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.

Electronically Filed
May 29 2020 12:07 p.m.
Elizabeth A. Brown
Clerk of 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 REPLY BRIEF

G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
JORGE L. ALVAREZ, ESQ.
Nevada Bar No. 014466
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
jalvarez@albrightstoddard.com

MICHAEL PALESTINA, ESQ. (PHV)
KAHN SWICK & FOTI, LLC
1100 Poydras Street, Suite 3200
New Orleans, LA 70163
Tel: (504) 455-1400

JUAN MONTEVERDE, ESQ. (PHV)
MONTEVERDE & ASSOCIATES
350 Fifth Avenue, Suite 4405
New York, NY 10118
Tel: 212-971-1341
jmonteverde@monteverdelaw.com

Attorneys for Appellant

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 firms of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, KAHN, SWICK & FOTI, LLC, and MONTEVERDE & ASSOCIATES PC.

Dated: May 29, 2020

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

/s/ G. Mark Albright

G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
JORGE L. ALVAREZ, ESQ.
Nevada Bar No. 014466
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
jalvarez@albrightstoddard.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Other Authorities

ARGUMENT

I. PLAINTIFF DOES NOT ASK THIS COURT TO "SUPPLANT" THE BUSINESS JUDGMENT RULE

A. NRS 78.138(7)(a) Recognizes That The Business Judgment Rule Can Be "Rebutted," And The Legislature Knew Of The Widely Followed Rule That The Presumption Is Rebutted In The Context Of A Controller Buyout

Contrary to Defendants' argument, Plaintiff does not ask this Court to "supplant" the business judgment rule codified in NRS 78.138(3). Def. Br. 19. The plain terms of the statute recognize that the business judgment presumption can be "rebutted." NRS 78.138(7)(a). Plaintiff simply asks this Court to "say what the law is…construing the language [the Legislature] has employed[,]" *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980), while applying the established canon that statutes are presumed to be harmonious with the common law absent an express legislative command to the contrary.[1]

The Legislature did not delineate the circumstances sufficient to "rebut" the business judgment presumption, and thus left it up to the judiciary to establish the ground rules. "[T]he language was enacted, and [this Court] must make something of it." *Asher v. Baxter Int'l Inc.*, 377 F.3d 727, 733 (7th Cir. 2004). This Court is now called upon to do so in the context of a buyout by a controlling stockholder.

---

[1] All emphasis is added, all internal citations and quotations are omitted, and all capitalized terms have the same meaning set forth in Plaintiff's opening brief ("Opening Brief").

In addressing the issue, the Court does not write from a clean slate. In *Foster v. Arata*, 74 Nev. 143 (1958) this Court recognized a "principle" that was already a widely recognized tenet of corporate law:

> 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.

Id. at 155 (quoting *Pepper v. Litton*, 308 U.S. 295, 306-07 (1939)).

Defendants contend that *Foster* is inapplicable here because it "involved self-dealing by officers and directors[,]" as opposed to a controlling shareholder. Def. Br. 22. That is incorrect. In the relevant passage, this Court considered whether the defendants were liable in their capacity as controlling stockholders. The Court explained that, while "it would appear that the defendants did not hold a majority of the stock…, *they were still in such dominant position as to subject them to the rule stated*." *Id*. at 156. This Court then elaborated that, under "the rule stated," *i.e.*, "inherent fairness," the defendants' "*activities must be subject to close scrutiny* to ascertain whether the foreclosure purchases and subsequent resale of the corporate properties *were completely fair to the corporation*. An important criterion is whether or not an *adequate price* was paid for the property." *Id*. Furthermore, in adopting

"the rule stated," this Court cited examples of how the inherent fairness rule had been applied in actions challenging the conduct of controlling shareholders. *Id*. at 155-56. Thus, Defendants' contention that *Foster* did not recognize the "inherent fairness" rule with respect to transactions involving controlling stockholders is erroneous. *Id*.

Both Defendants and the district court also dismiss *Foster* as "really old." Def. Br. 5. But this Court's precedents do not have expiration dates. They remain binding unless either the Legislature *expressly* abrogates them or this Court overrules them. Indeed, this Court cited to *Foster* in support of the proposition that "an interested fiduciary [bears the] burden to prove the good faith and inherent fairness of any transactions with the corporation" in 2006, *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640 n.61 (2006), and in support of a different proposition just two months ago. *Windmill Farms v. Findlay*, 459 P.3d 238 (Nev. 2020). And while Defendants make much of the fact that the business judgment presumption set forth in NRS 78.138(3) (which was derived from the Model Business Corporation Act ("MBCA"))[2] was enacted decades after *Foster*, they fail to acknowledge that the business judgment rule codified in the statute was not a new legal advent—it had *already been recognized by courts for decades*. *See* MBCA (2016 Revision) Official Comment to

[2] *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.*, 399 P.3d 334, 343 (Nev. 2017).

§ 8.31; Dennis J. Block, et al., *The Business Judgment Rule* 4 (4th ed. 1993 & Supp. 1995) (explaining rule has existed "[f]or over a century and a half"). Thus, to the extent Defendants suggest that the business judgment rule did not exist at the time *Foster* was rendered in 1958, they are mistaken.

Similarly, the "inherent" or "entire" fairness rule has been a "corporate law rule[] of well-nigh universal application" for the past century. *Drobbin v. Nicolet Instrument Corp.*, 631 F. Supp. 860, 879 (S.D.N.Y. 1986) (applying Nevada law). As explained in American Jurisprudence:

> [I]f the same person is the controlling shareholder in both corporations involved in a proposed merger, a fiduciary duty is owed by such shareholder to the minority shareholders, requiring that the interests of such shareholders be dealt with in an entirely fair manner, and the controlling stockholder and the corporations controlled by him or her must carry the burden of demonstrating the fairness of the merger.

18A AM. JUR. 2D *Corporations* § 658.

The *Fletcher Cyclopedia of the Law of Corporations* similarly explains:

> The test of intrinsic or entire fairness will call for heightened judicial scrutiny if it is shown that the majority has an interest with respect to the transaction that conflicts with the interest of the minority, as well as that the majority fixes the terms of the transaction and compels its effectuation…. [T]he dominant corporation sitting on both sides of a transaction—thus occupying a fiduciary position—must carry the burden of establishing the "entire fairness" of a proposed merger.

15 *Fletcher Cyc. Corp.* § 7160.50.

Additionally, the rationale for the rule that the business judgment presumption is rebutted in the context of a controlling stockholder buyout is sound. It is:

> [P]remised on a sincere concern that mergers with controlling stockholders involve an extraordinary potential for the exploitation by powerful insiders of their informational advantages and their voting clout. Facing the proverbial 800 pound gorilla who wants the rest of the bananas all for himself, chimpanzees like independent directors and disinterested stockholders could not be expected to make sure that the gorilla paid a fair price. Therefore, the residual protection of an unavoidable review of the financial fairness whenever plaintiffs could raise a genuine dispute of fact about that issue was thought to be a necessary final protection.

In re Cox Communs., Inc. S'holders Litig., 879 A.2d 604, 617 (Del. Ch. 2005) ("*Cox*") (Strine, V.C.). In light of this concern, the common law rule has long been that, "when the persons, be they stockholders or directors, who control the making of a transaction and the fixing of its terms, are on both sides, then *the presumption and deference to sound business judgment are no longer present. Intrinsic fairness, tested by all relevant standards, is then the criterion*." *David J. Greene & Co. v. Dunhill Int'l, Inc.*, 249 A.2d 427, 430-31 (Del. Ch. 1968). And, as the above-referenced authorities indicate, this rule is not unique to Delaware.

NRS 78.138 must be interpreted in light of this history. When the Legislature included a provision recognizing that the business judgment presumption could be "rebutted" but declined to delineate the specifics, NRS 78.138(7)(a), it is presumed to have acted with knowledge of the common law, and the statute is presumed to be harmonious with the common law. Defendants point to nothing indicating that the Legislature intended NRS 78.138 to abrogate the "well-nigh universal" rule that the business judgment presumption is at least initially rebutted in the context of a

controller buyout. And it defies credulity to think that the Legislature was unaware of a rule that has been a tenet of corporate law for the past century.

B. Defendants Misconstrue NRS 78.140, Which Is Facially Inapplicable

Defendants also contend that Plaintiff's argument "would render NRS 78.140 obsolete." Def. Br. 25. Defendants did not make this argument below, and it is therefore waived. Regardless, they misconstrue the statute. NRS 78.140 deals solely with transactions between a corporation and its "interested directors or officers"—it does not address *transactions between a corporation and a controlling stockholder*. NRS 78.140 derived from the MBCA[3] and merely codifies a rejection of the doctrine that deemed transactions between a corporation and its directors automatically void or voidable. *See Bassett v. Monte Christo G. & S. M. Co.*, 15 Nev. 293, 301 (Nev. 1880). As the comments to the MBCA explain:

> Subchapter F addresses legal challenges based on director conflicts of interest only. Subchapter F does not undertake to define, regulate, or provide any form of procedure regarding other possible claims. For example, subchapter F does not address a claim that a controlling shareholder has violated a duty owed to the corporation or minority shareholders.

2 *MBCA Annotated*, Introductory Comments to Subchapter F, at 8-373 (Supp. 1997); *see also Warren v. Campbell Farming Corp.*, 363 Mont. 190, 205-06, 271 P.3d 36, 47 (Mont. 2011) (same).

---

[3] The provision appeared in §8.31 of the 1984 MBCA and was moved to Subchapter F, §§8.60-63 in 1988.

Additionally, the word "solely" in NRS 78.140(1) is critical. Courts interpreting similar statutes have consistently held that they do not provide "the broad immunity for which defendants contend. It merely…provides against *invalidation* of an agreement '*solely'* because such a director or officer is involved. Nothing in the statute sanctions unfairness…or removes the transaction from judicial scrutiny." *Oberhelman v. Barnes Inv. Corp.*, 236 Kan. 335, 343 (Kan. 1984) (citing *Fliegler v. Lawrence*, 361 A.2d 218, 221-22 (Del. 1976)); *HMG/Courtland Props., Inc. v. Gray,* 749 A.2d 94, 114 n.24 (Del. Ch. 1999) (same). Simply put, the purpose of the statute "is to create a framework within which corporations can enter into binding agreements, even where conflicts of interest arise from such agreements, not to shield corporate directors from liability for breaches of their fiduciary duties." *McRedmond v. Estate of Marianelli*, 46 S.W.3d 730, 741 (Tenn. Ct. App., Aug. 31, 2000); *Cox*, 879 A.2d at 614-15 (same).

Lastly, by its plain text, the statute does not shield anyone—directors, officers, or controlling stockholders—*from damages*. Some states have elected to include a prohibition against damages awards in their interested director transaction statutes, but the Nevada Legislature has not, despite amending the statute multiple times, including in 2015. *Cf.* La. Rev. Stat. Ann. § 12:1-861. Because Plaintiff does not seek to "void" the Merger, NRS 78.140 is facially inapplicable. *See* 12B *Fletcher*

Cyc. Corp. § 5781.10 ("Transactions between a majority shareholder and the corporation, while not void, may be carefully scrutinized[.]").

***

In sum, neither NRS 78.138 nor NRS 78.140 abrogated the well-established "inherent" or "entire" fairness rule this Court recognized in *Foster* and *Shoen*. Accordingly, the district court's judgment—which dismissed the Complaint solely based on the business judgment rule—must be reversed, and this Court should reaffirm—consistent with *Foster*, *Shoen*, *and* NRS 78.138(7)(a)—that the business judgment presumption is rebutted in the context of a buyout by a controlling stockholder.[4]

II. ALTERNATIVELY, RATHER THAN ABROGATING *FOSTER*, THIS COURT MAY EXPOUND ON *FOSTER'S* INHERENT FAIRNESS PRINCIPLE BY ADOPTING THE MODERN GROUND RULES REGARDING CONTROLLER BUYOUTS, WHICH ELIMINATE THE CONCERNS RAISED BY DEFENDANTS

A. Adopting *MFW* and *Cornerstone* Would Ensure Fairness to Directors, Controllers, and Minority Stockholders

Defendants also contend that if the Court were to side with Plaintiff, it would "introduce uncertainty into any transaction between a corporation and its controlling stockholder." Def. Br. 19. That does not have to be so. As Defendants note, in recent

[4] Defendants do not contest, and therefore concede, that AMC and Johnson were interested fiduciaries in the Merger and that AMC was a controller.

years the court with the most experience applying the entire fairness doctrine has established ground rules that, if followed, allow both directors and controllers to exit the litigation at the pleading stage. *See* Def. Br. 29; *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"); *In re Cornerstone Therapeutics, Inc.*, 115 A.3d 1173 (Del. 2015) ("*Cornerstone*"). Defendants were admittedly aware of—*but expressly declined to follow*—these ground rules, which require, *inter alia*, a majority-of-the-minority voting requirement. As a result, the Merger does not carry "the earmarks of an arm's length bargain[,]" and a review of the Merger's inherent fairness is warranted under *Foster*. 74 Nev. at 155; *MFW*, 88 A.3d at 643-44 (explaining that *both* an independent special committee *and majority-of-the-minority requirement* are necessary and that "[a] transactional structure subject to both conditions *differs fundamentally from a merger having only one of those protections*[.]"); *Kahn v. Lynch Commc'n Sys.*, 638 A.2d 1110, 1117 (Del. 1994) ("[E]ven when an interested cash-out merger transaction receives the informed approval of a majority of minority stockholders or an independent committee of disinterested directors, an entire fairness analysis is the only proper standard[.]").

Certainty and fairness for directors, controlling stockholders, and minority stockholders would be achieved if this Court adopts the standards set forth in *MFW* and *Cornerstone*. Choosing this route rather than the one Defendants advocate for—

i.e., completely abandoning the inherent fairness principle this Court recognized in *Foster*—would also be consistent with *stare decisis*.

In *MFW*, the Delaware Supreme Court held:

> [I]n controller buyouts, the business judgment standard of review will be applied if and only if: (i) the controller conditions the procession of the transaction on the approval of ***both*** a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.

88 A.3d at 645; *see also Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 764 (Del. 2018) (dual *MFW* protections must be "put in place early and before substantive economic negotiations took place[.]").

And, in *Cornerstone*, the Delaware Supreme Court held that an exculpatory provision provided for by statute—similar to the one RLJ adopted pursuant to NRS 78.138(7)(b)(2)—allowed disinterested, independent directors to exit the litigation at the motion to dismiss stage, ***with the case proceeding against the controlling stockholders and their affiliated directors because*** "the companies did not follow the process established in [*MFW*] as a safe harbor to invoke the business judgment rule in the context of a self-interested transaction." 115 A.3d at 1177-80, 187.

Adopting the *MFW* and *Cornerstone* framework would maintain the well-established common law rule that the business judgment rule is initially rebutted—which NRS 78.138(7)(a) expressly recognizes is possible—when directors approve

a buyout by a controlling stockholder *without* putting *both* of the procedural protections necessary to fully disable the power of the controller in place *ab initio*. If, on the other hand, both protections are established *ab initio*, the business judgment presumption remains in place. And, even if the presumption is rebutted because of the failure to put both of the required protections in place, independent directors could still obtain dismissal under an exculpatory provision if the allegations against them did not amount to "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(2). The case would then proceed against the controlling stockholder, its affiliated directors, and any other interested director, who, by declining to condition the Merger on *both* the approval of an independent special committee and a majority of the minority shareholders, would be subject to liability if the transaction was not entirely fair to the minority. ***Such an outcome would remain consistent with NRS 78.138 and NRS 78.140, which provide no protection for claims against controlling stockholders***. *Supra* §I.B; *Infra* §III.

B. Defendants Did Not Take The Steps Necessary To Ensure The Merger Carried The Earmarks Of An Arm's Length Bargain, And Dismissal Was Therefore Unwarranted

Defendants knowingly declined to follow these strictures and establish the procedural protections necessary to give the Merger "the earmarks of an arm's length bargain." *Foster*, 74 Nev. at 155. Accordingly, dismissal of AMC was wholly

unwarranted, and the Director Defendants were not entitled to the business judgment presumption.

As the *MFW* Court explained, for a controller buyout to carry the earmarks of an arm's length bargain, the "dual procedural protections" of both an independent and *empowered special committee that meets its duty of care* and a majority-of-the-minority voting requirement is necessary. 88 A.3d at 645. Thus, Defendants' contention that the mere formation of a special committee should—by itself—be sufficient to obtain dismissal is unsound. Indeed, while NRS 78.138(2)(c) allows directors to rely on a special committee, it expressly provides that such reliance is prohibited "*if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted*." As set forth below, given the lack of the "dual protections" necessary to ensure the Committee could truly safeguard the interests of minority shareholders, the Director Defendants' reliance on the Committee was unwarranted.

1. The Committee Was Not Empowered

First, the Committee was not truly independent. Opening Brief 40-48. However, even if it were, *that alone was insufficient*. A properly functioning special committee must also be fully-empowered. *MFW*, 88 A.3d at 650. And a fully-empowered special committee must be able to *both* "say no definitively to" the controller, and, importantly, "*to 'make that decision stick.*'" *Id*.

Here, while Defendants repeatedly contend the Committee had the power to say no, they ignore that AMC prevented the Committee from having the power to make that decision stick. That is because AMC declined to promise that it would not "bypass the special committee's ability to say no." *Id*. at 644. In *MFW*, the controller at the outset "promised that it would not proceed with any going private proposal that did not have the support of the Special Committee," and thus the committee "did not have to fear that if it bargained too hard, [the controller] could bypass the committee and make a tender offer directly to the minority stockholders." *Id*. at 650. Furthermore, in *MFW*, the controller's proposal letter expressly stated that, "[*i]f the special committee does not recommend or the public stockholders of the Company do not approve the proposed transaction, such determination would not adversely affect our future relationship with the Company and we would intend to remain as a long-term stockholder*." *Id*. at 641.

By contrast, when AMC submitted its initial proposal on February 26, 2018, *it had already negotiated with Director Defendant Johnson (RLJ's Chairman and namesake) regarding his right to roll-over his equity into the surviving corporation*. JA-1:18 (¶46). Standing alone, that maneuver already undercut the Committee's ability to "make [no] stick." From the outset, the Committee was already keenly aware that "saying no" would draw the ire of both RLJ's Chairman and namesake (Johnson) *and* its largest stockholder (AMC), whom, by having already negotiated

Johnson's continued ownership, treated the Committee's approval of the Merger as a *fait accompli*. Furthermore, AMC's proposal did not indicate that it would refrain from bypassing the Committee, such as by promising "that it would not proceed with any going private proposal that did not have the support of the Special Committee[,]" and the proposal did not state that AMC's relationship with the Company and its directors would not be "adversely affected if the Special Committee rejected its proposal." *Cf. MFW*, 88 A.3d at 641, 650.

Rather than passively making an offer and "le[aving] the decision to the Special Committee," Def. Br. 39, AMC intervened in the process and *affirmatively prevented* the Committee from doing its job. When the Committee asked the Board for authority to explore alternative transactions, AMC interjected itself into the Board's deliberations (through Hsu, its Board designee) and warned, in writing, that it 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." JA-1:19-22 (¶¶49, 52, 54), 25 (¶62), 42 (¶104). As a result, the Board—which included two AMC appointees and Johnson—denied the Committee the ability to solicit proposals from or negotiate with any entities other than AMC. JA-1:14-15 (¶¶38-39), 18-39 (¶¶45-93). The Committee was therefore foreclosed from properly assessing "whether there were other strategic options…that

might generate more value for minority stockholders than a sale of their stock to [AMC]." *MFW*, 88 A.3d at 651.

2. The Committee Did Not Exercise Due Care

The Committee also failed to exercise due care. Rather than taking steps to negotiate a fair price, the Committee took actions adverse to the minority's interests, which further evinces its lack of real bargaining power. *First*, rather than requiring that Allen & Co. utilize solely RLJ's five-year base case financial forecasts—which Defendants admit were prepared in the *ordinary course of RLJ's business activities* "for internal budget and financial planning purposes" (Def. Br. 33)—the Committee expressed "concerns" about those projections being *too high* and required that RLJ management adjust the Base Case downward.[5] Rather than attempting to obtain a fair price, the Committee actively sought projections that could be used to justify a lower offer. Furthermore, the Committee took no steps to exclude conflicted members of management and AMC's director designees from partaking in the projection preparation and revision process. JA-1:49-50 (¶117); *Cf. MFW*, 88 A.3d at 651 (committee made sure conflicted executives "were excluded from the process

---

[5] Management projections prepared in the ordinary course of business "are generally deemed reliable[,]" while courts have been suspect of "projections that were not prepared in the ordinary course of business and which showed the influence of the transactional dynamics in which they were created." *ACP Master, Ltd. v. Sprint Corp.*, Nos. 8508-VCL, 9042-VCL, 2017 Del. Ch. LEXIS 125, at *80-81 (Del. Ch. July 21, 2017).

of preparing the updated financial projections."). And while Defendants contend that "the determination of which financial projections to rely upon is a clear exercise of business judgment," Def. Br. 33, special committee members are obligated to be more than rubber-stamps approving unreasonable projections created to justify a lower offer. Here, the alleged facts indicate there was no legitimate business reason for the Committee to seek lower projections. Indeed, just a few weeks prior to the time the Committee did so, management made public statements that were irreconcilable with the downward revision and, just two days after the Committee directed management to revise the projections downward, RLJ's then-CFO announced his resignation. *See* JA-1:23-24 (¶¶57-58), 50-51 (¶¶118-19).

Second, rather than making "a very aggressive" "counteroffer as a negotiating position" from which it "was prepared to accept less[,]" *MFW*, 88 A.3d at 652, the Committee countered AMC's absurdly low $4.92 offer with a bare minimum price of $6.00. As a result, minority shareholders ended up with just 4% more than the inadequate rock-bottom price the Committee set. While Defendants tout the fact that the Committee got AMC to increase its initial $4.25 offer, the negotiation was a sham. By analogy, when someone initially offers an absurdly low $1 to the fiduciary charged with negotiating the sale of your personal property that is worth $100, and the fiduciary counters with and obtains a rock bottom price of $50, that isn't a real

negotiation—it is a "facade of arm's-length negotiation" that amounts to "nothing more than a sham." *Gesoff v. IIC Indus.*, 902 A.2d 1130, 1152 (Del. Ch. 2006).

3. Defendants Refused to Require A Majority-Of-The-Minority Provision

Lastly, the Committee and remaining Director Defendants ultimately approved the Merger Agreement even though AMC refused to agree to a "majority-of-the-minority" condition. A buyout by a controlling stockholder subject to the approval of *both* a special committee and a majority of the minority stockholders "differs fundamentally from a merger having only one of those protections, in that" it fails to replicate an arm's length bargain. *MFW*, 88 A.3d at 643. Indeed, absent a majority-of-the-minority requirement established at the outset of negotiations, the minority shareholder vote is not truly voluntary. *Id.*; *Cox*, 879 A.2d at 616 (explaining that "even if the merger was approved by a fully informed majority of the minority vote, the entire fairness standard would still apply because of the implicit coercion that the electorate would feel in voting[,]", *i.e.*, "[t]heir fear that the controller would retaliate against a negative vote").

***

At bottom, AMC and the Director Defendants attempted to *create the illusion* of an arm's length bargain. The Merger approval process was a charade, orchestrated at the behest of AMC and RLJ's conflicted directors, who hoped that the creation of a nominal special committee that lacked the ability "to make [no] stick" would create

the aura of an arm's length bargain that was good enough to evade legal scrutiny. Despite Defendants' argument to the contrary, AMC declined to "relinquish[] its control [] such that the negotiation and approval process replicate[d] those that characterize a third-party merger." *MFW*, 88 A.3d at 639. This Court should not be fooled by the mirage—the Merger does not carry "the earmarks of an arm's length bargain," and "rigorous scrutiny" is necessary to protect minority shareholders. *Foster*, 74 Nev. at 155.

Furthermore, if the Court shares Defendants' purported concern about "uncertainty" in the context of controller buyouts, it should expound on rather than overrule *Foster* by adopting the ground rules set forth in *MFW* and *Cornerstone*. The Nevada courts should not be a rubber-stamp for unfair controller buyouts and a haven for controllers to trample on minority stockholders simply because the defendants in this particular case want an easy exit. The legal framework Defendants advocate for—where the formation of a nominal special committee that lacks real power to protect the minority automatically forecloses judicial scrutiny and requires the dismissal of claims against *both* the directors *and the controller* even in the absence of a majority-of-the-minority voting requirement—is both inequitable and bad for business. A system that allows the true will of both the directors and minority

shareholders to be subverted by aggressive controlling shareholders is not what the Legislature intended.[6]

III. AMC CONCEDES IT IS NOT ENTITLED TO THE PROTECTION OF NRS 78.138, AND PLAINTIFF SUFFICIENTLY PLED THAT AMC BREACHED ITS DUTIES AS A CONTROLLING SHAREHOLDER

"The [MBCA] and Nevada's statutes are designed to facilitate business mergers, while protecting minority shareholders from being unfairly impacted by the majority shareholders' decision to approve a merger." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 10 (2003). Accordingly, it has long been recognized that a minority shareholder may "allege that [a] merger was accomplished through the wrongful conduct of majority shareholders…and attempt to hold [them] liable for monetary damages under theories of breach of fiduciary duty or loyalty." *Id*. at 11.

The district court erroneously concluded that Plaintiff's distinct claim against AMC needed to be dismissed pursuant to the business judgment rule. JA-3:599-600. AMC concedes that was legally unsound, as, by its plain terms, NRS 78.138 provides no protection to controlling shareholders. Def. Br. 38 ("AMC is not seeking the protection of the business judgment rule."). Yet AMC contends that it is also

---

[6] Even if this Court were to overturn *Foster* and not adopt *MFW/Cornerstone*, these facts are sufficient to rebut the business judgment presumption. Opening Brief 34-48. Relatedly, Defendants *misconstrue* the conflict afflicting the Board and Committee as one of entrenchment. However, Plaintiff alleged that Defendants had a "rational fear" of losing a proxy fight because of the damage it would do to their other lucrative employments, not that they were interested in maintaining their positions on the Board. *Id.* at 40-43.

entitled to dismissal because it "is not alleged to have actually done anything that would give rise to liability." Def. Br. 39. While AMC pats itself on the back for purportedly "ensur[ing] a conflict-free negotiation process by delegation its authority to the Special Committee[,]" Def. Br. 41, it attempts to mischaracterize or ignore the allegations in the Complaint, which alleges several facts sufficient to state a claim for breach of fiduciary duty against AMC.

Rather than "relinquish[ing] its control—such that the negotiation and approval process replicate those that characterize a third-party merger[,]" *MFW*, 88 A.3d at 639, AMC engaged in a systematic pattern of conduct that was intended to (and ultimately did) allow it to steal "the rest of the bananas all for" itself at an unfair price. *Cox*, 879 A.2d at 617. Specifically, as alleged in the Complaint:

- AMC initiated the process that resulted in the financially unfair Merger, and made clear that it was intent on orchestrating a charade of a "negotiation" whereby it would submit unreasonably low offers and would refuse to "sell [its] stake in [RLJ], or be part of any other process." JA-1:18 (¶45).

- AMC secured, from the outset—before it even approached the Board—the support of Johnson, thereby undercutting the Committee.

- AMC declined to commit to refrain from bypassing the Committee if its demands were not met or to remain a long-term stockholder if it was rebuffed.

- When the Committee asked the Board for authority to explore alternative transactions, AMC intervened in the Board's deliberations (through Hsu, its Board designee) and warned that it would not support a transaction to sell RLJ to any party, *at any price*, or support any other transaction involving RLJ, and any attempt to do so "would be an exercise in futility,"

and the Board consequently denied the Committee the ability to solicit proposals from or negotiate with any entities other than AMC. JA-1:19-22 (¶¶49, 52, 54), 25 (¶62), 42 (¶104); JA-1:14-15 (¶¶38-39), 18-39 (¶¶45-93).

Finally, AMC refused to agree to a majority-of-the-minority voting condition, which rendered the shareholder vote coercive rather than truly voluntary. *Supra* §II.B.3. AMC was aware of the importance of such a condition, as the Committee and its advisors repeatedly requested such a provision. JA-1:29-30 (¶74), 32 (¶81). Nonetheless, AMC refused to agree, obviously concerned that minority shareholders would recognize the inadequacy of the Merger Consideration. Then, just before the vote, AMC exercised enough warrants to allow it to *unilaterally approve* the Merger regardless of the minority. JA-1:2-3 (¶2 & n.1), 8-9 (¶20). "The [unfair] structure of the transaction"—including the refusal to include a majority-of-the-minority provision—"was [AMC's] doing." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). And "[s]o far as negotiations were concerned, it is clear that they were modest at best." *Id*. "Modest" is an overstatement given the absurdly low $4.25 offer AMC made to start the so-called "negotiations" and the Committee's "counter" with a rock-bottom price.

AMC also contends that because "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 judiciary review standpoint[.]" Def. Br. 38-39. AMC cites no authority in support of this assertion, which is baseless. As much as it would like to,

AMC cannot simply ignore the fact that *this Court* and others across the country have long recognized that controlling shareholders owe fiduciary duties to minority shareholders, and that Plaintiff *pled a distinct claim against it* for breaching those duties.

AMC also suggests that Plaintiff's claim fails because in *Cohen* this Court "merely observed" that controlling stockholders owe duties to minority shareholders, but did not "elaborate on the scope of those duties under Nevada law[.]" Def. Br. 41. In other words, AMC invokes the "I didn't know I couldn't do that" defense, contending that the lack of case law in this state defining the *precise contours* of a controller's duties gives it a get out of jail free card. But AMC does not identify any legal doctrine that would allow a defendant in a civil action to obtain dismissal because the law was not developed enough for it to be held liable. And, even if such a doctrine existed, this case would be a poor one in which to apply it. Indeed, AMC did not have to blindly guess at the steps it should and should not have taken to avoid liability—there is a large body of precedent establishing a controller's obligations in a buyout. *Supra* §§I-II. And it is well-established that a controller breaches its fiduciary duties by orchestrating an unfair "merger at the expense of the minority shareholders." *Cohen*, 119 Nev. at 12; 18A AM. JUR. 2D *Corporations* § 658.

Lastly, AMC contends that this Court should just abandon the principle that controllers owe duties to the minority, because the Legislature has purportedly evinced a "reluctance" "to import Delaware legal principles." Def. Br. 41. As an initial matter, the principle that a controlling shareholder is a fiduciary to the minority is not a "Delaware legal principle"—it has been a bedrock tenet of corporate law for a century. *Supra* §I. And AMC points to nothing indicating that the Legislature wished to abandon that tenet. To the contrary, in drafting NRS 78.138, the Legislature provided protections *solely to directors and officers*. Additionally, while the Legislature has amended the corporations code multiple times over the past three decades (including after *Cohen*), it has declined to enact a statute that abrogates the common law duties of controlling stockholders. *See* 12B *Fletcher Cyc. Corp.* §5811 ("A state, however, may enact legislation providing that a shareholder has no fiduciary duty to any other shareholder[.]") (citing Utah Code Ann. § 16-10a-622, which, unlike any Nevada statute, expressly eliminates controller's duties)).

Furthermore, AMC overstates its case regarding whether this Court may be guided by Delaware—the state with the most developed body of controller jurisprudence—on this issue. As explained in Plaintiff's Opening Brief, the Legislature indicated it was rejecting the specific standards promulgated in *Unocal* and *Revlon—not that it was completely rejecting every single aspect of Delaware*

corporate law and forbidding this Court from looking to it. Indeed, the Legislature was plainly knowledgeable about Delaware law, as it picked out specific cases it "rejected." Yet there is no indication in either the legislative history or the text of NRS 78.138 that the Legislature also wished to "reject" the Delaware doctrines governing controlling stockholders, which emanate from *Weinberger* (a case this Court cited to favorably in *Cohen*) and its progeny, or that it intended to "reject" *this Court's own* inherent fairness jurisprudence.

Simply put, AMC fails to offer any compelling reason why this Court should abandon a widely recognized principle of corporate law that has existed for a century, especially when the Legislature evinced no intent to do so. By its plain terms, NRS 78.138 is concerned solely with the liability of directors and officers, not controlling stockholders. This Court should decline to upend a bedrock principle of corporate law simply to give the controlling stockholder in this case an exit route the Legislature did not provide.

IV. THE COURT SHOULD REVERSE AND REMAND

Plaintiff's argument can be summarized as follows:

1. Pursuant to the long-standing rule this Court recognized in *Foster*, the business judgment presumption is rebutted in the context of a controlling shareholder buyout, such that the dismissal of all Defendants was unwarranted. *Supra* §I.

2. Even if this Court were to expound on *Foster* and adopt *MFW/Cornerstone*, Defendants failed to take the steps necessary to

simulate an arm's length transaction, such that the dismissal of all Defendants was again unwarranted. *Supra* §II.

3. Even if this Court were to overturn *Foster* and decline to adopt *MFW/Cornerstone*, the facts alleged were sufficient to rebut the business judgment presumption, such that dismissal of the Director Defendants was unwarranted. *Supra* n.6; Opening Brief 34-48.

4. And, even if this Court were to overturn *Foster*, not adopt *MFW/Cornerstone*, and find that the facts alleged in the Complaint are insufficient to rebut the business judgment presumption afforded to *directors and officers* codified in NRS 78.138(3), that protection is facially inapplicable to AMC, such that dismissal of Plaintiff's claim against AMC for breaching its duties *as a controller* was unwarranted.

For these reasons, the district court's order and judgment should be reversed. With respect to Plaintiff's claim against AMC, the district court should be instructed that NRS 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.

With respect to Plaintiff's claim against the Director Defendants, the district court should be instructed that the Complaint's allegations are sufficient to rebut the business judgment presumption, and to conduct the second part of the applicable analysis under NRS 78.138(7)(b)(2) – *i.e.*, whether the Complaint sufficiently pleads the alleged breaches involved "intentional misconduct, fraud or a knowing violation of law." In their brief, Defendants ask this Court to make this determination now, in the first instance on appeal. But the district court's dismissal was based solely upon the business judgment rule, not NRS 78.138(7)(b)(2) (JA-3:599-600), and "appellant

is not required to anticipate and rebut in his opening brief every possible ground for affirmance that the defendant might (or might not) raise…It is enough if the appellant contests the grounds on which the district court actually decided the case against him." *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 359 (7th Cir. 1987) (Posner, C.J., concurring). "Where an argument has been briefed only cursorily before this Court and [was] not ruled on by the district court, it is normally inappropriate for [the appellate court] to evaluate the argument in the first instance." *Shirk v. United States*, 773 F.3d 999, 1007 (9th Cir. 2014).

Accordingly, the Court should remand and allow the district court to address whether the Complaint sufficiently pleads that the Director Defendants' breaches "involved intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(2). *See Chur v. Eighth Judicial Dist. Court of Nev.*, 458 P.3d 336, 341 n.4 (Nev. 2020) (making "no decision" concerning the first prong of the statute because the petition concerned the second prong).[7]

Nevertheless, should this Court elect to address NRS 78.138(7)(b)(2), Plaintiff sufficiently pled that the Director Defendants' breaches "involved

[7] Remanding would also allow Plaintiff to seek leave to amend if necessary. Plaintiff previously declined because amendment would have been futile since the district court believed the inherent fairness doctrine did not apply and that the only relevant question was the Committee's conduct. JA-3:604. However, if this Court agrees with Plaintiff regarding the inherent fairness doctrine but finds the Complaint insufficient under NRS 78.138(7)(b)(2), allowing Plaintiff the opportunity to seek leave to amend would be appropriate. *See Chur*, 458 P.3d at 342.

intentional misconduct…or a knowing violation of law." Specifically, the Complaint adequately alleged that the Director Defendants knowingly allowed AMC to orchestrate a Merger that was unfair and coercive to minority shareholders. In support, Plaintiff pleaded that:

- Hsu, AMC's designee on the Board, actively worked against the Committee and, through his written threats, caused the Board to reject the Committee's request to pursue alternative transactions. JA-1:6 (¶12), 20-22 (¶¶52, 54-55), 27-28 (¶¶68-70), 29 (¶¶72-73), 42-43 (¶105).

- Johnson likewise positioned himself on AMC's side and against the minority by negotiating his investment and employment in the post-close company *before AMC even approached the Board*. JA-1:3-4 (¶5), 31-32 (¶80), 43 (¶106).

- Director Defendants Judd and Zeigelman negotiated on behalf of, and ultimately secured unique benefits for, the Preferred Stockholders, not the common stockholders to whom they owed fiduciary duties, and the Committee engaged in such negotiations and raised Judd's concerns to AMC through Hsu, despite the fact that it knew their interests were divergent from the common stockholders' interests and that it was supposed to be negotiating solely for the non-affiliated stockholders. JA-1:26 (¶64), 31-35 (¶¶79, 82-90), 44-45 (¶¶108-09).

- The Committee (through its legal advisor) likewise negotiated post-close governance matters with AMC, even though common stockholders were precluded from rolling over their stock into the post-close combined company. JA-1:33 (¶85).

- The Director Defendants disclosed to AMC 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).

- 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 engaged in sham negotiations and 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, it did so despite management's contemporaneous public statements that were irreconcilable with the downward revision. *See* JA-1:23 (¶57).

- Finally, when the Committee told the Board that it had determined it would be in shareholders' best interests to perform a market check and asked for that authority, the entire Board knowingly breached its fiduciary duties by denying the Committee that authority in response to AMC's threats, after which the Committee re-determined that it would no longer "be productive to conduct a market check of the Company." JA-1:19-22 (¶¶49, 52-54), 25 (¶62), 42 (¶104).

These allegations are more than sufficient, at the pleadings stage, to allege intentional misconduct or a knowing breach of fiduciary duty.

CONCLUSION

In sum, the Court should reject Defendants' request to overrule the inherent fairness doctrine recognized in *Foster*, and should hold that the alleged facts were sufficient to rebut the business judgment presumption codified in NRS 78.138(3), and that any of the Director Defendants not entitled to dismissal under NRS 78.138(7)(b)(2)—along with AMC—bear the burden of proving the Merger was entirely fair to RLJ's minority shareholders.

//

//

Dated: May 29, 2020

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

/s/ G. Mark Albright

G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
JORGE L. ALVAREZ, ESQ.
Nevada Bar No. 014466
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
jalvarez@albrightstoddard.com

Of Counsel:

KAHN SWICK & FOTI, LLC
Michael Palestina (PHV)
1100 Poydras Street, Suite 3200
New Orleans, LA 70163
Tel.: 504-455-1400
Michael.Palestina@ksfcounsel.com

MONTEVERDE & ASSOCIATES PC
Juan Monteverde (PHV)
350 Fifth Avenue, Suite 4405
New York, NY 10118
Tel.: 212-971-1341
jmonteverde@monteverdelaw.com

Attorneys for Appellant

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 2016 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)(A)(ii) 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 6,992 words.

3. Finally, I hereby certify that I have read this reply 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 reply 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: May 29, 2020

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

/s/ G. Mark Albright

G. MARK ALBRIGHT, ESQ.
Nevada Bar No. 001394
JORGE L. ALVAREZ, ESQ.
Nevada Bar No. 014466
801 S. Rancho Drive, Suite D-4
Las Vegas, Nevada 89106
Tel: (702) 384-7111
Fax: (702) 384-0605
gma@albrightstoddard.com
jalvarez@albrightstoddard.com

Of Counsel:

KAHN SWICK & FOTI, LLC
Michael Palestina (PHV)
1100 Poydras Street, Suite 3200
New Orleans, LA 70163
Tel.: 504-455-1400
Michael.Palestina@ksfcounsel.com

MONTEVERDE & ASSOCIATES PC
Juan Monteverde (PHV)
350 Fifth Avenue, Suite 4405
New York, NY 10118
Tel.: 212-971-1341
jmonteverde@monteverdelaw.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT and that on the 29th day of May, 2020, I served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** upon counsel of record by electronically serving the document using the Court's electronic filing system.

/s/ Cheritta Grey
An employee of Albright, Stoddard, Warnick & Albright