IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

In Re: Newport Corporation Shareholder's Litigation;

Hubert Pincon, et al.
Appellants

v.

Robert J. Phillippy, et al.
Respondents

No. 80636

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See* KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department XXVII

County Clark Judge Hon. Nancy L. Allf

District Ct. Case No. A-16-733154-B

2. Attorney filing this docketing statement:

Attorney David C. O'Mara, Esq. Telephone 775.323.1321

Firm The O'Mara Law Firm, P.C.

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David T. Wissbroecker David A. Knotts Christopher H Lyons Robbins Geller Rudman&Dowd LLP; 655 W Broadway Ste 1900 San Diego, CA 92101; 6192311058

Client(s) Hubert C. Pincon, Locals 302 and 612 of the International Union of Operating

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

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Address 100 North City Parkway, Ste 1600, Las Vegas, Nevada 89106

Client(s) Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia

Attorney Meryl L. Young, Colin B. Davis Telephone 949.451.3800

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Client(s) Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☒ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of injunction
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other (specify): _____
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.*, bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None

8. Nature of the action. Briefly describe the nature of the action and the result below:

This is a certified stockholder class action brought by Class Representative Plaintiffs on behalf of the holders of Newport Corporation common stock, alleging breaches of fiduciary duty against Newport's Board of Directors in connection with the all-cash acquisition of Newport by MKS Instruments, Inc. at $23.00 per share, announced on February 23, 2016. On January 21, 2020, Defendants' Motion for Summary Judgment was granted and judgment was entered in favor of Defendants and against Plaintiffs on all of Plaintiffs' claims against Defendants. Prior to that ruling, the District Court also denied Plaintiffs' Motion for Leave to Amend the Second Amended Complaint and struck Plaintiffs' Jury Demand over Plaintiffs' opposition.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

The Principal Issues in this appeal are:

1. Whether a triable issue of fact exists regarding the well-supported claims for breach of fiduciary duty against Newport's board of directors for their self-dealing in connection with the acquisition of Newport by MKS Instruments, Inc.;

2. Whether Plaintiffs should have been granted leave to amend the Second Amended Complaint, which was timely filed consistent with the Court's deadline for filing amended pleadings under the case scheduling order; and

3. Whether Nevada's historical analysis test dictates that breach of fiduciary duty claims involve the right to trial by jury, given that the claims seek money damages on a tort-based cause of action.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter is presumptively retained by the Supreme Court under NRAP 17(a)(9)

14. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
No

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from January 23, 2020

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served January 23, 2020

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing N/A

☐ NRCP 52(b) Date of filing N/A

☐ NRCP 59 Date of filing N/A

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion N/A

(c) Date written notice of entry of order resolving tolling motion was served N/A

Was service by:

☐ Delivery

☐ Mail

19. Date notice of appeal filed February 18, 2020

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal: N/A

20. Specify statute or rule governing the time limit for filing the notice of appeal, *e.g.*, NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)	☐ NRS 38.205
☐ NRAP 3A(b)(2)	☐ NRS 233B.150
☐ NRAP 3A(b)(3)	☐ NRS 703.376
☐ Other (specify)	

(b) Explain how each authority provides a basis for appeal from the judgment or order:
NRAP 3A(b)(1) allows for an appeal to be taken from a final judgment entered in an action or proceeding commenced in the Court in which the judgment is rendered. On January 21, 2020, Defendants' Motion for Summary Judgment was granted and judgment was entered in favor of Defendants and against Plaintiffs on all of Plaintiffs' claims against Defendants.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Appellants: Hubert C. Pincon and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust.

Respondents: Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

The District Court Dismissed Appellants' claims for breach of fiduciary duty against all Defendants on January 23, 2020.

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

N/A

(b) Specify the parties remaining below:
N/A

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):
N/A

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Hubert Pincon, et al	David C. O'Mara
Name of appellant	Name of counsel of record
March 20, 2020	/s/ David C. O'Mara
Date	Signature of counsel of record
Washoe County, Nevada	
State and county where signed	

CERTIFICATE OF SERVICE

I certify that on the 19th day of March , 2020 , I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

See Attached

Dated this 19th day of March , 2020

/s/ Bryan Snyder
Signature

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The O'Mara Law Firm, P.C., 311 E. Liberty Street, Reno, Nevada 89501, and on this date I served a true and correct copy of the foregoing document on all parties to this action electronically, through the Court's Electronic Filing System.

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DATED: March 19, 2020

/s/ Bryan Snyder
BRYAN SNYDER

INDEX OF EXHIBITS

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[1] Filed, under seal, on July 28, 2017

[2] The Third Amended Complaint was filed, under seal, as Exhibit A to the Appendix of Exhibits for Motion for Leave to Amend the Second Amended Complaint on August 12, 2019.

EXHIBIT 1

CONFIDENTIAL

FILED UNDER SEAL

EXHIBIT 1

EXHIBIT 2

CONFIDENTIAL

FILED UNDER SEAL

EXHIBIT 2

EXHIBIT 3

EXHIBIT 3

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DISTRICT COURT
CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION	CASE NO.: A-16-733154-B (Consolidated with Case No. A-16-734039-B) CLASS ACTION
This Document Relates To: ALL ACTIONS.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

On November 21, 2019, the parties appeared for a hearing on Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone's (collectively, "Defendants") Motion for Summary Judgment. Plaintiffs and class representatives Hubert C. Pincon and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust appeared by and through their counsel of record, David A. Knotts, Esq. and Andrew Mundt, Esq., of Robbins Geller Rudman &

Dowd LLP, and David O'Mara, Esq., of The O'Mara Law Firm, P.C. Defendants appeared by and through their counsel of record, Brian M. Lutz, Esq., Meryl L. Young, Esq., and Colin B. Davis, Esq., of Gibson, Dunn & Crutcher LLP, and Maximilien D. Fetaz, Esq., of Brownstein Hyatt Farber Schreck LLP. The Court, having considered the briefing and evidence filed by the parties, the relevant legal authorities, and the oral arguments of counsel, makes the following findings of fact and conclusions of law in GRANTING Defendants' Motion for Summary Judgment.

Any Finding of Fact more appropriately designated as a Conclusion of Law shall be so deemed and any Conclusion of Law more appropriately designated as a Finding of Fact similarly shall be so deemed.

FINDINGS OF FACT

A. Background of the Merger

1. This matter concerns the all-cash acquisition of Newport Corporation ("Newport" or the "Company") by MKS Instruments, Inc. ("MKS") for $23.00 per share (the "Merger"), which was signed on February 22, 2016, and closed on April 29, 2016.

2. Before the Merger, Newport was a publicly traded supplier of advanced laser and photonics technology products and systems. Mr. Phillippy was Newport's CEO, Mr. Potashner was the independent Chairman of Newport's Board of Directors (the "Board"), and Messrs. Cox, Kadia, Khaykin, and Simone were the other independent, non-employee members of Newport's Board.

3. Beginning in June 2015, Newport engaged in discussions with nine parties as part of a Board-led strategic review process. The potential transactions Newport considered took many forms, including potential merger-of-equals transactions, a potential stock-and-cash transaction, and potential all-cash acquisitions, including by MKS.

4. In connection with the strategic review process, the Board retained independent, qualified financial and legal advisors (J.P. Morgan and Gibson, Dunn & Crutcher LLP). During the roughly nine-month sale process, the Board met sixteen times and received detailed financial analysis presentations from J.P. Morgan on at least nine occasions. The Board, through its

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representatives, negotiated with five potential transaction partners, including MKS. The Board received regular updates about the status of the negotiations, both at formal meetings and informally, and considered the merits and risks of each potential alternative, including remaining independent.

5. In late-November 2015, Newport received an unsolicited inquiry from MKS. The two companies promptly entered into a confidentiality agreement and commenced due diligence without exclusivity. On December 23, 2015, MKS proposed to acquire Newport for $20.50 per share in cash. After further negotiation, on January 15, 2016, MKS made a revised proposal to acquire Newport for $23.00 per share in cash, representing a 65% premium over Newport's then-current stock price.

6. MKS continued with due diligence, including extensive meetings with Newport management. On February 10, 2016, MKS sent Newport a letter reaffirming MKS's proposal of $23.00 per share and requesting exclusivity through February 25, 2016. In view of the advanced stage of the negotiations, another interested party's withdrawal from the sale process, and the fact that any possible combination with the only other remaining interested party would not result in a premium for Newport stockholders and was uncertain to proceed, the Board agreed to grant MKS twelve days of exclusivity.

7. At a February 22, 2016 Board meeting, J.P. Morgan delivered its opinion that the proposed consideration from MKS was fair to Newport stockholders. The Board unanimously approved the Merger Agreement and recommended that Newport stockholders vote in favor of the Merger. The parties signed the Merger Agreement the same day.

8. The Merger was announced on February 23, 2016. Newport's stockholders received $23.00 per share in cash, a 53% premium over Newport's closing stock price the day before the announcement, and a 13-year high price for Newport's shares. At an April 27, 2016 stockholder meeting, 99.4% of Newport's voting stockholders voted to approve the Merger. The Merger closed on April 29, 2016.

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B. Newport's Financial Forecasts and Strategic Planning Process

9. In connection with the strategic review process, Newport management prepared two sets of five-year financial forecasts to evaluate potential transactions—the "base case forecasts" and the "acquisition forecasts." The base case forecasts projected potential revenues if Newport grew organically (i.e., without acquisitions). The base case forecasted a compound annual revenue growth rate of 3% and assumed that Newport would increase its profit margins.

10. The alternative case that Newport modeled, the acquisition forecasts, assumed additional revenue to reach a compound annual revenue growth rate of 10%. The acquisition forecasts hypothesized that Newport would acquire one or more unidentified companies with $50 million of revenue each year ($250 million over five years), at a $75 million purchase price each year.

11. Newport disclosed to its stockholders each of these sets of forecasts in connection with their consideration of the Merger. Newport advised stockholders that "the inclusion of Forecasts in this proxy statement should not be regarded as an indication that [Newport], [MKS], Merger Sub or their respective affiliates or representatives considered or consider the Forecasts to be a prediction of actual future events, and the Forecasts should not be relied upon as such." Newport also disclosed in the Proxy that "the Acquisition Forecasts were prepared to provide the Company with a potential alternative standalone perspective to the Base Case Forecasts reflecting a hypothetical scenario in which the Company was projected to complete significant acquisitions each year." "Because the Acquisition Forecasts assumed the completion of highly uncertain acquisitions of unidentified and unknown parties by the Company, as well as other additional risks and uncertainties," the Newport Board primarily relied on the base case forecasts in evaluating the Merger. For the same reason, J.P. Morgan used the base case forecasts in its fairness opinion.

12. Newport's routine, annual strategic planning process commenced around the same time as the discussions with MKS. In late 2015, Newport's three business unit leaders delivered their initial strategic plan presentations to Newport management. The presentations from the business units contained hundreds of pages detailing proposed operational strategies and a

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handful of pages reflecting the business units' proposed financial projections for the next three years (i.e., 2016 through 2018). Because of the Merger, the 2016 to 2018 strategic plan never was presented to or approved by the Newport Board, as it would have been in the ordinary course.

13. During due diligence, MKS requested an update regarding Newport's strategic planning process. Newport responded that "our Strategic Plan update is still in process—we have reviewed the strategy presentations by each of our business groups, but have not yet synthesized or prioritized them into the strategic plan for Newport as a whole." Newport nonetheless provided the work-in-process strategic plan to MKS because MKS was well along in its due diligence process, and Newport wanted to be responsive to requests from an interested potential acquirer.

14. Although the 2016 to 2018 strategic plan never was finalized, Newport's business units and finance team used the 2016 forecasts in the strategic plan presentations to complete multiple iterations of Newport's 2016 annual operating plan. At a December 28, 2015 Board meeting, the Newport Board received an update on the status of Newport's 2016 annual operating plan. Newport updated the base case forecasts disclosed in the Proxy to incorporate the 2016 numbers contained in the annual operating plan, and J.P. Morgan relied on the updated base case forecasts in its fairness opinion.

C. Defendants' Post-Closing Roles and Related Discussions

15. Following the Merger, Mr. Phillippy lost his job as Newport's CEO. Unlike many other Newport employees, Mr. Phillippy was not retained as an MKS employee following the Merger.

16. MKS briefly retained Mr. Phillippy as a consultant to assist in the transition and appointed him to the MKS board of directors. The compensation Mr. Phillippy temporarily received as an MKS consultant and director was substantially lower than the compensation he would have received if he had remained as Newport's CEO.

17. Mr. Phillippy did not discuss his post-closing consultancy or MKS directorship with MKS before the Newport Board approved the Merger, and he was not offered either position

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until after the Newport Board approved the Merger. This was confirmed by the unrebutted testimony of MKS's corporate representative, John Ippolito:

> Q. Were there any discussions between Mr. Phillippy and MKS regarding his future role following the closing of the transaction prior to the merger agreement being signed?
>
> A. ***No.***

18. Following the Merger, the Newport Board ceased to exist. Newport's five independent directors were not retained by MKS in any capacity.

19. On February 24, 2016, after the Merger Agreement was signed and the Merger was publicly announced, Mr. Potashner sent an email to the chairman of a potential merger-of-equals partner of Newport that Newport had discussions with during the strategic review process and proposed to discuss "whether an opportunity exist[ed] for [board of directors] involvement" for Mr. Potashner at the subject company. The individual Mr. Potashner contacted responded that he had "a strong preference for a small board" and thought that the company's board of directors was "just the right size." Mr. Potashner never was appointed to that company's board of directors.

20. On February 27, 2016, Mr. Potashner sent an email to MKS's CEO suggesting that MKS consider two Newport Board members—Mr. Potashner and Mr. Simone—as candidates for MKS's board of directors. Neither Mr. Potashner nor Mr. Simone ever was appointed to the MKS board of directors.

CONCLUSIONS OF LAW

A. Legal Standard for Summary Judgment

1. Rule 56 safeguards the rights of litigants to obtain a timely and efficient resolution where there is no evidentiary basis for a claim. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (adopting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Summary judgment "shall" be granted where there is no "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). Although the moving party bears the initial burden to show the absence of such issues, that burden is satisfied by showing the lack of evidence to support a claim. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598,

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603, 172 P.3d 131, 134 (2007). The opponent then must set forth sufficient admissible evidence to permit a reasonable trier of fact to return a verdict in its favor. *Id.*

2. Moreover, if the nonmoving party will bear the burden of persuasion at trial, the "moving party may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out … that there is an absence of evidence to support the nonmoving party's case." *Francis v. Wynn Las Vegas*, 127 Nev. 657, 671, 262 P.3d 705, 714 (2011) (quoting *Cuzze*, 123 Nev. at 602–03, 172 P.3d at 134 (citation omitted)) (internal quotation marks omitted). "In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.* at 671, 262 P.3d at 714–15 (quoting *Cuzze*, 123 Nev. at 603, 172 P.3d at 134) (internal quotation marks omitted).

B. Plaintiffs Cannot Overcome Nevada's Business Judgment Rule

3. Under Nevada's business judgment rule, Newport's directors and officers, "in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). The business judgment rule "ensures that courts defer to the business judgment of corporate executives" and "precludes courts from reviewing the substantive reasonableness of a board's business decision." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. 369, 376–78, 399 P.3d 334, 343–44 (2017).

4. "The business judgment rule does not only protect individual directors from personal liability; rather, it expresses a sensible policy of judicial noninterference with business decisions and is designed to limit judicial involvement in business decision-making so long as a minimum level of care is exercised in arriving at the decision." *Id.*, 133 Nev. at 376, 399 P.3d at 342 (quoting 18B Am. Jur. 2d Corporations § 1451 (2016)) (internal quotation marks omitted). "Specifically, it prevents a court from replac[ing] a well-meaning decision by a corporate board with its own decision." *Id.* (citation and internal quotation marks omitted); *see also Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 87 Cal. Rptr. 2d 237, 980 P.2d 940, 945 (1999) ("A hallmark of the business judgment rule is that, when the rule's requirements

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are met, a court will not substitute its judgment for that of the corporation's board of directors."). "[E]ven a bad decision is generally protected by the business judgment rule's presumption that the directors acted in good faith, with knowledge of the pertinent information, and with an honest belief that the action would serve the corporation's interests." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006).

5. In an action for damages such as this, the Court first must determine whether the business judgment rule presumption has been rebutted. NRS 78.138(7); *see also Wynn Resorts*, 133 Nev. at 375, 399 P.3d at 341–42. In order to rebut Nevada's business judgment rule at the summary judgment stage, Plaintiffs must provide prima facie evidence that the Board's decision to approve the Merger was either (1) the product of fraud, (2) the product of self-interest, or (3) that the Board failed to exercise due care in reaching its decision. *Id.*, 133 Nev. at 377, 399 P.3d at 343; *see also La. Mun. Police Emps.' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1062 (9th Cir. 2016) (interpreting NRS 78.138); Nev. Jury Instruction 15.14 (explaining showing required to rebut presumption).

6. Despite Plaintiffs' claims of self-interest, there is no direct, material evidence against any of the Newport directors to rebut Nevada's business judgment rule.

1. The Newport Board Exercised Due Care

7. To determine whether the Board exercised due care, the Court only may consider "'the procedural indicia of whether the directors resorted in good faith to an informed decisionmaking process.'" *Wynn Resorts*, 133 Nev. at 377–78, 399 P.3d at 343 (quoting *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994), *aff'd* 65 F.3d 1172 (4th Cir. 1995)). These include "'the identity and qualifications of any sources of information or advice sought which bear on the decision reached, the circumstances surrounding selection of these sources, the general topics (but not the substance) of the information sought or imparted, whether advice was actually given, whether it was followed, and if not, what sources of information and advice *were* consulted to reach the decision in issue.'" *Id.*; *see also Shoen*, 121 Nev. at 632, 137 P.3d at 1178 ("[T]he duty of care consists of an obligation to act on an informed basis ....").

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8. There is no material evidence that any of the directors failed to exercise due care. The Merger came about following a nine-month sale process and with sixteen board meetings, whether full Board or committee meetings, which included financial and legal advisors to approve the sale. As such, the evidence supports that at least a minimum level of care was exercised in arriving at the Merger decision.

2. The Merger Was Not the Product of Self-Interest or Fraud

9. In *Wynn Resorts*, the Nevada Supreme Court held that "the business judgment rule applies to the Board" as a whole. 133 Nev. at 376, 399 P.3d at 342; *see also Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) ("[T]he business judgment rule presumption … can be rebutted by alleging facts which … establish that the *board* was either interested in the outcome of the transaction or lacked independence …."). Where, as here, board action is challenged, the decision in question cannot be "the product of" fraud or self-interest or a failure to exercise due care unless the purported self-interest or fraud affects the decision-making process of the board as a whole.

10. "To rebut the business judgment rule based solely on the material conflicts of a minority of the directors of a multi-director board, a plaintiff must allege that those conflicts affected the majority of the board." *In re Towers Watson & Co. Stockholders Litig.*, 2019 WL 3334521, at *8 (Del. Ch. July 25, 2019). "A plaintiff can show this in one of two ways: by demonstrating that the conflicted director either 'controls or dominates the board as a whole' or 'fail[ed] to disclose his interest in the transaction to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction.'" *Id.* (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995)).

11. The Merger was not the product of self-interest or fraud. There is no evidence that Newport's five independent directors—a majority of Newport's six-member Board—had any financial interest in the Merger other than as stockholders of Newport. Although Mr. Potashner requested that MKS and another potential merger-of-equals partner of Newport consider Mr. Potashner and Mr. Simone for board of directors positions, those requests occurred after the

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signing of the Merger Agreement and were denied. Any post-close employment discussions after the signing of the Merger Agreement are not relevant in the Court's analysis. *See English v. Narang*, 2019 WL 1300855, at *12 (Del. Ch. Mar. 20, 2019) ("[T]o be material, post-close employment discussions must have occurred before the Merger Agreement was signed.").

12. There also is no evidence that Mr. Phillippy controlled or dominated the Newport Board. To the contrary, the evidence shows that Newport's Board members independently exercised their business judgment to evaluate the merits of the Merger.

13. Nor is there any evidence that Mr. Phillippy failed to disclose a material interest in the Merger to the Newport Board. Mr. Phillippy's temporary post-closing consulting arrangement with MKS to assist in the transition and his appointment to the MKS board of directors did not render him interested in the Merger.[1] The undisputed evidence establishes that Mr. Phillippy did not discuss and was not offered either of these positions until after the Board approved the Merger. Again, any post-close employment discussions after the signing of the Merger Agreement are not relevant in the Court's analysis. *See id.* This is because the issue that could create a conflict of interest is whether a fiduciary of Newport had a motive to play favorites during the sale process in order to secure post close employment. By contrast, discussions that occur after the terms of the transaction are agreed to—like those that occurred here—do not pose the same risk of favoritism.

14. Plaintiffs' claim that Mr. Phillippy had an improper "interest" in the Merger also fails because there is no evidence that any supposed benefits he received were material to him. "Materiality means that the alleged benefit was significant enough 'in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the … shareholders without being influenced by her overriding personal interest.'" *Orman*, 794 A.2d at 23 (quoting *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d

[1] Plaintiffs also suggest that the change-in-control compensation Mr. Phillippy received under his preexisting severance agreement rendered him interested in the Merger. But these benefits were agreed to in 2008—years before the sale process that led to the Merger commenced—and Mr. Phillippy would have received them in connection with any change-in-control transaction that resulted in his termination.

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611, 617 (Del. Ch. 1999)); *see also Shoen*, 122 Nev. at 639, 137 P.3d at 1183 ("[T]o show interestedness, a shareholder must allege that a majority of the board members would be '*materially affected*, either to [their] benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders.'") (emphasis added) (citation omitted). Here, there is no evidence of Mr. Phillippy's individual "financial circumstances" that would permit a determination that any benefits he received were material to him, let alone that they somehow were more favorable than keeping his job as Newport's CEO. To the contrary, the compensation Mr. Phillippy temporarily received as an MKS consultant and director was substantially less than the compensation he would have received if he had remained as Newport's CEO.

15. There also is no material evidence that Mr. Phillippy's employment as Newport's CEO ever was at risk. Newport's CFO, who Mr. Phillippy had professional disagreements with, could not fire Mr. Phillippy because he was Mr. Phillippy's subordinate. And although an activist investor sent emails suggesting that the Company "needs a new CEO or needs to be sold," there is no material evidence that the Board ever considered firing Mr. Phillippy.

16. Nor is there any material evidence that Mr. Phillippy or Mr. Potashner intended to deceive the Board, or that the Merger was the product of fraud. Plaintiffs claim that Mr. Phillippy defrauded the Newport Board and stockholders by not disclosing the numbers that were generated by Newport's business units in connection with the Company's late-2015 strategic planning process (other than updating the base case forecasts to incorporate the 2016 annual operating plan). But there is no evidence that Mr. Phillippy believed that the strategic plan numbers were complete or reliable and nonetheless intentionally withheld them from the Newport Board and stockholders. And there is no evidence that Mr. Phillippy had a self-interested motive to conceal the strategic plan numbers from anyone.

ORDER

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' Motion for Summary Judgment be, and the same is, hereby GRANTED;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of Defendants and against Plaintiffs on all of Plaintiffs' claims against Defendants.

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IT IS SO ORDERED.

DATED: Jan. 21, 2020

Nancy L. Allf

HON. NANCY L. ALLF
DISTRICT COURT JUDGE

Submitted by:

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EXHIBIT 4

EXHIBIT 4

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DISTRICT COURT
CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION	CASE NO.: A-16-733154-B
	(Consolidated with Case No. A-16-734039-B)
This Document Relates To:	CLASS ACTION
ALL ACTIONS.	

ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE SECOND AMENDED COMPLAINT

This matter concerns the all-cash acquisition of Newport Corporation ("Newport") by MKS Instruments, Inc. for $23.00 per share (the "Merger"). On August 9, 2019 Plaintiffs and class representatives Hubert C. Pincon and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust filed a Motion for Leave to Amend the Second Amended Complaint (the "Motion"). On October 10, 2019, the Court heard argument on Plaintiffs' Motion. Plaintiffs appeared by and through their counsel of record, David A. Knotts, Esq., of Robbins Geller Rudman & Dowd LLP, and David O'Mara, Esq., of The O'Mara Law Firm, P.C. Defendants appeared by and through their counsel of record, Brian M. Lutz, Esq. and Colin B. Davis, Esq., of Gibson, Dunn & Crutcher LLP, and Maximilien D .Fetaz, Esq., of Brownstein Hyatt Farber Schreck LLP. The Court, having reviewed the papers filed by the parties, and considered the written and oral arguments of counsel, finds and orders as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. All pleading amendments other than those permitted "as a matter of course" under Rule 15(a)(1) of the Nevada Rules of Civil Procedure must meet the requirements of Rule 15(a)(2), which provides that, "a party may amend its pleading only with the opposing party's written consent or the court's leave."

2. Although the Court "should freely give leave [to amend] when justice so requires," NRCP 15(a)(2), the Court may deny leave to amend on grounds of "'undue delay, bad faith, or dilatory motives on the part of the movant.'" *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 239, 416 P.3d 249, 254-55 (2018) (quoting *Kantor v. Cantor*, 116 Nev. 886, 891-93, 8 P.3d 825, 828-29 (2000)).

3. This litigation commenced on March 9, 2016, when a putative shareholder of Newport filed the initial complaint in this action.

4. This case has been extensively litigated for more than three-and-a-half years. The parties have briefed and argued a motion for expedited discovery, two motions to dismiss, a motion for class certification, a motion to compel, and a motion to amend the order setting civil jury trial, pre-trial and calendar call. Fact discovery closed on May 10, 2019, and expert

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discovery closed on August 2, 2019. Defendants filed a motion for summary judgment on August 23, 2019, and that motion is scheduled to be heard November 21, 2019.

5. On August 9, 2019, Plaintiffs filed the Motion. Plaintiffs' Motion seeks leave to file a proposed third amended complaint containing additional factual allegations and additional theories of liability that are not contained in the operative Second Amended Complaint; naming Newport's former Chief Financial Officer, Charles Cargile, as a defendant; and adding a prayer for rescissory damages.

6. Although Plaintiffs' Motion was timely filed under the agreed-upon scheduling order, the Court nonetheless denies the motion because the proposed amendment would cause undue delay to the resolution of this case, and it would be prejudicial to Defendants and Mr. Cargile. The initial complaints in this matter, filed in March 2016, contained prayers for rescission and/or rescissory damages. Plaintiffs abandoned their prayer for rescission and/or rescissory damages in their First Amended Complaint (filed on October 18, 2016) and in their Second Amended Complaint (filed on July 27, 2017), the latter of which is the operative complaint in this action. Moreover, despite the requirement under NRCP 16.1 that "[a] party must, without awaiting discovery, provide to the other parties … a computation of each category of damages claimed by the disclosing party," Plaintiffs did not disclose in their NRCP 16.1 initial disclosures (served on May 15, 2018) that they would be claiming rescissory damages in this case. Plaintiffs did not give notice to Defendants that Plaintiffs intended to seek rescissory damages at trial until after fact discovery had closed, when their expert addressed rescissory damages in his opening report.

7. Plaintiffs acknowledge that "post-merger performance is crucial" to proving rescissory damages (Pls.' Reply Br. 14), but Plaintiffs abandoned their prayer for rescissory damages and sought to resurrect it only after fact discovery had closed. As a result, Defendants did not have the ability to develop evidence regarding issues relevant to rescissory damages, including the performance of Newport in the years following the closing of the Merger. Adding a prayer for rescissory damages at this late stage, just months before trial, would unduly delay resolution of this case, which has been pending for more than three-and-a-half years, and would

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prejudice Defendants. A new scheduling order would be required. Additional fact and expert discovery would be required for the period following the close of the Merger. Additional motion practice likely would be required, which further would delay the resolution of this case. Because Plaintiffs abandoned their prayer for rescissory damages and unduly delayed in seeking leave to add that prayer to this case, Plaintiffs cannot seek rescissory damages at trial.

8. Adding Mr. Cargile as a defendant at this late stage of the litigation also would unduly delay the resolution of this action. Mr. Cargile is not a necessary party. Although the Court makes no finding regarding the futility of Plaintiffs' proposed amendment adding Mr. Cargile as a defendant, as a result of discovery conducted early in this case, Plaintiffs had in their possession more than three years before they filed their Motion extensive information concerning Mr. Cargile's conduct and involvement in the transaction. Thus, Plaintiffs unduly delayed in seeking leave to add Mr. Cargile as a proposed defendant, and it would be prejudicial to Mr. Cargile and Defendants to add Mr. Cargile as a defendant at this late stage of the proceedings.

BASED UPON THE FOREGOING, THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES as follows:

Plaintiffs' Motion for Leave to Amend the Second Amended Complaint is DENIED.

IT IS SO ORDERED.

DATED: 11/18/19

Nancy L. Allf

HON. NANCY L. ALLF
DISTRICT COURT JUDGE

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EXHIBIT 5

EXHIBIT 5

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DISTRICT COURT

CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION	Lead Case No. A-16-733154-B
	(Consolidated with Case No. A-16-734039-B)
This Document Relates To:	CLASS ACTION
ALL ACTIONS.	

~~[PROPOSED]~~ ORDER STRIKING THE JURY DEMAND AND AMENDING THE ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL AND CALENDAR CALL

This matter concerns the all-cash acquisition of Newport Corporation ("Newport") by MKS Instruments, Inc. ("MKS") for $23.00 per share (the "Merger"). Plaintiffs Hubert C. Pincon ("Mr. Pincon") and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust (the "Fund," and collectively with Mr. Pincon, "Plaintiffs"), former shareholders of Newport during the relevant period, filed a complaint that brings only claims for breach of fiduciary duty arising out of the Merger but also

includes a demand for a jury trial. On March 4, 2019, Defendants filed a Motion to Amend the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call, asking the Court to set the case for a bench trial instead of a jury trial because it is a case in equity. On May 1, 2019, the Court heard Defendants' motion. Plaintiffs appeared by and through their counsel of record, David A. Knotts, Esq., and Timothy Z. LaComb, Esq., of Robbins Geller Rudman & Dowd LLP, and David O'Mara, Esq., of The O'Mara Law Firm, P.C. Defendants appeared by and through their counsel of record, Brian M. Lutz, of Gibson, Dunn & Crutcher LLP, and Brandi M. Planet, of Fennemore Craig, P.C. The Court, having reviewed the papers filed by the parties, and considered the written and oral arguments of counsel, finds and orders as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Each of Plaintiffs' claims is for breach of fiduciary duty brought by former shareholders of an acquired company against corporate directors of the acquired company related to a cash-out merger.

2. Under Nevada law, such claims are equitable in nature. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 11, 15 n.45, 17, 62 P.3d 720, 727, 729 n.45, 731 (2003).

3. Because this is a case in equity, "there is no right to a jury trial," NRCP 39(a), and the case must be tried to the Court, rather than to a jury.

BASED UPON THE FOREGOING, THE COURT HEREBY ORDERS, ADJUDGES AND DECREES as follows:

Defendants' Motion to Amend the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call is GRANTED.

Plaintiffs' demand for a jury trial is STRICKEN.

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Any and all orders referring to a jury trial in this case are AMENDED to provide for a bench trial.

The case will be set for a trial before the Court.

Dated this 21 day of May, 2019.

Nancy L Allf

DISTRICT COURT JUDGE

Respectfully Submitted by:

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EXHIBIT 6

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DISTRICT COURT
CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION _____ This Document Relates To: ALL ACTIONS.	CASE NO.: A-16-733154-C (Consolidated with Case No. A-16-734039-B) CLASS ACTION **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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. . .

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that a Findings of Fact, Conclusions of Law, and Order Granting Defendants' Motion for Summary Judgment was entered on January 23, 2020 in the above entitled matter. A copy of said Order is attached hereto.

DATED this 23rd day of January, 2020.

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/s/ Maximilien D. Fetaz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** to be submitted electronically to all parties currently on the electronic service list on January 23, 2020.

/s/ Wendy Cosby
an Employee of Brownstein Hyatt Farber Schreck, LLP

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DISTRICT COURT
CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION	CASE NO.: A-16-733154-B (Consolidated with Case No. A-16-734039-B) CLASS ACTION
This Document Relates To: ALL ACTIONS.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

On November 21, 2019, the parties appeared for a hearing on Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone's (collectively, "Defendants") Motion for Summary Judgment. Plaintiffs and class representatives Hubert C. Pincon and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust appeared by and through their counsel of record, David A. Knotts, Esq. and Andrew Mundt, Esq., of Robbins Geller Rudman &

Dowd LLP, and David O'Mara, Esq., of The O'Mara Law Firm, P.C. Defendants appeared by and through their counsel of record, Brian M. Lutz, Esq., Meryl L. Young, Esq., and Colin B. Davis, Esq., of Gibson, Dunn & Crutcher LLP, and Maximilien D. Fetaz, Esq., of Brownstein Hyatt Farber Schreck LLP. The Court, having considered the briefing and evidence filed by the parties, the relevant legal authorities, and the oral arguments of counsel, makes the following findings of fact and conclusions of law in GRANTING Defendants' Motion for Summary Judgment.

Any Finding of Fact more appropriately designated as a Conclusion of Law shall be so deemed and any Conclusion of Law more appropriately designated as a Finding of Fact similarly shall be so deemed.

FINDINGS OF FACT

A. Background of the Merger

1. This matter concerns the all-cash acquisition of Newport Corporation ("Newport" or the "Company") by MKS Instruments, Inc. ("MKS") for $23.00 per share (the "Merger"), which was signed on February 22, 2016, and closed on April 29, 2016.

2. Before the Merger, Newport was a publicly traded supplier of advanced laser and photonics technology products and systems. Mr. Phillippy was Newport's CEO, Mr. Potashner was the independent Chairman of Newport's Board of Directors (the "Board"), and Messrs. Cox, Kadia, Khaykin, and Simone were the other independent, non-employee members of Newport's Board.

3. Beginning in June 2015, Newport engaged in discussions with nine parties as part of a Board-led strategic review process. The potential transactions Newport considered took many forms, including potential merger-of-equals transactions, a potential stock-and-cash transaction, and potential all-cash acquisitions, including by MKS.

4. In connection with the strategic review process, the Board retained independent, qualified financial and legal advisors (J.P. Morgan and Gibson, Dunn & Crutcher LLP). During the roughly nine-month sale process, the Board met sixteen times and received detailed financial analysis presentations from J.P. Morgan on at least nine occasions. The Board, through its

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representatives, negotiated with five potential transaction partners, including MKS. The Board received regular updates about the status of the negotiations, both at formal meetings and informally, and considered the merits and risks of each potential alternative, including remaining independent.

5. In late-November 2015, Newport received an unsolicited inquiry from MKS. The two companies promptly entered into a confidentiality agreement and commenced due diligence without exclusivity. On December 23, 2015, MKS proposed to acquire Newport for $20.50 per share in cash. After further negotiation, on January 15, 2016, MKS made a revised proposal to acquire Newport for $23.00 per share in cash, representing a 65% premium over Newport's then-current stock price.

6. MKS continued with due diligence, including extensive meetings with Newport management. On February 10, 2016, MKS sent Newport a letter reaffirming MKS's proposal of $23.00 per share and requesting exclusivity through February 25, 2016. In view of the advanced stage of the negotiations, another interested party's withdrawal from the sale process, and the fact that any possible combination with the only other remaining interested party would not result in a premium for Newport stockholders and was uncertain to proceed, the Board agreed to grant MKS twelve days of exclusivity.

7. At a February 22, 2016 Board meeting, J.P. Morgan delivered its opinion that the proposed consideration from MKS was fair to Newport stockholders. The Board unanimously approved the Merger Agreement and recommended that Newport stockholders vote in favor of the Merger. The parties signed the Merger Agreement the same day.

8. The Merger was announced on February 23, 2016. Newport's stockholders received $23.00 per share in cash, a 53% premium over Newport's closing stock price the day before the announcement, and a 13-year high price for Newport's shares. At an April 27, 2016 stockholder meeting, 99.4% of Newport's voting stockholders voted to approve the Merger. The Merger closed on April 29, 2016.

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B. Newport's Financial Forecasts and Strategic Planning Process

9. In connection with the strategic review process, Newport management prepared two sets of five-year financial forecasts to evaluate potential transactions—the "base case forecasts" and the "acquisition forecasts." The base case forecasts projected potential revenues if Newport grew organically (i.e., without acquisitions). The base case forecasted a compound annual revenue growth rate of 3% and assumed that Newport would increase its profit margins.

10. The alternative case that Newport modeled, the acquisition forecasts, assumed additional revenue to reach a compound annual revenue growth rate of 10%. The acquisition forecasts hypothesized that Newport would acquire one or more unidentified companies with $50 million of revenue each year ($250 million over five years), at a $75 million purchase price each year.

11. Newport disclosed to its stockholders each of these sets of forecasts in connection with their consideration of the Merger. Newport advised stockholders that "the inclusion of Forecasts in this proxy statement should not be regarded as an indication that [Newport], [MKS], Merger Sub or their respective affiliates or representatives considered or consider the Forecasts to be a prediction of actual future events, and the Forecasts should not be relied upon as such." Newport also disclosed in the Proxy that "the Acquisition Forecasts were prepared to provide the Company with a potential alternative standalone perspective to the Base Case Forecasts reflecting a hypothetical scenario in which the Company was projected to complete significant acquisitions each year." "Because the Acquisition Forecasts assumed the completion of highly uncertain acquisitions of unidentified and unknown parties by the Company, as well as other additional risks and uncertainties," the Newport Board primarily relied on the base case forecasts in evaluating the Merger. For the same reason, J.P. Morgan used the base case forecasts in its fairness opinion.

12. Newport's routine, annual strategic planning process commenced around the same time as the discussions with MKS. In late 2015, Newport's three business unit leaders delivered their initial strategic plan presentations to Newport management. The presentations from the business units contained hundreds of pages detailing proposed operational strategies and a

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handful of pages reflecting the business units' proposed financial projections for the next three years (i.e., 2016 through 2018). Because of the Merger, the 2016 to 2018 strategic plan never was presented to or approved by the Newport Board, as it would have been in the ordinary course.

13. During due diligence, MKS requested an update regarding Newport's strategic planning process. Newport responded that "our Strategic Plan update is still in process—we have reviewed the strategy presentations by each of our business groups, but have not yet synthesized or prioritized them into the strategic plan for Newport as a whole." Newport nonetheless provided the work-in-process strategic plan to MKS because MKS was well along in its due diligence process, and Newport wanted to be responsive to requests from an interested potential acquirer.

14. Although the 2016 to 2018 strategic plan never was finalized, Newport's business units and finance team used the 2016 forecasts in the strategic plan presentations to complete multiple iterations of Newport's 2016 annual operating plan. At a December 28, 2015 Board meeting, the Newport Board received an update on the status of Newport's 2016 annual operating plan. Newport updated the base case forecasts disclosed in the Proxy to incorporate the 2016 numbers contained in the annual operating plan, and J.P. Morgan relied on the updated base case forecasts in its fairness opinion.

C. Defendants' Post-Closing Roles and Related Discussions

15. Following the Merger, Mr. Phillippy lost his job as Newport's CEO. Unlike many other Newport employees, Mr. Phillippy was not retained as an MKS employee following the Merger.

16. MKS briefly retained Mr. Phillippy as a consultant to assist in the transition and appointed him to the MKS board of directors. The compensation Mr. Phillippy temporarily received as an MKS consultant and director was substantially lower than the compensation he would have received if he had remained as Newport's CEO.

17. Mr. Phillippy did not discuss his post-closing consultancy or MKS directorship with MKS before the Newport Board approved the Merger, and he was not offered either position

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until after the Newport Board approved the Merger. This was confirmed by the unrebutted testimony of MKS's corporate representative, John Ippolito:

> Q. Were there any discussions between Mr. Phillippy and MKS regarding his future role following the closing of the transaction prior to the merger agreement being signed?
>
> A. ***No.***

18. Following the Merger, the Newport Board ceased to exist. Newport's five independent directors were not retained by MKS in any capacity.

19. On February 24, 2016, after the Merger Agreement was signed and the Merger was publicly announced, Mr. Potashner sent an email to the chairman of a potential merger-of-equals partner of Newport that Newport had discussions with during the strategic review process and proposed to discuss "whether an opportunity exist[ed] for [board of directors] involvement" for Mr. Potashner at the subject company. The individual Mr. Potashner contacted responded that he had "a strong preference for a small board" and thought that the company's board of directors was "just the right size." Mr. Potashner never was appointed to that company's board of directors.

20. On February 27, 2016, Mr. Potashner sent an email to MKS's CEO suggesting that MKS consider two Newport Board members—Mr. Potashner and Mr. Simone—as candidates for MKS's board of directors. Neither Mr. Potashner nor Mr. Simone ever was appointed to the MKS board of directors.

CONCLUSIONS OF LAW

A. Legal Standard for Summary Judgment

1. Rule 56 safeguards the rights of litigants to obtain a timely and efficient resolution where there is no evidentiary basis for a claim. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (adopting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Summary judgment "shall" be granted where there is no "genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." NRCP 56(a). Although the moving party bears the initial burden to show the absence of such issues, that burden is satisfied by showing the lack of evidence to support a claim. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598,

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603, 172 P.3d 131, 134 (2007). The opponent then must set forth sufficient admissible evidence to permit a reasonable trier of fact to return a verdict in its favor. *Id.*

2. Moreover, if the nonmoving party will bear the burden of persuasion at trial, the "moving party may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) pointing out … that there is an absence of evidence to support the nonmoving party's case." *Francis v. Wynn Las Vegas*, 127 Nev. 657, 671, 262 P.3d 705, 714 (2011) (quoting *Cuzze*, 123 Nev. at 602–03, 172 P.3d at 134 (citation omitted)) (internal quotation marks omitted). "In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact." *Id.* at 671, 262 P.3d at 714–15 (quoting *Cuzze*, 123 Nev. at 603, 172 P.3d at 134) (internal quotation marks omitted).

B. Plaintiffs Cannot Overcome Nevada's Business Judgment Rule

3. Under Nevada's business judgment rule, Newport's directors and officers, "in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." NRS 78.138(3). The business judgment rule "ensures that courts defer to the business judgment of corporate executives" and "precludes courts from reviewing the substantive reasonableness of a board's business decision." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Ct.*, 133 Nev. 369, 376–78, 399 P.3d 334, 343–44 (2017).

4. "The business judgment rule does not only protect individual directors from personal liability; rather, it expresses a sensible policy of judicial noninterference with business decisions and is designed to limit judicial involvement in business decision-making so long as a minimum level of care is exercised in arriving at the decision." *Id.*, 133 Nev. at 376, 399 P.3d at 342 (quoting 18B Am. Jur. 2d Corporations § 1451 (2016)) (internal quotation marks omitted). "Specifically, it prevents a court from replac[ing] a well-meaning decision by a corporate board with its own decision." *Id.* (citation and internal quotation marks omitted); *see also Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 87 Cal. Rptr. 2d 237, 980 P.2d 940, 945 (1999) ("A hallmark of the business judgment rule is that, when the rule's requirements

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are met, a court will not substitute its judgment for that of the corporation's board of directors."). "[E]ven a bad decision is generally protected by the business judgment rule's presumption that the directors acted in good faith, with knowledge of the pertinent information, and with an honest belief that the action would serve the corporation's interests." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006).

5. In an action for damages such as this, the Court first must determine whether the business judgment rule presumption has been rebutted. NRS 78.138(7); *see also Wynn Resorts*, 133 Nev. at 375, 399 P.3d at 341–42. In order to rebut Nevada's business judgment rule at the summary judgment stage, Plaintiffs must provide prima facie evidence that the Board's decision to approve the Merger was either (1) the product of fraud, (2) the product of self-interest, or (3) that the Board failed to exercise due care in reaching its decision. *Id.*, 133 Nev. at 377, 399 P.3d at 343; *see also La. Mun. Police Emps.' Ret. Sys. v. Wynn*, 829 F.3d 1048, 1062 (9th Cir. 2016) (interpreting NRS 78.138); Nev. Jury Instruction 15.14 (explaining showing required to rebut presumption).

6. Despite Plaintiffs' claims of self-interest, there is no direct, material evidence against any of the Newport directors to rebut Nevada's business judgment rule.

1. The Newport Board Exercised Due Care

7. To determine whether the Board exercised due care, the Court only may consider "'the procedural indicia of whether the directors resorted in good faith to an informed decisionmaking process.'" *Wynn Resorts*, 133 Nev. at 377–78, 399 P.3d at 343 (quoting *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994), *aff'd* 65 F.3d 1172 (4th Cir. 1995)). These include "'the identity and qualifications of any sources of information or advice sought which bear on the decision reached, the circumstances surrounding selection of these sources, the general topics (but not the substance) of the information sought or imparted, whether advice was actually given, whether it was followed, and if not, what sources of information and advice *were* consulted to reach the decision in issue.'" *Id.*; *see also Shoen*, 121 Nev. at 632, 137 P.3d at 1178 ("[T]he duty of care consists of an obligation to act on an informed basis ....").

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8. There is no material evidence that any of the directors failed to exercise due care. The Merger came about following a nine-month sale process and with sixteen board meetings, whether full Board or committee meetings, which included financial and legal advisors to approve the sale. As such, the evidence supports that at least a minimum level of care was exercised in arriving at the Merger decision.

2. The Merger Was Not the Product of Self-Interest or Fraud

9. In *Wynn Resorts*, the Nevada Supreme Court held that "the business judgment rule applies to the Board" as a whole. 133 Nev. at 376, 399 P.3d at 342; *see also Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) ("[T]he business judgment rule presumption … can be rebutted by alleging facts which … establish that the *board* was either interested in the outcome of the transaction or lacked independence ...."). Where, as here, board action is challenged, the decision in question cannot be "the product of" fraud or self-interest or a failure to exercise due care unless the purported self-interest or fraud affects the decision-making process of the board as a whole.

10. "To rebut the business judgment rule based solely on the material conflicts of a minority of the directors of a multi-director board, a plaintiff must allege that those conflicts affected the majority of the board." *In re Towers Watson & Co. Stockholders Litig.*, 2019 WL 3334521, at *8 (Del. Ch. July 25, 2019). "A plaintiff can show this in one of two ways: by demonstrating that the conflicted director either 'controls or dominates the board as a whole' or 'fail[ed] to disclose his interest in the transaction to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction.'" *Id.* (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995)).

11. The Merger was not the product of self-interest or fraud. There is no evidence that Newport's five independent directors—a majority of Newport's six-member Board—had any financial interest in the Merger other than as stockholders of Newport. Although Mr. Potashner requested that MKS and another potential merger-of-equals partner of Newport consider Mr. Potashner and Mr. Simone for board of directors positions, those requests occurred after the

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signing of the Merger Agreement and were denied. Any post-close employment discussions after the signing of the Merger Agreement are not relevant in the Court's analysis. *See English v. Narang*, 2019 WL 1300855, at *12 (Del. Ch. Mar. 20, 2019) ("[T]o be material, post-close employment discussions must have occurred before the Merger Agreement was signed.").

12. There also is no evidence that Mr. Phillippy controlled or dominated the Newport Board. To the contrary, the evidence shows that Newport's Board members independently exercised their business judgment to evaluate the merits of the Merger.

13. Nor is there any evidence that Mr. Phillippy failed to disclose a material interest in the Merger to the Newport Board. Mr. Phillippy's temporary post-closing consulting arrangement with MKS to assist in the transition and his appointment to the MKS board of directors did not render him interested in the Merger.[1] The undisputed evidence establishes that Mr. Phillippy did not discuss and was not offered either of these positions until after the Board approved the Merger. Again, any post-close employment discussions after the signing of the Merger Agreement are not relevant in the Court's analysis. *See id.* This is because the issue that could create a conflict of interest is whether a fiduciary of Newport had a motive to play favorites during the sale process in order to secure post close employment. By contrast, discussions that occur after the terms of the transaction are agreed to—like those that occurred here—do not pose the same risk of favoritism.

14. Plaintiffs' claim that Mr. Phillippy had an improper "interest" in the Merger also fails because there is no evidence that any supposed benefits he received were material to him. "Materiality means that the alleged benefit was significant enough 'in the context of the director's economic circumstances, as to have made it improbable that the director could perform her fiduciary duties to the … shareholders without being influenced by her overriding personal interest.'" *Orman*, 794 A.2d at 23 (quoting *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d

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[1] Plaintiffs also suggest that the change-in-control compensation Mr. Phillippy received under his preexisting severance agreement rendered him interested in the Merger. But these benefits were agreed to in 2008—years before the sale process that led to the Merger commenced—and Mr. Phillippy would have received them in connection with any change-in-control transaction that resulted in his termination.

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611, 617 (Del. Ch. 1999)); *see also Shoen*, 122 Nev. at 639, 137 P.3d at 1183 ("[T]o show interestedness, a shareholder must allege that a majority of the board members would be '*materially affected*, either to [their] benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders.'") (emphasis added) (citation omitted). Here, there is no evidence of Mr. Phillippy's individual "financial circumstances" that would permit a determination that any benefits he received were material to him, let alone that they somehow were more favorable than keeping his job as Newport's CEO. To the contrary, the compensation Mr. Phillippy temporarily received as an MKS consultant and director was substantially less than the compensation he would have received if he had remained as Newport's CEO.

15. There also is no material evidence that Mr. Phillippy's employment as Newport's CEO ever was at risk. Newport's CFO, who Mr. Phillippy had professional disagreements with, could not fire Mr. Phillippy because he was Mr. Phillippy's subordinate. And although an activist investor sent emails suggesting that the Company "needs a new CEO or needs to be sold," there is no material evidence that the Board ever considered firing Mr. Phillippy.

16. Nor is there any material evidence that Mr. Phillippy or Mr. Potashner intended to deceive the Board, or that the Merger was the product of fraud. Plaintiffs claim that Mr. Phillippy defrauded the Newport Board and stockholders by not disclosing the numbers that were generated by Newport's business units in connection with the Company's late-2015 strategic planning process (other than updating the base case forecasts to incorporate the 2016 annual operating plan). But there is no evidence that Mr. Phillippy believed that the strategic plan numbers were complete or reliable and nonetheless intentionally withheld them from the Newport Board and stockholders. And there is no evidence that Mr. Phillippy had a self-interested motive to conceal the strategic plan numbers from anyone.

ORDER

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' Motion for Summary Judgment be, and the same is, hereby GRANTED;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that judgment be entered in favor of Defendants and against Plaintiffs on all of Plaintiffs' claims against Defendants.

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IT IS SO ORDERED.

DATED: Jan. 21, 2020

Nancy L. Allf

HON. NANCY L. ALLF
DISTRICT COURT JUDGE

Submitted by:

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EXHIBIT 7

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DISTRICT COURT
CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION _____ This Document Relates To: ALL ACTIONS.	CASE NO.: A-16-733154-C (Consolidated with Case No. A-16-734039-B) CLASS ACTION

NOTICE OF ENTRY OF ORDER

19979976

PLEASE TAKE NOTICE that on November 20, 2019 an Order Denying Plaintiffs' Motion for Leave to Amend the Second Amended Complaint was filed in the above entitled matter. A copy of said Order is attached hereto.

DATED this 20th day of November, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Brownstein Hyatt Farber Schreck, LLP and pursuant to NRCP 5(b), EDCR 8.05, Administrative Order 14-2, and NEFCR 9, I caused a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER** to be submitted electronically to all parties currently on the electronic service list on November 20, 2019.

/s/ Wendy Cosby
an Employee of Brownstein Hyatt Farber Schreck, LLP

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	(Consolidated with Case No. A-16-734039-B)
This Document Relates To:	CLASS ACTION
ALL ACTIONS.	

ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE SECOND AMENDED COMPLAINT

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This matter concerns the all-cash acquisition of Newport Corporation ("Newport") by MKS Instruments, Inc. for $23.00 per share (the "Merger"). On August 9, 2019 Plaintiffs and class representatives Hubert C. Pincon and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust filed a Motion for Leave to Amend the Second Amended Complaint (the "Motion"). On October 10, 2019, the Court heard argument on Plaintiffs' Motion. Plaintiffs appeared by and through their counsel of record, David A. Knotts, Esq., of Robbins Geller Rudman & Dowd LLP, and David O'Mara, Esq., of The O'Mara Law Firm, P.C. Defendants appeared by and through their counsel of record, Brian M. Lutz, Esq. and Colin B. Davis, Esq., of Gibson, Dunn & Crutcher LLP, and Maximilien D .Fetaz, Esq., of Brownstein Hyatt Farber Schreck LLP. The Court, having reviewed the papers filed by the parties, and considered the written and oral arguments of counsel, finds and orders as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. All pleading amendments other than those permitted "as a matter of course" under Rule 15(a)(1) of the Nevada Rules of Civil Procedure must meet the requirements of Rule 15(a)(2), which provides that, "a party may amend its pleading only with the opposing party's written consent or the court's leave."

2. Although the Court "should freely give leave [to amend] when justice so requires," NRCP 15(a)(2), the Court may deny leave to amend on grounds of "'undue delay, bad faith, or dilatory motives on the part of the movant.'" *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 239, 416 P.3d 249, 254-55 (2018) (quoting *Kantor v. Cantor*, 116 Nev. 886, 891-93, 8 P.3d 825, 828-29 (2000)).

3. This litigation commenced on March 9, 2016, when a putative shareholder of Newport filed the initial complaint in this action.

4. This case has been extensively litigated for more than three-and-a-half years. The parties have briefed and argued a motion for expedited discovery, two motions to dismiss, a motion for class certification, a motion to compel, and a motion to amend the order setting civil jury trial, pre-trial and calendar call. Fact discovery closed on May 10, 2019, and expert

discovery closed on August 2, 2019. Defendants filed a motion for summary judgment on August 23, 2019, and that motion is scheduled to be heard November 21, 2019.

5. On August 9, 2019, Plaintiffs filed the Motion. Plaintiffs' Motion seeks leave to file a proposed third amended complaint containing additional factual allegations and additional theories of liability that are not contained in the operative Second Amended Complaint; naming Newport's former Chief Financial Officer, Charles Cargile, as a defendant; and adding a prayer for rescissory damages.

6. Although Plaintiffs' Motion was timely filed under the agreed-upon scheduling order, the Court nonetheless denies the motion because the proposed amendment would cause undue delay to the resolution of this case, and it would be prejudicial to Defendants and Mr. Cargile. The initial complaints in this matter, filed in March 2016, contained prayers for rescission and/or rescissory damages. Plaintiffs abandoned their prayer for rescission and/or rescissory damages in their First Amended Complaint (filed on October 18, 2016) and in their Second Amended Complaint (filed on July 27, 2017), the latter of which is the operative complaint in this action. Moreover, despite the requirement under NRCP 16.1 that "[a] party must, without awaiting discovery, provide to the other parties … a computation of each category of damages claimed by the disclosing party," Plaintiffs did not disclose in their NRCP 16.1 initial disclosures (served on May 15, 2018) that they would be claiming rescissory damages in this case. Plaintiffs did not give notice to Defendants that Plaintiffs intended to seek rescissory damages at trial until after fact discovery had closed, when their expert addressed rescissory damages in his opening report.

7. Plaintiffs acknowledge that "post-merger performance is crucial" to proving rescissory damages (Pls.' Reply Br. 14), but Plaintiffs abandoned their prayer for rescissory damages and sought to resurrect it only after fact discovery had closed. As a result, Defendants did not have the ability to develop evidence regarding issues relevant to rescissory damages, including the performance of Newport in the years following the closing of the Merger. Adding a prayer for rescissory damages at this late stage, just months before trial, would unduly delay resolution of this case, which has been pending for more than three-and-a-half years, and would

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prejudice Defendants. A new scheduling order would be required. Additional fact and expert discovery would be required for the period following the close of the Merger. Additional motion practice likely would be required, which further would delay the resolution of this case. Because Plaintiffs abandoned their prayer for rescissory damages and unduly delayed in seeking leave to add that prayer to this case, Plaintiffs cannot seek rescissory damages at trial.

8. Adding Mr. Cargile as a defendant at this late stage of the litigation also would unduly delay the resolution of this action. Mr. Cargile is not a necessary party. Although the Court makes no finding regarding the futility of Plaintiffs' proposed amendment adding Mr. Cargile as a defendant, as a result of discovery conducted early in this case, Plaintiffs had in their possession more than three years before they filed their Motion extensive information concerning Mr. Cargile's conduct and involvement in the transaction. Thus, Plaintiffs unduly delayed in seeking leave to add Mr. Cargile as a proposed defendant, and it would be prejudicial to Mr. Cargile and Defendants to add Mr. Cargile as a defendant at this late stage of the proceedings.

BASED UPON THE FOREGOING, THE COURT HEREBY ORDERS, ADJUDGES, AND DECREES as follows:

Plaintiffs' Motion for Leave to Amend the Second Amended Complaint is DENIED.

IT IS SO ORDERED.

DATED: 11/18/19

Nancy L. Allf

HON. NANCY L. ALLF
DISTRICT COURT JUDGE

FD

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EXHIBIT 8

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DISTRICT COURT

CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION This Document Relates To: ALL ACTIONS.	Lead Case No.: A-16-733154-B (Consolidated With Case No.: A-16-734039-B)

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an Order Striking the

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Jury Demand and Amending the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call was filed in the above-referenced matter on the 4th day of June, 2019, a copy of which is attached hereto.

Dated this 4th day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the following: **NOTICE OF ENTRY OF ORDER** was served upon the following person(s) either by electronic transmission through the Wiznet system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by mailing a copy to their last known address, first class mail, postage prepaid for non-registered users, on this 4th day of June, 2019 as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION	Lead Case No. A-16-733154-B
	(Consolidated with Case No. A-16-734039-B)
This Document Relates To:	CLASS ACTION
ALL ACTIONS.	

~~[PROPOSED]~~ ORDER STRIKING THE JURY DEMAND AND AMENDING THE ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL AND CALENDAR CALL

This matter concerns the all-cash acquisition of Newport Corporation ("Newport") by MKS Instruments, Inc. ("MKS") for $23.00 per share (the "Merger"). Plaintiffs Hubert C. Pincon ("Mr. Pincon") and Locals 302 and 612 of the International Union of Operating Engineers-Employers Construction Industry Retirement Trust (the "Fund," and collectively with Mr. Pincon, "Plaintiffs"), former shareholders of Newport during the relevant period, filed a complaint that brings only claims for breach of fiduciary duty arising out of the Merger but also

includes a demand for a jury trial. On March 4, 2019, Defendants filed a Motion to Amend the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call, asking the Court to set the case for a bench trial instead of a jury trial because it is a case in equity. On May 1, 2019, the Court heard Defendants' motion. Plaintiffs appeared by and through their counsel of record, David A. Knotts, Esq., and Timothy Z. LaComb, Esq., of Robbins Geller Rudman & Dowd LLP, and David O'Mara, Esq., of The O'Mara Law Firm, P.C. Defendants appeared by and through their counsel of record, Brian M. Lutz, of Gibson, Dunn & Crutcher LLP, and Brandi M. Planet, of Fennemore Craig, P.C. The Court, having reviewed the papers filed by the parties, and considered the written and oral arguments of counsel, finds and orders as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Each of Plaintiffs' claims is for breach of fiduciary duty brought by former shareholders of an acquired company against corporate directors of the acquired company related to a cash-out merger.

2. Under Nevada law, such claims are equitable in nature. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 11, 15 n.45, 17, 62 P.3d 720, 727, 729 n.45, 731 (2003).

3. Because this is a case in equity, "there is no right to a jury trial," NRCP 39(a), and the case must be tried to the Court, rather than to a jury.

BASED UPON THE FOREGOING, THE COURT HEREBY ORDERS, ADJUDGES AND DECREES as follows:

Defendants' Motion to Amend the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call is GRANTED.

Plaintiffs' demand for a jury trial is STRICKEN.

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Any and all orders referring to a jury trial in this case are AMENDED to provide for a bench trial.

The case will be set for a trial before the Court.

Dated this 21 day of May, 2019.

DISTRICT COURT JUDGE

Respectfully Submitted by:

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