proposal was still substantially below the price at which it would be willing to engage in negotiations, the Committee nonetheless continued to engage with AMC. JA-1:26 (¶66).

In its May 21, 2018 meeting, the Committee discussed – apparently for the first time – the lack of viable alternatives as a result of AMC's ability to acquire majority voting control, the inability of the Committee to "shop" the company to potential third-party buyers, and the likely impact on the price of RLJ stock if a proposed transaction with AMC was publicly withdrawn. JA-1:28-29 (¶71). At this meeting, the Committee also discussed – again, apparently for the first time – the implied valuation of the non-affiliate shares of RLJ stock. JA-1:28 (¶70).

At a meeting on May 16, 2018, the Committee set an arbitrary floor of $6.00 per share and it inexplicably resolved to communicate this to Hsu, rather than submitting a counter-proposal. JA-1:27-28 (¶69). The following week, on May 22, 2018, Hsu offered $5.95 per share – just below the $6.00 floor. JA-1:29 (¶72). In response, the Committee reiterated that $6.00 was the absolute minimum at which

negotiations would proceed – again, inexplicably refusing to submit a counteroffer – and Hsu then offered $6.00 per share. JA-1:29 (¶72). Following a brief adjournment, the Committee then indicated that it was now willing to accept $6.25 per share, and Hsu agreed, thus ending "negotiations." JA-1:29 (¶73).

The farcical nature of these "negotiations" is highlighted by additional facts that cast further doubt on the fairness and integrity of the process. For example, AMC was provided with projections that showed, and was told by the Committee, that RLJ would likely be unable to maintain the Minimum Cash Balance Requirement under the Credit Agreement (as defined therein) with AMC. JA-1:24-25 (¶¶60-61). This provided AMC with even more leverage on RLJ and set the stage for future downward revisions to its forecasts. JA-1:24 (¶60).

In addition, at several meetings, the Committee and its advisors discussed the absence of a condition to closing requiring approval of the Merger Agreement by the holders of a majority of the outstanding non-affiliate shares of RLJ stock (a "Majority-of-the-Minority Provision"). JA-1:29-30 (¶74), 32 (¶81). Greenberg indicated that it would include such a provision in the draft merger agreement, as such provisions were common in take-private transactions like the Merger and provided useful reference points for transactions involving Nevada corporations. JA-1:29-30 (¶74). Nevertheless, no such provision was included in the Merger Agreement (defined below).

Moreover, Greenberg repeatedly reminded the Committee that it was an agent for the interests of the non-affiliate common stockholders *only* and that the rights of the Preferred Stockholders were contractual in nature, such that they had no right to vote on the Merger. JA-1:34-35 (¶¶88-90), 44-45 (¶109). Nevertheless, the Committee repeatedly engaged in discussions about the Merger and valuation with the Company's Preferred Stockholders (represented by Judd and Zeigelman), as well as the vesting of equity awards for RLJ insiders, despite the fact that the Committee recognized that it was supposed to be negotiating solely for the non-affiliate stockholders. JA-1:26 (¶64), 31-32 (¶¶79, 82). Indeed, Judd, who had been nominated by the Company's Preferred Stockholders, had multiple conversations with Royster, and sent a letter to Johnson and the Board, regarding the substitute preferred stock that was required to be offered to the Preferred Stockholders under the terms of the Preferred Stock in the Merger. JA-1:33-35 (¶¶84-90), 43-44 (¶¶107-108). Even though the Preferred Stockholders had no role at the bargaining table with AMC and the Committee, Royster communicated Judd's concerns to Hsu. JA-1:33-34 (¶86). Finally, and equally as inappropriate, between June 28 and July 3, 2018, Greenberg and AMC's legal advisor negotiated, among other things, the provisions of the proposed charter and bylaws of the surviving company – even though the non-affiliate shareholders would be precluded from rolling over their stock into the post-Merger combined company. JA-1:33 (¶85).

On July 29, 2018, the Committee approved the merger agreement with AMC (the "Merger Agreement"). JA-1:36 (¶92). The next day, RLJ and AMC publicly announced the Merger Agreement. JA-1:2 (¶1), 36-39 (¶93). On or about October 1, 2018, AMC exercised some of the AMC Warrants. JA-1:8-9 (¶20). According to the Proxy, as of October 3, 2018, AMC beneficially owned approximately 51.9% of RLJ's outstanding stock and had "notified the Company that it will vote all shares of common stock owned by AMC in favor of the approval of the Merger Agreement at the Special Meeting." JA-1:2 (¶2 & n.1). In other words, AMC had the requisite voting power to unilaterally approve the Merger Agreement, without any need for additional votes by any other stockholder. JA-1:2-3 (¶2 & n.1).

The Merger was approved by shareholders on October 31, 2018 and closed that same day. JA-1:68. In the Merger, RLJ stockholders – other than Johnson, his affiliates, and AMC – received only $6.25 in cash for each share of RLJ stock they owned (the "Merger Consideration"). JA-1:2 (¶1). AMC acquired complete control and ownership of RLJ and Johnson rolled-over his equity into a 17% interest in the private, surviving company and secured employment therewith. JA-1:2-4 (¶¶1, 5), 18 (¶46), 31-32 (¶80), 43 (¶106). Further, as Preferred Stockholders, directors Judd and Zeigelman were each entitled to a cash-out price equal to a 125% premium to the Merger Consideration that common stockholders received. JA-1:35 (¶90), 43-44 (¶107). They were also entitled to reject this offer and receive substitute preferred

stock in the surviving corporation, a benefit that common stockholders were denied. JA-1:35 (¶90), 43-44 (¶107). Laszlo, Royster, Sinclair, and Judd each received $92,220 after the cashing out of their restricted shares. JA-1:48 (¶115). Finally, Laszlo and Royster secured up to $100,000 in compensation for their few months of services on the Committee. JA-1:20 (¶50), 52-53 (¶122).

VI. SUMMARY OF THE ARGUMENT

In *Chur v. Eighth Judicial Dist. Court of Nev.*, No. 78301, 2020 Nev. LEXIS 6 (Feb. 27, 2020), this Court held that "NRS 78.138(7) requires a two-step analysis to impose individual liability on a director or officer. First, the presumptions of the business judgment rule, codified in NRS 78.138, must be rebutted." *Id*. at *7. "Second, the 'director's or officer's act or failure to act' must constitute 'a breach of his or her fiduciary duties,' and that breach must further involve 'intentional misconduct, fraud or a knowing violation of law[']." *Id*. at *7-8.

Here, the district court only conducted the first part of the analysis and concluded that the business judgment rule codified in Section 78.138 applied and mandated dismissal of Appellant's claims against ***both*** *the Director Defendants* ***and*** *AMC*. JA-3:599-600. That was reversible error for multiple reasons.

First, in light of this Court's opinion in *Foster*, the business judgment rule presumption set forth in Section 78.138 is rebutted *as a matter of law* when a shareholder challenges an interested fiduciary's transaction with the corporation.

Therefore, because Appellant adequately alleges that AMC and Johnson were "interested fiduciaries" whose transaction with the Company is being challenged, Respondents are required to "show good faith and the transaction's fairness." This they could not – and indeed did not even attempt to – do below. Nor would it have been proper for the lower court to conduct a fairness inquiry on a motion to dismiss. For this reason alone, the lower court erred in granting the Motion to Dismiss with respect to ***all*** of Appellant's claims.

Second, even if this Court were to overturn *Foster* and conclude that the business judgment rule is not rebutted as a matter of law when a shareholder alleges an unfair transaction with a controlling shareholder, the Complaint's allegations are still sufficient to rebut the application of the business judgment rule presumption *with respect to the Director Defendants*. Appellant adequately alleges that the Board did not act in good faith, on an informed basis, and with a view to the interests of the corporation, and thus knowingly and intentionally breached its fiduciary duties of good faith, care, and loyalty, as well as its duty of disclosure. For these reasons, the district court erred in dismissing Appellant's claims *against the Director Defendants* based upon the business judgment rule.

Because the district court dismissed the claim against the Director Defendants based *solely* upon the business judgment rule (JA-3:599-600), this Court should reverse and remand with instructions for the district court to conduct the second part

of the applicable analysis – whether the alleged breach involved "intentional misconduct, fraud or a knowing violation of law" – in the first instance. *See Nationstar Mortg., Ltd. Liab. Co. v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 396 P.3d 754, 758 (Nev. 2017).

Third, the district court erred in dismissing Appellant's claims *against AMC*. The district court erroneously concluded that the *distinct claim* against AMC for breaching its fiduciary duties *as a controlling stockholder* should be dismissed simply because it believed it "had to enforce the Business Judgment Rule" to protect *all Respondents*, even though it acknowledged AMC "[wa]s not a board member." JA-3:599-600. By its plain terms, however, the business judgment rule codified in Section 78.138 applies solely to claims against "*directors and officers*" and, therefore, provides no protection against claims for breach of fiduciary duty by *controlling stockholders* like AMC. The Complaint adequately pleads that AMC breached the fiduciary duties it owed as a controlling stockholder to RLJ's minority shareholders, AMC is not entitled to the protection of the business judgment rule, and Appellant's claim *against AMC* must therefore be allowed to go forward regardless of whether Appellant's claim against the Director Defendants is allowed to proceed.

VII. STANDARD OF REVIEW

An order granting an NRCP 12(b)(5) motion to dismiss is reviewed *de novo* and "is subject to a rigorous standard of review on appeal." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28 (2008). This Court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff. *Id*. at 228. Dismissal is only appropriate when "it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* "Further, this Court reviews all legal conclusions, including statutory interpretation, *de novo*." *Id.*; *Torrealba v. Kesmetis*, 124 Nev. 95, 101 (2008).

VIII. LEGAL ARGUMENT

A. THE DISTRICT COURT ERRED IN DISMISSING APPELLANT'S CLAIMS BECAUSE THE BUSINESS JUDGMENT RULE CODIFIED IN NRS 78.138 IS REBUTTED WHEN THE CHALLENGED TRANSACTION INVOLVES INTERESTED FIDUCIARIES

As this Court first made clear long ago:

> A director is a fiduciary. * * * So is a dominant or controlling stockholder or group of stockholders. * * * Their powers are powers in trust. *Their dealings with the corporation are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged* ***the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness*** *from the viewpoint of the corporation and those interested therein. * * * The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain.* If it does not, equity will set it aside.

Foster v. Arata, 74 Nev. at 155 (quoting *Pepper v. Litton*, 308 U.S. 295, 306 (1939)); *see also id.* at 156 (requiring dominant stockholder to show that its transactions were "completely fair to the corporation," which includes "whether or not an adequate price was paid" in the challenged transaction). This Court reaffirmed this burden shift in *Shoen v. SAC Holding Corp.*, 122 Nev. 621 (2006), *overruled in part on other grounds by Chur v. Eighth Judicial Dist. Court of Nev.*, No. 78301, 2020 Nev. LEXIS 6 (Feb. 27, 2020) (overruling gross negligence standard regarding duty of care): "Generally, when an interested fiduciary's transactions with the corporation are challenged, the fiduciary must show good faith and the transaction's fairness." *Id*. at 640 n.61. The "inherent fairness" burden articulated by this Court in *Foster* and *Shoen* traces its roots to the United States Supreme Court's opinion in *Pepper* and is widely recognized by jurisdictions across the country. *See Drobbin v. Nicolet Instrument Corp.*, 631 F. Supp. 860, 879 (S.D.N.Y. 1986) (applying Nevada law including *Foster* and explaining that the "inherent fairness" test is a "corporate law rule[] 'of well-nigh universal application'"); *In re W. World Funding, Inc.*, 52 B.R. 743, 763 (Bankr. D. Nev. 1985) ("Although fiduciaries are not strictly forbidden to engage in 'interested' transactions with the corporation, such transactions must be 'inherently fair' and must 'carr[y] the earmarks of an arm's length bargain.'").[4]

[4] *W. World Funding* was affirmed in part and reversed in part on other grounds by *Buchanan v. Henderson*, 131 B.R. 859 (D. Nev. 1990), which was reversed by

Based on this authority, the business judgment rule is rebutted as a matter of law "when an interested fiduciary's transactions with the corporation are challenged." *Shoen*, 122 Nev. at 640 n.61. Indeed, while the legislature expressly recognized that the business judgment rule presumption codified in Section 78.138 *could be "rebutted,"* NRS 78.138(7)(a), it expressly declined to codify the circumstances or factors sufficient to trigger such a rebuttal. The legislature's silence on the issue, along with the well-settled principle that the legislature is presumed to act with knowledge of the common law and that a statute is presumed to be harmonious with the common law unless it expressly says otherwise, leads to the conclusion that this Court's holding in *Foster* remains binding and that the business judgment rule is rebutted as a matter of law "when an interested fiduciary's transactions with the corporation are challenged." *Shoen*, 122 Nev. at 640 n.61.

As outlined below, because Appellant adequately alleges that the Merger was a transaction in which AMC and Johnson both had special interests not shared with common stockholders, the business judgment rule has been rebutted and Respondents bear the burden of proving both good faith and the inherent fairness of the Merger. Because they did not even attempt to meet their burden, the trial court erred in granting the Motion to Dismiss as to ***all*** Respondents.

Henderson v. Buchanan, 985 F.2d 1021 (9th Cir. 1993) (reinstating bankruptcy court's finding of breach of duty).

1. AMC AND JOHNSON WERE FIDUCIARIES

As a director of the Company, Johnson was obviously a fiduciary. NRS §78.138; *Foster*, 74 Nev. at 155. Similarly, controlling stockholders owe fiduciary duties to minority stockholders. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 11 (2003) (minority shareholders "may also allege that the merger was accomplished through the wrongful conduct of *majority shareholders*, directors, or officers of the corporation and attempt to hold those individuals liable for monetary damages under theories of breach of fiduciary duty or loyalty"); *Foster*, 74 Nev. at 155 ("'A director is a fiduciary. * * * So is a dominant or controlling stockholder or group of stockholders.'"); *W. World*, 52 B.R. at 763 ("fiduciary duties are . . . imposed on majority shareholders").[5]

Here, there can be no doubt that AMC was, in fact, a "dominant or controlling stockholder." *First*, Plaintiff adequately alleges that AMC was a majority stockholder from the time it approached the Board to begin the process through the

[5] *See also* 12B William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 5811 (West 2009) ("A majority shareholder who actually dominates the company, although not an officer, stands in the same fiduciary relation to the other shareholders as does a director or other officer."); James Cox & Thomas Hazen, *Treatise on the Law of Corporations* § 11:11 (3d ed. 2013) ("The basis for the controlling stockholder's fiduciary obligation is the sound policy that, just as directors are bound by certain fiduciary obligations, one who has the potential to control the board's actions should be subject to an obligation as rigorous as those applied to the directors.").

execution of the Merger Agreement and held actual ownership of a majority before the shareholder vote.[6] *Supra* n. 2.

Second, Appellant adequately alleges that AMC was a majority stockholder that exercised significant control over RLJ. Specifically, as noted above, the AMC Warrants were exercisable at any time in AMC's discretion and, if exercised in full, would provide it with at least 50.1% of RLJ's stock and a majority of its total voting power. JA-1:14 (¶37). AMC had the right to designate two directors to the Board and, in fact, two AMC designees (Hsu and Manos) served on the Board at the time of the Merger. JA-1:14 (¶37). What is more, upon the exercise of the AMC Warrants in full, AMC had the right to designate a *majority* of the Board. JA-1:14 (¶37). The Investment Agreement also prohibited RLJ from entertaining *any* acquisition proposal not approved by AMC. JA-1:14-15 (¶¶38-39). From the time that AMC approached the Board to begin the process through the execution of the Merger Agreement, AMC beneficially owned a majority of RLJ's stock. *Supra* n. 2. And, at the time of the vote on the Merger, AMC actually owned a majority of RLJ's voting power and controlled the outcome thereof. JA-1:2-3 (¶2 & n.1), 8-9 (¶ 20), 17 (¶ 44).

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[6] As noted above, the Proxy provides conflicting accounts of AMC's beneficial ownership, with amounts ranging from 51.9% to 70.6%. *Supra* n. 2. At any rate, it is clear that AMC either had, or had the ability to acquire, more than a majority of RLJ's stock at all times.

Third, Appellant adequately alleges that AMC exercised actual control over the process that resulted in the Merger.[7] AMC initiated the process that resulted in the Merger by submitting the Initial Proposal. JA-1:18 (¶45). From the outset, AMC made clear that it would "not sell [its] stake in [RLJ], or be part of any other process." JA-1:18 (¶45). AMC had the ability to follow through with this threat because (1) it held enough warrants to take majority control and force a sale to itself or stop a sale to anyone else and (2) the Investment Agreement prohibited RLJ from entertaining *any* acquisition proposal not approved by AMC. JA-1:14-15 (¶¶37-39). AMC made clear that it would not waive this prohibition, and repeatedly stated – publicly and privately – that it would not vote for or support a transaction to sell RLJ to any party, ***at any price***, or support any other alternative transaction involving RLJ. JA-1:15 (¶39), 18 (¶45), 20-21 (¶¶52-53), 28-29 (¶71). As a result, the Committee was not given authority to consider bids from or negotiate with any potential buyers other than AMC. JA-1:18-19 (¶47), 25 (¶62).

Later, when the Committee decided that this restriction stopped it from being able to perform its work and asked the Board for authority to explore alternative

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[7] "Allegations of control over the particular transaction at issue are enough" for a non-majority stockholder to be considered a controller. *In re Primedia Inc. Derivative Litig.*, 910 A.2d 248, 257 (Del. Ch. 2006).

transactions beyond AMC, the Board denied it that authority after Hsu reiterated that AMC would not support a transaction to sell RLJ to any party, ***at any price***, or support any other strategic transaction involving RLJ, and any attempt to do so ***"would be an exercise in futility***" given AMC's beneficial ownership of more than 50% of RLJ's voting power, the No-Shop Provision, and AMC's status as lender for all of RLJ's outstanding senior debt. JA-1:19-22 (¶¶49, 52, 54), 25 (¶62), 42 (¶104). As a result, the Committee had no ability to – and did not – solicit proposals from or negotiate with any entities other than AMC. JA-1:14-15 (¶¶38-39), 18-39 (¶¶45-93).

Despite the Committee's determination that it "should" be able to shop RLJ and its recognition that the Initial Proposal was so materially inadequate that it did not provide a basis for further negotiation, rather than just say "no" to AMC (because it could not), the Committee afforded AMC due diligence and directed management to *revise RLJ's projections downward* to make AMC's proposal look palatable. JA-1:21-24 (¶¶53, 55-56, 59), 26 (¶66), 28 (¶69). And, even after the Committee determined that AMC's Second Proposal was still substantially below the price the Committee would be willing to engage in negotiations, it nonetheless continued to engage with AMC. JA-1:26 (¶¶65-66).

Moreover, AMC's designated directors (including Hsu) received and reviewed the Initial Base Case before the Committee reduced these forecasts. JA-1:22 (¶55). And, during the process, AMC was informed that RLJ would likely be

unable to maintain the Minimum Cash Balance Requirement under its credit agreement with AMC, which provided AMC with more leverage and eviscerated the Committee's ability to say "no." JA-1:24-25 (¶¶60-61), 29-31 (¶¶73, 77).

Unsurprisingly, throughout the process, the Committee acknowledged that it lacked any viable alternatives to a sale to AMC as a result of AMC's ability to acquire majority voting control, its statements that it was only a buyer (and not a seller), and the Committee's inability to "shop" RLJ to third-parties. JA-1:28-29 (¶71), 36 (¶92). As a result, the Committee literally negotiated against itself, revealing twice to Hsu the Committee's pricing floor *without once ever actually submitting a formal counterproposal* to AMC, all while revealing RLJ's approaching inability to maintain the Minimum Cash Balance Requirement. JA-1:24-25 (¶¶60-61), 27-28 (¶¶68-69), 29 (¶¶72-73). Finally, although the Committee recognized the propriety of requiring a Majority-of-the-Minority Provision, AMC refused and the Committee acceded. JA-1:29-30 (¶74).

In short, Appellant adequately alleges that AMC had the right to immediately seize majority ownership of RLJ and precluded the Committee from performing any sort of process or market check. As a result, the Board denied the Committee the powers it needed to negotiate, it accordingly had no leverage from which to bargain, and was thus ineffective and not independent. For these reasons, Plaintiff adequately alleges that AMC was both a *de jure* majority stockholder and a *de facto* controlling

stockholder, and thus a "'dominant or controlling stockholder'" for purposes of an inherent fairness inquiry under Nevada law. *See Foster*, 74 Nev. at 155.

2. AMC AND JOHNSON WERE INTERESTED IN THE MERGER

Appellant also adequately alleges that AMC and Johnson were interested in the Merger. As noted above, rather than receiving the Merger Consideration, AMC acquired control and ownership of RLJ in the Merger, and thus had an interest in the Merger as acquirer. JA-1:2 (¶1). And, as the acquirer, AMC was inherently in conflict with stockholders, as it wanted to pay as little as possible, while stockholders wanted it to pay as much as possible. JA-1:41-42 (¶103). Indeed, AMC specifically admitted that it sought to negotiate what was best for it, and not stockholders, and thus to pay as little as possible. JA-1:41-42 (¶103). In this way, AMC "stood on both sides" of the Merger, as both controller and buyer. *See, e.g. Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1117 (Del. 1994) (applying entire fairness to interested cash-out merger transaction by controlling/dominating shareholder because controller "stands on both sides of the transaction."); *In re Emerging Communs., Inc. S'holders Litig.*, No. 16415, 2004 Del. Ch. LEXIS 70, at *2, *111 (Del. Ch. May 3, 2004) (applying entire fairness to "going private" acquisition of company by majority stockholder (like that at issue here) because controller stood on both sides of transaction).

Furthermore, like AMC, Johnson had no incentive to maximize the amount paid to RLJ's remaining stockholders, and instead had every reason to minimize that amount so as to leave the surviving company, of which he would own 17%, as financially strong as possible. JA-1:3-4 (¶¶5), 18 (¶46), 31-32 (¶80), 43 (¶106). Indeed, *prior to the process even starting*, Johnson and AMC had *already* negotiated the terms of his continuing employment and equity roll-over. JA-1:3-4 (¶¶5), 18 (¶46), 31-32 (¶80), 43 (¶106). Johnson's interests were thus aligned with AMC's, and they engaged in a joint effort to pay as little as possible to RLJ's remaining stockholders. *See, e.g.*, *In re LNR Prop. Corp. S'holders Litig.,* 896 A.2d 169, 178 (Del. Ch. 2005) (denying motion to dismiss because entire fairness might apply to cash-out merger where director rolled part of his proceeds into 20% equity stake in surviving entity); *Frank v. Elgamal*, C.A. No. 6120-VCN, 2012 Del. Ch. LEXIS 62, at *25-26 (Del. Ch. Mar. 30, 2012) (applying entire fairness where controller was competing with stockholders for consideration where it acquired minority interest in surviving company while minority stockholders were cashed-out); *El Paso Corp. S'holder Litig.*, 41 A.3d 432, 444-45 (Del. Ch. Feb. 29, 2012) (CEO's intent to seek equity in post-merger company gave him "incentive different from maximizing what [bidder] would pay for [company]" because "the bloodier the negotiation, the more [CEO] risked [bidder] not wish[ing] to deal with him" in future).

3. RESPONDENTS THEREFORE BEAR THE BURDEN OF PROVING GOOD FAITH AND THE MERGER'S FAIRNESS, WHICH THEY DID NOT EVEN ATTEMPT TO DO

Because Appellant adequately alleges that AMC and Johnson were "fiduciaries" that were "interested" in the Merger, pursuant to *Foster* and *Shoen*, Respondents bear the burden of proving both their own good faith and the Merger's fairness. *Supra* §VII.A. This they did not even attempt to do.

Rather, in their Motion to Dismiss, they contended, *without citation of any kind*, that "Nevada recognizes no such deviation [as the inherent fairness burden] from the business judgment standard, nor does it impose any prerequisites to its application in connection with transactions with controlling stockholders." JA-1:74; *see also id.* ("Nevada law has never adopted any standard for review of transactions with [controlling] stockholders beyond business judgment"). This is plainly erroneous and contradicted by the plain language of long-standing and controlling Nevada Supreme Court jurisprudence. *Shoen*, 122 Nev. at 640 n.61; *Foster*, 74 Nev. at 155; *see also W. World*, 52 B.R. at 763 ("Although fiduciaries are not strictly forbidden to engage in 'interested' transactions with the corporation, such transactions must be 'inherently fair' and must 'carr[y] the earmarks of an arm's length bargain.'"). Respondents did not even attempt to address this controlling law.

Instead, in their Reply brief, they argued (for the first time) that the Nevada legislature's 1991 codification and/or 2017 revision to Section 78.138 legislatively

overruled *Shoen* and *Foster*, such that "inherent fairness" does not apply. JA-3:543-545.

But *Shoen* – which was decided in 2006 and which specifically cited *Foster* (which was decided in 1958) – was decided *after* the 1991 codification. And, as is apparent from a comparison of the 2003 version of Section 78.138 in effect when *Shoen* was decided to the 2017 version in effect during the wrongdoing here, Section 78.138 *always* provided for a business judgment rule presumption. JA-3:567, §3 (2003; reattached as Addendum A); JA-3:570, §3 (2017; reattached as Addendum B); JA-3:573-574, §3 (redline; reattached as Addendum C); *see also* Nev. SB 203 (6/12/17; outlining changes; attached as Addendum D). The *only* major change the 2017 amendment made regarding liability was to add that, for a director or officer to be found liable under Section 78.138, the business judgment rule presumption would have to first be rebutted. JA-3:573-574. Both versions of the statute required any such rebuttal to include evidence of a breach of duty and intentional misconduct, fraud, or knowing violation of the law. JA-3:573-574. Accordingly, the 2017 revision to Section 78.138 did not have the effect of overruling *Shoen* (or *Foster*). Had the Nevada legislature intended to statutorily abrogate the decisions of the Supreme Court of Nevada in the codification of Section 78.138 or its revision, it surely would have said so.

Indeed, to Appellant's knowledge, no Court has ever found as much, both *Foster* and *Shoen* remain good law, and the legislative history of the 2017 amendment specifically did not mention either controlling precedent. To the contrary, the legislative history makes clear that the specific intent of the 2017 amendment was to prevent Delaware's "enhanced scrutiny" (or "*Revlon*") standard of review from creeping into Nevada law – not to overrule or otherwise alter the business judgment rule and fairness burden inquiries long enshrined in Nevada law.[8] More specifically, part of the original text of Senate Bill 203, which was one of the bills introduced as part of the 2017 amendment, makes clear that one of the primary purposes of the amendment was to reject Delaware's enhanced scrutiny/*Revlon* standard:

> THE STANDARDS PROMULGATED BY THE SUPREME COURT OF DELAWARE IN UNOCAL CORPORATION V. MESA PETROLEUM CO., 493 A.2D 946 (DEL. 1985), AND REVLON, INC. V. MACANDREWS & FORBES HOLDINGS, INC., 506 A.2D 173 (DEL. 1986), AND THEIR PROGENY HAVE BEEN, AND ARE HEREBY, REJECTED BY THE LEGISLATURE.

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[8] Delaware has three standards of review: (1) the business judgment rule; (2) enhanced scrutiny, which applies in particular situations, such as mergers (the well-known "*Revlon*" standard); and (3) entire fairness, which applies when, for instance, a controlling shareholder acquires a company. *See In re Rural Metro Corp. Stockholders Litig.*, 88 A.3d 54, 82 (Del. Ch. 2014); *Chen v. Howard-Anderson,* 87 A.3d 648, 666-67 (Del. Ch. 2014).

2017 Bill Text NV S.B. 203 (introduced Feb. 23, 2017) (capitalization in original).

The Delaware Supreme Court created the enhanced scrutiny standard of review in *Unocal* (a hostile tender offer) and extended enhanced scrutiny to cash-out mergers in *Revlon*. *In re Rural Metro*, 88 A.3d at 82. Neither *Revlon* nor *Unocal* implicated the application of the inherent fairness burden referenced in *Foster* and *Shoen*, and neither Section 78.138 nor its legislative history make any reference to the inherent fairness burden recognized in *Foster* and *Shoen*.

Plainly, the legislature was aware of Delaware standards that it did not want creeping into Nevada law and chose to reject those standards; conversely, it was also aware of Nevada's own inherent fairness standard and chose *not* to reject that standard. Indeed, *Foster* was decided in 1958, the business judgment rule was codified in 1991, and *Shoen* was decided in 2006. Again, if the Nevada legislature had intended to statutorily abrogate long-standing Nevada Supreme Court precedent in the 1991 codification of Section 78.138 or its 2017 revision, it would have said so. It did not, and that silence is determinative. *See Hardy Cos. v. SNMARK, Ltd. Liab. Co.*, 126 Nev. 528, 537, (2010) ("'In the enactment of a statute, the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears by express declaration or necessary implication.'"); *id.* ("'[T]here is a presumption that the law-makers did not intend to abrogate or alter [the common law] in any manner, although

where the intention to alter or repeal is clearly expressed, it must be given effect by the courts'"); *id.* ("'The presumption is always against the intention to repeal where express terms are not used'"); *id.* ("'Repeals by implication are not favored, and are only held to have occurred in cases of irreconcilable repugnancy between the later and the former enactment, when the two cannot stand together'") (quotation citations omitted).

Accordingly, because Appellant adequately alleges that the Merger was a transaction in which AMC and Johnson both had special interests not shared with common stockholders, Respondents bear the burden of proving both good faith and the inherent fairness of the Merger. Because they did not even attempt to meet their burden, the district court erred in granting their Motion to Dismiss as to *all* Respondents.

4. ENTIRE FAIRNESS IS NOT APPROPRIATELY DECIDED ON A MOTION TO DISMISS

Finally, even if Respondents had undertaken to attempt to meet their burden, it would not have been appropriate for the lower court to make a fairness determination on the Motion to Dismiss, as such a determination is inherently fact-intensive and thus not suited for resolution on a motion to dismiss. *See*, *e.g.*, *Foster*, 74 Nev. at 156 (requiring dominant stockholder to show that its transactions were "completely fair to the corporation," which includes a factual determination "supported by the evidence" of "whether or not an adequate price was paid" in the

challenged transaction); *Calesa Assocs., L.P. v. Am. Capital, Ltd.*, C.A. No. 10557-VCG, 2016 Del. Ch. LEXIS 41, at *36 (Del. Ch. Feb. 29, 2016) (control analysis is "highly fact specific inquiry"); *In re Zhongpin, Inc. Stockholders Litig.*, C.A. No. 7393-VCN, 2014 Del. Ch. LEXIS 252, at *28 (Del. Ch. Nov. 26, 2014) (application of entire fairness "'normally will preclude dismissal of a complaint' on a motion to dismiss"); *Frank*, 2012 Del. Ch. LEXIS 62, at *34 (motion to dismiss is not proper vehicle for deciding whether burden of proof under entire fairness should be shifted).

B. EVEN IF THE INHERENT FAIRNESS STANDARD OF REVIEW DOES NOT APPLY, APPELLANT ALLEGES ADEQUATE FACTS TO REBUT THE BUSINESS JUDGMENT RULE

Even if this Court decides to now overturn the "inherent fairness" standard articulated in *Foster* and *Shoen*, the facts alleged in the Complaint are nevertheless sufficient to rebut the business judgment rule's presumption *with respect to the claims against the Director Defendants*. *See* NRS 78.138(7)(a) (business judgment rule can be "rebutted").

The business judgment rule presumption afforded to *directors and officers* by Section 78.138 may be rebutted by alleging (1) that a director or officer did not act in good faith, on an informed basis, or with a view to the interests of the corporation and (2) that the director's or officer's action constituted a breach of fiduciary duty that involved intentional misconduct, fraud, or a knowing violation of the law. NRS

§78.138(7); *FDIC v. Jacobs*, No. 3:13-CV-00084-RCJ, 2014 U.S. Dist. LEXIS 157449, at *14-15 (D. Nev. Nov. 5, 2014) (no presumption where facts suggested director "did not act 'in good faith and with a view to the interests of the [corporation]'").[9]

Although "good faith" is not defined in Section 78.138, this Court has defined the duty of loyalty coextensively with the duty of good faith, holding that "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*." *Shoen*, 122 Nev. at 632.[10] *Accordingly, allegations of self-interest, a conflict of*

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[9] Any breach of the duty of loyalty is *de facto* intentional misconduct. *See Jacobs*, 2014 U.S. Dist. LEXIS 157449, at *17 ("a breach of the duty of loyalty, *i.e.*, material omissions and a conflict of interest . . . is intentional misconduct.").

[10] Other courts define it similarly, holding that the duty of good faith requires directors to act with "a true faithfulness and devotion to the interests of the corporation and its shareholders." *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 755 (Del. Ch. 2005). Conversely, bad faith has "been defined as authorizing a transaction for some purpose other than a genuine attempt to advance corporate welfare or [when the transaction] is known to constitute a violation of applicable positive law." *Id*. "In the context of a sales process, a plaintiff can plead that a board breached its duty of loyalty by alleging non-conclusory facts, which suggest that a majority of the board was either interested in the sales process ***or*** acted in bad faith in conducting the sales process." *In re Answers S'holder Litig*., C.A. No. 6170-VCN, 2012 Del. Ch. LEXIS 76, at *21 (Del. Ch. Apr. 11, 2012). Nevada courts frequently look to Delaware law to help delineate the precise nature and scope of the fiduciary duties of good faith, loyalty, and care. *Shoen*, 122 Nev. at 632 (citing Delaware jurisprudence).

interest, or that an action was not taken in the best interests of shareholders will rebut the presumption. *Id.*; *see also* JA-1:70 (acknowledging that plaintiff can rebut presumption by showing that decision "'was the product of . . . self-interest'") (quoting *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.*, 399 P.3d 343 (Nev. 2017)); *Jacobs*, 2014 U.S. Dist. LEXIS 157449, at *17 ("a breach of the duty of loyalty, *i.e.*, material omissions and a conflict of interest . . . is intentional misconduct."); *Buchanan*, 131 B.R. at 868 ("The Business Judgment Rule, however, does not apply in cases in which the corporate decision lacks a business purpose, is tainted by conflict of interest, or is so egregious as to amount to a no-win situation or results from obvious and prolonged failure to exercise oversight or supervision.").

So too will allegations of a lack of full disclosure. See, e.g., Nutraceutical Dev. Corp. v. Summers, No. 53565, 2011 Nev. Unpub. LEXIS 1015, at *12 (July 1, 2011) ("The duty of care consists of an obligation to act on an informed basis . . . ."); *W. Indus. v. Gen. Ins. Co.*, 91 Nev. 222, 228, 533 P.2d 473, 476-77 (1975) ("a corporate officer and director . . . owes a duty of good faith, honesty and full disclosure.").

In sum, under Nevada law, the duties of loyalty, good faith, and care require directors to act on an informed basis, in a non-conflicted manner, in the best interests of stockholders, and not out of self-interest. To overcome the business judgment rule presumption, a plaintiff need only plead facts that raise the ***possibility*** that defendants acted without full disclosure, out of self-interest, in a conflicted manner,

and/or not in the best interests of shareholders. *FDIC v. Johnson*, No. 2:12-CV-209-KJD-PAL, 2014 U.S. Dist. LEXIS 148302, at *13 (D. Nev. Oct. 17, 2014).

Finally, nothing in Section 78.138 alters the plaintiff-friendly pleading standard and standard of review on a motion to dismiss, pursuant to which the lower court was required to "recognize all factual allegations in [Appellant's] complaint as true," draw all inferences in Appellant's favor, and dismiss the Complaint only if "it appear[ed] beyond a doubt that [she] could prove no set of facts, which, if true, would entitle [her] to relief." *Buzz Stew*, 124 Nev. at 228 (citations omitted); *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599 (1978) ("Nevada is a notice-pleading jurisdiction and liberally construes pleadings to place into issue matter which is fairly noticed to the adverse party.").[11]

Here, Appellant sufficiently alleges that (1) the Board placed AMC's, Johnson's, and their own interests ahead of those of stockholders; (2) the Committee lacked independence, was conflicted, and violated its duties of good faith, loyalty, and care; and (3) the Board failed to disclose all material information to stockholders. These allegations are sufficient to rebut the business judgment

[11] Additionally, a motion to dismiss is not an all or nothing proposition; the court may review each defendant's conduct individually and dismiss claims against certain defendants while declining to do so as to others. *In re AMERCO Derivative Litig.*, 127 Nev. 196, 224-26 (2011).

presumption on a motion to dismiss, and the lower court erred in granting the Motion to Dismiss.

1. APPELLANT ADEQUATELY PLEADS THAT THE BOARD WAS CONFLICTED

(a) Hsu and Manos

As outlined above, Appellant adequately alleges that AMC's interest in the Merger as the acquirer conflicted with those of stockholders, as it wanted to pay as little as possible, while stockholders wanted it to pay as much as possible. *Supra* §VII.A.2. Indeed, AMC admitted as much in the Proxy. JA-1:41-42 (¶103). Therefore, as AMC's designated directors, Hsu and Manos were incentivized to secure AMC's acquisition of RLJ as cheaply as possible and were thus conflicted regarding the Merger. JA-1:6-7 (¶¶12-13), 42-43 (¶105). Indeed, Hsu was AMC's "lead negotiator" and, through his written threats, caused the Board to reject the Committee's request to consider bids from buyers other than AMC. JA-1:6 (¶12), 20-22 (¶¶52, 54-55), 27-28 (¶¶68-70), 29 (¶¶72-73), 42-43 (¶105). In recognition of this conflict, Respondents admitted that they appointed Laszlo and Royster to the Committee because they were allegedly the only Board members that "had no commercial, financial or business affiliations or relationships with [AMC or Johnson]." JA-1:18-19 (¶47).

(b) Johnson

Appellant also adequately alleges that Johnson was conflicted, as he too

positioned himself on both sides of the Merger. *Supra* §VII.A.2. Before RLJ even received AMC's Initial Proposal, Johnson had already negotiated his investment and employment in the post-close company. JA-1:3-4 (¶5), 31-32 (¶80), 43 (¶106). Having secured for himself these unique benefits, none of which were shared by stockholders, Johnson was conflicted. *Supra* §VII.A.2 (collecting jurisprudence).

(c) Sinclair, Royster, and Penella

Third, as outlined in depth in the Complaint, Appellant adequately alleges that the principal source of income for Sinclair, Royster, and Penella was derived from RLJ. JA-1:6 (¶11), 7 (¶14), 46-47 (¶112). Accordingly, any failure to go along with AMC's and Johnson's scheme would have threatened their livelihoods and prospects for continued employment. JA:1:46-47 (¶112). Again, Respondents admitted this fact when they appointed only Laszlo and Royster to the Committee. JA-1:18-19 (¶47).

(d) Judd and Zeigelman

Fourth, Appellant adequately alleges that Judd and Zeigelman, as Board representatives of the Preferred Stockholders, were conflicted with respect to the Merger, as they too sought to negotiate on behalf of, and ultimately secured unique benefits for, the Preferred Stockholders not shared by RLJ's common stockholders.

Specifically, as Preferred Stockholders, Judd and Zeigelman were entitled to a 125% premium to the Merger Consideration that common stockholders received.

JA-1:43-44 (¶107). Judd and Zeigelman were also entitled to reject this offer and receive *substitute preferred stock in the surviving corporation*, a benefit that common stockholders were denied. JA-1:35 (¶90), 43-44 (¶107). Based on these unique interests, Judd and Zeigelman repeatedly and inappropriately sought to negotiate on behalf of and secure special benefits for Preferred Stockholders to the detriment of common stockholders. JA-1:26 (¶64), 33-35 (¶¶84-90), 44 (¶108).

Indeed, the Committee and Greenberg repeatedly acknowledged the divergent interests between the common and preferred stockholders, and the Committee was advised that attempts to negotiate with or on behalf of the Preferred Stockholders would be irreconcilable with its duty to common stockholders. JA-1:33-35 (¶¶86-90), 44-45 (¶109). And again, Respondents acknowledged these conflicts when they appointed only Laszlo and Royster to the Committee. JA-1:18-19 (¶47).

(e) Penella, Van Sinclair, Royster, Judd, Ziegelman, and Laszlo

Fifth, Appellant adequately alleges that the remaining directors – Penella, Van Sinclair, Royster, Judd, Ziegelman, and Laszlo – acceded to the AMC-induced sale to protect their reputations and to avoid a potentially career-ending and reputation-killing ouster from the Board, which could have affected their other business interests, their employment in other companies, and their positions on other boards.

As noted above, if RLJ said "no," AMC had the ability to and threatened to take majority control of RLJ, could remove the Board and nominate a majority of

directors, and could thus force a sale at a lower price in a hostile takeover. *Supra* § VII.A.1. This threat loomed over the Board during the entire process. *Supra* § VII.A.1. Many of these directors served on boards and/or had significant business interests beyond RLJ. For example, Judd, Laszlo, and Ziegelman all serve on the boards of private or publicly-traded companies or work for financial management vehicles that regularly advise buyers and sellers in public M&A matters. JA-1:46 (¶111). A forced removal from a publicly-traded company's board by AMC would have placed their qualifications into doubt; would have made them less attractive as board members on the companies for which they already worked, as well as for new board positions, or otherwise threatened their ability to serve existing or future clients; and thus would have placed each of their other positions in peril, thereby threatening their very livelihoods. *See In re MFW S'holders Litig.*, 67 A.3d 496, 528-29 (Del. Ch. 2013) (directors have a "self-protective interest in retaining their reputations as . . . fiduciaries").[12]

The reputational and financial losses that these directors would have suffered as a result of a public ouster at the hands of AMC far outweighed any nominal

[12] The former Chief Justice of the Delaware Supreme Court has written extensively on this inherent conflict. *See* Leo E. Strine, *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System,* 126 YALE L.J. 1870, 1926 (2017) (directors are "highly sensitive" to the "rational[] fear" of a public ouster from a board of a publicly-traded company because of its effect on their other directorship positions).

increase in value they may have secured for themselves had they fairly negotiated for RLJ's non-insider stockholders. That is because these directors were not heavily invested in RLJ, and much of their investment was in the form of restricted equity. *See* JA-1:46-49 (¶¶111-117) (outlining scant holdings). Thus, had these directors actually secured more value for stockholders, they would have gained very little incrementally from any such increase.

By contrast, these directors stood to gain far more by simply cashing out their restricted equity, all of which fully vested and was cashed out in the Merger (thanks to the Committee). JA-1:48 (¶115) (outlining equity holdings and cash outs). As a result of these insider holdings, and in addition to the potential loss of current and future employment opportunities, these directors were even less incentivized to secure additional value for common stockholders and more incentivized to say "yes" to a deal with AMC. JA-1:48 (¶115); *Strine, Wolves* at 1925-26 (equity holdings "create[] strong incentives for directors to support transactions that involve a sale of the company and will therefore unlock the capital that they would otherwise be required to keep invested"); JA-1:35-36 (¶91), 49-50 (¶117) (during process, Penella and Hsu discussed treatment of Penella's stock options and unvested restricted stock awards held by other employees).[13]

[13] This is especially true with respect to CEO Penella because of the size of his holdings and the amount he stood to gain in the Merger. JA-1:48 (¶115).

In short, Penella, Van Sinclair, Royster, Judd, Ziegelman, and Laszlo had very little financial incentive to comport with their fiduciary duties and negotiate for the best interests of non-insider stockholders. In exchange for any small gain, they risked a public ouster by AMC – one that could have cost them their other lucrative employments and board positions as well as their ability to liquidate their insider holdings. Stated differently, the miniscule amounts of money these directors stood to gain from defying AMC were not financially material in comparison to the sums made in their other employment, as a result of their other board memberships, and in cashing out their equity early.

(f) <u>The Committee and Its Advisors</u>

Sixth, and in addition to the reasons outlined above (*supra* § VII.B.1(f)), Appellant adequately alleges that the members of the Committee were further conflicted for several additional reasons. For example, during the process, the Committee members secured for themselves up to $100,000 for their few months of services. JA-1:20 (¶50), 52-53 (¶122). By comparison, for every 10 cents of greater consideration they secured for stockholders, the Committee members stood to *collectively* make just $11,490.60 more. JA-1:52-53 (¶122). In other words, just serving on the Committee enriched its members more than higher merger consideration could.

Moreover, despite its purported function as the sole bargaining agent for common stockholders, the Committee also engaged in negotiations on behalf of insiders whose interests (including their own outstanding options and restricted stock awards) were at odds with common stockholders. *See* JA-1:31-33 (¶¶79, 82, 85). Similarly, during the process, Greenberg (the Committee's legal advisor) negotiated post-close governance matters with AMC's legal advisor. JA-1:33 (¶85). But the Committee owed its fiduciary duties to common stockholders, who were precluded from rolling over their stock into the post-close combined company, so Greenberg had no reason to negotiate such post-close matters, casting serious doubt on its and the Committee's independence and suggesting that Greenberg's job was to facilitate the consummation of the Merger, not aid the Committee in getting the best price. JA-1:33 (¶85).

* * *

In sum, Appellant adequately alleges facts that, when viewed in the light most favorable to her (as they must be), suggest that each of the Board members was interested in the Merger, faced a conflict of interest in approving it, or failed to place "shareholders' best interests over anyone else's interests," thereby rebutting the business judgment rule at this stage. *Shoen*, 122 Nev. at 632.

2. THE COMMITTEE LACKED INDEPENDENCE AND BREACHED ITS DUTIES

Appellant also adequately alleges that the Committee was not sufficiently empowered, correspondingly had no leverage in and conducted no substantive negotiations, and therefore lacked independence, and as a result breached its duties of good faith, care, and loyalty.

First, Appellant adequately alleges that the Committee was not legitimately empowered to explore other transactions, veto the AMC-induced sale, or even withdraw from the sales process. *Supra* § VII.A.1. Indeed, the Committee was well aware that, if it did say "no," AMC could simply bypass it and force a sale to AMC at an even lower price in a hostile takeover. *Supra* § VII.A.1. In short, Appellant adequately alleges that the Committee was forced to participate in a single bidder negotiation with AMC – for whom the Board had already signaled their preference – while under the constant threat of AMC's ability to obtain majority control and force a hostile takeover at a lower price should the Committee balk or attempt to fulfill its duties. Unsurprisingly, as a result, the Committee had no ability to – and did not – solicit proposals from or negotiate with any entities other than AMC. *Supra* § VII.A.1.

Second, Appellant adequately alleges that, as a result of its limited authority and AMC's leverage, the Committee had no bargaining leverage and engaged in no substantive negotiations. Specifically, despite the Committee's determination that it

"should" be able to shop RLJ and its recognition that AMC's Initial Proposal was so materially inadequate that it did not even provide a basis for further negotiations, rather than just say "no" to AMC (because it could not), the Committee afforded AMC full due diligence. JA-1:21 (¶53), 24 (¶59). Even after the Committee determined that the Second Proposal was still substantially below the price at which the Committee would even be willing to engage in negotiations, the Committee nonetheless continued to engage with AMC. JA-1:26 (¶¶65-66). AMC was also informed that RLJ would likely be unable to maintain the Minimum Cash Balance Requirement under its credit agreement with AMC, which provided AMC with even more leverage and further eviscerated the Committee's ability to say "no." JA-1:24-25 (¶¶60-61), 29 (¶¶72-73).

Throughout the process, the Committee acknowledged that it lacked any viable alternatives to a sale to AMC as a result of AMC's ability to acquire majority voting control, its statements that it was only a buyer (and not a seller), and the Committee's inability to "shop" RLJ to third-parties. JA-1:28-29 (¶71), 36 (¶92). As a result of this lack of leverage, the Committee negotiated against itself, revealing twice to Hsu the Committee's own pricing floor *without once ever actually submitting a formal counterproposal* to AMC, all while revealing the approaching inability to maintain the Minimum Cash Balance Requirement. JA-1:24-25 (¶¶60-61), 27-28 (¶¶68-69), 29 (¶¶72-73). Finally, although the Committee recognized the

propriety of requiring a Majority-of-the-Minority voting provision, AMC refused and the Committee acceded. JA-1:29-30 (¶74).

Third, Appellant adequately alleges that the Committee breached its duties of good faith, care, and loyalty by knowingly conducting a flawed process and devaluing RLJ to make the Merger appear palatable. Specifically, despite determining that it would be in shareholders' best interests to perform a market check and seeking authority to do so, once AMC made its threat and the Board refused that authority, the Committee re-determined that "***it would not be productive to conduct a market check of the Company.***" JA-1:21 (¶53).

Further, despite the Committee's determination that it "should" be able to shop RLJ and its recognition that AMC's Initial Proposal was so materially inadequate that it did not provide a basis for further negotiation, rather than just say "no" (because it could not), the Committee directed management to revise RLJ's projections downward to make AMC's proposal look palatable. JA-1:22-28 (¶¶55-58, 63, 67, 69). Critically, however, the management team tasked with this downward revision was conflicted and incentivized to revise the projections downward. JA-1:49-50 (¶117). What is more, just a few weeks prior to these efforts, RLJ management made public statements that were irreconcilable with the downward revision. *See* JA-1:23 (¶57) (public comments touting financial success and long-term strategic growth plan). And, on April 6, 2018, just two days after the

Committee directed management to revise the projections downward, RLJ's then-CFO announced his resignation, and the circumstances of that departure suggest that it may have been due to his disagreement with the directive to decrease the projections. *See* JA-1:23-24 (¶58), 50-51 (¶¶118-19). Finally, although it had already directed the reduction of the projections, it was not until the end of May 2018 that the Committee even tried to assess the value of RLJ stock. JA-1:21 (¶53), 28 (¶70).

In sum, Appellant adequately alleges that, during the process leading to the Merger, AMC had the right to immediately seize majority ownership of RLJ and preclude the Committee from performing any sales process or market check of third-party buyers and force a sale at a lower price to itself in a hostile takeover. As a result, the Board denied the Committee the powers it needed to negotiate and the Committee was not empowered to explore other transactions, veto the AMC-induced sale, or even withdraw from the process, such that the Committee had no bargaining leverage, engaged in no substantive negotiations, negotiated against itself, and was ultimately powerless to do anything other than accede to AMC. As a result, the Committee lacked independence and took actions (like devaluing RLJ's projections) that violated its duties of good faith, care, and loyalty. These allegations – particularly when viewed in the light most favorable to Appellant – are sufficient to rebut the business judgment rule's presumption.

3. THE BOARD BREACHED ITS DUTY OF DISCLOSURE

As noted above, the Board also owed its stockholders a duty of full disclosure. *W. Indus.*, 91 Nev. at 228 ("a corporate officer and director . . . owes a duty of good faith, honesty and full disclosure") (internal citation omitted); *Jacobs*, 2014 U.S. Dist. LEXIS 157449, at *17 ("a breach of the duty of loyalty, *i.e.*, material omissions . . . . "); *Leavitt v. Leisure Sports Inc.*, 103 Nev. 81, 86, 734 P.2d 1221, 1224 (1987) ("Th[e] fiduciary relationship requires a duty of good faith, honesty and full disclosure.").

As outlined in depth in the Complaint, the Board failed to disclose significant material information regarding the process and the Merger, including, among other things, Johnson's pre-Initial Proposal communications and negotiations with AMC and whether the Committee sought and/or received indemnification rights for litigation arising from its role in the Merger. JA-1:18 (¶46), 20 (¶50); *see also* JA-1:22 (¶54), 25-29 (¶¶63, 67, 69, 71), 53-55 (¶¶125, 126, 128-130). For these reasons as well, Appellant rebutted the business judgment rule and the lower court erred in granting the Motion to Dismiss.

4. THE BUSINESS JUDGMENT RULE IS AN AFFIRMATIVE DEFENSE AND ITS APPLICATION IS NOT SUITED TO DETERMINATION ON A MOTION TO DISMISS

Finally, the district court should not have even reached the question of whether the business judgment rule applies because—under the operative version of Section

78.138 at the time this action was filed and the motion to dismiss was decided—the statute made clear that "*[t]he trier of fact*" was the one who "determines" whether the business judgment rule presumption "has been rebutted[.]" *See* NRS 78.138(7)(a) (version effective as of October 1, 2017) (Addendum B). The legislature amended the statute in 2019 by deleting the "trier of fact" language from NRS 78.138(7)(a), which evinces that, beginning on October 1, 2019 the legislature *no longer wished* for the determination of whether the business judgment presumption has been rebutted to be made by the "trier of fact." 2019 Nev. Stat., ch. 19, § 3, at 90-91. Indeed, if the legislature believed that the previous version of the statute (which governs here) already allowed a court rather than a jury to make the business judgment determination on a motion to dismiss without a factual record, there would have been no need to delete the "trier of fact" language from the statute.

As this Court recently made clear in *Chur*, Section 78.138 must be applied according to its plain language, 2020 Nev. LEXIS 6 at *8-10, and it is well-settled that "[e]very word and clause in an act must be given effect if possible and none rendered meaningless by overnice construction." *State ex rel. Las Vegas v. Clark Cty.*, 58 Nev. 469, 481 (1938); *see also Buckingham v. Fifth Judicial Dist. Court*, 60 Nev. 129, 137 (1940) ("We cannot reject the word 'now' as used in the statute as surplusage, because of a well-known rule of statutory construction that each and every word of a statute must be given its meaning.").

The plain language of the governing version of Section 78.138 makes clear that "the trier of fact" determines whether the business judgment rule is rebutted. And the established meaning of "trier of fact" is "[o]ne or more persons who *hear testimony and review evidence* to rule on a factual issue . . . in a judicial proceeding. " BLACK'S LAW DICTIONARY 711 (10th ed. 2014).[14] Obviously, hearing testimony and reviewing evidence cannot be done on a motion to dismiss. Furthermore, "[t]he general rule is that statutes are prospective only, unless it clearly, strongly, and imperatively appears from the act itself that the legislature intended the statute to be retrospective in its operation." *In re Estate of Thomas*, 116 Nev. 492, 495 (2000). "No such retroactive intent appears" in the 2019 amendments to Section 78.138, and the change thus has "no effect on the outcome of this appeal, except that…the amendment is persuasive evidence of what the legislature intended by the prior statute." *Id*. at 496.

In short, the determination of whether or not the business judgment rule presumption applies in this case requires the fact-finder to make a factual determination regarding whether the presumption "has been rebutted." NRS

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[14] "Trier of fact" redirects to "fact-finder." BLACK'S LAW DICTIONARY 1738 (10th ed. 2014). A "fact-finder" is: "One or more persons who *hear testimony and review evidence* to rule on a factual issue. The fact-finder may be the judge (in a bench trial) or a jury." *Id.* at 711. Resolution by a "trier of fact" thus requires testimony and evidence.

78.138(7)(a) (2017 version). That determination must be made by the "trier of fact" at the merits stage, not by the Court on a motion to dismiss. *See id.*; *W. Indus.*, 91 Nev. at 228 (1975) ("Certainly, a corporate officer and director has a fiduciary relationship…. *[W]hether such duty has been breached is, again, a question the trier of fact must resolve after scrutinizing all the evidence . . . .")*; *Leavitt*, 103 Nev. at 86 (1987) ("Any alleged breach of such a [fiduciary] duty is a question for the trier of fact after examination of all the evidence."); *Brinkerhoff v. Foote*, No. 68851, 2016 Nev. Unpub. LEXIS 1155, at *10 (Nev. Dec. 22, 2016) ("After hearing all the evidence, the fact-finder must determine" whether fiduciary has breached duty).[15] For this second independent reason, the trial court erred in granting the Motion to Dismiss *as to the claims against the Director Defendants*.

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[15] Courts throughout the country routinely hold that the "business judgment rule is an affirmative defense which involves factual issues that preclude its application to dismiss the complaint's claims." *FDIC v. Hawker*, No. 12-0127, 2012 U.S. Dist. LEXIS 79320, at *25 (E.D. Cal. June 6, 2012); *see also FDIC v. Jackson*, 133 F.3d 694, 700 (9th Cir. 1998) ("[t]he determination whether a corporate director has properly discharged his duties is a question of fact."). Indeed, in notice pleading jurisdictions, if the plaintiff alleges "breach of fiduciary duty on the Defendant's part, the business judgment rule would impose on Plaintiffs a burden at trial to present evidence to rebut the presumption the rule imposes. However, Plaintiffs are not likewise obligated to plead operative facts in their complaint that would rebut the presumption. The complaint need not state with precision all elements that give rise to a legal basis for recovery as long as fair notice of the nature of the action is provided." *Marsalis v. Wilson*, 778 N.E.2d 612, 616 (Oh. Ct. App. 2002); *NECA-IBEW Pension Fund v. Cox*, No. 1:11-cv-451, 2011 U.S. Dist. LEXIS 106161, at *8 (S.D. Ohio Sep. 20, 2011) (explaining that federal rule is much the same).

C. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S CLAIM AGAINST AMC, AND APPELLANT ADEQUATELY PLEADS THAT AMC BREACHED THE FIDUCIARY DUTIES IT OWED AS CONTROLLER TO RLJ'S MINORITY SHAREHOLDERS

Finally, even if this Court were to conclude that (i) the 2017 amendment to Section 78.138 eliminated the "inherent fairness" standard recognized in *Foster* and *Shoen* (it did not), and (ii) that the facts alleged in the Complaint are insufficient to rebut the business judgment rule presumption afforded to *directors and officers* codified in Section 78.138, it was error for the district court to dismiss Appellant's *distinct claim* against AMC for breaching its fiduciary duties *as a controller*. The district court dismissed the claim against AMC because it erroneously believed it "had to enforce the Business Judgment Rule" to protect *all Respondents*, even though it acknowledged AMC "[wa]s not a board member." JA-3:599-600. That was reversible error because, by its plain language, Section 78.138 and the business judgment rule codified therein do not apply to controlling shareholders, and Appellant adequately pleads that AMC breached the fiduciary duties it owed to RLJ's minority shareholders in its capacity as a controlling stockholder.

As with any statute, the plain language of Section 78.138 dictates whether the statute applies to controlling stockholders. *Chur*, 2020 Nev. LEXIS 6 at *8-10. And the language of Section 78.138 could not be clearer – it is *facially inapplicable* to controlling stockholders.

NRS 78.138 is entitled: "***Directors and officers***: Fiduciary duties; exercise of powers; performance of duties; presumptions and considerations; liability to corporation, stockholders and creditors." Throughout the statute, there are repeated references to "directors and officers." ***Nowhere does the statute refer to controlling shareholders.*** NRS 78.138. Indeed, the pertinent subsections – numbers 3 and 7 – expressly state that they only apply to "a director or officer." *Id.* Thus, on its face, the business judgment rule presumption afforded by Section 78.138(3) explicitly applies only to "directors and officers" – not to controlling stockholders like AMC.

Indeed, in their initial Reply and their Reply to Appellant's Surreply, ***Respondents acknowledged that "[Section] 78.138 only applies to directors and officers."*** JA-3:545; *see also* JA-3:579-580 ("NRS 78.138 Does Not Apply to Controlling Stockholders"). What is more, as noted above, it is well-settled (and Respondents also concede) that majority stockholders owe fiduciary duties to minority stockholders. *Supra* §§VII.A; JA-1:74; *Cohen*, 119 Nev. at 11 (2003) (minority shareholders "may also allege that the merger was accomplished through the wrongful conduct of majority shareholders . . . and attempt to hold those individuals liable for monetary damages under theories of breach of fiduciary duty or loyalty").

Accordingly, AMC may not avail itself of the protections of Section 78.138. Rather, the only test applicable to the actions of AMC, as an "interested fiduciary"

in a challenged transaction with the corporation, is whether AMC carried ***its*** burden of proving the good faith and inherent fairness of the Merger, and AMC has not attempted to carry this burden. *Supra* §VII.A. AMC is thus left with no legitimate argument in support of dismissal of the distinct claim against it. For this third, independent reason, the trial court erred in granting the Motion to Dismiss ***as to AMC***.

The ***only*** argument that AMC has offered in opposition is that Section 78.138's admitted inapplicability to AMC is a

> red herring [because] there is only one transaction at issue here and that transaction was approved by the Special Committee. If the Special Committee's acceptance of the AMC proposal is protected by the statute, that is the end of the issue.

JA-3:545; *see also* JA-3:544 ("the conduct at issue here is not that of AMC, but rather of the Special Committee").

This is again incorrect. Plaintiff raised *separate and distinct* claims against (1) the Board (as directors) and (2) AMC and its affiliates (as controlling stockholders). And, as outlined in depth above, it is well-settled – ***and, again, Respondents concede*** – that majority stockholders *like AMC* owe fiduciary duties to minority stockholders. *Supra* §VII.A; JA-1:74; *Cohen*, 119 Nev. at 11 (2003) (minority shareholders "may also allege that the merger was accomplished through the

wrongful conduct of majority shareholders . . . and attempt to hold those individuals liable for monetary damages under theories of breach of fiduciary duty or loyalty").

The Complaint also sufficiently alleges that AMC breached its duties as a controller. "The duty a controlling stockholder owes when it stands on both sides of the transaction—*i.e.*, where the controlling stockholder has a personal interest, as well as an interest as a fiduciary for the corporation—is to ensure that the transaction is entirely fair." *In re Cornerstone Therapeutics Inc. Stockholder Litig.*, No. 8922-VCG, 2014 Del. Ch. LEXIS 170, at *25 (Del. Ch. Oct. 9, 2014) (reversed and remanded on other grounds by *In re Cornerstone Therapeutics, Inc.*, 115 A.3d 1173 (Del. 2015)); *see also In re Tesla Motors, Inc. Stockholder Litig.*, No. 12711-VCS, 2020 Del. Ch. LEXIS 51, at *17-18 (Del. Ch. Feb. 4, 2020) (same); *Jones v. H. F. Ahmanson & Co.*, 1 Cal. 3d 93, 108-10 (1969) ("[M]ajority shareholders . . . have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority…."). The Complaint sufficiently alleges that the Merger was not "entirely fair" to RLJ's minority shareholders, and, as noted above, a determination of "entire fairness" cannot be made on a motion to dismiss. *Supra* §VII.A.4.

In short, the liability of AMC (as a controller) is simply not dependent on the liability of the Board (as directors), and Respondents cite no law or jurisprudence in support of their novel argument. Instead, Respondents ask the Court to disregard the plain text of Section 78.138 and to rewrite it to apply to an entirely new class of defendants – controlling shareholders. The Court should decline and should instead reverse the trial court's grant of the Motion to Dismiss as to AMC, which distinct claim should be allowed to proceed to discovery.

IX. CONCLUSION

The allegations in the Complaint implicate Nevada's inherent fairness burden, because AMC and Johnson were "interested fiduciaries" whose transaction with the Company is being challenged. This means that the business judgment presumption codified in NRS 78.138 has been rebutted as a matter of law, and Respondents are required to "show good faith and the transaction's fairness." This they could not – and did not even attempt to – do below. For this reason alone, the lower court erred in granting Respondents' Motion to Dismiss with respect to all claims.

Furthermore, even if this Court were to now overturn the "inherent fairness" standard articulated in *Foster* and *Shoen*, the facts alleged in the Complaint are nevertheless sufficient to rebut the business judgment rule's presumption on a motion to dismiss. The district court erred in reaching the contrary conclusion with respect to the claims against the Director Defendants.

Lastly, even if this Court finds that the district court properly dismissed the Director Defendants pursuant to the business judgment rule codified in Section 78.138, it was plainly erroneous for the district court to dismiss Appellant's distinct claim against AMC. By its plain text, Section 78.138 applies solely to claims against "*directors and officers,*" and thus provides no protection against claims for breach of fiduciary duty against *controlling stockholders* such as AMC. Accordingly, for this third, independent reason, the lower court erred in granting the Motion to Dismiss with respect to AMC.

Accordingly, the order and judgment of the district court should be reversed in its entirety, and this action should be remanded for further proceedings. With respect to Appellant's claim against the Director Defendants, the district court should be instructed that the allegations of the Complaint are sufficient to rebut the business judgment presumption, and to conduct the second part of the applicable analysis under NRS 78.138 – *i.e.*, whether the Complaint sufficiently pleads that the alleged breach involved "intentional misconduct, fraud or a knowing violation of law." With respect to the claim against AMC, the district court should be instructed that Section 78.138 and the business judgment rule codified therein are inapplicable to claims for breach of fiduciary duty against controlling shareholders and the action against AMC should proceed to discovery.

DATED this 16th day of March, 2020.

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ATTORNEYS' RULE 28.2 COMPLIANCE

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2. This brief consists of 14,001 words.

3. I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the 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 understand that I may be subject to sanctions in the event that the accompanying

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brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of March, 2020.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA GUZMAN, on behalf of herself and all Others Similarly Situated, Appellant, vs. ROBERT L. JOHNSON, MIGUEL PENELLA, JOHN HSU, ARLENE MANOS, H. VAN SINCLAIR, ANDOR M. LASZLO, SCOTT ROYSTER, DAYTON JUDD, JOHN ZIEGELMAN, AMC NETWORK, INC., DIGITAL ENTRTAINMENT HOLDINGS, LLC, and RIVER MERGER SUB, INC, DOES 1 through 100, inclusive, and ROE CORPORTAIONS 1 through 100, inclusive Respondents.	Supreme Court No. 79818

ADDENDUM TO APPELLANT'S OPENING BRIEF

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Attorneys for Appellant

IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA GUZMAN, on behalf of herself and all Others Similarly Situated, Appellant, vs. ROBERT L. JOHNSON, MIGUEL PENELLA, JOHN HSU, ARLENE MANOS, H. VAN SINCLAIR, ANDOR M. LASZLO, SCOTT ROYSTER, DAYTON JUDD, JOHN ZIEGELMAN, AMC NETWORK, INC., DIGITAL ENTRTAINMENT HOLDINGS, LLC, and RIVER MERGER SUB, INC, DOES 1 through 100, inclusive, and ROE CORPORTAIONS 1 through 100, inclusive Respondents.	Supreme Court No. 79818

ADDENDUM A

Exhibit 1 - Section 78.138 (2003)

1. Directors and officers shall exercise their powers in good faith and with a view to the interests of the corporation.

2. In performing their respective duties, directors and officers are entitled to rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence, but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if he has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

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.

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may consider:

(a) The interests of the corporation's employees, suppliers, creditors and customers;

(b) The economy of the State and Nation;

(c) The interests of the community and of society; and

(d) The long-term as well as short-term interests of the corporation and its stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

5. 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.

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

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, 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 capacity as a director or officer unless it is proven that:

(a) His act or failure to act constituted a breach of his fiduciary duties as a director or officer; and

(b) His breach of those duties involved intentional misconduct, fraud or a knowing violation of law.

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ADDENDUM B

Ex. 2 – Section 78.138 (2017)

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.

2. In exercising their respective powers, directors and officers may, and are entitled to , rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

> (a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;
>
> (b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or
>
> (c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence, but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

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.

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may:

> (a) Consider all relevant facts, circumstances, contingencies or constituencies, including, without limitation:
>
> > (1) The interests of the corporation's employees, suppliers, creditors or customers;
> >
> > (2) The economy of the State or Nation;
> >
> > (3) The interests of the community or of society;
> >
> > (4) The long-term or short-term interests of the corporation, including the possibility that these interests may be best served by the continued

independence of the corporation; or

(5) The long-term or short-term interests of the corporation's stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(b) Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.

5. Directors and officers are not required to consider, as a dominant factor, the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation.

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

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, 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

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

8. This section applies to all cases, circumstances and matters unless otherwise provided in the articles of incorporation, or an amendment thereto, including, without limitation, any change or potential change in control of the corporation.

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ADDENDUM C

Ex. 3 – Redline of Section 78.138 (2003) to Section 78.138 (2017)

1. ~~Directors~~The fiduciary duties of directors and officers ~~shall~~are to exercise their respective powers in good faith and with a view to the interests of the corporation.

2. In ~~performing~~exercising their respective ~~duties~~powers, directors and officers may, and are entitled to, rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the ~~preparer's~~preparer's or ~~presenter's~~presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the ~~committee's~~committee's designated authority and matters on which the committee is reasonably believed to merit confidence, but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if ~~he~~the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

~~3. Directors~~

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.

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may ~~consider~~:

(a) Consider all relevant facts, circumstances, contingencies or constituencies, including, without limitation:

(1) The interests of the ~~corporation's~~corporation's employees, suppliers, creditors ~~and~~or customers;

(~~b~~2) The economy of the State ~~and~~or Nation;

(~~c~~3) The interests of the community ~~and~~or of society; ~~and~~

(d4) The long-term ~~as well as~~or short-term interests of the corporation ~~and its~~, including the possibility that these interests may be best served by the continued independence of the corporation; or

(5) The long-term or short-term interests of the corporation's stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(b) Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.

5. Directors and officers are not required to consider, as a dominant factor, the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation ~~as a dominant factor~~.

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

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, 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 ~~it is proven that~~:

(a) ~~His~~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

(~~b) His~~2) Such breach ~~of those duties~~ involved intentional misconduct, fraud or a knowing violation of law.

8. This section applies to all cases, circumstances and matters unless otherwise provided in the articles of incorporation, or an amendment thereto, including, without limitation, any change or potential change in control of the corporation.

IN THE SUPREME COURT OF THE STATE OF NEVADA

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ADDENDUM D

2017 Nev. SB 203

Enacted, June 12, 2017

Reporter
2017 Nev. ALS 559; 2017 Nev. Stat. 559; 2017 Nev. Ch. 559; 2017 Nev. SB 203

NEVADA ADVANCE LEGISLATIVE SERVICE > NEVADA 79TH 2017 SESSION > CHAPTER 559 > SENATE BILL 203

Notice

Added: Text highlighted in green
Deleted: ~~Red text with a strikethrough~~

Digest

Legislative Counsel's Digest:

Under existing law, with certain exceptions, a director or officer of a domestic corporation is presumed not to be individually liable to the corporation or its stockholders or creditors for damages unless: (1) an act or failure to act of the director or officer was a breach of his or her fiduciary duties; and (2) such breach involved intentional misconduct, fraud or a knowing violation of law. (*NRS 78.138*)

Section 4 of this bill specifies that to establish liability on the part of a corporate director or officer requires: (1) a rebuttal of this presumption; and (2) a breach of a fiduciary duty accompanied by intentional misconduct, fraud or a knowing violation of law. Sections 4 and 5 of this bill clarify the factors that a director or officer of a domestic corporation is entitled to consider in exercising his or her respective powers in certain circumstances, including, without limitation, resisting a change or potential change in the control of a corporation.

Section 2 of this bill expresses the intent of the Legislature regarding the law of domestic corporations, including that the laws of other jurisdictions must not supplant or modify Nevada law.

Synopsis

AN ACT relating to business associations; expressing the intent of the Legislature concerning the law of domestic corporations; revising the presumption against negligence for the actions of corporate directors and officers; clarifying the factors that may be considered by corporate directors and officers in the exercise of their respective powers; and providing other matters properly relating thereto.

Text

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1.

Chapter 78 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2.

The Legislature hereby finds and declares that:

1. It is important to the economy of this State, and to domestic corporations, their directors and officers, and their stockholders, employees, creditors and other constituencies, for the laws governing domestic corporations to be clear and comprehensible.

2. The laws of this State govern the incorporation and internal affairs of a domestic corporation and the rights, privileges, powers, duties and liabilities, if any, of its directors, officers and stockholders.

3. The plain meaning of the laws enacted by the Legislature in this title, including, without limitation, the fiduciary duties and liability of the directors and officers of a domestic corporation set forth in *NRS 78.138* and *78.139*, must not be supplanted or modified by laws or judicial decisions from any other jurisdiction.

4. The directors and officers of a domestic corporation, in exercising their duties under *NRS 78.138* and *78.139*, may be informed by the laws and judicial decisions of other jurisdictions and the practices observed by business entities in any such jurisdiction, but the failure or refusal of a director or officer to consider, or to conform the exercise of his or her powers to, the laws, judicial decisions or practices of another jurisdiction does not constitute or indicate a breach of a fiduciary duty.

Sec. 3.

(Deleted by amendment.)

Sec. 4. NRS *78.138* is hereby amended to read as follows:

78.138

1. ~~Directors~~ The fiduciary duties of directors and officers ~~shall~~ are to exercise their respective powers in good faith and with a view to the interests of the corporation.

2. In ~~performing~~ exercising their respective ~~duties,~~ powers, directors and officers may, and are entitled to , rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:

(a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;

(b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or

(c) A committee on which the director or officer relying thereon does not serve, established in accordance with *NRS 78.125*, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence,

but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

3. ~~Directors~~ 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.

4. Directors and officers, in exercising their respective powers with a view to the interests of the corporation, may: ~~consider:~~

(a) Consider all relevant facts, circumstances, contingencies or constituencies, including, without limitation:

(1) The interests of the corporation's employees, suppliers, creditors ~~and~~ or customers;

(b)(2) The economy of the State ~~and~~or Nation;

(c)(3) The interests of the community ~~and~~ or of society; ~~and~~

(d)(4) The long-term ~~as well as~~or short-term interests of the corporation ~~and its~~, including the possibility that these interests may be best served by the continued independence of the corporation; or

(5) The long-term or short-term interests of the corporation's stockholders, including the possibility that these interests may be best served by the continued independence of the corporation.

(b) Consider or assign weight to the interests of any particular person or group, or to any other relevant facts, circumstances, contingencies or constituencies.

5. Directors and officers are not required to consider, as a dominant factor, the effect of a proposed corporate action upon any particular group or constituency having an interest in the corporation. ~~as a dominant factor.~~

6. The provisions of subsections 4 and 5 do not create or authorize any causes of action against the corporation or its directors or officers.

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, 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 ~~it~~:

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

(b) It is proven that:

(a)(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

~~(b) The~~

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

8. This section applies to all cases, circumstances and matters unless otherwise provided in the articles of incorporation, or an amendment thereto, including, without limitation, any change or potential change in control of the corporation.

Sec. 5. NRS *78.139* is hereby amended to read as follows:

78.139

1. ~~Except as otherwise provided in subsection 2 or the articles of incorporation, directors and officers, in connection with a change or potential change in control of the corporation, have:~~

~~(a) The duties imposed upon them by subsection 1 of NRS 78.138;~~

~~(b) The benefit of the presumptions established by subsection 3 of NRS 78.138; and~~

~~(c) The prerogative to undertake and act upon consideration pursuant to subsections 2, 4 and 5 of NRS 78.138.~~

~~2.~~ If directors or officers take action to resist a change or potential change in control of a corporation, which action impedes the exercise of the right of stockholders to vote for or remove directors:

(a) The directors must have reasonable grounds to believe that a threat to corporate policy and effectiveness exists; and

(b) The action taken which impedes the exercise of the stockholders" rights must be reasonable in relation to that threat.

If those facts are found, the directors and officers have the benefit of the presumption established by subsection 3 of *NRS 78.138*.

3.2. The provisions of subsection ~~2~~1 do not apply to:

(a) Actions that only affect the time of the exercise of stockholders" voting rights; or

(b) The adoption or signing of plans, arrangements or instruments that deny rights, privileges, power or authority to a holder of a specified number or fraction of shares or fraction of voting power.

4.3. The provisions of subsections 1 and 2 ~~and 3~~ do not permit directors or officers to abrogate any right conferred by ~~statute~~ the laws of this State or the articles of incorporation.

~~5. Directors~~

4. Without limiting the provisions of *NRS 78.138*, a director may resist a change or potential change in control of the corporation if the board of directors ~~by a majority vote of a quorum determine~~ determines that the change or potential change is opposed to or not in the best interest of the corporation~~:~~

~~(a) Upon~~ upon consideration of ~~the interests of the corporation's stockholders or any of the matters set forth in~~ any relevant facts, circumstances, contingencies or constituencies pursuant to subsection 4 of *NRS 78.138*~~; or~~

~~(b) Because~~, including, without limitation, the amount or nature of the indebtedness and other obligations to which the corporation or any successor to the property of either may become subject, in connection with the change or potential change, provides reasonable grounds to believe that, within a reasonable time:

(1)(a) The assets of the corporation or any successor would be or become less than its liabilities;

(2)(b) The corporation or any successor would be or become insolvent; or

(3)(c) Any voluntary or involuntary proceeding concerning the corporation or any successor would be commenced by any person pursuant to the federal bankruptcy laws.

Secs. 6 and 7.

(Deleted by amendment.)

History

Approved by the Governor June 12, 2017

Effective date: October 1, 2017

Sponsor

Committee on Judiciary

End of Document

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ALBRIGHT, STODDARD,WARNICK & ALBRIGHT and that on the 16th day of March, 2020, I served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF** upon all counsel of record by electronically serving the document using the Court's electronic filing system.

An employee of Albright, Stoddard, Warnick & Albright