No. 79818

In the Supreme Court of the State of Nevada

LISA GUZMAN,
APPELLANT,

v.

ROBERT L. JOHNSON; MIGUEL PENELLA; JOHN HSU; ARLENE MANOS; H. VAN SINCLAIR; ANDOR M. LASZLO; SCOTT ROYSTER; DAYTON JUDD; JOHN ZIEGELMAN; AMC NETWORKS INC.; DIGITAL ENTERTAINMENT HOLDINGS, LLC; AND RIVER MERGER SUB, INC.,
RESPONDENTS.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA (A-18-783643-B) (THE HONORABLE ELIZABETH GONZALEZ)

RESPONDENTS' ANSWERING BRIEF

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April 30, 2020

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Nevada Rule of Appellate Procedure ("NRAP") 26.1, 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 so that the Justices of this court may evaluate possible disqualifications or recusal:

1. There are no corporations or entities subject to disclosure; and
2. The following law firms have represented Respondents:
    a. Brownstein Hyatt Farber Schreck, LLP; and
    b. Sullivan & Cromwell LLP.

Dated this 30th day of April, 2020.

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I. ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court pursuant to NRAP 17(a)(9), on the basis that it originated in business court.

II. COUNTER-STATEMENT OF THE ISSUES

1. Should this Court supplant the business judgment rule codified at NRS 78.138 with Appellant's proposed "inherent fairness" review for all transactions between a Nevada corporation and its controlling stockholder?

2. If NRS 78.138 applies, does Appellant's complaint allege facts sufficient to satisfy the statute's requirements for director liability, including facts sufficient to rebut the statute's presumption that the directors on the special committee that approved the merger at issue acted in good faith?

3. Can a separate claim against AMC Networks Inc. survive where the complaint concedes that AMC left the decision to enter into the challenged transaction to a special committee of the board of directors and the complaint does not allege sufficient facts to undermine the committee's exercise of its business judgment?

III. COUNTER-STATEMENT OF THE CASE

This appeal arises from the District Court's dismissal of Appellant Lisa Guzman's ("Guzman") stockholder action against Respondents, the directors of RLJ Entertainment, Inc. ("RLJE") and RLJE's alleged controlling stockholder, AMC Networks Inc. ("AMC"). Guzman's complaint (the "Complaint"), filed on October 30, 2018, alleged that RLJE's directors breached their fiduciary duties in approving a merger with AMC that was announced on July 30, 2018 and closed on October 31, 2018 (the "Merger"). The Complaint also alleged that AMC breached its fiduciary duties as a controlling stockholder to RLJE's minority stockholders.

Despite its contention that AMC "dominated the process leading to the [p]roposed [b]uyout," the Complaint itself demonstrates that this assertion is nothing but rhetoric as it concedes that RLJE's board of directors (the "Board") delegated the full authority to negotiate the Merger with AMC to a special committee composed of two independent directors (the "Special Committee") (1 Joint Appendix ("JA") 18 ¶ 47); the Special Committee retained its own independent financial and legal advisors to assist it in the negotiations (1 JA 19 ¶ 48, 20 ¶ 51); and the Special Committee had the authority to just "say no" to a deal with AMC (1 JA 18-19 ¶ 47). The Complaint also concedes that the Special Committee did in fact "say no" several times, rejecting no fewer than four of AMC's proposals, resulting in AMC's offer increasing from $4.25 to the final $6.25 per share deal price. (1 JA 24 ¶ 59, 26 ¶ 65-66, 29 ¶ 72-73.) And though the Complaint describes at length how AMC *could* have coerced a sale of RLJE by exercising warrants granted by RLJE to take majority control of RLJE's Board (1 JA 3 ¶ 4, 14 ¶ 37), there are no allegations that AMC actually did or even threatened to do so—because it did not.

Notwithstanding these concessions, Guzman sought damages from RLJE's directors for having allegedly sold the corporation at a depressed price to

benefit AMC (1 JA 55-56 ¶¶ 134-35),[1] and from AMC for having allegedly breached its duties towards RLJE's minority stockholders by "forcing" the Merger (1 JA 56-57 ¶¶139-40).[2]

AMC and the individual Respondents moved to dismiss Guzman's Complaint on December 18, 2018. (1 JA 60-77.) The motion argued that the central issue in the litigation was whether RLJE's directors had adhered to their fiduciary duties in approving the Merger, and that those duties and the standards a plaintiff must meet to challenge RLJE's directors' performance of those duties are set out in NRS 78.138. (1 JA 63.) Given the Complaint's concessions, only the actions of the Special Committee were relevant to the analysis under NRS 78.138 because the Special Committee had the sole authority to approve the Merger. (*See* 1 JA 71.) The Complaint did not contain allegations sufficient to rebut NRS

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[1] The Complaint also alleged that the RLJE directors failed to disclose information about the Merger. This alleged information falls into two categories. *First*, immaterial details such as whether RLJE's Board unanimously approved of delegating authority to the Special Committee; the identities of individuals who prepared certain of RLJE's financial projections; details of the communications between AMC and RLJE's founder, Robert L. Johnson, preceding AMC's offer to acquire RLJE; and more detail about the financial projections relied upon by the Special Committee. *Second*, unsubstantiated speculation about why RLJE's former Chief Financial Officer resigned from the company and whether the Special Committee members had any personal relationships with AMC executives or Mr. Johnson. Guzman made little effort to explain the materiality of these alleged omissions in the District Court proceedings, and has included no such explanation in her appellate brief. (*See* App. Br. at 49; *see also* 1 JA 53-55 ¶¶ 125-30.)

[2] Guzman also sought to enjoin the Merger despite the fact that it was scheduled to close the day after the Complaint was filed. (*See* 1 JA 57.)

78.138's presumption that the directors on the Special Committee acted in good faith, as the Complaint contained no credible attacks on their independence and there were no allegations that they acted fraudulently, were self-interested, or failed to exercise due care in approving the Merger. (*See* 1 JA 63-64.) Nor did Guzman allege any basis for finding AMC liable, as she conceded in the Complaint that AMC deferred to the Special Committee as to whether to pursue the Merger. (1 JA 67; *see* 1 JA 18 ¶ 47.) And finally, no basis existed upon which to impose liability on the non-Special Committee directors as they were not alleged to have done anything regarding the Merger other than deferring to the Special Committee. (*See* 1 JA 71.)

In her opposition to the motion to dismiss, Guzman argued that NRS 78.138 did not apply to transactions between Nevada corporations and their controlling stockholders, and that instead AMC and the RLJE directors carried the burden of establishing the "inherent fairness" of the Merger pursuant to the decades-old case, *Foster* v. *Arata*, 74 Nev. 143, 325 P.2d 759 (1958). (3 JA 517-18.) Guzman also argued that, even if NRS 78.138 did apply, the good-faith presumption was rebutted as to the Special Committee because its members were conflicted by the risk of the reputational damage they would sustain if AMC removed them from the Board. (3 JA 532.)

In their reply, AMC and the individual Respondents countered, *inter alia*, that the plain language of NRS 78.138 made the statute applicable to review of the Merger, as it provides no exception for transactions between a corporation and its controlling stockholder. (3 JA 543.) Additionally, the alleged risk of reputational damage was facially insufficient to rebut the business judgment rule as to the directors on the Special Committee, and in any event those directors effectively voted themselves off the Board by approving the Merger. (3 JA 547.)

Oral argument on the motion to dismiss took place on June 17, 2019. The District Court refused to apply Guzman's purported "inherent fairness" test, commenting that *Foster* "is really old." (3 JA 598.) The District Court pointedly asked Guzman's counsel, "[w]hat allegations in your Complaint support a finding that the . . . special committee was not disinterested? Because that's the analysis I have to [conduct]." (3 JA 596-97.) Guzman's counsel replied that the Special Committee members "were at risk of being ousted [from RLJE's Board] and that's not a good footing." (3 JA 597.) The District Court found that these allegations were "not enough" under Nevada case law. (3 JA 597.) Guzman's counsel replied, "[t]hat's . . . what we have," to which the District Court responded, "[o]h, that's all you['ve] got?" (3 JA 597.) Guzman's counsel confirmed that the purported risk of reputational damage flowing from a board "ouster" was the Complaint's ***only*** allegation that the Special Committee members were self-

interested in approving the Merger. (3 JA 597.) The District Court dismissed Guzman's action on the basis that the Complaint did not allege facts sufficient to rebut the presumption that the Special Committee members acted in good faith. (3 JA 599-600.) Though the District Court granted Guzman leave to amend, Guzman chose not to do so and filed a notice of appeal on October 11, 2019.

IV. COUNTER-STATEMENT OF THE FACTS

The Merger at issue in this litigation combined the businesses of RLJE, a Nevada corporation that operates Acorn TV and the Urban Movie Channel (1 JA 10 ¶ 25, 13 ¶ 35), and Respondent AMC, a Delaware corporation that owns and operates several cable television channels (1 JA 8 ¶ 20, 13-14 ¶ 36). AMC effected the Merger through River Merger Sub Inc., a subsidiary of Digital Entertainment Holdings LLC ("Digital") that was formed for the sole purpose of entering into the Merger with RLJE. (1 JA 9-10 ¶ 22.) Digital, a subsidiary of AMC, was formed for the purpose of the investment agreement discussed below. (1 JA 9 ¶ 21.) The individual Respondents were members of the Board prior to the Merger and include Robert L. Johnson, the founder of RLJE. (1 JA 5-8 ¶¶ 10-19.) Respondents Andor M. Laszlo and Scott Royster were selected by the Board to form a Special Committee and were delegated full authority to evaluate AMC's proposal and determine whether to enter into the Merger. (1 JA 18-19 ¶ 47.) Mr. Laszlo, a member of the Board since October 2012, was at the time a Managing Director and Head of Technology, Media & Communications Equity Origination at

Sun Trust Robinson Humphrey. (1 JA 210.) Mr. Royster, a member of the Board since January 2014, was Chief Financial Officer of the United Negro College Fund and, in the past, had served as CEO or CFO of several companies. (1 JA 211.)

A. RLJE STOCKHOLDERS APPROVE THE INVESTMENT AGREEMENT.

The Complaint describes an August 19, 2016 investment agreement between Digital and RLJE (the "Investment Agreement"). (1 JA 3 ¶¶ 3-4.) Under the Investment Agreement, Digital provided RLJE with a $65 million credit facility in return for warrants that could be converted into sufficient shares of RLJE's common stock to give Digital, upon full exercise, ownership of 50.1% of RLJE's common stock. (1 JA 14 ¶ 37.) The Investment Agreement also "prohibit[ed] RLJ[E] from entertaining any acquisition proposal not approved by AMC" (1 JA 14 ¶ 38), which, considering AMC's ability to own over 50% of RLJE's stock under the Investment Agreement, was nothing more than a recognition of reality. While Guzman alleges that the agreement gave AMC the ability to exercise "unchecked power" over RLJE (1 JA 3 ¶¶ 3-4), importantly—but only alluded to in passing in the Complaint—the Investment Agreement, including the provisions limiting the ability of RLJE to entertain acquisition proposals, was approved by a vote of RLJE stockholders (1 JA 16 ¶ 41; 2 JA 463).

B. AMC PROPOSES A PURCHASE OF RLJE, SUBJECT TO THE APPROVAL OF AN INDEPENDENT SPECIAL COMMITTEE OF RLJE DIRECTORS.

On February 26, 2018, AMC sent the Board a letter offering to acquire the outstanding stock of RLJE not already owned by AMC or entities affiliated with Mr. Johnson for $4.25 per share in cash.[3] (1 JA 18 ¶ 45.) The Complaint quotes a portion of this letter stating that AMC would "not sell [its] stake in RLJE or be part of any other process." (1 JA 18 ¶ 45.) It omits another more relevant portion of the letter in which AMC stated, "[w]e expect that the Board . . . will form a special committee of independent directors to respond to our proposal on behalf of RLJE's public shareholders. We also encourage the special committee to retain its own legal and financial advisors to assist in its review." (2 JA 468.)

On February 26, 2018, the RLJE Board met and appointed Messrs. Laszlo and Royster as the Special Committee to evaluate AMC's proposed transaction. (1 JA 18-19 ¶ 47.) The Complaint concedes that Messrs. Laszlo and Royster "had no commercial, financial or business affiliations or relationships with AMC, Robert L. Johnson, or any of their respective affiliates" and were delegated full authority to negotiate with AMC and to approve or disapprove of any

[3] Mr. Johnson reached an agreement with AMC to exchange his RLJE common stock and certain warrants for an equity interest in Digital following the Merger. (*See* 1 JA 171.) While Guzman spends space in her brief on this fact (App. Br. at 28), it has no significance to this appeal as there is no allegation that Mr. Johnson in any way imposed himself on the Special Committee process.

transaction proposed by AMC. (1 JA 18-19 ¶ 47.) The Special Committee asked the Board to provide it with authority to consider and solicit offers from third parties, but the Board declined because of RLJE's contractual commitment not to do so in the Investment Agreement. (*See* 1 JA 20-21 ¶ 52.)

The Special Committee received monthly compensation subject to an overall cap of $100,000 (1 JA 20 ¶ 50, 52 ¶ 122), but this compensation was not conditioned on the consummation of a transaction with AMC (1 JA 124, 168), another fact omitted from the Complaint.

To assist it in its work, the Special Committee retained Greenberg Traurig, LLP ("Greenberg Traurig") as its legal advisor and Allen & Company LLC ("Allen & Co.") as its financial advisor. (1 JA 19 ¶ 48, 20 ¶ 51.) The Complaint alleges that the Special Committee pressured RLJE's management to revise downwards certain growth projections by asking Allen & Co. to share its "concerns" about the accuracy of those projections with RLJE's management (1 JA 22-24 ¶¶ 56-58), but cites nothing to support this speculation about the committee's motives.

C. THE SPECIAL COMMITTEE ENGAGES IN NEGOTIATIONS WITH AMC, REJECTING SEVERAL OFFERS AND OBTAINING A MATERIAL PRICE INCREASE.

The Complaint conclusorily asserts that the Special Committee "conducted sham negotiations with AMC" (1 JA 4 ¶ 6), but the Complaint's other allegations undermine this claim by demonstrating that, contrary to being

steamrolled by AMC, over nearly three months the Special Committee carefully and deliberately bargained AMC up by almost 50% from its original offer.

On April 5, 2018, over five weeks after it had been formed and started to analyze the AMC offer, the Special Committee informed AMC that $4.25 per share did not provide a "sufficient basis upon which the Special Committee would commence substantive discussions and negotiations of a potential transaction." (1 JA 24 ¶ 59.) On May 2, AMC increased its offer to $4.92 per share (1 JA 26 ¶ 65), but the Special Committee rejected that as well, stating that the new offer still "materially undervalued" RLJE's common stock and was "substantially below" the price at which the committee would engage in substantive negotiations (1 JA 26 ¶ 66). The Special Committee told AMC on May 16 that it would be "very difficult" for it to support a transaction at a price of less than $6.00 per share. (1 JA 27 ¶ 69.)

On May 22, AMC revised its offer to $5.95 per share. (1 JA 29 ¶ 72.) The Special Committee held to its $6.00 threshold for negotiations. (1 JA 29 ¶ 72.) AMC agreed to increase its offer to $6.00. (1 JA 29 ¶ 72.) That same day, the Special Committee countered that it would be prepared to accept a price of $6.25 per share. (1 JA 29 ¶ 73.) AMC agreed to this price. (1 JA 29 ¶ 73.)

Absent from the complaint are any allegations that AMC used, or threatened to use, its ability to increase its stock ownership under the Investment

Agreement to abort the process by replacing the Board and the Special Committee with its own representatives in order to force RLJE into a transaction. The Complaint characterizes as a "threat" AMC's advising RLJE that it did not intend to sell its RLJE holdings to a third party (1 JA 20-21 ¶ 52), but that was its right as a shareholder.[4] The Merger consideration represented a premium of approximately 61% over the $3.87 closing price per share on February 23, the last trading day before AMC's initial proposal to the Board was publicly announced. (1 JA 162.)

The Merger was approved at an October 31 stockholder meeting and closed later the same day.

D. ALLEGATIONS OF SELF-INTEREST AGAINST THE MEMBERS OF THE SPECIAL COMMITTEE.

The Complaint alleges that Messrs. Laszlo and Royster "acceded to the AMC-induced sale . . . to avoid a potentially career-ending and reputation-killing ouster from the Board." (1 JA 45 ¶ 110.) It further alleges that Mr. Laszlo's "business and reputation would surely suffer if he were forcibly removed from a public company board" (1 JA 46 ¶ 111), and that Mr. Royster's "ouster" from RLJE would "threaten [his] livelihood" because his "only apparent current

[4] The Complaint also characterizes the fact that RLJE was approaching the limits of a minimum cash balance requirement under a credit agreement between the two corporations as "additional leverage that AMC could exert over [RLJE]" (1 JA 24-25 ¶ 61), but this requirement was a fact of life as a result of the stockholder-approved decision to borrow money from AMC pursuant to the Investment Agreement, rather than any sort of threat.

source of income not involving RLJ[E] . . . comes from his service as CFO of the United Negro College Fund—a not-for-profit philanthropic institution" (1 JA 46-47 ¶ 112). However, the Complaint does not mention that the final Merger agreement approved by Messrs. Laszlo and Royster resulted in their removal from the Board. (1 JA 189; 2 JA 259.) Thus, rather than seeking to remain on the Board as Guzman suggests, Messrs. Lazlo and Royster, in pursuing the interests of minority stockholders, effectively negotiated themselves off of it.

The Complaint also alleges that the Special Committee was not sufficiently incentivized to seek a higher price in the Merger because its members owned a relatively modest amount of RLJE common stock, whereas the Special Committee members owned restricted common stock that, pursuant to the terms of RLJE's restricted stock award agreement, would vest and become unrestricted upon the change of control that would accompany the Merger. (1 JA 47-49 ¶¶ 113-16.) Again omitting an important fact, the Complaint does not explain that, under the terms of the restricted stock award agreement, the stock would have vested in nine months' time in any event.[5] (2 JA 494-95.) Moreover, the Complaint concedes that the value of the restricted stock to each Special Committee member was $92,220, whereas the consideration they received in the

[5] The accelerated vesting of Messrs. Laszlo and Royster's common stock was not a term of the Merger agreement, but instead was a feature of RLJE's 2012 Incentive Compensation Plan, which provided that the restricted stock would vest upon the occurrence of a change in control. (2 JA 485.)

Merger from the other shares of common stock they held was $370,900 for Mr. Laszlo and $347,262.50 for Mr. Royster (1 JA 48 ¶¶ 114-15)—approximately $81,895 and $76,675 above the market price of those shares the day before the Merger agreement was publicly announced, representing a 28% premium (1 JA 144).

V. SUMMARY OF ARGUMENT

NRS 78.138 sets out a clear pathway for a board to follow if it wants a corporate transaction to proceed with minimum litigation risk. This appeal seeks to replace that regime, in the instance of a transaction with a controlling stockholder, with a process that would maximize litigation risk.

It was a tactical error for Guzman to choose the Merger as the forum to advocate for new legal standards because the Complaint demonstrates how well the current ones work. As the Complaint concedes, AMC had the leverage to force the Merger upon RLJE. Had AMC done so, however, and taken the decision to merge out of the hands of independent RLJE Board members, the Merger would have lost the benefits of the standards of review codified by NRS 78.138 and been vulnerable to litigation that was not constrained by business judgment rule deference. Instead, AMC eschewed coercion and put matters into the hands of the Board with the knowledge that, if the Board acted independently and in good faith and approved the Merger, the transaction should be free from litigation attack. The Board, also guided by the statute, turned the matter over to two directors whose

independence was unassailable and who eventually approved the Merger. The District Court, focusing, as NRS 78.138 directs it to, on the independence of the Special Committee members, found the Complaint's allegations in that regard highly deficient, and dismissed the Complaint. Everything worked as it should have under the Nevada statutory regime—AMC was incentivized to rely on the Board, the Board was incentivized to rely on independent directors, and the parties were rewarded for their adherence to the statute by the litigation being terminated at the pleading stage.

The legislative history of NRS 78.138 explicitly states that the purpose of the statute is for "the laws governing domestic corporations to be clear and comprehensible" to "domestic corporations, their directors and officers, and their stockholders, employees, creditors and other constituencies." *See* NRS 78.012(1). Guzman's argument that, in a transaction with a controlling stockholder, the board and the controlling stockholder have the burden of proving the "inherent fairness" of the merger, and that such a burden can only be discharged after a full trial, would achieve precisely the opposite result of what was intended by the statute. "Clarity" could only be achieved after the defendants expended considerable resources in defense of the claim and only after awaiting a jury's interpretation of the amorphous concept of "inherent fairness." Such a

regime would impose burdens on corporations, their boards and stockholders, and the courts that currently do not exist.[6]

There is no Nevada legal precedent for the standards sought by Guzman. NRS 78.138 provides that directors "are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). The statute makes no exception for transactions between a corporation and its controlling stockholder, and this Court recently held that courts must give effect to the plain language of NRS 78.138 and cannot apply standards other than those set forth in the statute to situations that fall within the statute's scope. *See Chur* v. *Eighth Judicial Dist. Court*, 136 Nev. Adv. Op. 7, 458 P.3d 336, 339-41 (Nev. 2020) ("NRS 78.138 provides the sole mechanism to hold directors and officers individually liable for damages in Nevada.").

The case law cited by Guzman is inapposite. *Foster*, 74 Nev. 143, 325 P.2d 759, and *In re Western World Funding, Inc.*, 52 B.R. 743 (Bankr. D. Nev. 1985) ("*World Funding*"), were both decided years before NRS 78.138 was enacted. (App. Br. at 20.) And this Court recently disavowed *Shoen* v. *SAC*

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[6] Even Delaware has shifted toward a regime that allows defendants in controller buyout situations to avoid prolonged litigation. Whereas all transactions with controlling stockholders were once subjected to the "entire fairness" standard of review, now business judgment review applies to such transactions if "the procession of the transaction [was conditioned] on the approval of both [an independent] Special Committee and a majority of the minority stockholders." *See Kahn* v. *M&F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014).

Holding Corp., 122 Nev. 621, 137 P.3d 1171 (2006)—the only case cited by Guzman in support of the "inherent fairness" standard that was decided after the statute's enactment—to the extent that *Shoen* can be read in a manner that conflicts with the plain wording of NRS 78.138. *See Chur*, 136 Nev. Adv. Op. 7, 458 P.3d at 339-41.

Guzman's ardent advocacy for a new legal standard is obviously motivated by her lack of any real grounds to rebut NRS 78.138's presumption that the Special Committee members acted in good faith in approving the Merger—a weakness that was obvious to the District Court at oral argument. (*See* 3 JA 597 ("Oh, that's all you['ve] got?").) Though Guzman larded the Complaint with immaterial allegations of interest regarding the directors who were not on the Special Committee, the only directors' interest that is relevant is that of the Special Committee members as they are the directors to whom the Merger decision was delegated. The primary allegation of the Special Committee members' self-interest is that they were motivated by fear of being removed from the board of a public company and the attendant reputational harm (even though there is no companion allegation that AMC made any threat to remove them). Guzman cites no case finding that directors were interested because of their fear of removal. The contention is facially absurd—directors are removed from boards every day and any removal here would have been because the Special Committee members lost

the support of a controlling stockholder, not because they engaged in any sort of misbehavior. Moreover, the Merger, by its terms, resulted in the removal of the Special Committee members from the Board; to the extent these directors did fear removal, they overcame it in order to make what they viewed as the appropriate decision.

Guzman makes no effort to demonstrate that the Complaint overcomes the exculpation of director liability in NRS 78.138(7), as she does not allege that any of the directors engaged in "intentional misconduct, fraud or a knowing violation of law." Her only argument on this point is the fallback that the question is a factual one that should have been determined at trial. But this argument fails because plaintiffs are not gifted trials without first making sufficient allegations in their complaint. Guzman did not do so and therefore has not adequately pleaded a damages claim against the directors as a matter of law.

Finally, with respect to AMC, Guzman argues that NRS 78.138 establishes standards of review for the decisions of directors, not controlling stockholders. That argument is a red herring because, as Guzman concedes, the only decision at issue here was made by a Special Committee of two independent directors. (1 JA 18-19 ¶ 47.) There is no allegation as to what AMC did to breach any duty it had other than to make the acquisition bid in the first place and exercise

its stockholder-granted contractual rights under the Investment Agreement, neither of which could possibly be actionable.[7]

VI. STANDARD OF REVIEW

The District Court's dismissal of Guzman's action is subject to *de novo* review by this Court. *Slade* v. *Caesars Entm't Corp.*, 132 Nev. 374, 379, 373 P.3d 74, 78 (2016). Pursuant to NRCP 12(b)(5), a complaint should be dismissed if it appears that the plaintiff can prove no set of facts that, even if accepted as true by the trier of fact, would justify relief. *See Buzz Stew, LLC* v. *City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

VII. ARGUMENT

This Court should affirm the District Court's dismissal of the Complaint because Guzman relies on a legal standard that is inconsistent with Nevada law and the Complaint contains no allegations sufficient to overcome the protections afforded to boards of directors under NRS 78.138.

[7] It is not settled under Nevada law what fiduciary duties, if any, a controlling stockholder owes minority stockholders. The main authority for such duties is this Court's *dicta* in *Cohen* v. *Mirage Resorts, Inc.*, observing that majority stockholders can have "limited fiduciary duties to minority shareholders." 119 Nev. 1, 12, 62 P.3d 720, 727 (2003). This Court did not, however, elaborate on the scope of those duties or find that a controlling stockholder had breached them.

A. THIS COURT SHOULD NOT SUPPLANT THE CODIFIED BUSINESS JUDGMENT RULE WITH APPELLANT'S "INHERENT FAIRNESS" STANDARD.

Guzman asks this Court to hold that the business judgment rule codified by NRS 78.138 is automatically "rebutted" as a matter of law whenever a Nevada corporation transacts with a controlling stockholder, and that "Respondents bear the burden of proving both good faith and the inherent fairness of the Merger." (App. Br. at 21.) She also contends that the "inherent fairness" standard immunizes her Complaint from dismissal at the pleading stage because it requires a "fact-intensive" inquiry that is "not suited for resolution on a motion to dismiss." (App. Br. at 33.) Guzman essentially asks this Court to create a precedent entitling any stockholder who challenges a transaction between a Nevada corporation and its controlling stockholder to a trial assessing the "inherent fairness" of the transaction, irrespective of the substance of the stockholder's complaint. This Court should reject Guzman's attempt to rewrite Nevada corporate law and introduce uncertainty into any transaction between a corporation and its controlling stockholder.

Nevada has a straightforward statutory scheme for judicial review of a decision by a board of directors: directors "are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). To overcome this presumption Plaintiff must allege fraud, lack of due care, or interest of the directors. *See Wynn Resorts, Ltd.* v. *Eighth Judicial*

Dist. Court, 133 Nev. 369, 376-77, 399 P.3d 334, 343 (2017). Neither the statute nor the case law interpreting it provides that the business judgment rule is inapplicable to, or automatically rebutted by, transactions between a corporation and its controlling stockholder.[8]

Guzman relies on four cases for her argument to the contrary, three of which were decided before the adoption of NRS 78.138, a fourth that was recently disavowed in relevant part by this Court, and all of which are clearly distinguishable from this case.

Foster and *World Funding* were decided, respectively, 33 and 6 years prior to the Nevada Legislature's adoption of NRS 78.138 in 1991. (App. Br. at 19-20; 1991 Nev. Stat., ch. 442, § 2, at 1184.) Guzman also cites, for the first time on appeal, a 1986 federal case that briefly discusses Nevada law, *Drobbin* v. *Nicolet Instrument Corp.*, 631 F. Supp. 860 (S.D.N.Y. 1986), which also pre-dates the enactment of NRS 78.138.

Shoen—the only one of the four cases cited by Plaintiff that was decided after the adoption of NRS 78.138—did not address the statute. Instead, it clarified the applicable standard for determining whether making demand on a

[8] Guzman states that Respondents, in their arguments before the District Court, failed to cite a single case stating that Nevada recognizes no deviation from the business judgment standard for transactions with controlling stockholders. (App. Br. at 29.) That is because the statute is so clear on the point that apparently no Nevada plaintiff has heretofore put forth Guzman's argument.

board of directors prior to filing a derivative action is futile. 122 Nev. at 640, 137 P.3d at 1184. In a footnote, it cited the *Foster* "inherent fairness" language to note that a derivative plaintiff carries the burden of demonstrating demand futility even if it does not carry the burden on the underlying claim. 122 Nev. at 640 n.61, 137 P.3d at 1184 n.61.

In *Chur*, this Court rejected a similar attempt to use *dicta* in *Shoen* to impose a director liability standard that conflicted with the express language of NRS 78.138. 136 Nev. Adv. Op. 7, 458 P.3d at 340. In *Chur*, the district court had held that gross negligence could be a basis for director liability even though it is not an enumerated standard for such liability in NRS 78.138. *Id*. at 340. This Court reversed the district court's holding because "[a]s is clear from the plain language of NRS 78.138, the statute provides for the *sole circumstance* under which a director or officer may be held individually liable for damages stemming from the director's or officer's conduct in an official capacity." *Id.* (emphasis added). This Court refused to recognize a new basis for liability based on *dicta* from *Shoen* because it "conflict[ed] with the plain language of NRS 78.138." *Id.* Likewise, Guzman's contention that *Shoen*, *Foster*, *Drobbin*, and *World Funding* command the application of an "inherent fairness" standard to review the Merger conflicts with the plain language of the statute and should be rejected. *See id.*

Moreover, neither *Foster*, *World Funding*, nor *Drobbin* are applicable here for the additional reason that all three cases involved self-dealing by officers and directors. In *Foster*, the defendants purchased real estate from a corporation of which they were officers and directors, and thereafter sold it to third parties. 74 Nev. at 146, 325 P.2d at 760. Similarly, *World Funding* concerned an action by a trustee in bankruptcy proceedings against directors and officers for fraudulently converting corporate funds for their own use by, for example, using the funds "to pay . . . personal expenses, such as rent, utilities, cleaning, and clothing." 52 B.R. at 763. The *Drobbin* court—which, again, was not a Nevada court but a federal court in New York attempting to interpret Nevada law—found that the transactions at issue "must under the Nevada statute be scrutinized for fairness" because the corporation's directors voted for agreements under which the controlling stockholder would "pay [the directors] significant sums of money which were unavailable from any other source then known," 631 F. Supp. at 898-99—*not* because the transactions were between a corporation and its controlling stockholder, *see id.* at 899-900. These cases bear no relation to this case where there are no allegations that the Special Committee members took anything out of the company for their own use; instead they are challenged for an exercise of business judgment, which is precisely what NRS 78.138 addresses.

Guzman contends that Respondents took the position before the District Court that NRS 78.138 "legislatively overruled" *Foster* and *Shoen*. (App. Br. at 29-30.) In fact, Respondents argued that *Foster* and *Shoen* cannot be read as creating a distinct standard that contradicts and supplants the plain language of NRS 78.138 whenever there is a transaction between a Nevada corporation and a controlling stockholder. (*See* 3 JA 542-45.) This Court's ruling in *Chur* confirms that argument was correct. Guzman also points out that Senate Bill 203, which amended NRS 78.138 in 2017, did not state in its legislative history that it "overruled" *Foster*, *World Funding*, and *Shoen*. (App. Br. at 30-32.) However, it did not need to do so, as the statute's scope is apparent from its plain language, as confirmed by *Chur*. 136 Nev. Adv. Op. 7, 458 P.3d at 340.

Guzman's focus on the 2017 amendment to the statute is misguided, as the good-faith presumption in NRS 78.138(3) was added to the statute in 1999 and the limitation on director liability in NRS 78.138(7) was added in 2001.[9] Guzman also focuses on a statement of legislative intent that was included in the version of the 2017 amendment that was introduced in the Nevada Senate, but which was omitted from the enacted version. (*See* App. Br. at 31-32; S.B. 203, 79th Leg. (as introduced by Nevada Senate, Feb. 22, 2017); S.B. 203, 79th Leg.

[9] The 2017 amendment to NRS 78.138 did not substantively change the law but merely clarified the existing limitation on director liability. *See* Hearing on S.B. 203 Before the Assemb. Comm. on Judiciary, 79th Leg. 55 (Nev. May 25, 2017).

(Nev. 2017) (enacted).) What Guzman ignores is far more pertinent to this appeal—the language of the actual enacted bill, which demonstrates why the exception to the statute argued for by Guzman would defeat the purpose of the statute.

In the enacted bill, the Nevada Legislature stated that "[i]t 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." NRS 78.012(1). For this reason, NRS 78.138 must be the guiding standard for directors for all transactions, including transactions with insiders, because it instructs that if they establish a negotiating structure in which the relevant board members are independent, the deal will withstand judicial scrutiny. *See Wynn Resorts*, 133 Nev. at 376-77, 399 P.3d at 343.[10] By contrast, Guzman's position would take from directors, and the insiders they deal with, the ability to construct and follow a process that comports with NRS 78.138—and that by extension should withstand judicial scrutiny—and replace it with a mandated trial where a trier of fact determines *ex post facto* whether the transaction was "inherently fair."

[10] Indeed, NRS 78.138 "goes beyond shielding directors from personal liability in decision-making. Rather, it also ensures that courts defer to the business judgment of corporate executives and prevents courts from 'substitut[ing] [their] own notions of what is or is not sound business judgment.'" *Wynn Resorts*, 133 Nev. at 378, 399 P.3d at 344 (quoting *Sinclair Oil Corp.* v. *Levien*, 280 A.2d 717, 720 (Del. 1971)).

(App. Br. at 33-34.) The uncertainty of this framework would be anathema to the goal of NRS 78.138, and any controlling stockholder of a Nevada corporation would have to seriously weigh the risks associated with this uncertainty before entering into a transaction with the corporation, no matter how beneficial it believes that transaction might be to the corporation as a whole.

In addition to undermining the certainty provided by NRS 78.138, Guzman's argument would render NRS 78.140 obsolete. That statute expressly applies to contracts with interested directors, another category of contract that, according to Guzman, is subject to the "inherent fairness" standard. (*See* App. Br. at 28.) Yet NRS 78.140(2) sets out when such a contract is not void or voidable and while one circumstance is when it is "fair," *see* NRS 78.140(2)(d), there are three others, *see* NRS 78.140(2)(a)-(c), including where, as here, the transaction was approved in good faith by an independent special committee of the board, *see* NRS 78.140(2)(a). Under Guzman's expansive "inherent fairness" framework, all contracts between corporations and interested directors are void or voidable unless proven to be "inherently fair," and NRS 78.140(2)(a)-(c) are utterly irrelevant. The potential obliteration of an entire statutory provision further underscores the absurdity of Guzman's proposed reading of Nevada law. *See Orion Portfolio Servs. 2, LLC* v. *Cnty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010) (in construing a statute, "th[is] [C]ourt will not

render any part of the statute meaningless, and will not read the statute's language so as to produce absurd or unreasonable results"); *Nev. Power Co.* v. *Haggerty*, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) ("[W]henever possible, a court will interpret a rule or statute in harmony with other rules or statutes.").

B. APPELLANT FAILS TO STATE A CLAIM AGAINST RLJE'S DIRECTORS UNDER NRS 78.138.

In order to state a claim against RLJE's directors, Guzman "must allege facts that when taken as true (1) rebut the business judgment rule, and (2) constitute a breach of a fiduciary duty involving 'intentional misconduct, fraud or a knowing violation of law.'" *Chur*, 136 Nev. Adv. Op. 7, 458 P.3d at 341 (citing NRS 78.138(7)). Guzman does neither with respect to the directors on the Special Committee, and the Complaint is egregiously deficient in its allegations against the other RLJE directors, whose primary action, Guzman concedes, was to delegate decision-making authority to the Special Committee.

1. Appellant Does Not Rebut the Business Judgment Rule.

To rebut NRS 78.138's presumption that the Special Committee's directors acted in good faith, Guzman must sufficiently allege that the Special Committee—which had the sole authority to approve the Merger—lacked independence or that its members were fraudulent or self-interested, or failed to exercise due care. *Wynn Resorts*, 133 Nev. at 377, 399 P.3d at 343.

Guzman does not argue that the Special Committee's directors acted fraudulently. (*See* App. Br. 34-49.) Nor could Guzman make that argument, as the Complaint shows that the Special Committee acted with due care by utilizing experienced advisors to help it negotiate AMC to a higher purchase price. (1 JA 19 ¶ 48.) This Court has held that under NRS 78.138(2)-(3), "the Board can establish that it meets [the] presumption [of good faith] by relying on 'reports' and '[c]ounsel,' as long as the Board did not have 'knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.'" *Wynn Resorts*, 133 Nev. at 379, 399 P.3d at 344. Guzman concedes throughout the Complaint that the Special Committee frequently consulted with and received the opinions of Greenberg Traurig and Allen & Co. (*See, e.g.*, 1 JA 19 ¶ 48, 20 ¶ 51, 24 ¶ 60, 27-29 ¶ 69-71, 30 ¶ 75-76, 31 ¶ 78, 34-35 ¶ 88, 36 ¶ 92.)

Guzman's only effort to suggest that the Special Committee's reliance on its advisors was unwarranted is an allegation that Greenberg Traurig was somehow tainted because it was involved in negotiating "post-close matters" such as provisions of the proposed charter and bylaws of the post-merger entity. (1 JA 33 ¶ 85; App. Br. at 44.) But the Complaint provides no explanation of how this fact could in any way compromise Greenberg Traurig. In fact, it seems natural that, in helping the Special Committee negotiate the overall transaction, Greenberg Traurig would be involved in structuring those aspects of the Merger. And the

Complaint does not otherwise put in question the firm's acknowledged expertise in this area. *See, e.g.*, *Cotter, Jr.* v. *Cotter*, 2018 WL 4685418, at *5-6 (Nev. Dist. Ct. Aug. 14, 2018) ("[I]t is uncontested that Greenberg Traurig is qualified and experienced. . . RDI's Board, including the [i]ndependent [d]irectors, were entitled to rely upon Greenberg Traurig's advice . . .").[11]

The District Court correctly recognized that, on the facts alleged in the Complaint, Guzman's only argument for rebutting the good-faith presumption was her allegation that the Special Committee's directors were interested in the Merger. Guzman's allegations in that regard are implausible as they are solely based on the contention that Messrs. Laszlo and Royster "acceded to the AMC-induced sale to protect their reputations and to avoid a potentially career-ending and reputation-killing ouster from the Board." (App. Br. at 40.) This contention is facially absurd. Board members get voted off boards all the time; were it to have happened here, it would not have been because of moral turpitude, ineptness, or bad behavior but rather, according to the Complaint itself, simply because the stockholder with the most votes replaced them. (*See* 1 JA 45 ¶ 110.) Guzman cites no Nevada case law for the proposition that the possibility of removal from a public company's

[11] While recognizing that unpublished decisions are not binding upon this Court, *see* NRAP 36(b), Respondents cite *Cotter* here to illustrate that Nevada courts have acknowledged Greenberg Traurig's expertise in matters of corporate law.

board by a controlling stockholder rebuts the business judgment rule, nor does any exist. No such principle exists under Delaware law, either.[12]

In addition, the allegation, along with the contention that Mr. Royster needed the job for financial reasons (*see* App. Br. at 39), is completely undermined by the fact that, as part of the transaction, both Messrs. Royster and Laszlo agreed to resign from the Board. (1 JA 189; 2 JA 259.) If leaving the Board was indeed financially and reputationally harmful to the Special Committee members, they took a bullet for the team because they approved a deal that required their ouster. Tellingly, Guzman completely ignored this fact in her submissions throughout the District Court proceedings and continues to do so now. In her only concession to the existence of this inconvenient fact, Guzman returns to her argument that "forced removal from a publicly-traded company's board" is worse (App. Br. at 41), but, as stated above, that point is unsupported and illogical. It also proves too much as it would functionally render NRS 78.138's presumption of good faith

[12] The only case cited by Guzman on this point is the Delaware decision in *In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013). Yet *MFW* does not discuss whether a possibility of board "ouster" rebuts the business judgment rule. (App. Br. at 41.) To the contrary, the Delaware Court of Chancery remarked in *MFW* that "independent directors are presumed to be motivated to do their duty with fidelity, like most other people, and . . . directors have a more self-protective interest in retaining their reputations as faithful, diligent fiduciaries." 67 A.3d at 528-29. Following the reasoning in *MFW*, independent directors such as the Special Committee members have a "self-protective interest" not in keeping their board seats at all costs, but rather in preserving their reputations as fiduciaries by refusing to sell out minority stockholders for their own self-interest.

inapplicable to all decisions by directors of corporations with controlling stockholders—under Guzman's approach, every decision made by directors of such corporations could be challenged on the basis that it was motivated by the omnipresent threat of removal.

When the District Court understandably expressed incredulity during oral argument that Guzman's entire case hinged on allegations about the fear of board removal, saying to Guzman's counsel, "[o]h, that's all you['ve] got?," Guzman's counsel conceded that these were indeed the only allegations of self-interest "[f]or the [S]pecial [C]ommittee." (3 JA 597.) Guzman now attempts to muster some additional arguments for why the business judgment rule is rebutted as to the Special Committee, but to no avail.

Guzman argues that Messrs. Laszlo and Royster did not negotiate in the best financial interests of common stockholders because they stood to gain only "miniscule amounts of money" due to the level of their common stock ownership. (App. Br. at 43.) This allegation is wholly speculative and illogical. The actual consideration received in the Merger by the Special Committee members for their unrestricted common stock was $370,900 for Mr. Laszlo and more than $347,000 for Mr. Royster (1 JA 48 ¶ 114), and obtaining even more consideration would surely be in their interests—as it would be for any stockholder—especially if, as Guzman suggests, at least Mr. Royster had an ill-paying job "as CFO of a not-for

profit" (App. Br. at 5). Moreover, Guzman's allegation about the Special Committee members' restricted stock (*see* App. Br. at 42) is a red herring because, were they motivated to close the deal to get a payday, the $92,220 the Complaint alleges they would each receive through an acceleration of the vesting of their restricted stock (1 JA 48 ¶ 115)—a vesting that would have occurred in any event in another nine months (*see* 2 JA 494-95)—was dwarfed by the consideration they would receive for their unrestricted common stock under the Merger. The value of Messrs. Laszlo and Royster's unrestricted common stock would only grow larger as the per-share price that AMC paid for the transaction increased, and there is no reason to believe they had any incentive to leave money on the table.[13]

Guzman also alleges that the Special Committee was "conflicted" because its members "secured up to $100,000 in compensation for their few months of services," which, according to Guzman, meant that "serving on the [Special] Committee enriched its members more than higher merger consideration could." (App. Br. at 16, 43; *see also* 1 JA 52 ¶ 122.) This is not arithmetically correct—the Merger consideration each director received was more than $100,000,

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[13] Guzman also suggests that the Special Committee "negotiated on behalf of" preferred stockholders whose interests were allegedly at odds with those of common stockholders. (App. Br. at 44.) Guzman's only factual support for this contention is that the Special Committee had discussions with a preferred stockholder about that stockholder's concerns. (1 JA 33-35 ¶¶ 86-90.) There is no allegation that the Special Committee took some concrete action to favor the interests of preferred stockholders above those of common stockholders, and therefore the point is irrelevant.

and, unlike the $100,000 they received for serving on the Special Committee, would have grown if a higher Merger price had been attained. In any event, the Special Committee would have received the $100,000 whether they agreed to the Merger or not as it was not contingent on a deal getting done and, as such, did not provide any incentive for the Special Committee to soft-peddle its price negotiations with AMC. (1 JA 124, 168.)

Guzman also suggests that the Investment Agreement's "no shop" provision compromised the Special Committee's ability to negotiate—and, by extension, its independence—because it could not conduct a "market check of third-party buyers" or consider bids from other buyers. (App. Br. at 45-48; 1 JA 17-18 ¶ 44, 21 ¶ 53, 25 ¶ 62.) The existence of a "no shop" provision is irrelevant, however, to the issue of whether the Special Committee could independently assess the AMC bid and decide whether to accept or reject it. Also, under Nevada law, directors have no obligation to conduct a "market check" or auction a company in order to independently assess, negotiate, and approve a merger proposal. Therefore, the fact that the Investment Agreement included a "no shop" provision is legally immaterial. Ultimately, what Guzman takes issue with are the Special Committee's strategic choices in conducting its negotiations with AMC, including its choice to "reveal[] twice to [AMC] the [Special] Committee's own pricing floor without once ever actually submitting a formal counterproposal."

(App. Br. at 46.) Yet these choices are quintessential exercises of business judgment, which NRS 78.138 protects from outside second-guessing.

Similarly, Guzman contends that the Special Committee nefariously "directed management to revise RLJ[E]'s projections downward" (App. Br. at 25) because the Special Committee asked "Allen & Co. to discuss with management whether a more reliable . . . set of five-year financial forecasts should be prepared" given that the initial projections "were prepared for internal budget and financial planning purposes only and, to that extent, were somewhat aggressive in nature" (1 JA 126). Yet the determination of which financial projections to rely upon is a clear exercise of business judgment, and Guzman alleges no facts suggesting that this determination was the product of fraud, self-interest, or a failure to exercise due care.[14] *See Wynn Resorts*, 133 Nev. at 378, 399 P.3d at 344 (noting that NRS 78.138 "prevents courts from 'substitut[ing] [their] own notions of what is or is not sound business judgment" (quoting *Sinclair Oil*, 280 A.2d at 720)).

Additionally, Guzman contends that the business judgment rule is rebutted by the Complaint's allegations that the Board "failed to disclose significant material information regarding the process and the Merger." (App. Br.

[14] Relatedly, Guzman asserts that the "circumstances" of the departure of RLJE's then-Chief Financial Officer "suggest that it may have been due to [the Chief Financial Officer's] disagreement with the directive to decrease the projections." (App. Br. at 48.) This is rank speculation, as Guzman does not allege a single concrete fact to support the proposition.

at 49.) Yet nowhere does Guzman articulate how these alleged failures rebut the good-faith presumption, or otherwise articulate the materiality of the alleged non-disclosures. And none of the cases cited by Guzman in support of this argument (*see* App. Br. at 36-37, 49) hold that the business judgment rule is rebutted by allegations of a breach of the duty to disclose.[15]

Given the litany of allegations of conflict that Guzman makes about the RLJE directors who were not on the Special Committee, it bears noting that the only actions attributed to those directors were delegating responsibility over the Merger discussions to the Special Committee, advising the Special Committee that the Investment Agreement with AMC prevented the committee from shopping the company, and discussing RLJE's ability to comply with a minimum cash balance requirement in a credit agreement with AMC related to the Investment Agreement. (App. Br. at 38-46; *see* 1 JA 18-19 ¶ 47, 22 ¶54, 24-25 ¶ 61.) Recognizing the

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[15] In support of her disclosure argument, Guzman cites *Nutraceutical Dev. Corp.* v. *Summers*, 2011 WL 2623749, at *4 (Nev. July 1, 2011), for the proposition that "[t]he duty of care consists of an obligation to act on an informed basis." (App. Br. at 36.) Guzman misunderstands that proposition, however, which does not establish a duty of disclosure but rather requires directors to consider reasonably available information when making decisions. The other cases are also inapposite. *Leavitt* v. *Leisure Sports Inc.*, 103 Nev. 81, 734 P.2d 1221 (1987), and *Western Industries, Inc.* v. *General Insurance Co.*, 91 Nev. 222, 533 P.2d 473 (1975), do not address Nevada's business judgment rule and were decided prior to its codification. *FDIC* v. *Jacobs* involves claims brought under a federal statute—not under NRS 78.138—and only mentions NRS 78.138 because that federal statute defines certain terms by reference to "applicable State law." 2014 WL 5822873, at *2, *4 (D. Nev. Nov. 10, 2014).

need for an independent committee and advising that committee of the contractual obligations of the corporation are surely insufficient to rebut the business judgment rule. Guzman's claims against the directors who were not on the Special Committee must be dismissed irrespective of this Court's ruling on the liability of AMC and the Special Committee members, because those directors were not involved in the decision to approve the Merger and there are no allegations establishing a breach of their duties.

Finally, Guzman claims once more that her claim is immune from dismissal as a matter of law, stating that the application of the business judgment rule "is not suited to determination on a motion to dismiss." (App. Br. at 49.) Guzman rests her argument on the fact that the version of NRS 78.138(7) applicable to this case requires "the trier of fact" to determine whether the business judgment rule has been rebutted (*see* App. Br. at 49-51), but Guzman is not relieved of her initial pleading burden simply because the ultimate question of liability is to be decided by the trier of fact.

Guzman does not cite a single case denying a motion to dismiss on the ground that the business judgment rule's application cannot be decided at the pleading stage. Rather, she selectively quotes portions of appellate cases addressing whether a trier of fact had correctly applied the business judgment rule. (*See* App. Br. at 51-52 (citing *W. Indus., Inc.*, 91 Nev. 222, 533 P.2d 473; *Leavitt*,

103 Nev. 81, 734 P.2d 1221; *Brinkerhoff* v. *Foote*, 2016 WL 7439357 (Nev. Dec. 22, 2016)).) Yet, to the contrary, Nevada courts have routinely considered whether allegations are sufficient to state a claim against directors under NRS 78.138(7) and have dismissed claims at the pleading stage for failing to do so. *See, e.g.*, *Schmidt* v. *Liberator Med. Holdings, Inc.*, 2017 WL 8728116, at *1 (Nev. Dist. Ct. May 19, 2017); *In re Force Protection, Inc. S'holder Litig.*, 2012 WL 12336772, at *1 (Nev. Dist. Ct. Aug. 20, 2012); *In re Las Vegas Sands Corp. Derivative Litig.*, 2009 WL 6038660, at *10 (Nev. Dist. Ct. Nov. 4, 2009); *Sw. Vistas Homeowners Ass'n* v. *Reynen & Bardis Dev. (Nev.) LLC*, 2008 WL 8121145, at *1 (Nev. Dist. Ct. Nov. 7, 2008).[16] Indeed, the statute would not provide the clarity that the Legislature intended if a trial on the merits was required whenever a stockholder challenged a board decision, irrespective of the substance of the stockholder's challenge.

[16] Though NRAP 36(b) provides that unpublished decisions do not establish binding precedent, Respondents cite such decisions here to illustrate that several Nevada courts have interpreted NRS 78.138 as permitting dismissal at the pleading stage. These cases were not decided under the version of the statute that contains the "trier of fact" language, which was only in effect for two years. Guzman does not identify any Nevada court having held that this language precluded dismissal of complaints at the pleading stage for failure to allege facts sufficient to rebut the business judgment rule. Nor does the legislative history of that version of the statute suggest any intent to fundamentally change the law by precluding dismissal at the pleading stage. *See* Hearing on S.B. 203 at 55.

2. The Complaint Does Not Overcome the Exculpatory Provision of NRS 78.138(7)(b)(2).

Another fatal flaw in Guzman's claims against RLJE's directors is that, even had the Complaint sufficiently alleged a breach of duty by the directors under NRS 78.138(7)(b)(1), it still did not make allegations sufficient to satisfy NRS 78.138(7)(b)(2), another prerequisite to imposing liability for damages on directors.[17]

Under NRS 78.138(7)(b)(2), a director may be found personally liable only if a "breach [of his or her fiduciary duties as a director] involved intentional misconduct, fraud or a knowing violation of law." *See also Chur*, 136 Nev. Adv. Op. 7, 458 P.3d at 341. Guzman's sole effort to overcome this hurdle during the District Court proceedings was a footnote in her opposition brief stating that "[a]ny breach of the duty of loyalty is *de facto* intentional misconduct," relying on *FDIC*, 2014 WL 5822873, at *17. (*See* 3 JA 526 n.19.) Yet this attempt to modify the grounds for director liability is contrary to the plain language of NRS 78.138 and must therefore be rejected, as this Court made clear in *Chur*. *See* 136 Nev. Adv. Op. 7, 458 P.3d at 340.

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[17] One such circumstance is if the Company's articles of incorporation provide otherwise, but here they mirror NRS 78.138(7): "A director of the Corporation shall not be liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, except to the extent such exemption from liability or limitation thereof is not permitted under the NRS . . ." (3 JA 505.)

Guzman makes no effort whatsoever before this Court to overcome the exculpatory provision other than to contend that if this Court finds the business judgment rule to be rebutted, it should remand this action to the District Court for a determination of whether the Complaint sufficiently pleads "intentional misconduct, fraud or a knowing violation of law." (App. Br. at 17-18, 58.) Her only support for this proposition is *Nationstar Mortg., LLC* v. *SFR Invs. Pool 1, LLC*, 133 Nev. 247, 252, 396 P.3d 754, 758 (Nev. 2017), which held that remand is appropriate for "factual inquiries" not reached by the court below. Here, the only issue is one of law, *i.e.*, whether the Complaint contains allegations legally sufficient to overcome the exculpatory provision of NRS 78.138(7)(b)(2). It clearly does not.

C. APPELLANT'S ASSERTION THAT NRS 78.138 DOES NOT APPLY TO CONTROLLING STOCKHOLDERS IS A RED HERRING.

Guzman repeats as a mantra that NRS 78.138 establishes standards of review for the decisions of directors, not controlling stockholders, and contends that "AMC is not entitled to the protection of the business judgment rule." (App. Br. at 18; *see also id.* at 53-54.) This demonstrates a complete misunderstanding of AMC's argument. AMC is not seeking the protection of the business judgment rule. Rather, because, as the Complaint concedes, the transaction would only go forward if it was approved by the Special Committee, that committee's decision is

the only act that is relevant from a judicial review standpoint and AMC is not alleged to have actually done anything that would give rise to liability.

Guzman uses considerable space in her brief to lay out what AMC *could* have done with its purported "leverage" over RLJE, pointing out that AMC "held enough warrants to take majority control and force a sale to itself." (App. Br. at 24.) But what is lacking from the Complaint is any allegation that AMC actually used this alleged leverage. To the contrary, the Complaint concedes that, instead of doing so, AMC left the decision to the Special Committee, which had the authority to just "say no" to a deal with AMC and did in fact "say no" several times, rejecting no fewer than four of AMC's proposals. (1 JA 18-19 ¶ 47, 24 ¶ 59, 26 ¶¶ 65-66, 29 ¶¶ 72-73.) Guzman is litigating facts that did not occur, as opposed to those that did. She does not explain—nor could she—how a controlling stockholder can breach its duties by not exercising leverage and instead recusing itself from a decision-making process. Accordingly, the only conduct subject to judicial review here is the Special Committee's approval of the Merger.

Guzman attempts to characterize AMC's actions in negotiating to acquire RLJE as a form of coercion, but in fact AMC merely exercised its rights in accordance with Nevada law. AMC certainly had every right to submit a bid to acquire RLJE and Guzman cites no case law from Nevada or any other jurisdiction indicating that the mere making of a bid creates a basis for liability. AMC likewise

had the right to insist that the Special Committee adhere to RLJE's contractual obligations under the "no shop" provision in the Investment Agreement, which was approved by RLJE's stockholders. Again Guzman cites no case law to the contrary. Finally, Guzman also suggests that AMC coerced a sale by telling the Special Committee that it would not sell its RLJE stock to any third party (*see* App. Br. at 9, 46), but there is no law in Nevada requiring a controlling stockholder to put its stock for sale in order to shop the corporation around to the highest bidder.[18] No such principle exists under Delaware law either. *See, e.g.*, *MFW*, 67 A.3d at 508 (finding that "[u]nder Delaware law, [a controlling stockholder] had no duty to sell its block [of shares], which was large enough, as a practical matter, to preclude any other buyer from succeeding unless it decided to become a seller"); *Bershad* v. *Curtiss-Wright Corp.*, 535 A.2d 840, 845 (Del. 1987) ("Clearly, a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority."). Moreover, AMC's refusal to do so was irrelevant given that the Special Committee nevertheless had the ability, as the Complaint concedes, to just "say no" to AMC's offer. Thus, AMC merely exercised its rights in accordance with Nevada law, after

[18] Even in the case of a cash-out merger, minority stockholders can generally elect to dissent and seek an appraisal of their shares under Nevada's dissenter's rights statutes. *See generally* NRS 92A.300 *et seq.*

having ensured a conflict-free negotiation process by delegating its authority to the Special Committee.

Secondarily, Guzman's claim against AMC fails because she does not identify any Nevada law explaining the contours of a controlling stockholder's supposed duty. Guzman cites *Cohen*, 119 Nev. 1, 62 P.3d 720, for the proposition that AMC, as a controlling stockholder, owed RLJE's minority stockholders fiduciary duties. (App. Br. at 55-56.) In *Cohen*, this Court merely observed in *dicta* that majority stockholders can have "limited fiduciary duties to minority shareholders." 119 Nev. at 12, 62 P.3d at 727. This Court did not, however, elaborate on the scope of those duties under Nevada law or propose a standard for determining whether they have been breached. Indeed Guzman does not—and cannot—cite a single Nevada statute or case imposing this particular duty on controlling stockholders. Instead, she circles back to an attempt to import Delaware's "entire fairness" standard into Nevada law (*see* App. Br. at 56), even though the proposed legislative history of NRS 78.138 she cites indicates a reluctance by the Nevada legislature to import Delaware legal principles (*see* App. Br. at 31 ("The standards promulgated by the Supreme Court of Delaware in *Unocal* . . . and *Revlon* . . . and their progeny have been, and are hereby, rejected by the Legislature.")).

Thus, if the allegations of the Complaint are insufficient to state a claim under NRS 78.138 against the directors on the Special Committee for approving the Merger, the case is over as the Complaint does not allege that AMC did anything other than submit a merger proposal to the Special Committee for consideration and assert its stockholder-granted contractual rights to prevent the company from shopping AMC's proposal to third parties. Guided by NRS 78.138, RLJE and AMC followed a process that put the merger decision in the hands of an independent committee; they should not be disappointed in their expectation that such a process would be presumed to be in good faith unless "the decision was the product of fraud or self-interest or . . . the director[s] failed to exercise due care," *Wynn Resorts*, 133 Nev. at 377, 399 P.3d at 343 (quoting Joseph F. Troy & William D. Gould, *Advising and Defending Corporate Directors and Officers* § 3.15 (Cal. CEB rev. ed. 2007)). As discussed above, creating that expectation was the entire purpose of NRS 78.138 pursuant to the Nevada Legislature's declarations of policy, codified at NRS 78.012 in 2017.

VIII. CONCLUSION

For the reasons stated above, this Court should dismiss Guzman's appeal of the District Court's dismissal of her action.

Dated this 30th day of April, 2020.

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NRAP 28.2 AND NRAP 32(A)(9)(C) CERTIFICATE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 2010 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more, and contains 10,720 words.

3. Finally, 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 and volume number, if any, 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 brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **RESPONDENTS' ANSWERING BRIEF** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on April 30, 2020.

I also hereby certify that on April 30, 2020, or shortly thereafter, I served a copy of this document by mailing a true and correct copy, postage prepaid, via U.S. Mail, addressed to any counsel of record who did not receive the document via the Court's Electronic Filing System on April 30, 2020.

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