IN THE SUPREME COURT OF THE STATE OF NEVADA

In re NEWPORT CORPORATION SHAREHOLDER LITIGATION HUBERT C. PINCON; and LOCALS 302 AND 612 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS-EMPLOYERS CONSTRUCTION INDUSTRY RETIREMENT TRUST, Appellants, vs. ROBERT J. PHILLIPPY; KENNETH F. POTASHNER; CHRISTOPHER COX; SIDDHARTHA C. KADIA; OLEG KHAYKIN; and PETER J. SIMONE, Respondents.	**SUPREME COURT NO. 80636** **District Court No. A733154**

JOINT APPENDIX

Volume I

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA
311 East Liberty Street
Reno, NV 89501
Telephone: 775/323-1321
775/323-4082 (fax)

ROBBINS GELLER RUDMAN & DOWD LLP
RANDALL J. BARON
DAVID T. WISSBROECKER
DAVID A. KNOTTS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Counsel for Appellants

BROWNSTEIN HYATT FARBER SCHRECK, LLP
Adam K. Bult,
Maximilien Fetaz
100 North City Parkway, Ste 1600,
Las Vegas, Nevada 89106

GIBSON DUNN & CRUTCHER, LLP
Brian M. Lutz
555 Mission Street, Ste 3000
San Francisco, CA 94105

Meryl L. Young,
Colin B. Davis
3161 Michelson Dr,
Irvine, CA 92612

Counsel for Respondents

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DISTRICT COURT CIVIL COVER SHEET

A-16-733154-C

Clark County, Nevada

Case No. _____ (Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
DIXON CHUNG, individually and on behalf of all others similarly situated	NEWPORT CORP., KENNETH F. POTASHNER, CHRISTOPHER COX, ROBERT L. GUYETT, OLEG KHAYKIN, MICHAEL T. O'NEILL, D. KUMAR N. PATEL, ROBERT J. PHILLIPPY, PETER J. SIMONE, MKS INSTRUMENTS, INC., and PSI EQUIPMENT, INC.
Attorney (name/address/phone):	Attorney (name/address/phone):
John P. Aldrich, Aldrich Law Firm, Ltd. 1601 S. Rainbow Boulevard, Suite 160 Las Vegas, NV 89146 (702) 853-5490	

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
☐ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		■ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

3/9/16
Date

/s/ John P. Aldrich
Signature of initiating party or representative

See other side for family-related case filings.

COMP
John P. Aldrich, Esq.
Nevada Bar No. 6877
ALDRICH LAW FIRM, LTD.
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
Tel: (702) 853-5490
Fax: (702) 227-1975
jaldrich@johnaldrichlawfirm.com

Shane T. Rowley, Esq.
LEVI & KORSINSKY LLP
30 Broad Street, 24th Floor
New York, New York 10004
Tel: (212) 363-7500
Fax: (866) 367-6510
srowley@zlk.com
Pro Hac Vice Application to be submitted

Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DIXON CHUNG, individually and on behalf of all others similarly situated, Plaintiff, v. NEWPORT CORP., KENNETH F. POTASHNER, CHRISTOPHER COX, ROBERT L. GUYETT, OLEG KHAYKIN, MICHAEL T. O'NEILL, C. KUMAR N. PATEL, ROBERT J. PHILLIPPY, PETER J. SIMONE, MKS INSTRUMENTS, INC., and PSI EQUIPMENT, INC., Defendants.	Case No.: A-16-733154-C Dept. No.: I **CLASS ACTION COMPLAINT FOR BREACH OF FIDUCIARY DUTY** ***Exempt from Arbitration***

Plaintiff Dixon Chung ("Plaintiff"), by his attorneys, alleges upon information and belief, except for his own acts, which are alleged on knowledge, as follows:

1. Plaintiff brings this class action on behalf of the public stockholders of Newport Corp. ("Newport" or the "Company") against Newport's Board of Directors (the "Board" or the "Individual Defendants") for their breaches of fiduciary duties arising out of their attempt to sell the Company to MKS Instruments, Inc. ("MKS") by means of an unfair process and for an unfair price.

2. On February 23, 2016, MKS and the Company announced a definitive agreement under which MKS, through its wholly-owned subsidiary PSI Equipment, Inc. ("Merger Sub"), will acquire all of the outstanding shares of Newport for $23 per share in cash (the "Proposed Transaction"). The Proposed Transaction is valued at approximately $980 million. The Board has breached their fiduciary duties by agreeing to the Proposed Transaction for inadequate consideration. As described in more detail below, given Newport's recent strong performance as well as its future growth prospects, the consideration shareholders will receive is inadequate and undervalues the Company.

3. Defendants have exacerbated their breaches of fiduciary duty by agreeing to lock up the Proposed Transaction with unreasonable deal protection devices that serve to prevent other bidders from making a successful competing offer for the Company. Specifically, pursuant to the merger agreement dated February 22, 2016 (the "Merger Agreement"), defendants agreed to: (i) a strict no-solicitation provision that will prohibit the Company from soliciting other potential acquirers or from continuing ongoing discussions with potential acquirers; (ii) a provision that provides MKS with five business days to match any competing proposal in the event one is made; and (iii) a provision that requires the Company to pay MKS a termination fee of up to $32.6 million in order to enter into a transaction with a superior bidder. These provisions unreasonably inhibit the Board's ability to act with respect to investigating and pursuing superior proposals and alternatives, including a sale of all or part of Newport.

4. The Individual Defendants have breached their fiduciary duties and MKS and Merger Sub have aided and abetted such breaches by Newport officers and directors. Plaintiff seeks to enjoin the Proposed Transaction unless and/or until the defendants cure their breaches of fiduciary duty.

PARTIES

5. Plaintiff is, and has been at all relevant times, the owner of shares of common stock of Newport.

6. Newport is a corporation organized and existing under the laws of the State of Nevada. It maintains its principal executive offices at 1791 Deere Avenue, Irvine, California 92606.

7. Defendant Kenneth F. Potashner ("Potashner") has been the Chairman of the Board since 2007 and a director of the Company since 1998.

8. Defendant Christopher Cox ("Cox") has been a director of the Company since 2011.

9. Defendant Robert L. Guyett ("Guyett") has been a director of the Company since 1990.

10. Defendant Oleg Khaykin ("Khaykin") has been a director of the Company since 2010.

11. Defendant Michael T. O'Neill ("Khaykin") has been a director of the Company since 2003.

12. Defendant C. Kumar N. Patel ("Patel") has been a director of the Company since 1986.

13. Defendant Robert J. Phillippy ("Philippy") has been President, Chief Executive Officer ("CEO") and a director of the Company since 2007.

14. Defendant Peter J. Simone ("Simone") has been a director of the Company since 2003.

15. Defendants referenced in ¶¶ 7 through 14 are collectively referred to as Individual Defendants and/or the Board.

16. Defendant MKS is a Massachusetts corporation with its headquarters located at 2 Tech Drive, Suite 201, Andover, Massachusetts01810. MKS provides instruments, subsystems and process control solutions that measure, control, power, monitor, and analyze critical parameters of manufacturing processes in the United States and internationally.

17. Defendant Merger Sub is a Nevada corporation wholly owned by MKS that was created for the purposes of effectuating the Proposed Transaction.

INDIVIDUAL DEFENDANTS' FIDUCIARY DUTIES

18. By reason of the Individual Defendants' positions with the Company as officers and/or directors, they are in a fiduciary relationship with Plaintiff and the other public shareholders of Newport and owe them, as well as the Company, a duty of care, loyalty, good faith, candor, and independence.

19. To diligently comply with their fiduciary duties, the Individual Defendants may not take any action that:

(a) adversely affects the value provided to the corporation's shareholders;

(b) favors themselves or will discourage or inhibit alternative offers to purchase control of the corporation or its assets;

(c) adversely affects their duty to search and secure the best value reasonably available under the circumstances for the corporation's shareholders; and/or

(d) will provide the Individual Defendants with preferential treatment at the expense of, or separate from, the public shareholders.

20. In accordance with their duties of loyalty and good faith, the Individual Defendants are obligated to refrain from:

(a) participating in any transaction where the Individual Defendants' loyalties are divided;

(b) participating in any transaction where the Individual Defendants receive, or are entitled to receive, a personal financial benefit not equally shared by the public shareholders of the corporation; and/or

(c) unjustly enriching themselves at the expense or to the detriment of the public shareholders.

21. Plaintiff alleges herein that the Individual Defendants, separately and together, in connection with the Proposed Transaction, are knowingly or recklessly violating their fiduciary duties, including their duties of care, loyalty, good faith, candor, and independence owed to plaintiff and other public shareholders of Newport.

CLASS ACTION ALLEGATIONS

22. Plaintiff brings this action as a class action pursuant to Rule 23 of the Nevada Rules of Civil Procedure on behalf of all persons and/or entities that owned Newport common stock (the "Class") as of February 23, 2016, the date on which the Proposed Transaction was announced. Excluded from the Class are Defendants and their affiliates, immediate families, legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

23. The Class is so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through discovery, Plaintiff believes that there are thousands of members in the Class. According to the Merger Agreement, as of February 19, 2016, 38,627,839 shares of common stock were

represented by the Company as outstanding. All members of the Class may be identified from records maintained by Newport or its transfer agent and may be notified of the pendency of this action by mail, using forms of notice similar to that customarily used in securities class actions.

24. Questions of law and fact are common to the Class, including, *inter alia*, the following:

(i) Have the Individual Defendants breached their fiduciary duties of undivided loyalty, independence, or due care with respect to plaintiff and the other members of the Class in connection with the Proposed Transaction;

(ii) Have the Individual Defendants breached their fiduciary duty to maximize shareholder value for the benefit of Plaintiff and the other members of the Class in connection with the Proposed Transaction;

(iii) Have the Individual Defendants breached any of their other fiduciary duties to Plaintiff and the other members of the Class in connection with the Proposed Transaction, including the duties of good faith, diligence, honesty and fair dealing;

(iv) Have the Individual Defendants, in bad faith and for improper motives, impeded or erected barriers to discourage other strategic alternatives including offers from interested parties for the Company or its assets;

(v) Whether Plaintiff and the other members of the Class would be irreparably harmed were the transactions complained of herein consummated;

(vi) Have MKS and Merger Sub aided and abetted the Individual Defendants' breaches of fiduciary duty; and

(vii) Is the Class entitled to injunctive relief or damages as a result of defendants' wrongful conduct.

25. Plaintiff's claims are typical of the claims of the other members of the Class. Plaintiff and the other members of the Class have sustained damages as a result of Defendants' wrongful conduct as alleged herein.

26. Plaintiff will fairly and adequately protect the interests of the Class, and has no interests contrary to or in conflict with those of the Class that Plaintiff seeks to represent.

27. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

FURTHER SUBSTANTIVE ALLEGATIONS

Company Background and its Poise for Growth

28. Newport is a leading global supplier of advanced technology products, systems and solutions for markets worldwide, including Scientific Research, Life & Health Science, Aerospace & Defense, Photovoltaics, Industrial Manufacturing, Semiconductors, and Microelectronics markets. The Company operates in three groups, Photonics, Lasers, and Optics. The Company sells its products and services to original equipment manufacturers, end-user customers, and capital equipment customers through direct sales organizations, a network of independent distributors, and sales representatives. The Company also sells its products through catalogs and websites.

29. Newport has enjoyed strong financial results and positioned itself well for future growth with several acquisitions. On February 5, 2015, the Company announced in a press release that it had entered into an agreement to acquire FEMTOLASERS Produktions GmbH a leading

developer and manufacturer of ultrafast laser systems used extensively in scientific and biomedical research applications. During that same press release, David Allen ("Allen"), the Senior Vice President and General Manager of Newport's Spectra-Physics Lasers Group, stated, "We are excited to announce our agreement to acquire FEMTOLASERS, which will advance our strategic initiative to extend our industry leadership in ultrafast lasers." He continued, stating, "FEMTOLASERS has developed some truly impressive leading-edge technology that will be invaluable as we work together to develop the next generation of ultrafast lasers. We welcome the FEMTOLASERS team to Newport and look forward to their contributions to our Spectra-Physics Lasers Group."

30. In addition to the FEMTOLASERS acquisition, the Company reported strong financial results for the first quarter 2015, ending April 4, 2015. In a May 6, 2015 press release, the Company reported net sales increase 6.6% to $156.7 million, compared to the same quarter in 2014. The Company's new orders also increased by 5% to $154.6 million, compared to the same quarter in 2014.

31. The Company experienced a slight decline in net sales for the second quarter 2015, ended July 4, 2015. In an August 4, 2015 press release, Defendant Phillippy explained this decline, and stated, "Accordingly, we are implementing cost reduction actions in these areas to align our cost base with current business conditions."These actions described by Defendant Phillippy proved effective for the Company, when the Company announced its third quarter 2015 financial results ending on October 3, 2015, in a press release on November 4, 2015. The Company reported net sales of $147.6 million and new orders of $146.5 million. These results were what the Company had expected, as Defendant Phillippy stated in the press release, "Our third quarter sales and profit met our expectations, and we expect our financial performance to gain additional momentum in the

fourth quarter of 2015 as we continue to focus on achieving new design wins, increasing share in our target markets and implementing our cost reduction initiatives."

32. The additional momentum Defendant Phillippy hoped the Company would gain in the fourth quarter proved true. The Company announced its fourth quarter and full year 2015, ending on January 2, 2016, in a press release on February 23, 2016, the same day the merger was announced. The Company reported net sales of $150.5 million for the fourth quarter and $602.7 million for the full year. Defendant Phillippy was pleased with the Company's 2015 fiscal year results. In the press release he stated, "The Newport team delivered a strong fourth quarter, with cash generated from operations and earnings per diluted share both at the highest levels of the year. This performance demonstrates the effectiveness of our business model and the results of our actions to streamline our operations."

33. Although the Company is performing extremely well and has not yet fully realized the benefits of its recent acquisition of FEMTOLASERS and its efforts in cost reduction, the Board decided to sell the Company for inadequate consideration.

The Proposed Transaction Fails to Maximize Shareholder Value

34. In a press release dated February 23, 2016, the Company announced that it had entered into a merger agreement with MKS pursuant to which MKS, through Merger Sub, will acquire all of the outstanding shares of the Company for $23 per share in cash.

35. Given the Company's recent strong performance, positioning for growth, and exciting and promising expansion into the laser market, the Proposed Transaction consideration is inadequate and significantly undervalues the Company.

36. Newport's stock is also currently outperforming similar companies' stock, with a 30-day trend in share price performance of 8.23% better than the peer median as of February 18, 2016.

37. In addition, the Proposed Transaction consideration fails to adequately compensate Newport's shareholders for the significant synergies created by the merger. The Proposed Transaction is a strategic merger for MKS, which is "a global provider of technologies that enable advanced processes and improve productivity[.]" As stated in the press release announcing the Proposed Transaction, "The combination of MKS Instruments and Newport Corporation creates a premier supplier of critical components and subsystems for a diverse set of growing end markets, each with a common need for highly precise technology enabling solutions." The combined company is expected to have approximately $1.4 billion in pro forma annual revenue, and is expected to realize $25 million in annualized cost synergies within 18 to 36 months.

38. Despite the significant synergies inherent in the transaction for MKS, however, the Board failed to secure a fair price for the Company, either for the intrinsic value of its assets or the value of the Company's assets to MKS.

39. MKS is seeking to acquire the Company at the most opportune time, at a time when the Company is performing very well and is positioned for tremendous growth.

The Individual Defendants Will Receive Millions of Unvested Shares

40. What is more, Company insiders will have an opportunity to cash in unvested equity awards through the Proposed Transaction. Pursuant to section 2.2(b) of the Merger Agreement, any unvested restricted stock will become vested and will receive the same treatment as other outstanding stock. According to the Form 10-Q filed on November 12, 2015, several insiders possess large holdings of unvested restricted stock. Specifically, according to a Statement of Changes in Beneficial Ownership on Form 4 filed with the SEC on September 16, 2015Defendant Phillippy holds more than 303,247 unvested restricted shares. On the same form filed on May 22, 2015,Defendant Cargile holds 111,805 unvested restricted shares, and Defendant Potashner holds 99,522 unvested restricted shares, all of which would not otherwise fully vest until March 31, 2018,

without the occurrence of certain transactions, such as the Proposed Transaction. These insiders will be able to cash in on their unvested restricted shares now at the expense of the Company's public shareholders.

The Unreasonable Deal Protection Devices

41. In addition, as part of the Merger Agreement, Defendants agreed to certain onerous and unreasonable deal protection devices that operate conjunctively to make the Proposed Transaction a *fait accompli* and potentially preclude competing offers will emerge for the Company.

42. Section 5.4(a) of the Merger Agreement includes a "no solicitation" provision barring the Company from soliciting interest from other potential acquirers in order to procure a price in excess of the amount offered by MKS. Section 5.4(a) further prohibits the Company granting any amendment, waiver or release of any standstill or similar contract with respect to the Company or any shares.

43. Pursuant to § 5.4(b) of the Merger Agreement, should an unsolicited bidder submit a competing proposal, the Company must notify MKS of the bidder's identity and the terms of the bidder's offer. Thereafter, § 5.4(d) demands that should the Board determine to enter into a superior competing proposal, it must grant MKS five business days in which the Company must negotiate in good faith with MKS (if MKS so desires) and allow MKS to amend the terms of the Merger Agreement to make a counter-offer so that the competing offer will no longer constitute a "Superior Proposal" under the Merger Agreement. In other words, the Merger Agreement gives MKS access to any rival bidder's information and allows MKS a free right to top any superior offer simply by matching it. Accordingly, no rival bidder is likely to emerge and act as a stalking horse, because the Merger Agreement unfairly assures that any "auction" will favor MKS, who will be able to piggy-back upon the due diligence of the foreclosed second bidder.

44. The Merger Agreement also provides that a termination fee of $32,600,000 must be paid to MKS by Newport if the Company decides to pursue the competing offer, thereby essentially requiring that the competing bidder agree to pay a naked premium for the right to provide the shareholders with a superior offer.

45. Ultimately, these deal protection provisions unreasonably restrain the Company's ability to solicit or engage in negotiations with any third party regarding a proposal to acquire all or a significant interest in the Company. The circumstances under which the Board may respond to an unsolicited written bona fide proposal for an alternative acquisition that constitutes or would reasonably be expected to constitute a superior proposal are too narrowly circumscribed to provide an effective "fiduciary out" under the circumstances.

46. Accordingly, Plaintiff seeks injunctive and other equitable relief to prevent the irreparable injury that Company shareholders will continue to suffer absent judicial intervention.

CLAIMS FOR RELIEF

COUNT I
Breach of Fiduciary Duties

(Against All Individual Defendants)

47. Plaintiff repeats all previous allegations as if set forth in full herein.

48. The Individual Defendants have violated their fiduciary duties owed to the public shareholders of Newport and have acted to put their personal interests ahead of the interests of Newport shareholders.

49. The Individual Defendants' recommendation of the Proposed Transaction will result in a change of control of the Company which imposes heightened judicial scrutiny of the Board's process and its obligation to maximize Newport's value for the benefit of the stockholders.

50. The Individual Defendants have breached their fiduciary duties owed to the shareholders of Newport because, among other reasons:

(a) they failed to take steps to maximize the value of Newport to its public shareholders and took steps to avoid competitive bidding;

(b) they failed to properly value Newport; and

(c) they ignored or did not protect against the numerous conflicts of interest resulting from the directors' own interrelationships or connection with the Proposed Transaction.

51. As a result of the Individual Defendants' breaches of their fiduciary duties, Plaintiff and the Class will suffer irreparable injury in that they have not and will not receive their fair portion of the value of Newport's assets and will be prevented from benefiting from a value-maximizing transaction.

52. Unless enjoined by this Court, the Individual Defendants will continue to breach their fiduciary duties owed to Plaintiff and the Class, and may consummate the Proposed Transaction, to the irreparable harm of the Class.

53. Plaintiff and the Class have no adequate remedy at law.

COUNT II

Aiding and Abetting
(Against MKS and Merger Sub)

54. Plaintiff repeats all previous allegations as if set forth in full herein.

55. As alleged in more detail above, Defendants Newport, MKS, and Merger Sub have aided and abetted the Individual Defendants' breaches of fiduciary duties.

56. As a result, Plaintiff and the Class members are being harmed.

57. Plaintiff and the Class have no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment against defendants jointly and severally, as follows:

(A) declaring this action to be a class action and certifying Plaintiff as the Class representatives and his counsel as Class counsel;

(B) enjoining, preliminarily and permanently, the Proposed Transaction;

(C) in the event that the transaction is consummated prior to the entry of this Court's final judgment, rescinding it or awarding Plaintiff and the Class rescissory damages;

(D) directing that Defendants account to Plaintiff and the other members of the Class for all damages caused by them and account for all profits and any special benefits obtained as a result of their breaches of their fiduciary duties;

(E) awarding Plaintiff the costs of this action, including a reasonable allowance for the fees and expenses of Plaintiff's attorneys and experts; and

(F) granting Plaintiff and the other members of the Class such further relief as the Court deems just and proper.

Dated this 9th day of March, 2016.

Respectfully submitted,

ALDRICH LAW FIRM, LTD.

/s/ John P. Aldrich
John P. Aldrich, Esq.
Nevada Bar No. 6877
1601 S. Rainbow Boulevard, Suite 160
Las Vegas, Nevada 89146
Tel: (702) 853-5490
Fax: (702) 227-1975

Shane T. Rowley, Esq.
LEVI & KORSINSKY, LLP
30 Broad Street, 24th Floor
New York, New York 10004
Tel: (212) 363-7500
Fax: (866) 367-6510
Pro Hac Vice Application to be submitted

Attorneys for Plaintiff

IAFD
John P. Aldrich, Esq.
Nevada Bar No. 6877
ALDRICH LAW FIRM, LTD.
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
Tel: (702) 853-5490
Fax: (702) 227-1975
jaldrich@johnaldrichlawfirm.com

Shane T. Rowley, Esq.
LEVI & KORSINSKY LLP
30 Broad Street, 24th Floor
New York, New York 10004
Tel: (212) 363-7500
Fax: (866) 367-6510
srowley@zlk.com
Pro Hac Vice Application to be submitted

Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DIXON CHUNG, individually and on behalf of all others similarly situated, Plaintiff, v. NEWPORT CORP., KENNETH F. POTASHNER, CHRISTOPHER COX, ROBERT L. GUYETT, OLEG KHAYKIN, MICHAEL T. O'NEILL, C. KUMAR N. PATEL, ROBERT J. PHILLIPPY, PETER J. SIMONE, MKS INSTRUMENTS, INC., and PSI EQUIPMENT, INC., Defendants.	Case No.: Dept. No.: **INITIAL APPEARANCE FEE DISCLOSURE**

VERIFIED CLASS ACTION COMPLAINT
FOR BREACH OF FIDUCIARY DUTY

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above entitled action as indicated below:

///

DIXON CHUNG	$270.00
TOTAL REMITTED	**$270.00**

Dated this 9th day of March, 2016.

Respectfully submitted,

ALDRICH LAW FIRM, LTD.

/s/ John P. Aldrich
John P. Aldrich, Esq.
Nevada Bar No. 6877
1601 S. Rainbow Boulevard, Suite 160
Las Vegas, Nevada 89146
Tel: (702) 853-5490
Fax: (702) 227-1975

Shane T. Rowley, Esq.
LEVI & KORSINSKY, LLP
30 Broad Street, 24th Floor
New York, New York 10004
Tel: (212) 363-7500
Fax: (866) 367-6510
Pro Hac Vice Application to be submitted

Attorneys for Plaintiff

ACOM
John P. Aldrich, Esq.
Nevada Bar No. 6877
ALDRICH LAW FIRM, LTD.
1601 S. Rainbow Blvd., Suite 160
Las Vegas, Nevada 89146
Tel: (702) 853-5490
Fax: (702) 227-1975
jaldrich@johnaldrichlawfirm.com

Shane T. Rowley, Esq.
LEVI & KORSINSKY LLP
30 Broad Street, 24th Floor
New York, New York 10004
Tel: (212) 363-7500
Fax: (866) 367-6510
srowley@zlk.com
Pro Hac Vice Application to be submitted

Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

DIXON CHUNG, individually and on behalf of all others similarly situated, Plaintiff, v. NEWPORT CORP., KENNETH F. POTASHNER, CHRISTOPHER COX, SIDDHARTHA C. KADIA, OLEG KHAYKIN, ROBERT J. PHILLIPPY, PETER J. SIMONE, MKS INSTRUMENTS, INC., and PSI EQUIPMENT, INC., Defendants.	Case No.: A-16-733154-C Dept. No.: I **AMENDED CLASS ACTION COMPLAINT FOR BREACH OF FIDUCIARY DUTY** ***Exempt from Arbitration***

Plaintiff Dixon Chung ("Plaintiff"), by his attorneys, alleges upon information and belief, except for his own acts, which are alleged on knowledge, as follows:

1. On February 23, 2016, Newport Corp. ("Newport" or the "Company") and MKS Instruments, Inc. ("MKS") announced they had entered into a definitive agreement and plan of merger ("Merger Agreement"), dated February 22, 2016, under which MKS, through its wholly-owned subsidiary PSI Equipment, Inc. ("Merger Sub"), will acquire all of the outstanding shares of Newport. As consideration for the acquisition, Newport's shareholders will receive $23 per share in cash (the "Proposed Transaction"). The Proposed Transaction is valued at approximately $980 million.

2. Newport's Board of Directors (the "Board" or the "Individual Defendants") has breached their fiduciary duties by agreeing to the Proposed Transaction for inadequate consideration. As described in more detail below, given Newport's recent strong performance as well as its future growth prospects, the consideration shareholders will receive is inadequate and undervalues the Company.

3. Although the Company experienced recent market turbulence, which caused its stock to slightly decline, the price began to steadily increase in the month before the Merger was announced, and is expected to continue increasing. In fact, the week before the Merger Agreement was announced, the Company's stock was performing 8.23% better than the peer median, further showing that the Company's stock price was beginning to improve.

4. Since this is an all-cash transaction, Newport's stockholders will be precluded from experiencing the significant synergies the Proposed Transaction will create for the newly formed company. The combined company is expected to have approximately $1.4 billion in pro forma annual revenue and to realize $35 million in annualized cost synergies within 18 to 36 months.

5. The Company also recently acquired FEMTOLASERS Productions GmbH, a leading developer and manufacturer of ultrafast laser systems, a lucrative acquisition the Company was only beginning to see the benefits from, and of which MKS and its stockholders will now enjoy

at the exclusion of Newport's stockholders. The Company also recently implemented cost reduction actions which have attributed to the now-increasing stock price, another benefit which Newport's stockholders will also be precluded from experiencing.

6. The proposed offer is the product of an inherently flawed merger process plagued by unfair practices that operate for MKS's benefit and to the detriment of Newport's shareholders. The Board and MKS agreed to a Merger Agreement filled with a host of onerous preclusive deal mechanisms- including a hefty $32.6 million Termination Fee and a strict no-solicitation provision- that unfairly locks up the deal in favor of MKS.

7. The Board, because of its interests in the deal and the benefits they acquire from it, was motivated and incentivized to authorize the Proposed Transaction, and therefore did not and could not competently represent the best interests of Newport's shareholders to secure a better offer. Under these circumstances, it is clear that MKS's offer to acquire Newport is inadequate. Absent consideration that matches up with Newport's real value, the Board should not have proceeded with the Merger Agreement, which, through restrictive mechanisms, essentially guarantees that only MKS can acquire Newport. Yet, this is exactly what the Board did.

8. Lastly, on March 15, 2016, Newport filed a Form PREM14A Preliminary Proxy on behalf of the Company (the "Proxy") with the SEC that lacks material information necessary for shareholders to make an informed decision on whether to vote for or against the merger. Specifically, the information in the Proxy regarding the merger process and the fairness opinion by J.P. Morgan Securities LLC ("J.P. Morgan") was incomplete, inadequate and incomprehensive, and therefore incapable, under the present circumstances, of providing Newport's shareholders with an accurate picture of the true state of affairs of the Merger Agreement. By issuing this deficient Proxy, which Newport shareholders will most assuredly rely upon in deciding whether to approve

the Proposed Transaction, the Board members have violated their fiduciary duties of candor, loyalty, and good faith.

9. For these reasons, Plaintiff seeks to enjoin the Defendants from taking any steps to consummate the Proposed Transaction or, in the event the Proposed Transaction is consummated, recover damages resulting from the Individual Defendants' (as defined herein,) violations of their fiduciary duties.

PARTIES

10. Plaintiff is, and has been at all relevant times, the owner of shares of common stock of Newport.

11. Newport is a corporation organized and existing under the laws of the State of Nevada. It maintains its principal executive offices at 1791 Deere Avenue, Irvine, California 92606. The Company is focused on advanced technology products, systems and solutions for markets worldwide. The Company operates in three groups, Photonics, Lasers, and Optics. The Company sells its products and services to original equipment manufacturers, end-user customers, and capital equipment customers through direct sales organizations, a network of independent distributors, and sales representatives. The Company also sells its products through catalogs and websites.

12. Defendant Kenneth F. Potashner ("Potashner") has been the Chairman of the Board since 2007 and a director of the Company since 1998.

13. Defendant Christopher Cox ("Cox") has been a director of the Company since 2011.

14. Defendant Siddhartha C. Kadia ("Kadia") has been a director of the Company since 2014.

15. Defendant Oleg Khaykin ("Khaykin") has been a director of the Company since 2010.

16. Defendant Robert J. Phillippy ("Phillippy") has been President, Chief Executive Officer ("CEO") and a director of the Company since 2007.

17. Defendant Peter J. Simone ("Simone") has been a director of the Company since 2003.

18. Defendants referenced in ¶¶ 12 through 17 are collectively referred to as Individual Defendants and/or the Board.

19. Defendant MKS is a Massachusetts corporation with its headquarters located at 2 Tech Drive, Suite 201, Andover, Massachusetts 01810. MKS provides instruments, subsystems and process control solutions that measure, control, power, monitor, and analyze critical parameters of manufacturing processes in the United States and internationally.

20. Defendant Merger Sub is a Nevada corporation wholly owned by MKS that was created for the purposes of effectuating the Proposed Transaction.

INDIVIDUAL DEFENDANTS' FIDUCIARY DUTIES

21. By reason of the Individual Defendants' positions with the Company as officers and/or directors, they are in a fiduciary relationship with Plaintiff and the other public shareholders of Newport and owe them, as well as the Company, a duty of care, loyalty, good faith, candor, and independence.

22. To diligently comply with their fiduciary duties, the Individual Defendants may not take any action that:

(a) adversely affects the value provided to the corporation's shareholders;

(b) favors themselves or will discourage or inhibit alternative offers to purchase control of the corporation or its assets;

(c) adversely affects their duty to search and secure the best value reasonably available under the circumstances for the corporation's shareholders; and/or

(d) will provide the Individual Defendants with preferential treatment at the expense of, or separate from, the public shareholders.

23. In accordance with their duties of loyalty and good faith, the Individual Defendants are obligated to refrain from:

(a) participating in any transaction where the Individual Defendants' loyalties are divided;

(b) participating in any transaction where the Individual Defendants receive, or are entitled to receive, a personal financial benefit not equally shared by the public shareholders of the corporation; and/or

(c) unjustly enriching themselves at the expense or to the detriment of the public shareholders.

24. Plaintiff alleges herein that the Individual Defendants, separately and together, in connection with the Proposed Transaction, are knowingly or recklessly violating their fiduciary duties, including their duties of care, loyalty, good faith, candor, and independence owed to plaintiff and other public shareholders of Newport.

CLASS ACTION ALLEGATIONS

25. Plaintiff brings this action as a class action pursuant to Rule 23 of the Nevada Rules of Civil Procedure on behalf of all persons and/or entities that owned Newport common stock (the "Class") as of February 23, 2016, the date on which the Proposed Transaction was announced. Excluded from the Class are Defendants and their affiliates, immediate families, legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

26. The Class is so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained

through discovery, Plaintiff believes that there are thousands of members in the Class. According to the Merger Agreement, as of February 19, 2016, 38,627,839 shares of common stock were represented by the Company as outstanding. All members of the Class may be identified from records maintained by Newport or its transfer agent and may be notified of the pendency of this action by mail, using forms of notice similar to that customarily used in securities class actions.

27. Questions of law and fact are common to the Class, including, *inter alia*, the following:

(i) Have the Individual Defendants breached their fiduciary duties of undivided loyalty, independence, or due care with respect to plaintiff and the other members of the Class in connection with the Proposed Transaction;

(ii) Have the Individual Defendants breached their fiduciary duty to maximize shareholder value for the benefit of Plaintiff and the other members of the Class in connection with the Proposed Transaction;

(iii) Have the Individual Defendants breached any of their other fiduciary duties to Plaintiff and the other members of the Class in connection with the Proposed Transaction, including the duties of good faith, diligence, honesty and fair dealing;

(iv) Have the Individual Defendants, in bad faith and for improper motives, impeded or erected barriers to discourage other strategic alternatives including offers from interested parties for the Company or its assets;

(v) Whether Plaintiff and the other members of the Class would be irreparably harmed were the transactions complained of herein consummated;

(vi) Have MKS and Merger Sub aided and abetted the Individual Defendants' breaches of fiduciary duty; and

(vii) Is the Class entitled to injunctive relief or damages as a result of defendants' wrongful conduct.

28. Plaintiff's claims are typical of the claims of the other members of the Class. Plaintiff and the other members of the Class have sustained damages as a result of Defendants' wrongful conduct as alleged herein.

29. Plaintiff will fairly and adequately protect the interests of the Class, and has no interests contrary to or in conflict with those of the Class that Plaintiff seeks to represent.

30. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Plaintiff knows of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

FURTHER SUBSTANTIVE ALLEGATIONS

Company Background and its Poise for Growth

31. Newport is a leading global supplier of advanced technology products, systems and solutions for markets worldwide, including Scientific Research, Life & Health Science, Aerospace & Defense, Photovoltaics, Industrial Manufacturing, Semiconductors, and Microelectronics markets. The Company operates in three groups, Photonics, Lasers, and Optics. The Company sells its products and services to original equipment manufacturers, end-user customers, and capital equipment customers through direct sales organizations, a network of independent distributors, and sales representatives. The Company also sells its products through catalogs and websites.

32. Newport has enjoyed strong financial results and positioned itself well for future growth with several acquisitions. On February 5, 2015, the Company announced in a press release that it had entered into an agreement to acquire FEMTOLASERS Produktions GmbH, a leading developer and manufacturer of ultrafast laser systems used extensively in scientific and biomedical research applications. During that same press release, David Allen ("Allen"), the Senior Vice President and General Manager of Newport's Spectra-Physics Lasers Group, stated, "We are excited to announce our agreement to acquire FEMTOLASERS, which will advance our strategic initiative to extend our industry leadership in ultrafast lasers." He continued, stating, "FEMTOLASERS has developed some truly impressive leading-edge technology that will be invaluable as we work together to develop the next generation of ultrafast lasers. We welcome the FEMTOLASERS team to Newport and look forward to their contributions to our Spectra-Physics Lasers Group."

33. In addition to the FEMTOLASERS acquisition, the Company reported strong financial results for the first quarter 2015, ending April 4, 2015. In a May 6, 2015 press release, the Company reported net sales increase 6.6% to $156.7 million, compared to the same quarter in 2014. The Company's new orders also increased by 5% to $154.6 million, compared to the same quarter in 2014.

34. The Company experienced a slight decline in net sales for the second quarter 2015, ended July 4, 2015. In an August 4, 2015 press release, Defendant Phillippy explained this decline, and stated, "Accordingly, we are implementing cost reduction actions in these areas to align our cost base with current business conditions."These actions described by Defendant Phillippy proved effective for the Company, when the Company announced its third quarter 2015 financial results ending on October 3, 2015, in a press release on November 4, 2015. The Company reported net sales of $147.6 million and new orders of $146.5 million. These results were what the Company

had expected, as Defendant Phillippy stated in the press release, "Our third quarter sales and profit met our expectations, and we expect our financial performance to gain additional momentum in the fourth quarter of 2015 as we continue to focus on achieving new design wins, increasing share in our target markets and implementing our cost reduction initiatives."

35. The additional momentum Defendant Phillippy hoped the Company would gain in the fourth quarter proved true. The Company announced its fourth quarter and full year 2015, ending on January 2, 2016, in a press release on February 23, 2016, the same day the merger was announced. The Company reported net sales of $150.5 million for the fourth quarter and $602.7 million for the full year. Defendant Phillippy was pleased with the Company's 2015 fiscal year results. In the press release he stated, "The Newport team delivered a strong fourth quarter, with cash generated from operations and earnings per diluted share both at the highest levels of the year. This performance demonstrates the effectiveness of our business model and the results of our actions to streamline our operations."

36. Although the Company is performing extremely well and has not yet fully realized the benefits of its recent acquisition of FEMTOLASERS and its efforts in cost reduction, the Board decided to sell the Company for inadequate consideration.

The Newport Board Allowed Defendants to Run a Process That Almost Exclusively Favored a Deal with MKS, Without Conducting Any Meaningful Market Check

37. According to the Proxy, on June 11, 2015, Defendant Phillippy met with the CEO of a company referred to as "Party A" to discuss the merits of a potential business combination. A month later, on July 11, 2015, Defendant Phillippy met with the chairman of the board of directors of a company referred to as "Party B", and then subsequently both engaged in phone conversations on August 1, August 21, and August 27, 2015. On September 14, 2015, Defendant Phillippy met with the CEO of a company referred to as "Party C." Defendants do not disclose in the Proxy who initiated these conversations nor why these three parties were chosen.

38. However, despite ongoing discussions with three potential strategic partners, the Board decided on September 16, 2015, to only submit a preliminary, non-binding proposal to Party B for an at-market, stock-for-stock strategic merger between the Company and Party B. The Defendants fail to disclose in the Proxy why the Company initiated a non-binding proposal, and why this was only initiated with Party B.

39. While waiting for a response from Party B, Party C submitted a non-binding proposal on October 5, 2015, for $21.50 per share, with a portion being comprised of 19.9% of Party C's then-outstanding common stock, which was also approximately 30% of the total consideration. On October 8, 2015, the Board held a special telephonic meeting during which they discussed Party C's proposal. The Company determined that this only represented a significant premium over the Company's stock due to a recent decline, but that it represented a significantly lower premium over the 12-month average price and 52-week high price of the Company's common stock. The Board also believed that a greater portion of the proposed consideration should be comprised of Party C's common stock to provide the Company's stockholders with greater participation in the future value that could result from a combination with Party C. However, Defendants fail to disclose in the Proxy their reasoning behind their belief that a greater portion of the proposed consideration should be comprised of common stock, especially since they ultimately entered into an all-cash Merger Agreement.

40. During this meeting, the Board also determined that it should obtain advice from its financial advisor to fully evaluate Party C's proposal and resolved to formally engage J.P. Morgan as the Company's financial advisor. Defendants fail to disclose in the Proxy why they did not formally engage a financial advisor prior to this date, especially since the Company itself submitted a non-binding proposal a month prior, and had begun discussions of a strategic transaction four months prior.

41. Also on October 8, 2015, Defendant Coyne outlined the provisions in the Company's Bylaws that require the Company Board to form an independent committee to consider, evaluate, and make recommendations with respect to acquisition proposals. The Company therefore created an independent committee comprised of Defendants Potashner, Khaykin, and Simone (the "Independent Committee"). Defendants fail to disclose in the Proxy what the provisions in the Company's Bylaws are that required the creation of such a committee, and again, like with the financial advisor, why the Company waited until now to create the Committee, when they were four months into discussions with three potential acquirers, and had already made a non-binding proposal.

42. On October 11, 2015, Party C increased its proposal to $22.50 per share, with a portion being comprised of 19.9% of Party C's then-outstanding common stock. On October 15, 2015, the Board held a special telephonic meeting during which they discussed Party C's increased proposal, and still determined that the Company should be able to obtain a higher price from Party C or another potential buyer.

43. On October 19, 2015, Defendant Potashner communicated the Board's position to Party C's CEO regarding an increase in Party C's proposal. Party C's CEO responded that Party C would not increase its proposed price any further unless it received a counter-proposal from the Company, and also insisted the Company agree to negotiate exclusively with Party C before Party C would execute a confidentiality agreement and conduct due diligence.

44. On October 23, 2015, the Board held a special telephonic meeting during which they resolved to respond to Party C that it would be open to an offer at a price that represented a 50% premium over the price of the Company's common stock after it recovered from its recent decline, with a floor value of $23.00 per share. Defendants fail to disclose in the Proxy how they determined $23.00 per share would be a fair value for the Company's stockholders.

45. On October 26, 2015, Party C again made a revised proposal for either (i) $22.60 per share, to be comprised of cash and up to 19.9% of Party C's then-outstanding common stock, or (ii) $23.00 per share, to be comprised of cash and up to $150 million in value of Party C's common stock. Party C's CEO also reiterated Party C would not move forward with negotiations or commence due diligence unless the Company agreed to negotiate exclusively with Party C.

46. On October 28, 2015, the Board held a special telephonic meeting during which they discussed Party C's revised proposal. The Board determined that it would be imperative for Party C to agree to bear all antitrust risks and take any actions required to obtain approval for the proposed transaction from antitrust authorities, and also provide concrete evidence that Party C would be able to obtain financing for the proposed transaction. The Board also reached the consensus that the Company should seek a higher value proposal from Party C or another buyer. Defendants fail to disclose in the Proxy why they had provided Party C with a counter proposal of $23.00, and then later determined this was inadequate.

47. On October 29, 2015, Party C put their proposal in writing, but again insisted this was contingent on the Company agreeing to negotiate exclusively with Party C. The Board then held a special telephonic meeting on October 30, 2015, during which the Independent Committee decided not to grant exclusivity to Party C at this time, and instead concluded that the Company's management and J.P. Morgan should conduct a confidential market check. The Independent Committee selected five highly qualified potential strategic acquirers, Parties D, E, F, G, and H, to be contacted by Company's management and J.P. Morgan in the market check. The Defendants failed to disclose in the Proxy why the Independent Committee determined now, after being in discussions with strategic acquirers for almost five months, to conduct a market check. Defendants also failed to disclose why only five companies were selected, the number of companies that were

considered, and why they waited until now to contact these companies when some of them had previously expressed interest.

48. Also at the October 29, 2015 meeting, the Independent Committee asked Defendant Coyne to prepare a draft merger agreement to be provided to Party C for comment so that the Company Board could better understand any legal issues or risks, including the antitrust and financing issues discussed previously, associated with Party C's proposal. The Board also determined not to grant Party C exclusivity at this time, all of which was communicated to Party C on November 2, 2015. On November 3, 2015, Party C provided a "highly confident letter" from a third-party lender for the financing of a potential acquisition of the Company.

49. Between November 3, 2015 and November 9, 2015, Parties F, G, and H informed the Company that they would not pursue the opportunity to acquire the Company, though the Proxy fails to disclose the reasons behind their disinterest. On November 5 and 6, 2015, the Company entered into confidentiality agreements with Party E and Party D, and both companies indicated that they would submit preliminary indications of interest and valuations for the acquisition of the Company by November 11, 2015.

50. On November 11, 2015 Party D submitted a non-binding indication of interest for $25.00 to $27.00 per share in cash, with cash on hand and debt financing. Party E also submitted a non-binding indication of interest for $20.00 per share in cash, but J.P. Morgan indicated to them that this was not competitive.

51. On November 16, 2015, Party C rescinded its previous proposal, but stated that it would be interested in an all-cash acquisition of the Company. On November 18, 2015, Party C's financial advisors then explained that Party C had decided not to participate in the Company's process, but that Party C would still be interested in a combination the Company if the Company's process did not result in a transaction.

52. On November 23, 2015 Party D decided not to pursue an acquisition of the Company.

53. On November 24, 2015, Defendant Potashner, after consulting with the Independent Committee, directed Defendant Phillippy to contact Party C's CEO and inform him that the Company would be willing to grant a brief period of exclusivity to Party C if Party C would increase its proposal to $25.00 per share. Defendants, however, fail to disclose in the Proxy why they determined now, after over four months of negotiations with Party C, to offer a brief period of exclusivity.

54. On November 25, 2015, the Board held a special telephonic meeting during which the Board determined that a purchase price below $24.75 per share from Party C would not be adequate to recommend to the Company's stockholders. Defendants failed to adequately disclose in the Proxy the reasoning the determination that $24.75 per share would be the goal point for a proposal especially given the fact that they ultimately accepted a much lower acquisition proposal from MKS.

55. On November 27, 2015, Party C's CEO indicated Party C was not willing to improve it proposed price to $25.00 per share, but communicated a counter-proposal of $23.00 per share, with a portion of the consideration to be comprised of up to 19.9% of Party C's then-outstanding common stock. However, the Board determined they would not grant exclusivity at that price.

56. On November 27, 2015, MKS submitted an unsolicited inquiry regarding whether the Company would be interested in discussing a potential business combination.

57. On December 3, 2015, Party C increased its proposal to $23.25 per share, with a portion of the consideration to be comprised of up to 19.9% of Party C's then-outstanding common stock.

58. On December 8, 2015, the Company and MKS entered into a confidentiality agreement. On that same day the Board also submitted a counter-proposal to Party C of $24.75 per share. Party C then indicated that it was not interested in moving forward with an acquisition of the Company at that price.

59. On December 18, 2015, Party B submitted a preliminary, non-binding proposal for a stock-for-stock merger with the Company in an "at market" transaction. Defendants, however, failed to define in the Proxy what an "at market" transaction would entail.

60. On December 23, 2015, MKS submitted a preliminary, non-binding proposal to acquire the Company for $20.50 per share in cash. The Board held a special telephonic meeting on December 29, 2015, during which they directed J.P. Morgan to (i) continue discussions with Party B to gauge the potential strategic benefits and synergies that could be achieved in a strategic business combination, (ii) inform Party C that the Company's process was taking longer than anticipated and that the Company would provide a response to Party C as soon as practicable, and (iii) communicate to MKS that it would need to significantly improve its proposal to remain competitive in the process.

61. On January 15, 2016, MKS submitted a revised proposal to acquire the Company for $23.00 per share in cash, with a target of announcing a transaction in mid-February 2016, and requested that the Company agree to exclusivity through February 19, 2016. The Board indicated that it would not be willing to grant MKS exclusivity at that time, but that MKS could proceed with detailed due diligence on a non-exclusive basis.

62. On January 19, 2016, Party B informed the Company that it had decided not to move forward with further negotiations regarding a strategic combination with the Company. However, Defendants fail to disclose in the Proxy Party B's reasoning for now dropping out of the process after several months of negotiations.

63. On February 8, 2016, Party C indicated that in light of the recent market turbulence, Party C was not willing to increase its most recent proposed price of $23.25 per share, and was no longer interested in pursuing an acquisition of the Company. However, Defendants fail to disclose in the Proxy what the "market turbulence" was that the Company was experiencing, whether or not this was a temporary situation, how long it had been going on for, and whether the Company considered halting negotiations until the market improved.

64. On February 10, 2016, MKS submitted a letter to the Company reaffirming its acquisition proposal at a price of $23.00 per share in cash, and on February 11, 2016, provided a mark-up of the draft Merger Agreement.

65. On February 12, 2016, the Company and MKS entered into an exclusivity agreement until February 22, 2016, despite continually refusing to do so with Party C, and despite MKS's proposal being significantly lower than the $25.00 demanded of Party C before an exclusivity period would be considered. During this time, the Company and MKS negotiated the terms and conditions of the Merger Agreement.

66. On February 22, 2016, the Board held a special telephonic meeting during which J.P. Morgan rendered its fairness opinion that the consideration to be paid to the holders of the Company Common Stock in the proposed Merger was fair, from a financial point of view, to such holders. The Board then unanimously resolved to approve the terms of the Merger Agreement and recommend it for adoption by the Company's stockholders.

The Proposed Transaction Fails to Maximize Shareholder Value

67. In a press release dated February 23, 2016, the Company announced that it had entered into a merger agreement with MKS pursuant to which MKS, through Merger Sub, will acquire all of the outstanding shares of the Company for $23.00 per share in cash. The release, however, is bereft of any language that demonstrates or indicates, even in the slightest, that the sale

is beneficial to or in the best interest of Newport shareholders. Simply, neither MKS nor Newport could have made such a pronouncement because the proposed consideration is in no way reflective of the intrinsic value of Newport. The release, in relevant part, provides as follows:

> **ANDOVER, Mass., Feb. 23, 2016** (GLOBE NEWSWIRE) -- MKS Instruments, Inc. (NASDAQ:MKSI), a global provider of technologies that enable advanced processes and improve productivity, and Newport Corporation (NASDAQ:NEWP), a worldwide leader in photonics solutions, today announced that they have entered into an agreement for MKS Instruments to acquire Newport Corporation for $23.00 per share. The all-cash transaction is valued at approximately $980 million.
>
> The combined company is expected to have approximately $1.4 billion in pro forma annual revenue, based on the two companies' 2015 historical results. The transaction is expected to be accretive to MKS Instruments' Non-GAAP net earnings and free cash flow during the first 12 months post-closing. The combined company expects to realize $35 million in annualized cost synergies within 18 to 36 months and anticipates revenue synergies from the expansion of MKS Instruments' served addressable markets and leverage of complementary sales channels.
>
> "The combination of MKS Instruments and Newport Corporation creates a premier supplier of critical components and subsystems for a diverse set of growing end markets, each with a common need for highly precise technology enabling solutions," said Gerald Colella, MKS Instruments' Chief Executive Officer and President. "This acquisition is consistent with our strategy to pursue sustained profitable growth by expanding into adjacent markets while increasing our served addressable market in our core semiconductor business. Our shared customer requirements and complementary technologies together with our increased scale will enable us to lead in our served markets, deliver innovative and cost-effective solutions for our customers, and drive profitable growth."
>
> "This combination represents a great outcome for all of Newport's stakeholders," said Robert Phillippy, President and Chief Executive Officer of Newport Corporation. "The complementary nature of the two companies' technologies and customer base will create exciting opportunities for our employees, and enable the combined company to deliver innovative solutions to our customers. We look forward to working closely with the MKS Instruments team to ensure a smooth transition."
>
> MKS Instruments intends to fund the transaction with a combination of available cash on hand and up to $800 million in committed debt financing. The combined company will maintain a very strong balance sheet, with combined pro forma net cash and investments on hand of approximately $425 million.
>
> The transaction has been approved by MKS Instruments' and Newport Corporation's board of directors and is subject to customary approvals, including regulatory and

approval by Newport Corporation's shareholders, and is expected to close in the second quarter of 2016.

Lazard acted as financial advisor to MKS Instruments. JP Morgan acted as financial advisor to Newport Corporation.

68. Given the Company's recent strong performance, positioning for growth, and exciting and promising expansion into the laser market, the Proposed Transaction consideration is inadequate and significantly undervalues the Company.

69. Newport's stock is also currently outperforming similar companies' stock, with a 30-day trend in share price performance of 8.23% better than the peer median as of February 18, 2016.

70. In addition, the Proposed Transaction consideration fails to adequately compensate Newport's shareholders for the significant synergies created by the merger. The Proposed Transaction is a strategic merger for MKS, which is "a global provider of technologies that enable advanced processes and improve productivity [.]" As stated in the press release announcing the Proposed Transaction, "The combination of MKS Instruments and Newport Corporation creates a premier supplier of critical components and subsystems for a diverse set of growing end markets, each with a common need for highly precise technology enabling solutions." The combined company is expected to have approximately $1.4 billion in pro forma annual revenue, and is expected to realize $25 million in annualized cost synergies within 18 to 36 months.

71. Despite the significant synergies inherent in the transaction for MKS, however, the Board failed to secure a fair price for the Company, either for the intrinsic value of its assets or the value of the Company's assets to MKS.

72. MKS is seeking to acquire the Company at the most opportune time, at a time when the Company is performing very well and is positioned for tremendous growth.

Newport's Officers and Directors Stand to Receive Special Benefits from the Proposed Transaction That the Company's Public Stockholders Will Not Receive

73. What is more, Company insiders will have an opportunity to cash in unvested equity awards through the Proposed Transaction. Pursuant to section 2.2(b) of the Merger Agreement, any unvested restricted stock will become vested and will receive the same treatment as other outstanding stock. According to the Form 10-Q filed on November 12, 2015, several insiders possess large holdings of unvested restricted stock. Specifically, according to a Statement of Changes in Beneficial Ownership on Form 4 filed with the SEC on September 16, 2015Defendant Phillippy holds more than 303,247 unvested restricted shares. On the same form filed on May 22, 2015, Defendant Cargile holds 111,805 unvested restricted shares, and Defendant Potashner holds 99,522 unvested restricted shares, all of which would not otherwise fully vest until March 31, 2018, without the occurrence of certain transactions, such as the Proposed Transaction. These insiders will be able to cash in on their unvested restricted shares now at the expense of the Company's public shareholders.

74. The following table details the amount of shares of the Company's common stock beneficially owned by several Directors and executives of the Company:

Robert J. Phillippy(8)	482,410
Charles F. Cargile(9)	215,954
Jeffrey B. Coyne(10)	181,484
David J. Allen(11)	141,806
Dennis L. Werth(12)	120,446
Kenneth F. Potashner	87,242
Oleg Khaykin(13)	53,899
Peter J. Simone(14)	48,512
Christopher Cox	33,933
Siddhartha C. Kadia	4,414

75. In addition, the Board members secured for themselves other benefits not shared by the Company's shareholders, and consequently, were incentivized and motivated to green light a transaction with almost no upside for the shareholders. Knowing that they had compromised their fiduciary duties to the Company and its shareholders, the Board readily acknowledged, via the Proxy, that their interests in the deal were not aligned with those of the Company's stockholders, as if the admission nullified the breach. The Individual Defendants, among other things, negotiated for themselves the following benefits:

a. a lump sum payment equal to twelve months of such officer's highest base salary during the 12-month period preceding the termination (with the exception of Mr. Phillippy, who will be entitled to a payment equal to 24 months of salary);

b. a lump sum payment equal to such officer's annual incentive compensation bonus payable under cash incentive plan or other bonus plans then in effect calculated

based on 100% satisfaction of all performance goals (with the exception of Mr. Phillippy, who will be entitled to receive two times such bonus payment);

c. continuation of benefits under the Company's medical, dental and vision plans, and long-term disability insurance for 24 months following termination (provided that this continuation of benefits will terminate at such time such officer becomes eligible for similar benefits from any subsequent employer);

d. automatic vesting and settlement of all unvested restricted stock and Company RSUs held by such officer, based on 100% satisfaction of any applicable performance goals and, at the executive's election, the Company's repurchase of all such shares of Company Common Stock received by the executive at the fair market price (calculated as set forth in the applicable Severance compensation Agreement);

e. automatic vesting and settlement of all unvested Company SARs held by such officer, based on 100% satisfaction of any applicable performance goals and, at the executive's election, the Company's repurchase of all such shares of Company's common stock received by the executive at the price determined in accordance with the applicable Severance Compensation Agreement; and

f. payment of an amount sufficient to offset any excess "parachute payment" excise tax payable by such officer pursuant to the provisions of the Internal Revenue Code, and/or any comparable provision of state or foreign law.

76. The following table details the amount of money these Directors, as well as several executives, will uniquely earn from Company RSUs if the Proposed Transaction is consummated:

Name	Number of shares of Company Common Stock underlying Company RSUs held	Number of Company RSUs that will vest in connection with the Merger	Consideration payable in respect of Company RSUs that will vest in connection with the Merger	Awards for Parent Common Stock issued in respect of Company RSUs that will be assumed by Parent in connection with the Merger(1)(2)
Executive Officers				
Robert J. Phillippy	98,260	—	—	66,331
Charles F. Cargile	44,680	—	—	30,161
Jeffrey B. Coyne	31,390	—	—	21,190
Dennis L. Werth	27,220	—	—	18,374
David J. Allen	27,220	—	—	18,374
Non-Employee Directors				
Christopher Cox	6,280	6,280	$ 144,440	—
Siddhartha C. Kadia	11,228	11,228	$ 258,244	—
Oleg Khaykin	6,280	6,280	$ 144,440	—
Kenneth F. Potashner	6,280	6,280	$ 144,440	—
Peter J. Simone	6,280	6,280	$ 144,440	—

77. In addition to these benefits, certain named executive officers will receive "Golden Parachute Compensation" in connection with the Proposed Transaction. Specifically, these compensations represent the net exercise value of each executive's outstanding unvested options as of March 10, 2016, and total value of restricted stock that will become vested and exercisable and unrestricted, respectively, upon consummation of the merger pursuant to the merger agreement as well as certain other cash payments. The following table details the amount of money these executives will uniquely earn if the Proposed Transaction is consummated:

Golden Parachute Compensation

Name	Cash(1)	Equity(2)	Perquisites/ Benefits(3)	Tax Reimbursement(4)	Total(5)
Robert J. Phillippy	$ 2,349,198	$ 2,765,062	$ 64,418	$ —	$ 5,178,678
Charles F. Cargile	702,009	1,258,651	58,721	—	2,019,372
Jeffrey B. Coyne	516,800	887,869	57,096	—	1,461,765
Dennis L. Werth	515,200	769,906	53,535	—	1,338,641
David J. Allen	498,400	769,906	54,941	—	1,323,247

78. Accordingly, the conflicted executives and the Board, led by conflicted Defendant Phillippy, made sure to garner huge personal benefits while failing to negotiate an adequate price for the Company's shareholders. Therefore, the Company's true value is compromised by the consideration offered in the Proposed Transaction, which is the product of the Board's self-interest and breach of their fiduciary duties aided and abetted by MKS and the Merger Sub.

The Unreasonable Deal Protection Devices

79. In addition, as part of the Merger Agreement, Defendants agreed to certain onerous and unreasonable deal protection devices that operate conjunctively to make the Proposed Transaction a *fait accompli* and potentially preclude competing offers will emerge for the Company.

80. Section 5.4(a) of the Merger Agreement includes a "no solicitation" provision barring the Company from soliciting interest from other potential acquirers in order to procure a price in excess of the amount offered by MKS. Section 5.4(a) further prohibits the Company granting any amendment, waiver or release of any standstill or similar contract with respect to the Company or any shares.

81. Pursuant to § 5.4(b) of the Merger Agreement, should an unsolicited bidder submit a competing proposal, the Company must notify MKS of the bidder's identity and the terms of the bidder's offer. Thereafter, § 5.4(d) demands that should the Board determine to enter into a superior competing proposal, it must grant MKS five business days in which the Company must negotiate in good faith with MKS (if MKS so desires) and allow MKS to amend the terms of the Merger Agreement to make a counter-offer so that the competing offer will no longer constitute a "Superior Proposal" under the Merger Agreement. In other words, the Merger Agreement gives MKS access to any rival bidder's information and allows MKS a free right to top any superior offer simply by matching it. Accordingly, no rival bidder is likely to emerge and act as a stalking horse, because the Merger Agreement unfairly assures that any "auction" will favor MKS, who will be able to piggy-back upon the due diligence of the foreclosed second bidder.

82. The Merger Agreement also provides that a termination fee of $32,600,000 must be paid to MKS by Newport if the Company decides to pursue the competing offer, thereby essentially requiring that the competing bidder agree to pay a naked premium for the right to provide the shareholders with a superior offer.

83. Ultimately, these deal protection provisions unreasonably restrain the Company's ability to solicit or engage in negotiations with any third party regarding a proposal to acquire all or a significant interest in the Company. The circumstances under which the Board may respond to an unsolicited written bona fide proposal for an alternative acquisition that constitutes or would reasonably be expected to constitute a superior proposal are too narrowly circumscribed to provide an effective "fiduciary out" under the circumstances.

84. Accordingly, Plaintiff seeks injunctive and other equitable relief to prevent the irreparable injury that Company shareholders will continue to suffer absent judicial intervention.

The Proxy is Materially Misleading

85. On March 15, 2016, Newport filed a Form PREM14A (referred to herein as the Proxy) with the SEC. The Proxy is bereft of critically vital information that Newport's shareholders require in order to make reasonably informed decisions about the facts and circumstances surrounding the Merger Agreement and the merger process. In particular, the Proxy is materially misleading in several respects.

Materially Deficient Disclosures Concerning the Flawed Sales Process

86. The *Background of the Merger* section of the Proxy omits the following material information which must be disclosed to Newport's shareholders:

(a) The context in which the discussion with Party A commenced.

(b) The context in which the discussion with Party B commenced.

(c) The context in which the discussion with Party C commenced.

(d) Explanation of the catalyst that caused deal discussions between Newport and Parties A, B, and C, or whether this was the normal course of business for the Company.

(e) Explanation of the basis for the Board's belief that Newport's stock was "temporarily trading at a discounted price," including the perceived magnitude of, and reason for, the discount.

(f) Specific details regarding the Independent Committee's duties, powers, restrictions, responsibilities, and so on, and the basis for selecting its members.

(g) Explanation of the general nature of the antitrust concerns by Newport in negotiating an acquisition proposal with Party C, and whether these concerns were legitimate, given that extensive discussions took place with Party C for an extended period of time.

(h) Explanation of the reason or reasons given by Party C in rescinding its proposal.

(i) Information for each instance in the *Background of the Merger* section in which a party declined to participate, discontinued its earlier participation, changed the terms of a bid, and so forth.

Materially Incomplete and Misleading Disclosures Concerning J.P. Morgan's Financial Analysis

87. The Proxy also omitted the following information regarding the analyses conducted by J.P. Morgan that would be material to Newport's stockholders in their attempts to understand, recreate, or critically assess the analyses:

a. With respect to J.P. Morgan's "*Public Trading Multiples,*" the following information is missing: (a) a valuation summary detailing the calculation of fully diluted shares, equity value (at the unaffected price and the offer) and enterprise value (at the unaffected price and the offer); (b) whether or not multiples were calculated, and if so, what the multiples were; (c) the objective selection criteria and the observed company-by-company financial metrics examined, whether or not other multiples were examined and if so, what the multiples were; (d) a justification

for J. P. Morgan's selection of pricing-multiple ranges for both P/E and EBITDA that go below Newport's corresponding multiples and all the multiples examined among the comparable companies; and (e) a correction to the apparent math errors included in the analyses, such as if NEWP's $15.04 unaffected price corresponds to a 9.8x P/E multiple, then a 9.5x (bottom of selected multiple range) multiple cannot correspond to the $16.25 lower end of the implied equity value range.

b. With respect to J.P. Morgan's "*Discounted Cash Flow Analyses,*" the following information is missing: (a)the implied terminal pricing multiples corresponding to the assumed perpetuity growth rates; and (b) the identity of the assumptions underlying J.P. Morgan's estimate of Newport's WACC and a quantification and basis for each assumption.

c. With respect to J.P. Morgan's "*Selected Transactions Analysis,*"the following information is missing: (a) the objective selection criteria and the observed transaction-by-transaction enterprise values and financial metrics; (b) whether or not other multiples and/or transaction premiums were examined, and if so, what they were; (c) Newport's LTM EBITDA multiple implied by the offer; and (d) a correction to the apparent math errors included in the EBITDA multiples similar to the error in the "*Public Trading Multiples.*"

d. With respect to J.P. Morgan's "*Miscellaneous,*" the following information is missing: (a) the quantification of J.P. Morgan's fees in dollar amount, not just "1.25% of the total transaction value."

e. Quantification of the share repurchase assumptions used in the forecasts and the basis for the assumed share purchase price.

f. Synergies for the tables labeled "*Base Case Forecasts*" and "*Acquisition Forecasts.*"

88. Shareholders are entitled to be able to understand what factors might influence the Board's deliberation process and its financial advisor's analytical efforts in opining on and recommending the Proposed Transaction.

89. Accordingly, Plaintiff seeks injunctive and other equitable relief to prevent the irreparable injury that Company shareholders will continue to suffer absent judicial intervention.

CLAIMS FOR RELIEF

COUNT I
Breach of Fiduciary Duties

(Against All Individual Defendants)

90. Plaintiff repeats all previous allegations as if set forth in full herein.

91. The Individual Defendants have violated their fiduciary duties owed to the public shareholders of Newport and have acted to put their personal interests ahead of the interests of Newport shareholders.

92. The Individual Defendants' recommendation of the Proposed Transaction will result in a change of control of the Company which imposes heightened judicial scrutiny of the Board's process and its obligation to maximize Newport's value for the benefit of the stockholders.

93. The Individual Defendants have breached their fiduciary duties owed to the shareholders of Newport because, among other reasons:

(a) they failed to take steps to maximize the value of Newport to its public shareholders and took steps to avoid competitive bidding;

(b) they failed to properly value Newport; and

(c) they ignored or did not protect against the numerous conflicts of interest resulting from the executives and directors' personal financial interests in the Proposed Transaction.

94. As a result of the Individual Defendants' breaches of their fiduciary duties, Plaintiff and the Class will suffer irreparable injury in that they have not and will not receive their fair portion of the value of Newport's assets and will be prevented from benefiting from a value-maximizing transaction.

95. Unless enjoined by this Court, the Individual Defendants will continue to breach their fiduciary duties owed to Plaintiff and the Class, and may consummate the Proposed Transaction, to the irreparable harm of the Class.

96. Plaintiff and the Class have no adequate remedy at law.

COUNT II

Aiding and Abetting
(Against MKS and Merger Sub)

97. Plaintiff repeats all previous allegations as if set forth in full herein.

98. As alleged in more detail above, Defendants Newport, MKS, and Merger Sub have aided and abetted the Individual Defendants' breaches of fiduciary duties.

99. As a result, Plaintiff and the Class members are being harmed.

100. Plaintiff and the Class have no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment against defendants jointly and severally, as follows:

(A) declaring this action to be a class action and certifying Plaintiff as the Class representative and his counsel as Class counsel;

(B) enjoining, preliminarily and permanently, the Proposed Transaction;

(C) in the event that the transaction is consummated prior to the entry of this Court's final judgment, rescinding it or awarding Plaintiff and the Class rescissory damages;

(D) directing that Defendants account to Plaintiff and the other members of the Class for all damages caused by them and account for all profits and any special benefits obtained as a result of their breaches of their fiduciary duties;

(E) awarding Plaintiff the costs of this action, including a reasonable allowance for the fees and expenses of Plaintiff's attorneys and experts; and

(F) granting Plaintiff and the other members of the Class such further relief as the Court deems just and proper.

Dated this 25th day of March, 2016.

Respectfully submitted,

ALDRICH LAW FIRM, LTD.

/s/ John P. Aldrich
John P. Aldrich, Esq.
Nevada Bar No. 6877
1601 S. Rainbow Boulevard, Suite 160
Las Vegas, Nevada 89146
Tel: (702) 853-5490
Fax: (702) 227-1975

Shane T. Rowley, Esq.
LEVI & KORSINSKY, LLP
30 Broad Street, 24th Floor
New York, New York 10004
Tel: (212) 363-7500
Fax: (866) 367-6510
Pro Hac Vice Application to be submitted

Attorneys for Plaintiff

BUSINESS COURT CIVIL COVER SHEET A-16-734039-B

County, Nevada

Case No. XXVII
(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Hubert C. Pincon	Newport Corporation, MKS Instruments, INC.; PSI Equipment Inc. et. al
Attorney (name/address/phone):	Attorney (name/address/phone):
DAVID O'Mara 775-529-4042 316 E. Bridger Avenue, 2ND Floor Las Vegas, Nevada 89101	unknown

II. Nature of Controversy *(Please check the applicable boxes for both the civil case type and business court case type)*

☐ Arbitration Requested

Civil Case Filing Types

Real Property

Landlord/Tenant
- ☐ Unlawful Detainer
- ☐ Other Landlord/Tenant

Title to Property
- ☐ Judicial Foreclosure
- ☐ Other Title to Property

Other Real Property
- ☐ Condemnation/Eminent Domain
- ☐ Other Real Property

Construction Defect & Contract

Construction Defect
- ☐ Chapter 40
- ☐ Other Construction Defect

Contract Case
- ☐ Uniform Commercial Code
- ☐ Building and Construction
- ☐ Insurance Carrier
- ☐ Commercial Instrument
- ☐ Collection of Accounts
- ☐ Employment Contract
- ☐ Other Contract

Torts

Negligence
- ☐ Auto
- ☐ Premises Liability
- ☐ Other Negligence

Malpractice
- ☐ Medical/Dental
- ☐ Legal
- ☐ Accounting
- ☐ Other Malpractice

Other Torts
- ☐ Product Liability
- ☐ Intentional Misconduct
- ☐ Employment Tort
- ☐ Insurance Tort
- ☐ Other Tort

Civil Writs
- ☐ Writ of Habeas Corpus
- ☐ Writ of Mandamus
- ☐ Writ of Quo Warrant
- ☐ Writ of Prohibition
- ☐ Other Civil Writ

Judicial Review/Appeal/Other Civil Filing

Judicial Review
- ☐ Foreclosure Mediation Case

Appeal Other
- ☐ Appeal from Lower Court

Other Civil Filing
- ☐ Foreign Judgment
- ☒ Other Civil Matters

Business Court Filing Types

CLARK COUNTY BUSINESS COURT
- ☐ NRS Chapters 78-89
- ☐ Commodities (NRS 91)
- ☐ Securities (NRS 90)
- ☒ Mergers (NRS 92A)
- ☐ Uniform Commercial Code (NRS 104)
- ☐ Purchase/Sale of Stock, Assets, or Real Estate
- ☐ Trademark or Trade Name (NRS 600)
- ☐ Enhanced Case Management
- ☐ Other Business Court Matters

WASHOE COUNTY BUSINESS COURT
- ☐ NRS Chapters 78-88
- ☐ Commodities (NRS 91)
- ☐ Securities (NRS 90)
- ☐ Investments (NRS 104 Art.8)
- ☐ Deceptive Trade Practices (NRS 598)
- ☐ Trademark/Trade Name (NRS 600)
- ☐ Trade Secrets (NRS 600A)
- ☐ Enhanced Case Management
- ☐ Other Business Court Matters

3/25/16
Date

Signature of initiating party or representative

Civil Case Type: Other Civil Matters Per Firm

Nevada AOC - Research Statistics Unit
Pursuant to NRS 3.275

Form PA 201
Rev 3.1

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA (Nevada Bar No. 8599)
316 E. Bridger Avenue, 2nd Floor
Las Vegas, Nevada 89101
Telephone: 725/529.4042
775/323-4082 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
DAVID T. WISSBROECKER
EDWARD M. GERGOSIAN
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Attorneys for Plaintiff

[Additional counsel appear on signature page.]

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

HUBERT C. PINCON, Individually and on Behalf of All Others Similarly Situated, Plaintiff, vs. NEWPORT CORPORATION, MKS INSTRUMENTS, INC., PSI EQUIPMENT, INC., ROBERT J. PHILLIPPY, KENNETH F. POTASHNER, CHRISTOPHER COX, SIDDHARTHA C. KADIA, OLEG KHAYKIN and PETER J. SIMONE, Defendants.	Case No. A-16-734039-B Dept No. XXVII CLASS ACTION COMPLAINT BASED UPON BREACH OF FIDUCIARY DUTIES DEMAND FOR JURY TRIAL

Plaintiff Hubert C. Pincon, by counsel, submits this complaint against the defendants named herein and allege as follows:

SUMMARY OF THE ACTION

1. This is a stockholder class action brought by plaintiff on behalf of the holders of Newport Corporation ("Newport" or the "Company") common stock against Newport, its Board of Directors (the "Board"), MKS Instruments, Inc., a Massachusetts corporation ("Parent"), and its newly formed, wholly owned subsidiary, PSI Equipment, Inc., a Nevada corporation ("Merger Sub," and with Parent, "MKS"), arising out of their efforts to sell Newport to MKS via an unfair process at a grossly inadequate and unfair price (the "Proposed Acquisition").

2. Newport is a Nevada corporation headquartered in Irvine, California. Newport is a leading global supplier of advanced-technology products and systems to customers in the scientific research, microelectronics, life and health sciences, industrial manufacturing and defense/security markets. On February 23, 2016, Newport and MKS announced that they had entered into a definitive merger agreement (the "Merger Agreement") under which MKS will acquire the Company. Under the terms of the transaction, Newport shareholders will receive just $23.00 in cash for each share of Newport common stock.

3. The Proposed Acquisition is the result of an unfair and disjointed sale process that warrants heightened judicial scrutiny. One of the most important decisions in the corporate lifespan concerns whether to embark on a shopping process for an end-stage merger of a corporation, like Newport, with an otherwise perpetual existence. For Newport, that decision was not made by the full Board, it was usurped by one conflicted individual. Newport's Chief Executive Officer ("CEO"), Robert J. Phillippy ("Phillippy"), unilaterally put the Company in play through a series of unauthorized meetings with potential acquirers. Worse, Phillippy made outright merger proposals to potential acquirers and hijacked a financial advisor to engage in negotiations regarding his proposal without the authorization, knowledge or discussion of the full Board. Yet when the Board eventually became aware of its own sale process, the situation did not improve.

4. Led by reckless Chairman Kenneth F. Potashner ("Potashner"), the Board made a series of irrational decisions throughout late 2015 and early 2016 that impeded the highest offer for

Newport stockholders. In particular, the Board placed roadblocks in front of a known interested party identified only as "Party C." Despite Party C's viable acquisition proposal of $23.25 per share, the Board determined that it would not accept an offer less than $24.75 from Party C, yet agreed to a deal with MKS at $23.00 just months later. Newport received an offer from a "Party D" at $25.00 to $27.00 per share, but no outside director ever bothered to meet with Party D and it withdrew its proposal shortly thereafter. In addition, a "Party A" remained interested in discussing an acquisition, but Phillippy unilaterally cancelled a scheduled meeting with Party A while the Board completed the lower-priced deal with MKS.

5. The Board also engaged in bad faith with regard to Newport's standalone business plans. Newport management developed a business plan to enhance the growth profile of the Company through a series of strategic bolt-on acquisitions. This was a highly developed plan. Management prepared detailed multi-year projections that incorporated the specific effects of the acquisition strategy on the Company's costs, revenues and cash flows. Management provided these projections to the Board's financial advisor, J.P. Morgan Securities LLC ("J.P. Morgan"). Yet the Board then informed J.P. Morgan to discard a valuation on those same projections in J.P. Morgan's fairness opinion regarding the Proposed Acquisition. By doing so, the Board chose to make its last decision in the corporate existence of Newport – voting on an end-stage all-cash acquisition – knowing that it did not have material information regarding the most updated valuation of management's acquisition plan. This willful act of blindness was textbook bad faith.

6. Through this unfair process, Newport's executives will also receive additional special payments for themselves while ignoring the interests of the shareholders in maximizing the price the shareholders will receive from the Proposed Acquisition. The Company's officers will obtain from the Proposed Acquisition millions of dollars for change of control payments.

7. The Proposed Acquisition price of $23.00 per share does not fairly reflect either Newport's inherent value as a standalone company, or the Company's value to MKS.

8. Newport will provide MKS with substantial value. The combined company is expected to have approximately $1.4 billion in pro forma annual revenue, based on the two companies' 2015 historical results. MKS expects the transaction to be accretive to its non-GAAP

net earnings and free cash flow during the first 12 months after the deal closes. In addition, the combined entity is expected to realize $35 million in annualized cost synergies within 18 to 36 months. Gerald Colella, MKS' CEO and President, remarked about the Proposed Acquisition:

> "The combination of MKS Instruments and Newport Corporation creates a premier supplier of critical components and subsystems for a diverse set of growing end markets, each with a common need for highly precise technology enabling solutions. . . . This acquisition is consistent with our strategy to pursue sustained profitable growth by expanding into adjacent markets while increasing our served addressable market in our core semiconductor business. Our shared customer requirements and complementary technologies together with our increased scale will enable us to lead in our served markets, deliver innovative and cost-effective solutions for our customers, and drive profitable growth."

9. The Board also breached its fiduciary duties by agreeing to preclusive deal protection devices in connection with the Merger Agreement the Company entered into with MKS. The Merger Agreement contains deal protection devices, which collectively preclude any competing offers for the Company, including: (i) a no-solicitation provision that precludes the Company from providing confidential Company information to, or even communicating with, potential competing bidders except under extremely limited circumstances; (ii) a matching rights provision that allows MKS to match any competing superior proposal; and (iii) a termination fee provision which obligates the Company to pay MKS a $32.6 million penalty fee in the event the Proposed Acquisition is terminated in favor of a superior proposal. These provisions substantially and improperly limit the Board's ability to act with respect to investigating and pursuing superior proposals.

10. In pursuing the unlawful plan to sell Newport, each of the defendants violated applicable law by directly breaching and/or aiding the other defendants' breaches of their fiduciary duties of loyalty, due care, candor, independence, good faith and fair dealing.

11. Instead of attempting to obtain the highest price reasonably available for Newport for its shareholders, the Individual Defendants tailored the terms of the Proposed Acquisition to meet their own needs and the specific needs of MKS. In essence, the Proposed Acquisition is the product of a hopelessly flawed process that was designed to ensure the sale of Newport to MKS and MKS only, on terms preferential to MKS and to aggrandize the financial interests of the Individual Defendants at the expense of plaintiff and Newport's public stockholders.

12. Accordingly, plaintiff seeks to enjoin the Proposed Acquisition.

JURISDICTION AND VENUE

13. This Court has jurisdiction over each defendant named herein because each defendant is either a corporation that conducts business in and maintains operations in this County, or is an individual who has sufficient minimum contacts with Nevada so as to render the exercise of jurisdiction by the Nevada courts permissible under traditional notions of fair play and substantial justice.

14. Venue is proper in this Court because Newport is incorporated in Nevada and defendants include officers and/or directors of a Nevada corporation. In addition, and in connection with Merger Agreement, the Board adopted an amendment to Newport's bylaws, which amendment designates the Business Court in the Eighth Judicial District Court of Clark County, Nevada as the sole and exclusive forum for any stockholder to bring an action asserting a claim of breach of a fiduciary duty.

PARTIES

15. Plaintiff Hubert C. Pincon is, and at all times relevant hereto was, a shareholder of Newport.

16. Defendant Newport is a publicly traded company headquartered in Irvine, California and incorporated in Nevada, and is sued herein as an aider and abetter.

17. Defendant Parent is a Massachusetts corporation headquartered in Andover, Massachusetts, and is sued herein as an aider and abetter.

18. Defendant MergerSub is a Nevada corporation and wholly owned subsidiary of Parent, and is sued herein as an aider and abetter.

19. Defendant Phillippy is and at all relevant times has been Newport's CEO and President, and a director.

20. Defendant Potashner is and at all relevant times has been Newport's Chairman and a director.

21. Defendant Christopher Cox is and at all relevant times has been a director.

22. Defendant Siddhartha C. Kadia is and at all relevant times has been a director.

23. Defendant Oleg Khaykin ("Khaykin") is and at all relevant times has been a director.

24. Defendant Peter J. Simone ("Simone") is and at all relevant times has been a director.

25. The defendants named above in ¶¶19-24 are collectively referred to herein as the "Individual Defendants."

DEFENDANTS' FIDUCIARY DUTIES

26. Where the directors of a publicly traded corporation undertake a transaction that will result in either (i) a change in corporate control or (ii) a break up of the corporation's assets, the directors have an affirmative fiduciary obligation to obtain the highest value reasonably available for the corporation's shareholders, and if such transaction will result in a change of corporate control, the shareholders are entitled to receive a significant premium. To diligently comply with these duties, the directors and/or officers may not take any action that:

(a) adversely affects the value provided to the corporation's shareholders;

(b) will discourage or inhibit alternative offers to purchase control of the corporation or its assets;

(c) contractually prohibits themselves from complying with their fiduciary duties;

(d) will otherwise adversely affect their duty to search and secure the best value reasonably available under the circumstances for the corporation's shareholders; and/or

(e) will provide the directors and/or officers with preferential treatment at the expense of, or separate from, the public shareholders.

27. In accordance with their duties of loyalty and good faith, the Individual Defendants, as directors and/or officers of Newport, are obligated under Nevada law to refrain from:

(a) participating in any transaction where the directors' or officers' loyalties are divided;

(b) participating in any transaction where the directors or officers receive, or are entitled to receive, a personal financial benefit not equally shared by the public shareholders of the corporation; and/or

(c) unjustly enriching themselves at the expense or to the detriment of the public shareholders.

28. Plaintiff alleges herein that defendants, separately and together, in connection with the Proposed Acquisition, are knowingly or recklessly violating their fiduciary duties, including their duties of loyalty, good faith, and independence owed to plaintiff and other public shareholders of Newport. Defendants stand on both sides of the transaction, are engaging in self-dealing, are obtaining for themselves personal benefits, including personal financial benefits, not shared equally by plaintiff or the Class (defined herein), and are choosing not to provide shareholders with all information necessary to make an informed decision in connection with the Proposed Acquisition and/or are aiding and abetting other defendants' breaches. As a result of defendants' self-dealing and divided loyalties, neither plaintiff nor the Class are being treated fairly in connection with the Proposed Acquisition.

29. Defendants also owe the Company's stockholders a duty of truthfulness under Nevada law, which includes the disclosure of all material facts concerning the Proposed Acquisition and, particularly, the fairness of the price offered for the stockholders' equity interest. Defendants are knowingly or recklessly breaching their fiduciary duties of candor and good faith by failing to disclose all material information concerning the Proposed Acquisition, and/or aiding and abetting other defendants' breaches.

30. Defendants are knowingly or recklessly breaching their duties of loyalty, good faith, independence and candor in connection with the Proposed Acquisition, and/or aiding and abetting other defendants' breaches, and have the burden of proving the inherent or entire fairness of the Proposed Acquisition, including all aspects of its negotiation, structure, price and terms.

THE PROPOSED ACQUISITION

31. Newport is a supplier of advanced technology products and systems, including lasers, photonics instrumentation, precision positioning and vibration isolation products and systems, optical components, subassemblies and subsystems, three-dimensional non-contact measurement equipment and advanced automated manufacturing systems. The Company markets its products to a wide range of industries, including scientific research, microelectronics, defense/security, life and health sciences, and industrial markets. It operates through three business segments: Photonics, Lasers and Optics Group. The Photonics Group segment includes the photonics products and

technologies, such as photonics instruments, precision positioning devices, vibration isolation systems, optical hardware and three-dimensional non-contact measurement sensors and equipment. The Lasers Group segment offers a broad array of laser technology products and services to OEM and end-user customers. This segment's laser-based systems include ultrafast lasers and amplifiers, diode-pumped solid-state lasers, high-energy pulsed lasers, tunable lasers, fiber lasers and gas lasers. The Optics Group segment's products include precision optics and lens assemblies, optical components and opto-mechanical subassemblies.

32. On February 23, 2015, Newport and MKS announced that they had entered into the Merger Agreement under which MKS will acquire the Company. Under the terms of the transaction, Newport shareholders will receive just $23.00 in cash for each share of Newport common stock.

33. The press release announcing the Proposed Acquisition states in pertinent part:

> **MKS Instruments Announces Agreement to Acquire Newport Corporation**
>
> - **Acquiring an Industry-Leading Technology Company that Serves Common Markets with Complementary Customer Solutions**
> - **Expands MKS' Addressable Market by $4.8 Billion**
> - **Strengthens Presence in Key Strategic Markets – Semiconductor, Industrial, Research and Life Sciences**
> - **Expected to Realize $35 Million in Annualized Cost Synergies Within 18-36 Months**
> - **Expected to be Accretive to MKS' Non-GAAP Earnings and Free Cash Flow in the First 12 Months Following the Closing**
>
> . . . MKS Instruments, Inc., a global provider of technologies that enable advanced processes and improve productivity, and Newport Corporation, a worldwide leader in photonics solutions, today announced that they have entered into an agreement for MKS Instruments to acquire Newport Corporation for $23.00 per share. The all-cash transaction is valued at approximately $980 million.
>
> The combined company is expected to have approximately $1.4 billion in pro forma annual revenue, based on the two companies' 2015 historical results. The transaction is expected to be accretive to MKS Instruments' Non-GAAP net earnings and free cash flow during the first 12 months post-closing. The combined company expects to realize $35 million in annualized cost synergies within 18 to 36 months and anticipates revenue synergies from the expansion of MKS Instruments' served addressable markets and leverage of complementary sales channels.

"The combination of MKS Instruments and Newport Corporation creates a premier supplier of critical components and subsystems for a diverse set of growing end markets, each with a common need for highly precise technology enabling solutions," said Gerald Colella, MKS Instruments' Chief Executive Officer and President. "This acquisition is consistent with our strategy to pursue sustained profitable growth by expanding into adjacent markets while increasing our served addressable market in our core semiconductor business. Our shared customer requirements and complementary technologies together with our increased scale will enable us to lead in our served markets, deliver innovative and cost-effective solutions for our customers, and drive profitable growth."

"This combination represents a great outcome for all of Newport's stakeholders," said Robert Phillippy, President and Chief Executive Officer of Newport Corporation. "The complementary nature of the two companies' technologies and customer base will create exciting opportunities for our employees, and enable the combined company to deliver innovative solutions to our customers. We look forward to working closely with the MKS Instruments team to ensure a smooth transition."

MKS Instruments intends to fund the transaction with a combination of available cash on hand and up to $800 million in committed debt financing. The combined company will maintain a very strong balance sheet, with combined pro forma net cash and investments on hand of approximately $425 million.

The transaction has been approved by MKS Instruments' and Newport Corporation's board of directors and is subject to customary approvals, including regulatory and approval by Newport Corporation's shareholders, and is expected to close in the second quarter of 2016.

Lazard acted as financial advisor to MKS Instruments. JP Morgan acted as financial advisor to Newport Corporation.

34. The Proposed Acquisition is being driven by and is the result of an unfair process through which Newport's directors and executives – who collectively hold over 1.15 million Newport shares (almost 3% of the Company's outstanding shares) – are seeking to "cash in" their illiquid Newport holdings, for which they will receive over ***$26.4 million*** in cash from the Proposed Acquisition if it closes.

35. Through this unfair process, Newport's executives will also receive additional special payments for themselves while ignoring the interests of the shareholders in maximizing the price the shareholders will receive from the Proposed Acquisition. The Company's officers will obtain from the Proposed Acquisition millions of dollars for change of control payments.

36. Phillippy's change-in-control agreement further motivated Phillippy to sell Newport. In total, Phillippy stood to gain a $5,178,678 windfall by steering Newport to a buyer which could replace Phillippy as Newport's CEO, thus triggering Phillippy's change-in-control provision and

simultaneously liberating Phillippy from his employment obligations. According to defendants, if MKS terminates Phillippy as Newport's CEO following the close, Phillippy's contract entitles Phillippy to:

(a) a $1,092,650 lump sum payment representing 24 months of Phillippy's highest base salary during the 12-month period preceding Phillippy's termination;

(b) a $1,256,548 lump sum payment representing twice Phillippy's annual incentive compensation bonus payable under Newport's cash incentive plan or other bonus plans then in effect, calculated based on 100% satisfaction of all Phillippy's performance goals;

(c) $2,259,980 in automatic vesting and settlement of all Phillippy's unvested restricted stock and Company RSUs, based on 100% satisfaction of Phillippy's performance goals and, at Phillippy's election, Newport's repurchase of all such Newport shares Phillippy received at the fair market price;

(d) $505,082 in automatic vesting and settlement of all Phillippy's unvested Company SARs, based on 100% satisfaction of Phillippy's performance goals and, at Phillippy's election, Newport's repurchase of all such shares of Company common stock Phillippy received at the price determined in Phillippy's Severance Compensation Agreement;

(e) $64,418 in estimated medical, dental and vision plans, and long-term disability insurance benefits for 24 months following Phillippy's termination (until such time Phillippy becomes eligible for similar benefits from any subsequent employer); and

(f) a payment offsetting any excess "parachute payment" excise tax Phillippy owes pursuant to the provisions of the Internal Revenue Code, and/or any comparable provision of state or foreign law.

37. Thus, Phillippy's contract incentivized Phillippy to sell Newport and move on to new opportunities, a benefit unique to Phillippy and distinct from Newport's other shareholders.

38. This process has resulted in an unfair price to be paid to Newport shareholders if the Proposed Acquisition closes. The Proposed Acquisition price of $23.00 per share does not fairly reflect either Newport's inherent value as a standalone company, or the Company's value to MKS.

39. For example, on the same day the Proposed Acquisition was announced, Newport reported its results from operations for the fourth quarter and fiscal year ended December 31, 2015. For the fourth quarter and full year, the Company announced:

(a) net sales of $150.5 million for the fourth quarter (up from the third quarter of 2015) and $602.7 million for the full year;

(b) new orders of $152.7 million for the fourth quarter (up from the third quarter of 2015) and $605.7 million for the full year;

(c) non-GAAP net income of $15.5 million, or $0.39 per diluted share (which results exceeded Wall Street expectations of $0.35 per share) for the fourth quarter, and $52.3 million, or $1.31 per diluted share, for the full year, excluding the amortization of intangible assets, stock-based compensation expense, acquisition-related, restructuring and severance costs, a loss on disposal of assets, and the tax impact of the excluded amounts; and

(d) cash generated from operations of $23.3 million for the fourth quarter and $51.7 million for the full year.

40. Commenting on these results, President and CEO Phillippy stated:

> "The Newport team delivered ***a strong fourth quarter***, with cash generated from operations and earnings per diluted share both ***at the highest levels of the year***. This performance demonstrates ***the effectiveness of our business model*** and the results of our ***actions to streamline our operations***."

41. Newport will provide MKS with substantial value. The combined company is expected to have approximately $1.4 billion in pro forma annual revenue, based on the two companies' 2015 historical results. MKS expects the transaction to be accretive to its non-GAAP net earnings and free cash flow during the first 12 months after the deal closes. In addition, the combined entity is expected to realize $35 million in annualized cost synergies within 18 to 36 months. Gerald Colella, MKS' CEO and President, remarked about the Proposed Acquisition:

> "The combination of MKS Instruments and Newport Corporation creates a premier supplier of critical components and subsystems for a diverse set of growing end markets, each with a common need for highly precise technology enabling solutions. . . . This acquisition is consistent with our strategy to pursue sustained profitable growth by expanding into adjacent markets while increasing our served addressable market in our core semiconductor business. Our shared customer requirements and complementary technologies together with our increased scale will

enable us to lead in our served markets, deliver innovative and cost-effective solutions for our customers, and drive profitable growth."

42. Because defendants dominate and control the business and corporate affairs of Newport and are in possession of private corporate information concerning Newport's assets, business and future prospects, there exists an imbalance and disparity of knowledge and economic power between them and the public shareholders of Newport, which makes it inherently unfair for them to pursue any proposed transaction wherein they will reap disproportionate benefits to the exclusion of maximizing stockholder value.

43. In pursuing the unlawful plan to sell Newport, each of the defendants violated applicable law by directly breaching and/or aiding the other defendants' breaches of their fiduciary duties of loyalty, due care, candor, independence, good faith and fair dealing.

44. Instead of attempting to obtain the highest price reasonably available for Newport for its shareholders, the Individual Defendants tailored the terms of the Proposed Acquisition to meet their own needs and the specific needs of MKS. In essence, the Proposed Acquisition is the product of a hopelessly flawed process that was designed to ensure the sale of Newport to MKS and MKS only, on terms preferential to MKS and to aggrandize the financial interests of the Individual Defendants at the expense of plaintiff and Newport's public stockholders.

45. Accordingly, plaintiff seeks to enjoin the Proposed Acquisition.

THE BOARD RAN A FLAWED AND TILTED SALE PROCESS

Phillippy Puts the Company in Play and Makes a Proposal to an Acquirer Without Full Board Knowledge or Authorization

46. The following allegations are based on information and belief under the highly limited partial disclosures contained in defendants' Schedule 14A Preliminary Proxy dated March 14, 2016 (the "Proxy"). In June and July 2015, Phillippy held meetings with Party A and Party B to discuss a merger. The full Board did not provide pre-authorization for these meetings. Phillippy's unilateral actions put Newport in play without full Board authorization, expressed or implied, and undermined the Company's ability to remain a standalone entity. At the August 17-18, 2015 Board meeting, Phillippy inaccurately described both meetings to the Board as "very

preliminary." As a result of that description, the full Board authorized Phillippy simply to continue discussions. Soon after that meeting, however, Phillippy unilaterally expanded his mandate to negotiate formal merger terms with Party B including structure and valuation of synergies on August 21, 2015 and "stock-for-stock" consideration on August 27, 2015.

47. On September 16, 2015, Phillippy submitted a formal merger proposal to Party B without full Board authorization. The Proxy cryptically states that "the Company" submitted the proposal, but upon information and belief, Phillippy personally did so – according to the Proxy, Phillippy was the only individual from Newport to engage in any discussion with Party B during this time. Phillippy's proposal involved an "at-market, stock-for-stock" merger. The proposed "at-market" structure was particularly detrimental to Newport stockholders because it failed to include an acquisition premium, thus signaling to Party B that Phillippy was willing to surrender control of Newport for inadequate consideration. Shortly thereafter, Phillippy hijacked J.P. Morgan, who had not been formally retained by the Board, to discuss Phillippy's "at-market" merger proposal with Party B's financial advisors. The full Board would not ask J.P. Morgan to become involved until two weeks later. Even then, the Board limited J.P. Morgan's mandate to evaluate a different merger proposal (from Party C), not to discuss any proposal to Party B. Also noteworthy, the Board determined on October 8, 2015 that Newport's common stock was "temporarily trading at a discount" at that time. That determination underscores the undervalued and ill-considered nature of Phillippy's "at-market" proposal to Party B – if Newport's stock price was indeed temporarily trading at a discount[], an "at-market" merger would be disastrous to Newport stockholders by permanently locking in a depressed ownership ratio in the combined entity.

48. Ironically, Party B responded that it would evaluate Phillippy's proposal with Company B's board of directors, but Newport's Board had no such opportunity. Phillippy would not thereafter mention Party B to the Board until October 23, 2015. The Board met on multiple occasions between September 16 and October 22, 2015, and there is no indication in the Proxy that Phillippy discussed Party B in any of those meetings. Moreover, on October 28, 2015, the Board decided that it would ***not*** conduct a market check for potential acquirers, which further illustrates the unauthorized nature of Phillippy's "at-market" merger proposal. Had Phillippy informed the Board,

the full Board could have at least been given the opportunity to isolate a sitting CEO from the temptation of negotiating post-close employment and management structure with a potential merger partner, but Phillippy did not offer the Board the chance until it was too late. The Company was already in play as a result of Phillippy's personal efforts.

Phillippy and Potashner Lead a Tilted and Unfair Sale Process as They Inexplicably Turn Against Party C

Party C Pursues an Acquisition; the Newport Board Initially Responds Favorably

49. Party C aggressively and actively pursued an acquisition of Newport. On September 14, 2015, Phillippy met with Party C to discuss an acquisition. Phillippy did not promptly inform the Board of this discussion, but Party C then contacted Potashner on September 24, 2015 to discuss the same topic. Potashner reported the contact to a few Board members and, with no input from a financial advisor, Potashner prematurely described to Party C the Board's "valuation expectations" for an acquisition of Newport. Defendants conceal the range of these "valuation expectations" in the Proxy. Defendants also do not explain why Potashner provided Party C with different valuation expectations than the "at-market" merger proposal Phillippy had just submitted to Party B. The disjointed process would continue to deteriorate thereafter.

50. Party C continued to advance its acquisition effort. On October 5, 2015, Party C proposed to acquire Newport at $21.50 per share, with 30% of the consideration consisting of Party C stock. On October 8, 2015, the Board empaneled a so-called "Independent Committee" to evaluate Party C's proposal, consisting of Potashner, Khaykin and Simone. Despite their positions on the Committee, the latter two individuals declined to become involved in the process: Khaykin engaged in no discussions with any potential acquirer and Simone only engaged in a single discussion with Party B later in December. Notably, the Independent Committee was set up to address the Party C proposal, but not the proposal that Phillippy had just made to Party B.

51. Also on October 8, 2015, according to the Proxy, the Board purportedly determined by consensus that "a greater proportion of the proposed consideration should be comprised of Party C's common stock to provide the Company's stockholders with greater participation in the future value that could result from a combination with Party C." In other words, the Board determined that

a stock-for-stock transaction with Party C was preferable to an all-cash transaction in light of the valuation upside inherent in Newport, as well as the synergies between the two companies. The Board later reversed course.

52. Party C quickly raised its offer to $22.50 per share in a telephone conversation with Potashner on October 11, 2015. Over the course of multiple conversations, Potashner conveyed a counter-proposal by Newport to Party C at $23.00 per share. Party C immediately agreed to Potashner's counter-offer. On October 26, 2015, Party C responded to Potashner with an offer of $23.00 per share, to be comprised of cash and up to $150 million of Party C stock. Alternatively, Party C offered $22.60 per share through a different mix of cash and stock.

The Board Spurns Party C's Overtures and Fails to Appropriately Respond to Party D's $25.00 to $27.00 Proposal

53. On a telephone call on October 28, 2013, the Board changed course and decided that $23.00 per share from Party C was insufficient. Over the following week, Potashner continued unsupervised negotiations with Party C, while the rest of the "Independent Committee" remained absent from merger discussions. Party C reiterated its proposal in writing and provided a letter confirming available financing for the cash aspect of its proposal. Party C also provided a due-diligence request list and process timeline containing an announcement date of December 7, 2015.

54. On October 30, 2015, the Board decided to contact an artificially limited number of additional potential strategic merger parties, but contacted no potential financial buyers. Parties E and D expressed interest in an acquisition and on November 11, 2015, Party D submitted an acquisition proposal at $25.00 to $27.00 per share. The same day, Party B indicated that it remained interested in discussing the "at-market" merger that Phillippy had already proposed. Given that Newport's stock price was trading at around $17.00 per share on that date, the proposal on the table from Phillippy to Party B still represented a drastic difference from the $23.00 per share and $25.00-$27.00 per share proposals on the table and continued to signal that Phillippy was willing to accept a deal with no premium from one party, but not others.

55. After a series of unsupervised discussions with Phillippy, Party D withdrew its proposal on November 23, 2015. During the nearly two weeks Party D's $25.00 to $27.00 proposal

remained outstanding, no Board member other than Phillippy bothered to engaged in a single discussion with Party D, nor did J.P. Morgan.

56. On November 23, 2015, Phillippy and Potashner held a call with J.P. Morgan and agreed to demand that Party C increase its proposal to $25.00 per share, even though Party C had already met Potashner's prior counter-proposal of $23.00 per share. Phillippy communicated this proposal to Party C the following day. ***Amazingly, on November 25, 2015, the Board determined that any price below $24.75 would be "inadequate" from Party C, yet the Board decided three months later to accept a proposal at $23.00 per share from MKS.***

57. On December 3, 2015, Party C again increased its proposal, this time to ***$23.25 per share. Phillippy rejected the offer out-of-hand and countered at $24.75 per share five days later***. Newport entered into a confidentiality agreement with MKS and began diligence discussions, while at the same time, Newport went cold on Party C and refused to discuss Party C's still-outstanding $23.25 per share offer. As any rational counter-party would do after being repeatedly rebuffed and stymied, Party C declared that it was not interested in continuing to negotiate beyond its existing $23.25 per share offer.

58. On January 15, 2016, MKS submitted the lower bid at $23.00 per share. Three days later, the Board jumped to respond to MKS and worked to "solidify the[] proposal." At the same January 18, 2016 meeting, however, the Board decided to continue to delay responding to Party C's still-viable $23.25 proposal. This favoritism had no benefit to Newport stockholders. While delaying a response to Party C, the Board rolled out the red carpet for MKS: Newport management met with MKS for diligence meetings around the world, from China, to California, to New York, to Massachusetts, to Israel. On February 22, 2013, the Board approved the MKS deal at just $23.00 per share.

The Board Walls-Off Viable Interest from Party A

59. The Board also unreasonably excluded Party A's expression of interest in acquiring Newport. Phillippy met with Party A on December 7, 2015 and January 22, 2015. In those meetings, Party A continued to express interest in acquiring Newport. At the latter meeting, Party A proposed to meet again on February 17, 2016. Yet on February 11, 2016, while Party A remained

interested, Phillippy unilaterally canceled the scheduled February 17, 2016 meeting. With a sale process ongoing, fiduciary duty obligated Phillippy to attempt to elicit a bid from a viable, interested party. Phillippy did not do so, nor did he inform Party A that a deal with another party was imminent. Phillippy simply canceled the meeting and the Board deliberately blinded itself to this expression of interest from a viable third party acquirer.

THE BOARD LOCKED UP THE ACQUISITION WITH PRECLUSIVE DEAL PROTECTION DEVICES

60. The Board determined that a bid below $24.75 inadequately compensated shareholders and only weeks later committed Newport to a lesser deal at $23.00, a bid which purportedly resulted from MKS' unsolicited inquiry. The Board never questioned the depth of the Independent Committee's market check even though their process produced bids above the price the Board ultimately accepted. Moreover, Party C submitted a proposal that was $0.25 above the deal price without due diligence, a benefit the Board afforded MKS. Fiduciary duty obligates the Board to determine if Party C will deal at $23.25 and if Party C, or any other party, would improve its bid if it received the same information Newport gave MKS. The Board failed to do that.

61. To the contrary, the Board agreed to effectively lock-up the Proposed Acquisition with multiple "deal protection devices" preventing any alternate bidder from topping MKS' $23.00 bid. These devices include:

(a) a "no-solicitation" or "no-shop" provision (i) prohibiting Newport from even facilitating inquiry, providing confidential Company information to, or even communicating with, potential competing bidders for the Company, except upon receipt of a bona fide, unsolicited written proposal and (ii) requiring Newport to reveal the bid and the bidder's identity to MKS within 24 hours;

(b) an illusory "fiduciary out" for the no-shop provision requiring Newport's Board to freeze the Board's recommendation for five days (three in the case of proposals known to MKS) after a topping bidder secures committed financing, even though the Board has already determined a superior proposal is pending;

(c) a "matching rights" provision requiring Newport provide MKS five days (three in the case of proposals known to MKS) with an opportunity to negotiate an offer "at least as favorable" to Newport shareholders, after having consulted with Newport's outside counsel and Newport's financial advisor; and

(d) a termination and expense fee provision requiring Newport pay MKS $32,600,000 if shareholders vote down defendants' Proposed Acquisition in favor of a superior proposal within a year.

62. Ultimately, these preclusive deal protection provisions restrain Newport's ability to solicit or engage in negotiations with any third party regarding a proposal to acquire all or a significant interest in the Company. The circumstances under which the Board may accept a superior proposal are too narrowly circumscribed to provide an effective "fiduciary out" under the circumstances.

THE BOARD APPROVED A MISLEADING PROXY, WHICH IT PLANS TO ISSUE DIRECTLY TO NEWPORT STOCKHOLDERS

63. On March 15, 2016, Newport filed the Proxy with the U.S. Securities and Exchange Commission in connection with the Proposed Acquisition and plans to distribute it in substantially similar form to Newport stockholders. The Proxy, however, omits vital material information, without which Newport shareholders will cast an uninformed vote and thus, suffer irreparable harm. Indeed Newport's filing enables the Board's fiduciary breaches because it misleads shareholders into consummating the Proposed Acquisition. Specifically, the Proxy fails to provide material information concerning the sale process, Company projections, and the financial inputs J.P. Morgan used.

64. Regarding J.P. Morgan's financial analysis, the Proxy fails to disclose the following material information:

(a) whether J.P. Morgan performed any type of benchmarking analysis for Newport in relation to the selected public companies;

(b) specific items in the Wall Street consensus estimates for Newport, upon which J.P. Morgan relied, including:

(i) 2016E EPS; and

(ii) 2016E EBITDA;

(c) the individual inputs and assumptions J.P. Morgan utilized when deriving the discount rate range of 9.0%-11.0% for its Discounted Cash Flow analysis;

(d) the implied terminal EBITDA multiples resulting from J.P. Morgan's Discounted Cash Flow analysis;

(e) whether J.P. Morgan extrapolated projections for the years 2021 through 2015 or whether management provided projections for those years;

(f) the financial Base Case and Acquisition Case projections Newport management provided to J.P. Morgan and upon which J.P. Morgan relied for its analysis, for fiscal years 2016-2020, including specifically:

(i) capital expenditures;

(ii) changes in net working capital;

(iii) any other adjustments to unlevered free cash flow; and

(iv) unlevered free cash flows (for the Acquisition Case only);

(g) the financial Base Case and Acquisition Case projections J.P. Morgan extrapolated (or, alternatively, Newport management provided to J.P. Morgan and upon which J.P. Morgan relied) for purposes of its analysis, for fiscal years 2021-2025, for the following items:

(i) revenue;

(ii) EBITDA;

(iii) depreciation;

(iv) amortization of Intangible Assets;

(v) EBIT (or D&A);

(vi) taxes (or tax rate);

(vii) net income (GAAP and Non-GAAP);

(viii) EPS;

(ix) capital expenditures;

(x) changes in net working capital;

(xi) stock-based compensation expense;

(xii) any other adjustments to unlevered free cash flow; and

(xiii) unlevered free cash flow.

65. Regarding the Newport sale process, defendants' Proxy fails to disclose the following items:

(a) the potential synergies Phillippy and Party C's Chairman identified on August 21, 2015, the method employed to value those synergies, and the range at which Phillippy and Party C's Chairman valued those synergies;

(b) the precise merger terms Newport proposed to Party C on September 16, 2015;

(c) the "valuation expectations" Potashner communicated to Party C in late-September or early-October 2015;

(d) how J.P. Morgan came to know about the at-market, stock-for-stock merger submitted to Party B on September 16, 2015, and the background and scope of authority (if any) granted to J.P. Morgan regarding that discussion;

(e) the background and substance underlying the initial and prior communications with Parties A, B and C, including communications made in "previous years" or "prior years";

(f) the background and substance of the "previously expressed interest" the Independent Committee considered on October 30, 2015, when selecting candidates for its market check;

(g) the confidentiality and exclusivity agreement terms Party C proposed to Newport on October 29, 2015 and Newport rejected on November 2, 2015;

(h) the nature of the "Company's comments on the draft confidentiality agreement previously provided by Party C" relayed to Party C on November 2, 2015;

(i) the confidentiality agreement terms entered into with MKS on December 8, 2015;

(j) whether Newport provided multi-year projections to each party listed in the Proxy, including Parties A, B, C, D, E, F, G and H;

(k) whether J.P. Morgan ever applied a discounted cash flow analysis to the Proposed Acquisition forecasts and, if so, the results of that analysis; and

(l) the background and substance of Potashner and Phillippy's discussion with Party B on December 14, 2015, specifically involving "the leadership of the combined company and preliminary transaction structuring matters."

CLASS ACTION ALLEGATIONS

66. Plaintiff brings this action individually and as a class action on behalf of all holders of Newport common stock who are being and will be harmed by defendants' actions described below (the "Class"). Excluded from the Class are defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any defendant.

67. This action is properly maintainable as a class action.

68. The Class is so numerous that joinder of all members is impracticable. According to the Merger Agreement, there are more than 38.6 million shares of Newport common stock issued and outstanding.

69. There are questions of law and fact which are common to the Class and which predominate over questions affecting any individual Class member. The common questions include, *inter alia*, the following:

(a) whether the Individual Defendants are breaching their fiduciary duties of undivided loyalty, independence, or due care with respect to plaintiff and the other members of the Class in connection with the Proposed Acquisition;

(b) whether defendants are engaging in self-dealing in connection with the Proposed Acquisition;

(c) whether defendants are unjustly enriching themselves and other insiders or affiliates of Newport;

(d) whether the Individual Defendants are breaching any of their other fiduciary duties to plaintiff and the other members of the Class in connection with the Proposed Acquisition, including the duties of good faith, diligence, honesty and fair dealing;

(e) whether the Individual Defendants are breaching their fiduciary duties of candor to plaintiff and the other members of the Class in connection with the Proposed Acquisition by failing to disclose all material information concerning the Proposed Acquisition;

(f) whether defendants, in bad faith and for improper motives, are impeding or erecting barriers to discourage other offers for the Company or its assets;

(g) whether the Proposed Acquisition terms are unfair and inadequate to plaintiff and the other members of the Class; and

(h) whether plaintiff and the other members of the Class would be irreparably harmed were the Proposed Acquisition complained of herein consummated.

70. Plaintiff's claims are typical of the claims of the other members of the Class and plaintiff does not have any interests adverse to the Class.

71. Plaintiff is an adequate representative of the Class, has retained competent counsel experienced in litigation of this nature, and will fairly and adequately protect the interests of the Class.

72. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class.

73. Plaintiff anticipates that there will be no difficulty in the management of this litigation. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

74. Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole.

FIRST CAUSE OF ACTION

Claim for Breach of Fiduciary Duties Against the Individual Defendants

75. Plaintiff repeats and realleges each allegation set forth herein.

76. The Individual Defendants are knowingly or recklessly and in bad faith violating fiduciary duties of care, loyalty, good faith, candor, and independence owed to the public shareholders of Newport and have acted to put their personal interests ahead of the interests of Newport shareholders.

77. By the acts, transactions and courses of conduct alleged herein, the Individual Defendants, individually and as a part of a common plan, have acted knowingly or recklessly and in bad faith.

78. The Individual Defendants have knowingly or recklessly and in bad faith violated their fiduciary duties by approving the Proposed Acquisition without regard to the fairness of the transaction to Newport shareholders and by failing to disclose all material information concerning the Proposed Acquisition to such shareholders.

79. As demonstrated by the allegations above, the Individual Defendants are knowingly or recklessly failing to exercise the care required, and breaching their duties of loyalty, good faith, candor and independence owed to the shareholders of Newport because, among other reasons:

(a) they are taking steps to avoid competitive bidding, to cap the price of Newport stock and to give MKS an unfair advantage, by, among other things, failing to solicit other potential acquirers or alternative transactions;

(b) they are ignoring or are not protecting against the numerous conflicts of interest resulting from the directors' own interrelationships or connection with the Proposed Acquisition; and

(c) they are failing to disclose all material information that would permit Newport stockholders to cast a fully informed vote on the Proposed Acquisition, including both financial information and regulatory information which may materially affect the Company and the Company's shareholders.

80. Because the Individual Defendants dominate and control the business and corporate affairs of Newport, and are in possession of private corporate information concerning Newport's assets, business and future prospects, there exists an imbalance and disparity of knowledge and economic power between them and the public shareholders of Newport which makes it inherently

unfair for them to pursue any proposed transaction wherein they will reap disproportionate benefits to the exclusion of maximizing stockholder value.

81. By reason of the foregoing acts, practices and course of conduct, the Individual Defendants are knowingly or recklessly and in bad faith failing to exercise ordinary care and diligence in the exercise of their fiduciary obligations toward plaintiff and the other members of the Class.

82. Unless enjoined by this Court, the Individual Defendants will continue to knowingly or recklessly and in bad faith breach their fiduciary duties owed to plaintiff and the Class, and may consummate the Proposed Acquisition which will exclude the Class from its fair share of Newport's valuable assets and businesses, and/or benefit them in the unfair manner complained of herein, all to the irreparable harm of the Class.

83. The Individual Defendants are engaging in self-dealing, are not acting in good faith toward plaintiff and the other members of the Class, and knowingly or recklessly have breached and are continuing to breach their fiduciary duties to the members of the Class.

84. As a result of defendants' unlawful actions, plaintiff and the other members of the Class are being harmed in that defendants will deprive plaintiff and the Class of a fair sale process. Unless the Proposed Acquisition is enjoined by the Court, the Individual Defendants will continue to knowingly or recklessly and in bad faith breach their fiduciary duties owed to plaintiff and the members of the Class, will not engage in arm's-length negotiations on the Proposed Acquisition terms, and will not supply to Newport's minority stockholders sufficient information to enable them to cast informed votes on the Proposed Acquisition and may consummate the Proposed Acquisition, all to the irreparable harm of the members of the Class.

85. Plaintiff and the members of the Class have an inadequate remedy at law. Only through the exercise of this Court's equitable powers can plaintiff and the Class be fully protected from the immediate and irreparable injury which defendants' actions threaten to inflict.

SECOND CAUSE OF ACTION

Claim for Aiding and Abetting Breaches of Fiduciary Duty Against Newport, Parent and MergerSub

86. Plaintiff repeats and realleges each allegation set forth herein.

87. Newport, Parent and MergerSub aided and abetted the Individual Defendants in breaching their fiduciary duties owed to the public shareholders of Newport, including plaintiff and the members of the Class.

88. The Individual Defendants owed to plaintiff and the members of the Class certain fiduciary duties as fully set out herein.

89. By committing the acts alleged herein, the Individual Defendants breached their fiduciary duties owed to plaintiff and the members of the Class.

90. Newport, Parent and MergerSub colluded in or aided and abetted the Individual Defendants' breaches of fiduciary duties, and were active and knowing participants in the Individual Defendants' breaches of fiduciary duties owed to plaintiff and the members of the Class.

91. Plaintiff and the members of the Class shall be irreparably injured as a direct and proximate result of the aforementioned acts.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands injunctive relief, in plaintiff's favor and in favor of the Class and against defendants as follows:

A. Declaring that this action is properly maintainable as a class action;

B. Declaring and decreeing that any Merger Agreement entered into by the Company was approved in breach of the fiduciary duties of defendants and is therefore unlawful and unenforceable;

C. Enjoining defendants, their agents, counsel, employees and all persons acting in concert with them from consummating the Proposed Acquisition, unless and until the Company adopts and implements a fair sale process;

D. Directing defendants to exercise their fiduciary duties to obtain a transaction which is in the best interests of Newport's shareholders;

E. Rescinding, to the extent already implemented, the Proposed Acquisition or any of the terms thereof;

F. Awarding plaintiff the costs and disbursements of this action, including reasonable attorneys' and experts' fees; and

G. Granting such other and further equitable relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury.

DATED: March 25, 2016

THE O'MARA LAW FIRM, P.C.

DAVID C. O'MARA

316 E. Bridger Avenue, 2nd Floor
Las Vegas, Nevada 89101
Telephone: 725/529.4042
775/323-4082 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
DAVID T. WISSBROECKER
EDWARD M. GERGOSIAN
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

JOHNSON & WEAVER, LLP
FRANK J. JOHNSON
600 West Broadway, Suite 1540
San Diego, CA 92101
Telephone: 619/230-0063
619/255-1856 (fax)

JOHNSON & WEAVER, LLP
W. SCOTT HOLLEMAN
99 Madison Avenue, 5th Floor
New York, NY 10016
Telephone: 212/802-1486
212/602-1592 (fax)

Attorneys for Plaintiff

IAFD
David C. O'Mara, Esq. SBN 8599
The O'Mara Law Firm, P.C.
316 E. Bridger Ave., 2nd Floor
Las Vegas, NV 89101
Telephone: 725.529.4042
775/323-4082 (fax)

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

HUBERT C. PINCON,

Plaintiff(s),

-vs-

NEWPORT CORP, et al.

Defendant(s).

CASE NO. _____

DEPT. NO. _____

INITIAL APPEARANCE FEE DISCLOSURE (NRS CHAPTER 19)

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for parties appearing in the above entitled action as indicated below:

New Complaint Fee	**1st Appearance Fee**
☒ $1530 ☐ $520 ☐ $299 ☐ $270.00	☐ $1483.00 ☐ $473.00 ☐ $223.00

Name: Hubert C. Pincon

☐ $30

☐ $30

☐ Total of Continuation Sheet Attached ☐ $_____

TOTAL REMITTED: (Required) Total Paid $ 1530.

DATED this 25 day of MARCH, 2016.

DAVID C. O'MARA, ESQ.

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA (Nevada Bar No. 8599)
316 E. Bridger Avenue, 2nd Floor
Las Vegas, NV 89101
Telephone: 725/529-4042
775/323-4082 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON
DAVID T. WISSBROECKER
EDWARD M. GERGOSIAN
DAVID A. KNOTTS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

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

PLAINTIFFS' REQUEST TO VACATE PRELIMINARY INJUNCTION HEARING DATE

By agreement of the parties, plaintiffs request that the Court vacate the preliminary injunction hearing date, currently set for April 25, 2016. Plaintiffs also notify the Court that plaintiffs do not presently intend to file a motion for preliminary injunction regarding the proposed acquisition of Newport Corporation ("Newport" or the "Company") (the "Proposed Acquisition"). Plaintiffs' reasons for doing so are twofold.

First, plaintiffs' expedited work in challenging the Proposed Acquisition was successful, in part. After the close of business on Friday, April 15, 2016, defendants issued "Supplemental Disclosures in Response to the Stockholder Litigation," amending the Definitive Proxy. *See* Exhibit A (the "Supplemental Disclosures"). The Supplement Disclosures described structural modifications and addressed many of the disclosure issues alleged in the Complaint and addressed items identified by plaintiffs at the April 14, 2016 hearing on plaintiffs' Motion to Waive Rule 16.1 Requirements (the "Hearing"). The following provides the Court with a flavor of those disclosures and structural contract modifications as compared to plaintiffs' claims.

At the Hearing, plaintiffs stated that a "red flag" existed in that defendants concealed a higher intrinsic valuation on a competing proposal above the ultimate $23.00 per share price of the Proposed Acquisition. Plaintiffs argued as follows:

> Newport got a higher proposal per share, the intrinsic value of which is not being disclosed to stockholders. There was one . . . potential acquirer called Party C in the proxy. It submitted a proposal to the company [that] involved stock [and] cash. But we understand the stock component of that proposal was worth far more and resulted in potentially far more value to stockholders than just $23 a share. . . . And we know that that valuation is not being disclosed to stockholders.

Hearing Tr. at 14-15. In response, defendants disclosed the following information in the Supplemental Disclosures:

> J.P. Morgan presented an illustrative analysis of a range of implied values for Party C's proposal from $20.32 to $25.64 per share, where the high end of the range was at the low end of the range of Party D's proposal. J.P. Morgan's analysis was presented for illustrative purposes only, based on hypothetical trading performance of Party C's stock following a transaction. Assuming Party C continued to trade at its current P/E multiple (which was much higher than the Company's P/E multiple) and $25 million of pre-tax synergies, ***the analysis indicated that the implied value of Party C's offer would be $25.06 per share***.

Supplemental Disclosures at 6 (some emphasis omitted).

Prior to the Hearing, plaintiffs specifically pressed defendants to produce any "standstill agreements" that prevented potential acquirers from coming forward and making a higher offer for Newport stockholders. *See* Exhibit B. As a result of that request, counsel for defendants learned that defendant Phillippy had inappropriately bound "Party A" to a restrictive standstill agreement on January 22, 2016, which barred Party A from making a competing proposal to Newport even after the announcement of the Proposed Transaction. *Id.* On April 13, 2016, the day before the Hearing, defendants obtained a waiver of that provision. The Supplemental Disclosures state:

> Also on January 22, 2016, the Company and Party A entered into a second mutual confidentiality agreement. This mutual confidentiality agreement included a standstill provision . . . .
>
> * * *
>
> Promptly after becoming aware that the standstill provision included in the January 22, 2016 confidentiality agreement between the Company and Party A remained in effect because it did not by its terms terminate upon the Company's execution of the Merger Agreement with Parent, the Company, without having communicated with Party A since February 24, 2016, determined to request Parent's consent to waive the Company's rights under this standstill provision. On April 13, 2016, Parent consented to this waiver and on the same date, the Company notified Party A that the Company waived its rights under this standstill provision.

Supplemental Disclosures at 8-9 (emphasis omitted).

In the Complaint, plaintiffs described the unauthorized nature of defendant Phillippy's proposal to Party A and demanded disclosure of the "precise merger terms" of that proposal. ¶¶47, 65(b). As a result, defendants disclosed that Phillippy had indeed engaged in the self-interested act of submitting a merger proposal that identified himself as CEO of the post-merger combined entity:

> On September 16, 2015, the Company submitted a preliminary, non-binding proposal to Party B for an at-market, stock-for-stock strategic merger of equals between the Company and Party B. The Company's proposal contemplated an exchange ratio based on the respective trailing one-month closing prices of the Company Common Stock and the common stock of Party B. The proposal also contemplated that the Company and Party B would each appoint an equal number of the directors to the board of directors of the combined company, ***with Mr. Phillippy serving as the CEO and an additional director of the combined company*** and Party B's CEO serving as the chief operating officer of the combined company.

Supplemental Disclosures at 4 (some emphasis omitted).

Second, discovery problems arose after the Hearing that made it nearly impossible to present a full record to support the extraordinary remedy of injunctive relief beyond what we already

accomplished in the Supplement Disclosures. Defendants did not comply with the Court-ordered schedule for document production, which undermined the pre-vote deposition and briefing schedule. *See* Exhibit C. The Court ordered a good faith deadline for defendants to complete rolling document production at 12:00 p.m. on Monday, April 18, 2016. The parties agreed that depositions would take place the following day, Tuesday, April 19, 2016, at 1:00 p.m. Yet defendants chose not to start their production until after the deadline for completion, producing 12,000 pages of documents at 1:51 p.m. Monday afternoon. *Id.* That evening, at 7:06 p.m. Monday, defendants produced another 10,000 pages of documents. *Id.* Defendants provided no advance notice to plaintiffs that such a sizeable production would be coming in so late after the deadline. *Id.* We worked into the night reviewing these documents to prepare for out-of-town depositions the following day. But given the problematic timing on document production, the parties agreed to postpone the depositions of Newport Board Chairman Kenneth Potashner and Newport CEO Robert Phillippy. *Id.* The parties also agreed that after the two postponed depositions take place, plaintiffs will – without objection – file an amended complaint seeking a post-close damages award. *Id.*

While plaintiffs forced many additional disclosures in the Supplemental Proxy, the April 18, 2016 document production illuminates a multitude of conflicts of interest, bad faith acts, process flaws, and valuation issues that warrant monetary relief. As a result, plaintiffs have determined that further disclosures prior to the stockholder vote would be of marginal incremental utility. Plaintiffs therefore intend to file a post-close complaint for money damages on behalf of the Newport stockholder class. *See, e.g., Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 11 (Nev. 2003) (shareholders "may also allege that the merger was accomplished through the wrongful conduct of majority shareholders, directors, or officers of the corporation and attempt to hold those individuals liable for monetary damages under theories of breach of fiduciary duty or loyalty").

Plaintiffs appreciate the Court's willingness to hear this matter on an expedited basis. If the Proposed Acquisition closes, the parties will notify the Court and submit an updated schedule to complete the currently-postponed depositions and file a post-close complaint.

DATED: April 20, 2016

Respectfully submitted,

THE O'MARA LAW FIRM, P.C.

DAVID C. O'MARA

316 E. Bridger Avenue, 2nd Floor
Las Vegas, NV 89101
Telephone: 725/529-4042
775/323-4082 (fax)

Liaison Counsel

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON
DAVID T. WISSBROECKER
EDWARD M. GERGOSIAN
DAVID A. KNOTTS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

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 by:

_____ Depositing in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, following ordinary business practices

__X__ Via Email

__X__ Electronically through the Court's Electronic Filing System

addressed as follows:

Abran Vigil
Vigila@ballardspahr.com
100 N. City Pkwy #1750
Las Vegas, NV 89106

Chris H. Byrd, Esq.
cbyrd@fclaw.com
Fennemore Craig, P.C.
300 S. Fourth St., Ste. 1400
Las Vegas, NV 89101

Daniel W. Halston, Esq.
Daniel.halston@wilmerhale.com
WilmerHale LLP
60 State St.
Boston MA, 02109

Brian M. Lutz, Esq.
BLutz@gibsondunn.com
Gibson, Dunn & Crutcher LLP
555 Mission St., Ste. 3000
San Francisco, CA 94105

Catherine Wrangham-Rowe
wranghamrowec@ballardspahr.com
100 N. City Pkwy #1750
Las Vegas, NV 89106

Maria Gall
gallm@ballardspahr.com
100 N. City Pkwy #1750
Las Vegas, NV 89106

Meryl L. Young, Esq.
MYoung@gibsondunn.com
Colin Davis, Esq.
CDavis@gibsondunn.com
Gibson, Dunn & Crutcher, LLP
3161 Michelson Dr.
Irvine, CA 92612

DATED: April 20, 2016

BRYAN SNYDER

EXHIBIT A

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 8-K

CURRENT REPORT
Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934

Date of Report (Date of earliest event reported)
April 15, 2016

NEWPORT CORPORATION

(Exact name of registrant as specified in its charter)

Nevada	**000-01649**	**94-0849175**
(State or other jurisdiction of incorporation)	(Commission File Number)	(IRS Employer Identification No.)

1791 Deere Avenue, Irvine, California	**92606**
(Address of principal executive offices)	(Zip Code)

(949) 863-3144
(Registrant's telephone number, including area code)

Not Applicable
(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☒ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 8.01. Other Events

As previously disclosed in the Current Report on Form 8-K filed with the U.S. Securities and Exchange Commission (the "SEC") on February 23, 2016 by Newport Corporation (the "Company"), on February 22, 2016, the Company entered into an Agreement and Plan of Merger (the "Merger Agreement") with MKS Instruments, Inc., a Massachusetts corporation ("Parent"), and PSI Equipment, Inc., a Nevada corporation and a wholly owned subsidiary of

Parent ("Merger Sub"). The Merger Agreement provides for the merger of Merger Sub with and into the Company (the "Merger"), with the Company surviving the Merger as a wholly owned subsidiary of Parent, subject to the terms and conditions set forth in the Merger Agreement.

In connection with the Merger, on March 29, 2016, the Company filed with the SEC a definitive proxy statement (as supplemented by the Company's Current Report on Form 8-K filed with the SEC on March 29, 2016 (the "Proxy Statement")), and mailed the Proxy Statement to the stockholders of the Company. As further described in the Proxy Statement, the stockholders of the Company will vote upon the Merger and certain other matters at a special meeting of the Company's stockholders to be held on April 27, 2016.

The additional disclosures in this Current Report on Form 8-K supplement the disclosure contained in the Proxy Statement and should be read in conjunction with the disclosure contained in the Proxy Statement, which in turn should be read in its entirety. To the extent that the information in this Current Report on Form 8-K differs from or updates information contained in the Proxy Statement, the information in this Current Report on Form 8-K shall supersede or supplement the information contained in the Proxy Statement.

Regulatory Matters

Under the Merger Agreement, the parties' obligations to complete the Merger were conditioned upon, subject to certain exceptions specified in the disclosure letter delivered by the Company to Parent in connection with the Merger Agreement, receipt of affirmative approval or clearance under the antitrust laws of Germany and Israel. On April 4, 2016, Parent and the Company received approval of the Merger from the *Bundeskartellamt* (Federal Cartel Office) of the Federal Republic of Germany. On April 13, 2016, Parent and the Company received approval of the proposed merger from the Israeli Antitrust Authority.

Planned Post-Closing Appointments

Parent has informed the Company that Parent intends to appoint Robert J. Phillippy, the President and Chief Executive Officer of the Company, to Parent's Board of Directors following (and subject to) the completion of the Merger and that Parent anticipates that Mr. Phillipy will be engaged by the Company for a transitional period following the completion of the Merger to assist with transition and integration matters. In early March 2016, after the Merger Agreement was signed and the Merger was announced, Gerald G. Colella, the Chief Executive Officer and President of Parent, raised with Mr. Phillippy the possibility of Mr. Phillippy joining Parent's Board of Directors following completion of the Merger and assisting in transition and integration matters following completion of the Merger. Parent has also informed the Company that Parent intends to appoint Dennis L. Werth, the Company's Senior Vice President and General Manager, Photonics Group, as Senior Vice President, Business Units (Newport) of Parent following (and subject to) the completion of the Merger.

Litigation Update

As previously disclosed in the Proxy Statement, on March 9, 2016, a putative class action lawsuit captioned *Dixon Chung v. Newport Corp., et al.,* Case No. A-16-733154-C, was filed in the District Court, Clark County, Nevada on behalf of a putative class of the Company's stockholders. On March 25, 2016, the plaintiff in the *Chung* action filed an amended complaint, which added certain allegations, including that the Proxy Statement omitted material information. Also on March 25, 2016, a second putative class action complaint captioned *Hubert C. Pincon v. Newport Corp., et al.*, Case No. A-16-734039-B, was filed in the District Court, Clark County, Nevada, on behalf of a putative class of the Company's stockholders. Both putative class action lawsuits relate to the Merger Agreement.

On March 30, 2016, plaintiff in the *Pincon* action filed a motion seeking expedited discovery, which defendants opposed. On March 31, 2016, plaintiff in the *Pincon* action filed a motion seeking to consolidate the *Pincon* action with the putative class action complaint with the *Chung* action and to appoint counsel for plaintiff in the *Pincon* action as lead counsel.

At a hearing on these motions on April 14, 2016, the Court partially allowed the motion seeking expedited discovery. The Court also granted the motion to consolidate the *Pincon* and *Chung* actions and appointed counsel in the *Pincon* action as lead counsel. Finally, the Court established a briefing schedule for plaintiffs' anticipated motion for preliminary injunction and scheduled a hearing on plaintiffs' anticipated motion for preliminary injunction for April 25, 2016.

The Company believes that the claims asserted in the complaints have no merit and the Company, Parent, Merger Sub and the named directors intend to defend vigorously against these claims.

Supplemental Disclosures in Response to Stockholder Litigation

While the Company believes that the disclosures set forth in the Proxy Statement comply fully with applicable law, in order to address plaintiffs' unmeritorious disclosure claims regarding the Proxy Statement and provide additional information to the Company's stockholders, the Company has determined to voluntarily supplement the Proxy Statement as described in this Current Report on Form 8-K. Nothing in this Current Report on Form 8-K shall be deemed an admission by the Company of the legal necessity or materiality under applicable laws of any of the disclosures set forth herein. To the contrary, the Company specifically denies all allegations that any additional disclosure was or is required.

The additional language is in bold and underlined text below and the deleted language is in strikethrough text below.

The following disclosure supplements and restates the second paragraph on page 29 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On June 11, 2015, **with the approval of the Company Board,** Mr. Robert J. Phillippy, the Company's Chief Executive Officer ("*CEO*"), met with the CEO of Party A, a prospective strategic partner, to discuss the merits of a potential business combination, **which would be structured as a stock-for-stock, strategic merger of equals that would not involve a premium to the trading price of either party's stock**.

The following disclosure supplements and restates the third and fourth paragraphs on page 29 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On July 17, 2015, Mr. Phillippy ~~met~~ **held an informal, ordinary course meeting** with the chairman of the board of directors ("*Chairman*") of Party B, another prospective strategic partner with whom the Company had periodically discussed a potential business combination in previous years, **during which Party B's Chairman** ~~to discuss the merits~~ **raised the possibility** of a potential business combination **between the two companies**. Mr. Phillippy also had **a subsequent** telephone conversations with Party B's Chairman on August 1**, 2015 regarding these matters.** ~~, August 21 and August 27, 2015, during which Mr. Phillippy and Party B's Chairman discussed a potential stock-for-stock merger between the two companies. On August 21, 2015, Mr. Phillippy and Party B's Chairman discussed preliminary transaction structuring matters and the value of the potential synergies that could result from a combination.~~

On August 17 and 18, 2015, the Company Board held its regular quarterly meeting, at which members of the Company's management were present. At the meeting, Mr. Phillippy provided an update regarding business development matters, including the potential transactions with Party A and Party B. The Company Board then reviewed the status and merits of these potential transactions. The Company Board noted that discussions with Party A remained very preliminary, and directed the Company's management to continue discussions with both Party A and Party B.

On August 21, 2015, **at the direction of the Company Board,** Mr. Phillippy and Party B's Chairman discussed **via telephone a potential stock-for-stock merger between the two companies,** preliminary transaction structuring matters and the value of the potential synergies that could result from a combination **between the Company and Party B. On August 27, 2015, Mr. Phillippy and Party B's Chairman had a telephone conversation continuing their previous discussions.**

The following disclosure supplements and restates the fifth paragraph on page 29 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On September 14, 2015, Mr. Phillippy ~~met~~ **held an ordinary course, informal meeting** with the CEO of Party C, a potential strategic acquirer with whom the Company had periodically discussed a potential business combination in previous years**, to discuss various routine business matters**. During the meeting, Party C's CEO

revisited the topic of a potential acquisition of the Company by Party C. **Mr. Phillippy subsequently communicated Party C's expression of interest to the Company Board.**

3

The following disclosure supplements and restates the sixth paragraph on page 29 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On September 16, 2015, the Company submitted a preliminary, non-binding proposal to Party B for an at-market, stock-for-stock strategic merger **of equals** between the Company and Party B. **The Company's proposal contemplated an exchange ratio based on the respective trailing one-month closing prices of the Company Common Stock and the common stock of Party B. The proposal also contemplated that the Company and Party B would each appoint an equal number of the directors to the board of directors of the combined company, with Mr. Phillippy serving as the CEO and an additional director of the combined company and Party B's CEO serving as the chief operating officer of the combined company.** Representatives of Party B communicated to the Company that Party B was interested in the proposed transaction, but they would need to evaluate the Company's proposal with Party B's board of directors.

The following disclosure supplements and restates the last paragraph on page 29, which continues on page 30, of the Proxy Statement under the heading "The Merger—Background of the Merger."

On September 24, 2015, Party C's CEO contacted Mr. Kenneth F. Potashner, the Company's Chairman, indicating that Party C's board of directors had discussed the strategic merits of a combination with the Company earlier that week, and had directed him to contact Mr. Potashner to gauge the Company Board's interest in discussing such a transaction. Between September 24 and September 27, 2015, Mr. Potashner discussed this inquiry individually with the members of the Company Board, and the consensus of the Company Board was that the Company Board would be open to discussing a proposal from Party C at an appropriate valuation. On September 27, 2015, Mr. Potashner replied to Party C's CEO that the Company Board would be receptive to **considering** an offer to acquire the Company. Over the succeeding few days, Mr. Potashner and Party C's CEO communicated regarding the Company Board's valuation expectations and the appropriate next steps to continue discussions between the companies. **During these communications, Mr. Potashner indicated to Party C's CEO that the Company Board would evaluate any proposal from Party C based on the historical trading price of the Company Common Stock, and not in light of the recent decline in the trading price of the Company Common Stock, which the Company Board viewed as temporary.**

The following disclosure is an additional section that is inserted as the second full paragraph on page 30 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On October 2, 2015, the Company and Party A entered into a mutual confidentiality agreement that included customary obligations regarding non-disclosure of confidential information and a non-solicitation provision with respect to each party's employees. This mutual confidentiality agreement did not include a standstill provision.

The following disclosure supplements and restates the fifth full paragraph on page 30 of the Proxy Statement under the heading "The Merger—Background of the Merger."

Also on October 8, 2015, Messrs. Phillippy and Coyne met with Party A's CEO to discuss the rationale for a potential strategic ~~combination~~ **merger of equals** between the companies.

The following disclosure supplements and restates the first full paragraph on page 31 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On October 15, 2015, the Company Board, including the members of the Independent Committee, held a special telephonic meeting to discuss Party C's revised proposal, at which members of the Company's management and representatives from Gibson, Dunn & Crutcher LLP, the Company's outside counsel ("*Gibson Dunn*"), and J.P. Morgan were also present. Representatives from Gibson Dunn reviewed certain legal considerations, including the directors' fiduciary duties in the context of an acquisition proposal. Representatives from J.P. Morgan then presented their financial analysis of Party C's revised proposal. Following these presentations, representatives from Gibson Dunn and J.P. Morgan

left the meeting. The Company Board then discussed the current valuations and future prospects of the Company. The Company Board also discussed the current value of Party C's revised proposal, including, as previously discussed on October 8, 2015, the possibility that the Company's stockholders could participate in the future value created by the proposed combination, but also noted factors including (i) the significant deal certainty risks associated with a transaction with Party C due to antitrust issues **resulting from the substantial product overlap between the Company and Party C**, (ii) the risks associated with potential declines in the future value of Party C's common stock given the equity component of the proposed consideration, and (iii) the fact that Party C's revised proposal did not include any evidence of available financing for the proposed transaction, and the risk that Party C would be unable to obtain such financing. Following these discussions, the Company

Board reached the consensus that the Company should be able to obtain a higher price from Party C or another potential buyer.

The following disclosure supplements and restates the last paragraph on page 31, which continues on page 32, of the Proxy Statement under the heading "The Merger—Background of the Merger."

On October 23, 2015, the Company Board, including the members of the Independent Committee, held a special telephonic meeting at which members of the Company's management and representatives from Gibson Dunn and J.P. Morgan were present. Representatives from J.P. Morgan presented a preliminary valuation analysis of the Company based on updated financial forecasts prepared by the Company's management, and the Company Board discussed their preliminary valuation perspectives of the Company. Messrs. Potashner and Phillippy then summarized recent developments with Party B and Party C. The Company Board discussed with representatives of J.P. Morgan the potential market reaction to a combination with Party B and the potential stockholder value expected to result from such a combination. The Company Board also discussed the current and potential future value of Party C's proposal, as well as the execution risks discussed in previous meetings associated with a combination with Party C, and Party C's insistence that the Company agree to negotiate exclusively with Party C. After members of the Company's management and representatives from Gibson Dunn and J.P. Morgan left the meeting, the Company Board continued their discussion regarding Party C's proposal and their preliminary valuation perspectives of the Company, and reached a consensus that Party C's proposal remained inadequate to recommend to the Company's stockholders. The Company Board resolved to respond to Party C that it would be open to ~~an offer at~~ **a proposal reflecting a dynamic pricing arrangement, pursuant to which Party C would pay** a price **per share of Company Common Stock** that represented a 50% premium over the price of the Company Common Stock after it recovered from its recent decline, with a**n absolute** floor value of $23.00 per share. **The Company Board believed that this dynamic pricing arrangement would result in an acquisition price with a value greater than $23.00 per share.**

The following disclosure supplements and restates the second, third and fourth full paragraphs on page 32, continuing on page 33, of the Proxy Statement under the heading "The Merger—Background of the Merger."

On October 28, 2015, the Company Board, including the members of the Independent Committee, held a special telephonic meeting at which members of the Company's management and representatives from Gibson Dunn and J.P. Morgan were present. Mr. Potashner summarized the recent developments with Party C. Representatives from J.P. Morgan then presented their financial analysis of the two alternatives presented in Party C's revised proposal. The Company Board discussed Party C's revised proposal, including the potential future value that could result from such a combination and the antitrust and financing risks discussed in previous meetings. The Company Board noted that it would be imperative for Party C to agree to bear all antitrust risks and take any actions required to obtain approval for the proposed transaction from antitrust authorities, and that the Company Board would need to receive concrete evidence that Party C would be able to obtain financing for the proposed transaction. In addition, the Company Board discussed conducting a market check, **the parties to approach and the risks associated therewith, including the risk that contacting a substantial number of potential strategic acquirers could negatively impact the Company's business and operations, and the possibility that the market check would not remain confidential. Following this discussion, the Company Board** ~~and~~ reached the consensus that**, given the risks involved and the preliminary nature of the proposal received from Party C,** the Company should not initiate a market check until the Company received a written proposal from Party C that also addressed antitrust and financing issues. After members of the Company's management and representatives from Gibson Dunn and J.P. Morgan left the meeting, the Company Board discussed the Company's

response to Party C's proposal. The Company Board reached the consensus that **Party C's proposed purchase prices were at the bottom of the range of valuations that the Company Board would consider from Party C given the antitrust and financing risks associated with a potential transaction with Party C and that** the Company should seek a higher value proposal from Party C or another buyer, and resolved to request that Party C formalize its revised proposal in writing and address antitrust and financing matters. Mr. Potashner communicated this request to Party C's CEO on October 29, 2015.

In response to the request of the Company Board, on October 29, 2015, Party C sent the Company a letter reiterating its previous acquisition proposal at $22.60 per share, with a portion of the consideration to be comprised of up to 19.9% of Party C's then-outstanding common stock. Party C's proposal represented a 50% premium over the closing price of the Company Common Stock of $15.05 on that date. **Party C's letter stated that its advisors were drafting a "highly confident" letter for the financing component of its proposal but did not address antitrust matters.** Party C also provided the Company with ~~drafts of~~ a proposed **mutual** confidentiality agreement, **which included obligations regarding non-disclosure of confidential information received from the other party, a standstill provision that would automatically terminate in certain circumstances, including in the event that either party entered into a definitive acquisition agreement with another party, and a non-solicitation provision with respect to each party's employees. Party C also provided the Company with** ~~and~~ a proposed exclusivity agreement **that would require the Company to**

terminate discussions with other parties regarding potential business combination transactions and negotiate exclusively with Party C until December 15, 2015. Party C ~~and~~ stated that their target was to announce a transaction on December 14, 2015. In subsequent communications between J.P. Morgan and Party C's financial advisors, Party C's financial advisors reaffirmed that Party C's proposal was contingent on the Company agreeing to negotiate exclusively with Party C.

On October 30, 2015, the Independent Committee held a special telephonic meeting, at which members of the Company's management and representatives from Gibson Dunn and J.P. Morgan were present. Mr. Potashner and representatives from J.P. Morgan summarized their recent communications with Party C and its financial advisors. The Independent Committee then discussed Party C's demand for exclusivity in detail, and asked questions of representatives from Gibson Dunn regarding the possible sale of the Company. The Independent Committee then discussed the benefits and drawbacks of conducting a pre-signing market check, and discussed the execution risks presented by a combination with Party C, including the antitrust and financing concerns raised in previous meetings. Following this discussion, the Independent Committee decided to not grant exclusivity to Party C at that time, and instead concluded that the Company's management and J.P. Morgan should conduct a confidential market check. The Independent Committee then discussed the scope of the market check, including the risk that contacting a substantial number of potential strategic acquirers could **lead to unauthorized or unintended disclosures of confidential or proprietary information, which could** negatively impact the Company's business and operations **and the trading price of the Company Common Stock**, and significantly reduce the likelihood that the market check would remain confidential. The Independent Committee then discussed how to select the potential strategic acquirers that would be contacted in the market check, and determined that the Company should contact potential buyers that the Independent Committee believed, after discussing with J.P. Morgan, would be most likely to be interested in pursuing a strategic transaction with the Company based on their business activities and/or previously expressed interest in acquiring the Company, and which possessed the financial and other resources that would be necessary to complete a transaction with the Company. The Independent Committee also reviewed the possibility that a financial buyer might be interested in a potential acquisition of the Company, and determined that such interest would be unlikely at a price equal to or greater than the price under discussion with Party C. Based on the foregoing considerations, the Independent Committee selected five highly qualified potential strategic acquirers (Parties D, E, F, G and H) to be contacted by the Company's management and J.P. Morgan in the market check. **The Independent Committee determined, after consultation with J.P. Morgan and the Company's management, that these potential strategic acquirers would be the most likely buyers in terms of interest and capability.** The Independent Committee also asked Mr. Coyne to prepare a draft merger agreement to be provided to Party C for comment so that the Company Board could better understand any legal issues or risks, including the antitrust and financing issues discussed previously, associated with Party C's proposal.

The following disclosure supplements and restates the second full paragraph on page 33 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On November 2, 2015, J.P. Morgan had a telephone conversation with Party C's financial advisors to clarify certain points in Party C's most recent proposal, at which time J.P. Morgan communicated that the Company Board had determined that the Company would not grant exclusivity to Party C at that time, but encouraged Party C to conduct due diligence on a non-exclusive basis. J.P. Morgan also conveyed the Company's comments on the draft confidentiality agreement previously provided by Party C, **in which the Company proposed certain customary restrictions on Party C's disclosure of confidential information to potential sources of financing for the proposed transaction, more restrictive non-disclosure obligations with respect to confidential information received from the other party, and extensions of the periods covered by the standstill and non-solicitation provisions.** On November 3, 2015, Party C provided a highly confident letter from a third party lender for the financing of a potential acquisition of the Company.

The following disclosure supplements and restates the fourth full paragraph on page 34 of the Proxy Statement under the heading "The Merger—Background of the Merger."

Also on November 12, 2015, the Company Board, including the members of the Independent Committee, held a special telephonic meeting at which members of the Company's management and representatives from J.P. Morgan were present. Representatives from J.P. Morgan provided updates regarding recent developments with Party C, Party D and Party E and Mr. Phillippy provided an update regarding his conversation with Party D's CEO, noting that Party D appeared to be serious about completing due diligence and pursuing a transaction with the Company. Representatives from J.P. Morgan then presented their financial analysis of Party D's proposal. The Company Board then discussed with representatives of J.P. Morgan how to communicate with Party C in light of Party D's proposal**. J.P. Morgan presented an illustrative analysis of a range of implied values for Party C's proposal from $20.32 to $25.64 per share, where the high end of the range was at the low end of the range of Party D's proposal. J.P. Morgan's analysis was presented for illustrative purposes only, based on hypothetical trading performance of Party C's stock following a transaction. Assuming Party C continued to trade at its current P/E multiple (which was much higher than the Company's P/E multiple) and $25 million of pre-tax synergies, the analysis indicated that the implied value of Party C's offer would be $25.06 per share. J.P. Morgan also noted that such analysis should not be interpreted as a stock price prediction. After discussion, the Company Board** ~~and,~~ directed J.P. Morgan to communicate to Party C that their previous proposal remained competitive, but would likely need to be increased to be successful. The Company Board also directed J.P. Morgan to encourage Party C to execute a confidentiality agreement and commence due diligence, and thereby engage in the Company's process

The following disclosure supplements and restates the third full paragraph on page 35 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On November 23, 2015, Party D's CEO contacted Mr. Phillippy and informed him that, after further review and deliberation, Party D had decided not to pursue an acquisition of the Company. Party D's CEO expressed concern that certain of the Company's businesses did not fit Party D's strategic model, and that an acquisition of the Company would entail significant integration effort and risk. On the same date, Messrs. Phillippy and Mr. Potashner, members of the Company's management and representatives of J.P. Morgan held a telephonic meeting to discuss recent developments in the Company's process. Mr. Phillippy provided an update regarding recent communications with Party C and Party D. After considering and discussing various alternatives **in light of the results of the confidential market check and Party D's decision not to pursue an acquisition of the Company,** the meeting attendees proposed to **encourage Party C to increase its proposed purchase price by** offer**ing** Party C a brief period of exclusivity if Party C would increase its proposed price to $25.00 per share and target signing a definitive acquisition agreement before December 25, 2015. Following the meeting, Mr. Potashner

contacted the other members of the Independent Committee and received their support for this approach.

The following disclosure supplements and restates the fifth full paragraph on page 35 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On November 25, 2015, the Company Board, including the members of the Independent Committee, held a special telephonic meeting, at which members of the Company's management and representatives from Gibson Dunn and J.P. Morgan were present. Mr. Phillippy summarized the recent developments with Party C and Party D. The Company Board then discussed communication strategy with respect to Party C, and confirmed that the offer of exclusivity to Party C at a price of $25.00 per share was appropriate. The Company Board also discussed the execution risks associated with a transaction with Party C, including antitrust and financing risks discussed in previous meetings, and representatives of Gibson Dunn discussed ways to mitigate the antitrust risks associated with Party C's proposal. After members of the Company's management and representatives from Gibson Dunn and J.P. Morgan left the meeting, the Company Board discussed strategic alternatives to a transaction with Party C and the risks related to those alternatives. Based on the significant ~~execution~~ **antitrust and financing risks** associated with a transaction with Party C **discussed previously by the Company Board**, and in light of the process being undertaken by the Company, the Company Board determined that a **higher purchase price would be required in a transaction with Party C than would be required in a transaction that did not present these risks. Accordingly, the Company Board determined in the exercise of its business judgment that a** purchase price below $24.75 per share from Party C would not be adequate to recommend to the Company's stockholders **due to the significant uncertainty that a transaction with Party C could be completed on a timely basis, or at all, in view of the associated antitrust and financing risks.**

The following disclosure supplements and restates the fourth and fifth full paragraphs on page 36 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On December 7, 2015, Messrs. Phillippy and Coyne met with the CEO and CFO of Party A to further discuss the merits of a potential strategic ~~business combination~~ **merger of equals transaction**. Mr. Phillippy and Party A's CEO agreed to schedule a subsequent discussion on this topic. However, Party A's CEO indicated that he would not be available for that discussion until January 2016. On the same date, Mr. Simone met with the CEO of Party B to discuss the strategic fit of the Company and Party B and the Company's business units.

On December 8, 2015, the Company and Parent entered into a confidentiality agreement **that included customary obligations regarding non-disclosure of Company confidential information received by Parent, a customary standstill provision that would automatically terminate in certain circumstances, including in the event that the Company entered into a definitive acquisition agreement with another party, and a customary non-solicitation provision with respect to the Company's employees** ~~with a customary standstill provision that would terminate in the event that the Company entered into a definitive acquisition agreement with another party~~. On the same date, at the direction of the Company Board, Mr. Phillippy had a telephone conversation with Party C's CEO, during which he responded to Party C's revised proposal with a counter-proposal at a price of $24.75 per share. Party C indicated that it was not interested in moving forward with an acquisition of the Company at that price.

The following disclosure supplements and restates the eighth full paragraph on page 36 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On December 18, 2015, Party B submitted a preliminary, non-binding proposal for a stock-for-stock merger **of equals** with the Company in an "at market" transaction. **Party B's proposal contemplated an exchange ratio based on the spot exchange ratio, the 30-day weighted average exchange ratio or the 90-day weighted average exchange ratio resulting from the respective closing prices of the Company Common Stock and the common stock of Party B, with the alternative producing the most favorable exchange ratio for the holders of Party B's Common Stock being selected. Party B's proposal also contemplated that the Company and Party B would each appoint an equal number of directors to the board of directors of the combined company, with each party appointing its then-current CEO. Party B's proposal also contemplated that Party B would appoint the initial Chairman of the combined company, with Mr. Phillippy serving as the CEO of the combined company and Party B's CEO serving as the chief operating officer of the combined company. Party B's proposal also contemplated that the proposed transaction would be structured as an inversion for tax purposes.** Based on this proposal, the Company agreed to schedule due diligence meetings in January 2016 with Party B.

The following disclosure supplements and restates the first full paragraph on page 38 of the Proxy Statement under

the heading "The Merger—Background of the Merger."

On January 18, 2016, the Company Board, including the members of the Independent Committee, held a special telephonic meeting, at which members of the Company's management and representatives from Gibson Dunn and J.P. Morgan were present. Representatives from J.P. Morgan summarized the recent developments with Party B, Party C and Parent. Representatives from J.P. Morgan and the Company's management then reviewed projected financial information for Party B and presented information regarding the synergies that could be achieved in a strategic combination transaction with Party B and the potential value creation resulting from the combination, as well as various other financial valuation analyses. Representatives of J.P. Morgan also presented their financial analysis of the most recent acquisition proposals submitted by Party C and Parent. Representatives from Gibson Dunn then reviewed and answered questions regarding certain legal considerations. The Company Board then discussed the significant antitrust risks posed by a transaction with Party C that had been raised at prior meetings. Representatives of Gibson Dunn and Mr. Coyne provided further input regarding the deal certainty risks **associated with these antitrust issues** in connection with a transaction with Party C**, including the potential inability to obtain in a timely manner, or at all, regulatory approval and potential divestitures that might be required due to the substantial product overlap between the Company and Party C**. Following this discussion, and after considering the advice of Gibson Dunn and J.P. Morgan, the Company Board determined that on balance, the Parent proposal appeared to be the most attractive and that the best course of action would be to further engage with Parent without granting exclusivity, before asking Party C for its best and final offer. After the Company's management and the representatives of J.P. Morgan left the meeting, the Company Board discussed the various alternative proposed transactions. After evaluating the proposals, the Company Board resolved to direct J.P. Morgan to (i) work with Parent on a non-exclusive basis to solidify their proposal and seek additional insight into their due diligence process, their positions on certain key provisions in the draft Merger Agreement and their access to financing and (ii) after solidifying Parent's proposal, reengage Party C to confirm or update its proposal. The Company Board also resolved to continue discussions with Party B while working with Party C and Parent.

The following disclosure supplements and restates the third full paragraph on page 38 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On January 19, 2016, Parent and its advisors received access to the virtual data room established by the Company to share certain information related to the Company and the proposed acquisition, including the draft Merger Agreement**, which contemplated, among other matters, that all awards granted under any Company Equity Plan would accelerate and vest in full, and be converted into the right to receive the merger consideration**.

The following disclosure supplements and restates the fourth full paragraph on page 38 of the Proxy Statement under the heading "The Merger—Background of the Merger."

Also on January 19, 2016, Party B informed the Company that**, after further review and deliberation,** it had decided not to move forward with further negotiations regarding a strategic combination with the Company **because, based on its analysis, the synergies that could be achieved in a strategic combination with the Company would not be sufficient to warrant the risks and disruption to Party B's business that would likely be associated with such a transaction.**

The following disclosure is an additional paragraph that is inserted as the sixth full paragraph on page 38 of the Proxy Statement under the heading "The Merger—Background of the Merger."

Also on January 22, 2016, the Company and Party A entered into a second mutual confidentiality agreement. This mutual confidentiality agreement included a standstill provision and a non-solicitation provision with respect to each party's employees, and customary obligations regarding non-disclosure of confidential information.

The following disclosure supplements and restates the fourth full paragraph on page 39 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On February 8, 2016, Party C's financial advisors communicated to J.P. Morgan that, in light of the recent ~~market~~ **general** turbulence **in the equity markets**, Party C was not willing to increase its most recent proposed price of $23.25 per share, and was no longer interested in pursuing an acquisition of the Company **at all**.

The following disclosure supplements and restates the sixth full paragraph on page 39 of the Proxy Statement under the heading "The Merger—Background of the Merger."

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On February 11, 2016, Parent provided a mark-up of the draft Merger Agreement, **which included, among other matters, Parent's proposal that all awards granted under any Company Equity Plan would be assumed by Parent and converted into awards for Parent Common Stock. Parent also provided** revised draft debt commitment documents and a list of outstanding confirmatory due diligence issues and requests to the Company.

The following disclosure supplements and restates the seventh full paragraph on page 39 of the Proxy Statement under the heading "The Merger—Background of the Merger."

Also on February 11, 2016, the Company Board, including the members of the Independent Committee, held a special telephonic meeting, at which members of the Company's management and representatives from Gibson Dunn and J.P. Morgan were present. Representatives from J.P. Morgan discussed the recent developments with Party A, Party B, Party C and Parent.~~, and t~~**T**he Company Board determined that**, given the probability that any potential transaction with Party A would be structured as an at market, stock-for-stock merger of equals that would not offer a premium over the trading price of the Company Common Stock, and was not likely to be consummated, if at all, until late 2016 or early 2017 due to the fact that discussions between the Company and Party A remained very preliminary and had not progressed significantly in several months,** a transaction with Party A was unlikely to deliver value in the near-term that would be greater than the price of $23.00 per share proposed by Parent**, which represented a significant premium over the then-current trading price of the Company Common Stock**. Mr. Coyne then referred the Company Board to the summary of draft Merger Agreement issues that had been provided to the Company Board, and reviewed certain significant issues. Mr. Coyne and representatives of Gibson Dunn answered the Company Board's questions regarding the various draft Merger Agreement issues. The Company Board then discussed whether to grant Parent's request for exclusivity, asking questions of the representatives of Gibson Dunn and Mr. Coyne, and resolved to grant Parent exclusivity through February 22, 2016. Representatives of J.P. Morgan then reviewed their financial analysis of Parent's proposal. On the same date, Mr. Phillippy notified Party A's CEO that he would not be able to meet as planned on February 17, 2016.

The following disclosure supplements and restates the last paragraph on page 39, which continues on page 40, of the Proxy Statement under the heading "The Merger—Background of the Merger."

From February 12, 2016 to February 22, 2016, representatives of the Company and Parent, together with representatives from Gibson Dunn and WilmerHale, negotiated the terms and conditions of the Merger Agreement and the ancillary documents related thereto, including terms related to the definition of "material adverse effect," **the treatment of awards granted under Company Equity Plans in the Merger,** the Company Board's "fiduciary out" in the event of an alternative proposal, the preparation of the Company's proxy statement and the holding of a Company stockholder meeting, the conditions under which the Merger Agreement could be terminated, the amount of the break-up fee and the conditions under which Parent would be entitled to receive the break-up fee. During this period, Parent and its financing sources also continued to conduct confirmatory due diligence.

The following disclosures are additional paragraphs that are inserted as the fifth and sixth full paragraphs on page 40 of the Proxy Statement under the heading "The Merger—Background of the Merger."

On February 23, 2016, Mr. Phillippy contacted Party A's CEO to confirm that Party A was aware that the Company had entered into the Merger Agreement with Parent and that as a result, the Company could not continue discussions with Party A regarding an alternative transaction. On February 24, 2016, Party A's CEO thanked Mr. Phillippy for contacting him, confirmed that he was aware of the transactions contemplated by the Merger Agreement and wished Mr. Phillippy and the Company's employees the best in the future.

Promptly after becoming aware that the standstill provision included in the January 22, 2016 confidentiality agreement between the Company and Party A remained in effect because it did not by its terms terminate upon the Company's execution of the Merger Agreement with Parent, the Company, without having communicated with Party A since February 24, 2016, determined to request Parent's consent to waive the

Company's rights under this standstill provision. On April 13, 2016, Parent consented to this waiver and on the same date, the Company notified Party A that the Company waived its rights under this standstill provision.

The following disclosure is an additional paragraph that is added as a footnote to the end of the second full paragraph on page 51 of the Proxy Statement under the heading "The Merger—Certain Financial Forecasts."

In connection with the process described under the heading "The Merger—Background of the Merger,"

Parties B and D and Parent were also provided a prior version of the Base Case Forecasts that had not been updated to reflect actual operating results for fiscal year 2015 because fiscal year 2015 had not been completed at the time that such forecasts were provided. The Company's management did not prepare forecasts for any periods other than those covered by the Base Case Forecasts and the Acquisition Forecasts as set forth in the summary tables below.

The following disclosure supplements and restates footnote (5) to the table titled "Base Case Forecasts" on page 51, which continues on page 52, of the Proxy Statement under the heading "The Merger—Certain Financial Forecasts."

(5) Unlevered Free Cash Flow defined as EBITDA less taxes, less capital expenditures, less stock-based compensation expense (net of tax) plus change in net working capital. **Capital expenditures used to compute Unlevered Free Cash Flow were (in millions) $20, $21, $22, $24, $25 and $26 for FY2015A, FY2016AOP, FY2017E, FY2018E, FY2019E and FY2020E, respectively.**

Forward-Looking Statements

Statements in this document regarding the proposed transaction between the Company and Parent, the expected timetable for completing the transaction, future financial and operating results, benefits and synergies of the transaction, future opportunities for the combined company and any other statements about the Company or Parent managements' future expectations, beliefs, goals, plans or prospects constitute forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995. Any statements that are not statements of historical fact (including statements containing the words "will," "projects," "intends," "believes," "plans," "anticipates," "expects," "estimates", "forecasts", "continues" and similar expressions) should also be considered to be forward-looking statements. There are a number of important factors that could cause actual results or events to differ materially from those indicated by such forward-looking statements, including: (1) the ability to consummate the transaction, (2) risks that the conditions to the closing of the transaction are not satisfied, including the risk that required approvals for the transaction from governmental authorities or the stockholders of the Company are not obtained; (3) litigation relating to the transaction; (4) the ability of Parent to successfully integrate the Company's operations and employees; (5) unexpected costs, charges or expenses resulting from transaction; (6) risks that the proposed transaction disrupts the current plans and operations of the Company and Parent; (7) the ability to realize anticipated synergies and cost savings; (8) competition from larger and more established companies in the Company's markets; (9) Parent's ability to successfully grow the Company's business; (10) potential adverse reactions or changes to business relationships resulting from the announcement or completion of the transaction; (11) the availability and terms of the financing to be incurred in connection with the transaction; (12) the retention of key employees; (13) legislative, regulatory and economic developments, including changing business conditions in the industries in which the Company and Parent operate and the economy in general as well as financial performance and expectations of the Company's and Parent's existing and prospective customers, and the other factors described in the Company's Annual Report on Form 10-K for the year ended January 2, 2016, as amended, and in Parent's Annual Report on Form 10-K for the year ended December 31, 2015. However, it is not possible to predict or identify all such factors. Consequently, while the list of factors presented here is considered representative, no such list should be considered to be a complete statement of all potential risks and uncertainties. The Company and Parent disclaim any intention or obligation to update any forward-looking statements as a result of developments occurring after the date of this document.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

April 15, 2016

NEWPORT CORPORATION

By: /s/ Jeffrey B. Coyne
Senior Vice President, General Counsel and Corporate Secretary

EXHIBIT B

David Knotts

From: Young, Meryl L. <MYoung@gibsondunn.com>
Sent: Friday, April 15, 2016 10:27 PM
To: David Knotts; Davis, Colin B.; Brian Lutz; 'Chris Byrd (cbyrd@fclaw.com)'
Cc: 'david@omaralaw.net'; Randall Baron
Subject: Re: Pincon v. Newport Corp. Nev. Dist. Ct.)

David,

We're fine producing the NDAs and are planning to do so with our production on Monday. At the time we spoke, obviously we weren't aware of Party A's NDA or that term.

Meryl

From: David Knotts
Sent: Friday, April 15, 2016 9:32 PM
To: Davis, Colin B.; Lutz, Brian M.; Young, Meryl L.; 'Chris Byrd (cbyrd@fclaw.com)'
Cc: 'david@omaralaw.net'; Randall Baron
Subject: RE: Pincon v. Newport Corp. (Nev. Dist. Ct.)

Meryl, when I asked for the NDA agreements on our prior call about core documents, you specifically stated that none were still in effect and that there were no issues in that regard. As a result of that representation, when you did not produce them pursuant to my request, we did not continue to press the issue that they be included in the core production. It appears that statement was not accurate – our call was well prior to the April 13, 2016 waiver by MKS. Please produce the NDAs with potential acquirers immediately.

Promptly after becoming aware that the standstill provision included in the January 22, 2016 confidentiality agreement between the Company and Party A remained in effect because it did not by its terms terminate upon the Company's execution of the Merger Agreement with Parent, the Company, without having communicated with Party A since February 24, 2016, determined to request Parent's consent to waive the Company's rights under this standstill provision. On April 13, 2016, Parent consented to this waiver and on the same date, the Company notified Party A that the Company waived its rights under this standstill provision.

From: David Knotts
Sent: Friday, April 15, 2016 4:39 PM
To: 'Davis, Colin B.'; Brian Lutz; 'Young, Meryl L.'; 'Chris Byrd (cbyrd@fclaw.com)'
Cc: 'david@omaralaw.net'; Randall Baron
Subject: RE: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- search terms

Proposed order attached.

From: David Knotts
Sent: Friday, April 15, 2016 10:38 AM
To: 'Davis, Colin B.'; Brian Lutz; Young, Meryl L.; Chris Byrd (cbyrd@fclaw.com)
Cc: david@omaralaw.net; Randall Baron
Subject: RE: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- search terms

Please also identify the actual search terms that are being run, so we can confirm agreement that they are consistent with Exhibit A of the Reply, as modified by agreement and the Court's rulings.

From: Davis, Colin B. [mailto:CDavis@gibsondunn.com]
Sent: Thursday, April 14, 2016 9:52 PM
To: David Knotts; Brian Lutz; Young, Meryl L.; Chris Byrd (cbyrd@fclaw.com)
Cc: david@omaralaw.net; Randall Baron
Subject: RE: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- search terms

David, the protocol and metadata fields are acceptable, with the exception of the following metadata fields, which our systems do no support:

MEETING START DATE MM/DD/YYYY Start date of calendar entry
MEETING START TIME HH:MM Start time of calendar entry
MEETING END DATE MM/DD/YYYY End date of calendar entry
MEETING END TIME HH:MM End time of calendar entry

From: David Knotts [mailto:DKnotts@rgrdlaw.com]
Sent: Thursday, April 14, 2016 5:07 PM
To: Lutz, Brian M.; Young, Meryl L.; Chris Byrd (cbyrd@fclaw.com); Davis, Colin B.
Cc: david@omaralaw.net; Randall Baron
Subject: RE: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- search terms

Counsel, please produce ESI under the attached protocol with the attached metadata. Let us know promptly if any of this is going to be a problem, but this is a streamlined, simplified protocol given the expedited timing.

Thanks

David Knotts
Robbins Geller Rudman & Dowd LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Tel 619 231 1058 | Fax 619 231 7423
Dir 619 744 4934

From: David Knotts
Sent: Monday, April 11, 2016 9:11 PM
To: Brian Lutz; Young, Meryl L.; Chris Byrd (cbyrd@fclaw.com); Davis, Colin B.

Cc: david@omaralaw.net; Randall Baron
Subject: RE: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- search terms

We've reviewed the board minutes and offer letters produced Friday afternoon and await production of the rest of the minutes, the other proposal letters, the management presentations to the Board, and the banker books. The first three categories of course don't require an agreement with JPM.

This contains our initial proposal for expedited collection of ESI. In order to keep things on schedule, to the extent you have not already done so, please begin running the following search terms for custodians Robert Phillippy, Kenneth F. Potashner, and Charles F. Cargile:

Terms
[redacted]
MKS
[redacted]
[redacted]
"base case"
"acquisition case"
projection*
[redacted] [and actual name of [redacted] and last name of [redacted] CEO]
[redacted] [and actual name of [redacted] and last name of [redacted] CEO]
[redacted] [and actual name of [redacted] and last name of [redacted] CEO]
[redacted] [and actual name of [redacted]]
"J.P. Morgan"
jpmorgan
JPM
2018E

Time period
June 1, 2015 to the date of production.

We of course reserve the right to identify additional terms as documents come in and this is meant only as an abbreviated, initial expedited production. Happy to discuss further tomorrow.

Thanks

From: Davis, Colin B. [CDavis@gibsondunn.com]
Sent: Friday, April 08, 2016 5:55 PM
To: David Knotts
Cc: Brian Lutz; Young, Meryl L.; Chris Byrd (cbyrd@fclaw.com); david@omaralaw.net
Subject: [WARNING: MESSAGE ENCRYPTED]Pincon v. Newport Corp. (Nev. Dist. Ct.) -- Newport Defendants' First Production of Documents -- Highly Confidential/Attorneys' Eyes Only

David:

Pursuant to the Newport Defendants' agreement to produce certain "core" documents, attached please find the Newport Defendants' first production of documents in this action. The documents in this production bear Bates numbers NEWP000001 through NEWP000055. All of the documents have been designated "Highly Confidential – Attorneys' Eyes Only." As you acknowledged on our call yesterday, you have agreed to treat these documents as "attorneys' eyes only" pending entry by the Court of the agreed-upon form of protective order.

To maintain the security of Newport's confidential and proprietary information, the production is encrypted. I will send the password to access the encrypted production separately.

The Newport Defendants will produce additional documents on a rolling basis as they are available.

Regards,
Colin

Colin B. Davis

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
3161 Michelson Drive, Irvine, CA 92612-4412
Tel +1 949.451.3993 • Fax +1 949.475.4792
CDavis@gibsondunn.com • www.gibsondunn.com

NOTICE: This email message is for the sole use of the intended recipient(s) and may contain information that is confidential and protected from disclosure by the attorney-client privilege, as attorney work product, or by other applicable privileges. Any unauthorized review, use, disclosure or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy all copies of the original message.

EXHIBIT C

David Knotts

From: Randall Baron
Sent: Tuesday, April 19, 2016 10:06 AM
To: Young, Meryl L.
Cc: Kahn, Michael J.; Brian Lutz; Davis, Colin B.; daniel.halston@wilmerhale.com; alexandra.boudreau@wilmerhale.com; vigila@ballardspahr.com; David O'Mara, Esq.; David Knotts; Chris Byrd - Fennemore Craig, P.C. (cbyrd@fclaw.com)
Subject: Re: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- Newport Defendants' Third Production of Documents

Fair enough. We have a deal then.

Sent from my iPhone

On Apr 19, 2016, at 9:43 AM, Young, Meryl L. <MYoung@gibsondunn.com> wrote:

> Randy,
>
> We generally agree with the terms of the agreement outlined below. Of course, we reserve our rights with respect to any further action you might try to take to postpone or stop the closing of the merger based on "discovery of any new information."
>
> Regards,
> Meryl
>
> **Meryl L. Young**
>
> GIBSON DUNN
>
> Gibson, Dunn & Crutcher LLP
> 3161 Michelson Drive, Irvine, CA 92612-4412
> Tel +1 949.451.4229 • Fax +1 949.475.4619
> MYoung@gibsondunn.com • www.gibsondunn.com
>
> ---
>
> **From:** Randall Baron [mailto:RandyB@rgrdlaw.com]
> **Sent:** Tuesday, April 19, 2016 8:28 AM
> **To:** Young, Meryl L.
> **Cc:** Kahn, Michael J.; Lutz, Brian M.; Davis, Colin B.; daniel.halston@wilmerhale.com; alexandra.boudreau@wilmerhale.com; vigila@ballardspahr.com; David O'Mara, Esq.; David Knotts
> **Subject:** RE: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- Newport Defendants' Third Production of Documents
>
> Meryl, thank you for calling me back. Given the timing of the production, the short deadlines for filing and a preliminary injunction hearing, and the fact that defendants have mooted out some of the most significant disclosure concerns, as well as standstill concerns; we have agreed to the following:
>
> 1. We will postpone the two depositions scheduled for this afternoon;

2. We will vacate the hearing scheduled for next week;

3. We will inform the Court of our reason for vacating the hearing in writing (you can respond if you believe it is necessary);

4. We will take no further action to postpone or stop the closing of the merger, absent discovery of any new information;

5. Once we have confirmed a complete pre-close production, as has been agreed to by the parties, we will review the production and reschedule the two postponed depositions;

6. After the two postponed depositions take place, we will (without objection) file an amended complaint seeking a post-close damages award.

Please confirm that this is our agreement.

Regards,
Randy

From: Randall Baron
Sent: Tuesday, April 19, 2016 7:19 AM
To: David Knotts
Cc: Kahn, Michael J.; Young, Meryl L.; Brian Lutz; Davis, Colin B.; daniel.halston@wilmerhale.com; alexandra.boudreau@wilmerhale.com; vigila@ballardspahr.com; David O'Mara, Esq.
Subject: Re: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- Newport Defendants' Third Production of Documents

Meryl, this is unacceptable. I have had folks working most of the night to get through the documents but there are too many produced too late.

Accordingly, we will **not** be going forward with the depositions this afternoon. Please call me when we you get this to discuss how we deal with this situation. I am in my office. 619-338-4535.

Sent from my iPhone

On Apr 18, 2016, at 8:05 PM, David Knotts <DKnotts@rgrdlaw.com> wrote:

> Meryl and Brian, we are surprised by this late production of nearly 10,000 pages of documents, or about double the entire production thus far. And we are disappointed that, when responding to my question about document timing, you chose not to inform us of the anticipated size of this massive production. 10,000 pages added to 12,000 pages is much more than a mere add-on "supplemental production." Please be advised that this production and the lack of transparency on production timing jeopardizes the current deposition and briefing schedule.
>
> ---
>
> **From:** Kahn, Michael J. [mailto:MJKahn@gibsondunn.com]
> **Sent:** Monday, April 18, 2016 7:06 PM
> **To:** David Knotts
> **Cc:** Young, Meryl L.; Brian Lutz; Davis, Colin B.; daniel.halston@wilmerhale.com; alexandra.boudreau@wilmerhale.com; vigila@ballardspahr.com

Subject: RE: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- Newport Defendants' Third Production of Documents

Counsel,

Our supplemental production is now available on the SFTP site. These documents are Bates numbered NEWP012150 - NEWP021993. These documents are being produced subject to the same conditions set forth in my email below. The passwords for the SFTP and for the new .zip file remain the same.

Regards,
Michael

Michael J. Kahn

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1881 Page Mill Road, Palo Alto, CA 94304-1211
Tel +1 650.849.5332 • Fax +1 650.849.5032
MJKahn@gibsondunn.com • www.gibsondunn.com

From: Kahn, Michael J.
Sent: Monday, April 18, 2016 1:49 PM
To: 'DKnotts@rgrdlaw.com'
Cc: Young, Meryl L.; Lutz, Brian M.; Davis, Colin B.; 'daniel.halston@wilmerhale.com'; 'alexandra.boudreau@wilmerhale.com'; 'vigila@ballardspahr.com'
Subject: Pincon v. Newport Corp. (Nev. Dist. Ct.) -- Newport Defendants' Third Production of Documents

Counsel,

Per the Court's April 14, 2016 order in this matter, the Newport Defendants are making their third production of documents. The documents have been uploaded to our SFTP site. The login information for the SFTP is below, and the instructions are attached; the password will follow under separate cover. Additionally, the .zip folder on the SFTP is encrypted; that password will also follow under separate cover. These documents, Bates numbered NEWP000220 – NEWP012149, are being produced subject to the protective order dated April 14, 2016. The documents have been stamped with confidentiality designations in conformity with the protective order.

We intend to run a supplemental production of the documents required by the Court's April 14, 2016 order as soon as possible.

Regards,
Michael

URL	Sftp.gibsondunn.com
Connection type	SFTP/SSH (we recommend using the software FileZilla to connect)

Port	22
Username	66755-00011
Password to SFTP	Following under separate cover
Location of Files	

Michael J. Kahn

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1881 Page Mill Road, Palo Alto, CA 94304-1211
Tel +1 650.849.5332 • Fax +1 650.849.5032
MJKahn@gibsondunn.com • www.gibsondunn.com

Electronically Filed
04/21/2016 04:04:37 PM

CLERK OF THE COURT

NNOP
FENNEMORE CRAIG, P.C.
Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
E-mail:cbyrd@fclaw.com
-and-
GIBSON, DUNN & CRUTCHER, LLP
Meryl L. Young, Esq. (CA Bar #110156 Pro Hac)
Colin B. Davis, Esq. (CA Bar #273942 Pro Hac)
3161 Michelson Dr.
Irvine, CA 92612-4412
Telephone (949) 451-4229
E-mail:myoung@gibsondunn.com
cdavis@gibsondunn.com
-and-
Brian M. Lutz, Esq. (Pro Hac)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: 415.393.8200
Facsimile: 415.393.8306
E-mail: blutz@gibsondunn.com
Attorneys for Defendants NEWPORT CORPORATION, ROBERT J. PHILLIPPY, KENNETH F. POTASHNER, CHRISTOPHER COX, SIDDHARTHA C. KADIA, OLEG KHAYKIN and PETER J. SIMONE

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE NEWPORT CORPORATION SHAREHOLDER LITIGATION	Lead Case No:. A-16-733154-C (Consolidated with Case No.: A-16-734039-B)
This Document Related To: ALL ACTIONS	Dep't No. XXVII CLASS ACTION

NEWPORT DEFENDANTS' STATEMENT OF NON-OPPOSITION TO PLAINTIFFS' REQUEST TO VACATE PRELIMINARY INJUNCTION HEARING DATE

Defendants Newport Corporation ("Newport"), Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone (the "Newport Defendants") of course do not oppose Plaintiffs' Request to Vacate Preliminary Injunction Hearing Date (the "Request"), but submit this response to address Plaintiffs' description of their purported reasons for making the Request and their improper insinuation that Defendants

somehow violated a Court order.

First, Plaintiffs' suggestion in the Request that they were "successful" in obtaining supplemental disclosures and "structural modifications" is misleading. Request at 1. Newport *voluntarily* provided supplemental disclosures in its April 15, 2016 8-K, and made clear in that filing that Newport believes its definitive proxy complied "fully with applicable law" and that Plaintiffs' disclosure claims are "unmeritorious." *See* Request, Ex. A. In their description of these disclosures, Plaintiffs continue to distort the actual facts surrounding the 53% premium offer for Newport. The Newport Defendants categorically deny that there were any "conflicts of interest, bad faith acts, process flaws, or valuation issues." (Request at 3). They will address any such baseless allegations if Plaintiffs elect to file a post-closing amended complaint challenging the conduct of the independent board of directors that oversaw the negotiation of this highly favorable deal for Newport's shareholders.

Second, Plaintiffs' attempt to blame the Newport Defendants for Plaintiffs' supposed inability to proceed with a preliminary injunction motion is just plain wrong. *Id.* at 2-3. At the April 14, 2016 hearing on Plaintiffs' Request to Waive the Rule 16.1 Requirements, counsel for the Newport Defendants committed to making a "good faith effort to produce [responsive, non-privileged documents] by Monday at 12:00," but made clear that they could not "promise that" because they "just [did not] know what [they were] going to have" in terms of the volume of documents to review. Transcript of April 14, 2016 Hearing ("Tr.") at 58. Beginning immediately after the hearing, a large team of lawyers for the Newport Defendants began working around the clock to collect and review documents, and worked throughout the entire weekend so that a production could be made to the Plaintiffs as soon as possible on Monday. At great expense and after a Herculean effort, the Newport Defendants produced 3,118 documents on Monday at 1:49 pm, and told counsel for Plaintiffs that another production would be coming. The Newport Defendants then produced another 1,567 later in the day on Monday. Plaintiffs' insinuation that the Newport Defendants somehow sandbagged the Plaintiffs by delaying the production is baseless. To the contrary, this significant production by the Newport Defendants of the very documents requested by Plaintiffs is the definition of a good faith effort by a litigant working

under extreme circumstances. Indeed, the Newport Defendants even agreed to move back the deadline for Plaintiffs' opening brief (from Tuesday at 7:00 pm to Wednesday at noon) to accommodate the compressed discovery schedule—a fact that Plaintiffs fail to even mention. For Plaintiffs now to suggest that the Newport Defendants did something wrong by giving the Plaintiffs exactly what they wanted all along—significant pre-closing discovery and a "substantial production on Monday" (Tr. at 55-56)—is improper gamesmanship that should have no place in this litigation.

If Plaintiffs elect to continue with this litigation after Newport's shareholders vote on April 27 to approve this highly attractive transaction, the Newport Defendants hope that the focus of the litigation is on the actual facts of this premium deal and the thorough process leading up to it, not on Plaintiffs' false attacks on the transaction, the defendants, and their counsel.

DATED this 21st day of April, 2016.

GIBSON, DUNN & CRUTCHER, LLP

/s/Meryl L. Young, Esq.
Meryl L. Young, Esq. (CA Bar #110156 Pro Hac)
Colin B. Davis, Esq. (CA Bar #273942 Pro Hac)
3161 Michelson Dr.
Irvine, CA 92612-4412
Telephone (949) 451-4229
E-mail:myoung@gibsondunn.com
cdavis@gibsondunn.com
-and-
Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
E-mail:cbyrd@fclaw.com
-and-
Brian M. Lutz, Esq. (Pro Hac)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: 415.393.8200
Facsimile: 415.393.8306
E-mail: blutz@gibsondunn.com
Attorneys for Defendants NEWPORT CORPORATION, ROBERT J. PHILLIPPY, KENNETH F. POTASHNER, CHRISTOPHER COX, SIDDHARTHA C. KADIA, OLEG KHAYKIN and PETER J. SIMONE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the **NEWPORT DEFENDANTS' STATEMENT OF NON-OPPOSITION TO PLAINTIFFS' REQUEST TO VACATE PRELIMINARY INJUNCTION HEARING DATE** 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 21st day of April, 2016 as follows:

David C. O'Mara, Esq. The O'Mara Law Firm, P.C. 316 E. Bridger Avenue, 2nd Floor Las Vegas, Nevada 89101 david@omaralaw.net	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- David T. Wissbroecker, Esq. Edward M. Gergosian, Esq. Robbins Geller Rudman & Dowd LLP 655 West Broadway, Suite 1900 San Diego, CA 92101 DWissbroecker@rgrdlaw.com EGergosian@rgrdlaw.com	[ ] Via E-service [X] Via U.S. Mail (Not registered with CM/ECF Program)
-and- Frank J. Johnson, Esq. Johnson & Weaver, LLP 600 W. Broadway Suite 1540 San Diego, CA 92101 frankj@johnsonandweaver.com	[ ] Via E-service [X] Via U.S. Mail (Not registered with CM/ECF Program)
-and- W. Scott Holleman, Esq. Johnson & Weaver, LLP 99 Madison Avenue 5th Floor New York, NY 10016 scotth@johnsonandweaver.com *Attorneys for Plaintiffs*	[ ] Via E-service [X] Via U.S. Mail (Not registered with CM/ECF Program)
John P. Aldrich, Esq. Aldrich Law Firm, Ltd. 1601 S. Rainbow Blvd. Suite 160 Las Vegas, NV 89146 jaldrich@johnaldrichlawfirm.com	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- Shane T. Rowley, Esq. Levi & Korsinsky LLP 30 Broad Street, 24th Floor New York, NY 10004 srowley@zlk.com *Attorneys for Plaintiff, Dixon Chung*	[ ] Via E-service [X] Via U.S. Mail (Not registered with CM/ECF Program)

///

Meryl L. Young, Esq. Colin B. Davis, Esq. Gibson, Dunn & Crutcher, LLP 3161 Michelson Dr. Irvine, CA 92612 MYoung@gibsondunn.com CDavis@gibsondunn.com	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- Brian M. Lutz, Esq. Gibson, Dunn & Crutcher LLP 555 Mission St., Ste 3000 San Francisco, CA 94105 BLutz@gibsondunn.com *Counsel for Defendants Newport Corporation, Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin and Peter J. Simone*	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
Abran E. Vigil, Esq. Ballard Spahr LLP 100 N. City Parkway, Suite 1750 Las Vegas, NV 89106 702-471-7000; FAX: 702-471-7070 vigila@ballardspahr.com	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- Daniel W. Halston, Esq. Wilmer Cutler Pickering Hale & Dorr LLP 60 State St. Boston, MA 02109 Daniel.halston@wilmerhale.com *Attorneys for Defendants MKS Instruments, Inc. and PSI Equipment, Inc.*	[ ] Via E-service [X] Via U.S. Mail (Not registered with CM/ECF Program)

/s/Trista Day
An employee of Fennemore Craig, P.C.

ORDR

DISTRICT COURT
CLARK COUNTY, NEVADA

* * * *

IN RE NEWPORT CORPORATION SHAREHOLDER LITIGATION This Document Related to: ALL ACTIONS.	CASE NO.: A-16-733154-B (Consolidated with Case No. A16-734039-B) DEPARTMENT 27 CLASS ACTION

ORDER GRANTING PLAINTIFFS' REQUEST TO VACATE PRELIMINARY INJUNCTION HEARING DATE

COURT FINDS that on April 20, 2016, Plaintiffs' Request to Vacate Preliminary Injunction Hearing Date was filed with this Court.

COURT FURTHER FINDS that on April 21, 2016, Newport Defendants' Statement of Non-Opposition to Plaintiffs' Request to Vacate Preliminary Injunction Hearing Date.

For good cause appearing, COURT ORDERS, the Preliminary Injunction hearing date scheduled for April 25, 2016 is VACATED.

Dated: April 22, 2016

Nancy L Allf

NANCY ALLF
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed I caused the foregoing document to be electronically served pursuant to EDCR 8.05(a) and 8.05(f), through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail and via email to:

David C. O'Mara, Esq.
The O'Mara Law Firm, P.C.
david@omnaralaw.net

David T. Wissbroecker, Esq.
Edward M. Gergosian, Esq.
Robbins Geller Rudman & Dowd LLP
DWissbroecker@rgrdlaw.com
EGergosian@rgrdlaw.com

Frank J. Johnson, Esq.
W. Scott Holleman, Esq.
Johnson & Weaver, LLP
frankj@johnsonandweaver.com
scotth24johnsonandweaver.com

John P. Aldrich, Esq.
Aldrich Law Firm, Ltd.
jaldrich@johnaldrichlawfirm.com

Shane T. Rowley Esq.
Levi & Korsinsky LLP
srowley@zlk.com

Meryl L. Young, Esq
Cohn B. Davis, Esq.
Gibson, Dunn & Crutcher, LLP
MYoung@gibsondunn.com
CDavis@gibsondunn.com

Brian M. Lutz, Esq.
Gibson, Dunn & Crutcher
BLutz@gibsondunn.com

Abran E. Vigil, Esq.
Ballard Spahr LLP
vigila@ballardspahr,com

Daniel W. Halston, Esq.
Wilmer Cutler Pickering Hale & Don LLP
Daniel.halston@wilmerhale.com

Karen Lawrence
Judicial Executive Assistant

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA (Nevada Bar No. 8599)
316 E. Bridger Avenue, 2nd Floor
Las Vegas, NV 89101
Telephone: 725/529-4042
775/323-4082 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON
DAVID T. WISSBROECKER
DAVID A. KNOTTS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

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.	

STIPULATION AND [PROPOSED] ORDER FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE OF NEWPORT CORPORATION ONLY

WHEREAS, Plaintiffs in the above-captioned consolidated action (the "Action") filed a First Amended Complaint for Breach of Fiduciary Duty (the "Complaint") on October 25, 2016;

WHEREAS, the Complaint names, among others, Newport Corporation ("Newport") as a defendant in the Action;

WHEREAS, Newport filed a motion to dismiss the Complaint on December 9, 2016, Plaintiffs filed an opposition to Newport's motion to dismiss on January 13, 2017, and Newport filed a reply in further support of its motion to dismiss on February 3, 2017;

WHEREAS, the Court held a hearing on February 15, 2017 regarding, *inter alia*, Newport's motion to dismiss the Complaint;

WHEREAS, on June 22, 2016, the Court granted Newport's motion to dismiss with leave to amend;

WHEREAS, following discussion between counsel for Plaintiffs and counsel for Newport, Plaintiffs have agreed not to assert any amended claims against Newport in the Second Amended Complaint and agree to voluntarily dismiss Newport from the Action without prejudice pursuant to Nevada Rules of Civil Procedure 41(a)(2) in order to save costs and streamline future motion practice, subject to the agreement concerning discovery as set forth herein; and

WHEREAS, no compensation in any form has passed directly or indirectly from Newport to Plaintiffs or their counsel, and no promise to give any such compensation has been made in connection with the agreement set forth herein.

IT IS HEREBY STIPULATED by the parties hereto, subject to the approval of the Court, that:

1. Pursuant to Nevada Rules of Civil Procedure 41(a)(2), Newport is dismissed from the Action without prejudice, and Plaintiffs are not asserting any amended claims against Newport in the Second Amended Complaint.

2. All disputes concerning any document or deposition discovery issued in the Action and directed to Newport shall be heard exclusively before the District Court for the State of Nevada in and for the County of Clark, under Nevada substantive law and without regard to Nevada's choice of law rules. The parties hereto consent to the jurisdiction of this Court for purposes of resolving such disputes.

3. Plaintiffs agree to meet and confer, through counsel, with Newport regarding the appropriate scope of any subpoenas served by Plaintiffs for depositions of Newport or any of Newport's current or former officers or employees.

4. Both Newport and Plaintiffs shall each bear their own costs and expenses in connection with this dismissal and thereby waive their rights, if any, to seek costs or expenses directly from each other in connection with this Action.

IT IS SO STIPULATED.

DATED: 8/1/17

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA

DAVID C. O'MARA

316 E. Bridger Avenue, 2nd Floor
Las Vegas, NV 89101
Telephone: 725/529-4042
775/323-4082 (fax)

Liaison Counsel

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON
DAVID T. WISSBROECKER
DAVID A. KNOTTS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

DATED: 7/27/17

FENNEMORE CRAIG, P.C.

CHRISTOPHER H. BYRD

300 South Fourth Street, Suite 1400
Las Vegas, NV 89106
Telephone: 702/692-8000
Facsimile: 702/692-8099

GIBSON, DUNN & CRUTCHER, LLP
MERYL L. YOUNG
(Admitted Pro Hoc Vice)
COLIN B. DAVIS
(Admitted Pro Hoc Vice)
3161 Michelson Dr.
Irvine, CA 92612-4412
Telephone: 949/451-4229
-and-
BRIAN M. LUTZ
(Admitted Pro Hoc Vice)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921

Attorneys for Defendant Newport

* * *

ORDER

IT IS SO ORDERED.

DATED: August 8, 2017

DISTRICT COURT JUDGE

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA (Nevada Bar No. 8599)
316 E. Bridger Avenue, 2nd Floor
Las Vegas, NV 89101
Telephone: 725/529-4042
775/323-4082 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON
DAVID T. WISSBROECKER
DAVID A. KNOTTS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

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: ALL ACTIONS.	CLASS ACTION

STIPULATION AND [PROPOSED] ORDER FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE OF MKS INSTRUMENTS, INC. ONLY

WHEREAS, Plaintiffs in the above-captioned consolidated action (the "Action") filed a First Amended Complaint for Breach of Fiduciary Duty (the "Complaint") on October 25, 2016;

WHEREAS, the Complaint names, among others, MKS Instruments, Inc. ("MKS") as a defendant in the Action;

WHEREAS, MKS filed a motion to dismiss the Complaint on December 9, 2016, Plaintiffs filed an opposition to MKS' motion to dismiss on January 13, 2017, and MKS filed a reply in further support of its motion to dismiss on February 3, 2017;

WHEREAS, the Court held a hearing on February 15, 2017 regarding, *inter alia*, MKS' motion to dismiss the Complaint;

WHEREAS, on June 22, 2016, the Court granted MKS' motion to dismiss with leave to amend;

WHEREAS, following discussion between counsel for Plaintiffs and counsel for MKS, Plaintiffs have agreed not to assert any amended claims against MKS in the Second Amended Complaint and agree to voluntarily dismiss MKS from the Action without prejudice pursuant to Nevada Code of Civil Procedure 41(a)(2) in order to save costs and streamline future motion practice, subject to the agreement concerning discovery as set forth herein; and

WHEREAS, no compensation in any form has passed directly or indirectly from MKS to Plaintiffs or their counsel, and no promise to give any such compensation has been made in connection with the agreement set forth herein.

IT IS HEREBY STIPULATED by the parties hereto, subject to the approval of the Court, that:

1. Pursuant to Nevada Code of Civil Procedure 41(a)(2), MKS is dismissed from the Action without prejudice, and Plaintiffs are not asserting any amended claims against MKS in the Second Amended Complaint.

2. In the event this Action survives a motion to dismiss against any defendant, the undersigned counsel agrees to accept service of a Massachusetts subpoena and produce non-objected to documents pursuant to that subpoena without requiring that Plaintiffs obtain a commission and file a separate action in Massachusetts.

3. Plaintiffs agree to meet and confer, through counsel, with MKS regarding the appropriate scope of any subpoenas served by Plaintiffs for depositions of MKS or any of MKS' current or former officers or employees. MKS agrees to accept service of any such subpoena directed to MKS or its current officers or employees sent directly to the undersigned counsel for MKS. Any effort to compel compliance with any subpoena will be pursued in the courts of the Commonwealth of Massachusetts.

4. Both MKS and Plaintiffs shall each bear their own costs and expenses in connection with this dismissal and thereby waive their rights, if any, to seek costs or expenses directly from each other in connection with this Action.

IT IS SO STIPULATED.

DATED: 8/1/17

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA

DAVID C. O'MARA

316 E. Bridger Avenue, 2nd Floor
Las Vegas, NV 89101
Telephone: 725/529-4042
775/323-4082 (fax)

Liaison Counsel

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON
DAVID T. WISSBROECKER
DAVID A. KNOTTS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

DATED: 7/28/17

BALLARD SPAHR LLP
ABRAN E. VIGIL

ABRAN E. VIGIL

100 N. City Parkway, Suite 1750
Las Vegas, NV 89106
Telephone: 702/868-7523
702/471-7070 (fax)

WILMER CUTLER PICKERING HALE AND DORR LLP
DANIEL W. HALSTON
(Admitted Pro Hac Vice)
60 State Street
Boston, MA 02109
Telephone: 617/526-6000
617/526-5000 (fax)

Attorneys for Defendant MKS

* * *

ORDER

IT IS SO ORDERED.

DATED: August 8, 2017

DISTRICT COURT JUDGE

MAME
FENNEMORE CRAIG, P.C.
Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
E-mail: cbyrd@fclaw.com
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young, Esq. (Admitted *Pro Hac Vice*)
Colin B. Davis, Esq. (Admitted *Pro Hac Vice*)
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: (949) 451-3800
E-mail: myoung@gibsondunn.com
cdavis@gibsondunn.com
-and-
Brian M. Lutz, Esq. (Admitted *Pro Hac Vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
E-mail: blutz@gibsondunn.com
Attorneys for Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone

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) **DEFENDANTS' MOTION TO AMEND THE ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL AND CALENDAR CALL** **Date of Hearing:** **Time of Hearing:**

Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone, by and through their counsel of record, Fennemore Craig, P.C. and Gibson, Dunn & Crutcher LLP, hereby file this Motion to Amend the Order Setting Civil Jury Trial, Pre-Trial and Calendar Call ("Motion").

This Motion is made based on the following Memorandum of Points and Authorities, all other pleadings, papers, and documents on file with the Court in this action, such further documentary evidence as the Court deems appropriate, and the arguments of counsel at the hearing on this Motion.

Dated this 4th day of March, 2019.

FENNEMORE CRAIG, P.C.

/s/Christopher H. Byrd, Esq.

Christopher H. Byrd, Esq. (Bar No. 1633)
300 S. Fourth Street, Suite 1400
Las Vegas, NV 89101
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young (*pro hac vice*)
Colin B. Davis (*pro hac vice*)
3161 Michelson Drive
Irvine, CA 92612-4412
-and-
Brian M. Lutz (*pro hac vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Attorneys for Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin and Peter J. Simone

NOTICE OF MOTION

TO: ALL INTERESTED PARTIES; and

TO: THEIR ATTORNEYS

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **DEFENDANTS' MOTION TO AMEND THE ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL AND CALENDAR CALL** on for hearing before Department XXVII of the above-entitled Court on the ____ day of _____, 2019, at the hour of _____ o'clock _.m., on said date, or as soon thereafter as counsel can be heard.

Dated this 4th day of March, 2019.

FENNEMORE CRAIG, P.C.

/s/Christopher H. Byrd, Esq.

Christopher H. Byrd, Esq. (Bar No. 1633)
300 S. Fourth Street, Suite 1400
Las Vegas, NV 89101
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young (*pro hac vice*)
Colin B. Davis (*pro hac vice*)
3161 Michelson Drive
Irvine, CA 92612-4412
-and-
Brian M. Lutz (*pro hac vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Attorneys for Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha

I. BACKGROUND

This is a case in equity, and as such should be tried to the Court. Although the operative Second Amended Complaint includes a jury demand, Plaintiffs do not have a right to a jury trial because they assert only equitable claims. Each of the SAC's six claims is for "breach of fiduciary duty" against a Newport director, alleging that the director "violated his fiduciary duties of loyalty, good faith, independence, and candor owed to the public shareholders of Newport" by approving a merger. (SAC ¶¶ 117-47.) Nevada law is clear that such claims are equitable and should be tried by the Court.

Because the Court's May 1, 2018 "Order Setting Civil Jury Trial, Pre-Trial and Calendar Call" set the case "to be tried before a jury," Defendants respectfully request that the Court amend the Order to provide for a trial by the Court instead. The Order provides that it "may be amended or modified by the Court upon good cause shown." Because Plaintiffs are not entitled to a jury trial, good cause exists for this Court to amend the Order to set the case for a bench trial.

II. ARGUMENT

A. Plaintiffs Are Not Entitled To A Jury Trial Because All Claims Arise In Equity.

Plaintiffs allege that, in pursuing and executing the merger, each defendant breached his fiduciary duties. (SAC ¶¶ 117-47.) These claims are equitable in nature, and Plaintiffs are not entitled to a jury trial. *See EXX, Inc. v Stabosz*, No. A-10-627976-B, 2013 WL 6431989, at *1 (Nev. Dist. Ct. July 11, 2013) (striking jury demand because breach of fiduciary duty claims arising out of merger are equitable claims). It is well established that "the right to a jury trial does not extend to equitable matters," including any "equitable claims" in the case. *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618 (2007). Thus, "in an equity case," there is no right to a jury trial; "that is a matter purely for the court." *Close v. Isbell Const. Co.*, 86 Nev. 524, 529 (1970) (citation omitted).

As the Nevada Supreme Court has recognized, the "breach of fiduciary duty" claims in an "action [challenging] a merger" are "equitable in nature." *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 11, 15 n.45 (2003). In order for former shareholders like Plaintiffs (SAC ¶ 18) to challenge a merger through fiduciary duty claims, "[t]hey must assert and prove *in an equitable action* that the merger was improper." *Id.* at 17 (emphasis added). This comports with the general rule that claims regarding "trust administration and alleged breaches of fiduciary duty by [the] trustees" are "equitable claims." *Hoffman*

v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe, No. 60119, 2013 WL 7158424, at *1 (Nev. Dec. 16, 2013). Like the duties of trustees, "[t]he fiduciary duty of a controlling shareholder or director to a minority shareholders is based on powers in trust," and "that power is at all times subject to the *equitable* limitation that it may not be exercised for the aggrandizement, preference, or advantage of the fiduciary." *Interactive Multimedia Artists, Inc. v. Superior Court*, 62 Cal. App. 4th 1546, 1555 (1998) (quotation marks omitted). Thus, "[a]though [Plaintiffs] filed a demand for jury trial," their claims for breach of fiduciary duty "are subject to the court's equity jurisdiction, and therefore must be tried by a court and not a jury." *Hoffman*, 2013 WL 7158424, at *1 (punctuation omitted).

In *EXX*, as here, Plaintiffs brought breach of fiduciary duty claims, claiming that corporate directors had breached their fiduciary duties in connection with a merger. *See* Mot. to Strike Jury Demand 24 & n.19, *EXX, Inc. v Stabosz*, No. A-10-627976-B (May 22, 2013), available at 2013 WL 6631519. Plaintiffs in *EXX* had demanded a jury and sought monetary damages. The late Judge Scann of this Court struck the jury demand, explaining that, because "Plaintiffs' claims are equitable in nature," they "therefore must be tried to the Court" even though Plaintiffs sought a damages award. *EXX*, 2013 WL 6431989, at *1. The Court should reach the same conclusion here.

The law is also the same in other states. For example, under Delaware law—which "the Nevada Supreme Court frequently [treats as] persuasive," *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1245 (D. Nev. 2008)[1]—"[a]n action for breach of fiduciary duty" is "equitable in nature" and therefore there is no "right to trial by jury." *Damage Recovery Sys., Inc. v. Tucker*, No. CIV.02-1647-SLR, 2005 WL 388597, at *2 (D. Del. Feb. 2, 2005). Even where a "plaintiff has requested money damages," he cannot "demand [a] trial by jury" if the only claim is for breach of fiduciary duty. *Id.* at *2 & n.3; *accord, e.g., C&K Engineering Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 9 (1978) ("the prayer for relief in a particular case is not conclusive. … Thus, the fact that damages is one of a full range of possible remedies does not guarantee … the right to a jury"); *A-C Co. v. Sec. Pac. Nat. Bank*, 173 Cal. App. 3d 462, 473 (1985) (similar). In Delaware, such cases fall within the "Court of Chancery's

[1] *E.g., Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 10-17 (2003) (relying on Delaware law to interpret rights of dissenting shareholders of Nevada corporation to challenge a merger); *see also Delaware Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P.*, CIV.A. 6547-VCN, 2014 WL 1813340, at *18 (Del. Ch. May 7, 2014) ("Nevada courts frequently look to Delaware corporate law for guidance on novel questions of Nevada corporate law.").

exclusive … jurisdiction," where there is no trial by jury. *Harman v. Masoneilan Int'l, Inc.*, 442 A.2d 487, 498-99 (Del. Super. Ct. 1982); *see also, e.g.*, *Interactive*, 62 Cal. App. 4th at 1548 (action for breach of a fiduciary duty against directors of a corporation is "an equitable action under both Delaware law and California law and hence" plaintiffs are "not entitled to a jury trial"); *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 668 (Del. Ch. 2012) ("[b]reach of fiduciary duty is an equitable claim").

Here too, because the former shareholder Plaintiffs' breach of fiduciary duty claims are entirely "equitable in nature," they must "be tried by the court." *Cent. Laborers' Pension Fund v. McAfee, Inc.*, 17 Cal. App. 5th 292, 350 (2017).

B. Good Cause Exists To Amend The Scheduling Order.

The Court should therefore amend the Order setting trial to provide for a trial by the Court because "a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the State." Nev. R. Civ. P. 39(a)(2). As the Supreme Court has explained, "[i]t is elemental that in a suit in equity the judgment or decree must be based upon findings of the court rather than a jury verdict." *Musgrave v. Casey*, 68 Nev. 471, 474 (1951). Because Plaintiffs' Second Amended Complaint includes—as its only claims—six causes of action for breach of fiduciary duty, this case may not be tried before a jury. Good cause therefore exists to amend the Court's Order setting the case for a jury trial, to provide instead for a bench trial.

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III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court amend its Order Setting Civil Jury Trial, Pre-Trial and Calendar Call to specify that this case will be tried before the Court, and not a jury.

Dated this 4th day of March, 2019.

FENNEMORE CRAIG, P.C.

/s/Christopher H. Byrd, Esq.

Christopher H. Byrd, Esq. (Bar No. 1633)
300 S. Fourth Street, Suite 1400
Las Vegas, NV 89101
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young (*pro hac vice*)
Colin B. Davis (*pro hac vice*)
3161 Michelson Drive
Irvine, CA 92612-4412
-and-
Brian M. Lutz (*pro hac vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Attorneys for Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha

CERTIFICATE OF SERVICE

I hereby certify that a copy of the following: **DEFENDANTS' MOTION TO AMEND THE ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL AND CALENDAR CALL** 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 March, 2019 as follows:

David C. O'Mara, Esq. The O'Mara Law Firm, P.C. 316 E. Bridger Avenue, 2nd Floor Las Vegas, Nevada 89101 725-529-4042; FAX 775-323-4082 david@omaralaw.net bsnyder@omaralaw.net val@omaralaw.net	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- David T. Wissbroecker, Esq. Edward M. Gergosian, Esq. David A. Knotts, Esq. Randall J. Baron, Esq. Robbins Geller Rudman & Dowd LLP 655 West Broadway, Suite 1900 San Diego, CA 92101 619-231-1058; FAX 619-231-7423 DWissbroecker@rgrdlaw.com EGergosian@rgrdlaw.com dknotts@rgrdlaw.com randyb@rgrdlaw.com tlacomb@rgrdlaw.com jaimem@rgrdlaw.com	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- Frank J. Johnson, Esq. Johnson & Weaver, LLP 600 W. Broadway Suite 1540 San Diego, CA 92101 619-230-0063; FAX 619-255-1856 frankj@johnsonandweaver.com	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- W. Scott Holleman, Esq. Johnson & Weaver, LLP 99 Madison Avenue 5th Floor New York, NY 10016 212-802-1486; FAX 212-602-1592 scotth@johnsonandweaver.com *Attorneys for Plaintiffs*	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)

///

///

John P. Aldrich, Esq. Aldrich Law Firm, Ltd. 1601 S. Rainbow Blvd. Suite 160 Las Vegas, NV 89146 jaldrich@johnaldrichlawfirm.com traci@johnaldrichlawfirm.com -and- Shane T. Rowley, Esq. Levi & Korsinsky LLP 30 Broad Street, 24th Floor New York, NY 10004 srowley@zlk.com *Attorneys for Plaintiff, Dixon Chung*	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program) [X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
Meryl L. Young, Esq. Colin B. Davis, Esq. Katie Magallanes, Esq. Gibson, Dunn & Crutcher, LLP 3161 Michelson Drive Irvine, CA 92612-4412 MYoung@gibsondunn.com CDavis@gibsondunn.com kmagallanes@gibsondunn.com kbarry@gibsondunn.com bakin@gibsondunn.com pmclean@gibsondunn.com -and- Brian M. Lutz, Esq. Gibson, Dunn & Crutcher, LLP 555 Mission Street, Suite 3000 San Francisco, CA 94105-0921 BLutz@gibsondunn.com *Counsel for Defendants Newport Corporation, Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin and Peter J. Simone*	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
Abran E. Vigil, Esq. Ballard Spahr LLP 100 N. City Parkway, Suite 1750 Las Vegas, NV 89106 702-471-7000; FAX: 702-471-7070 vigila@ballardspahr.com lvdocket@ballardspahr.com GallM@ballardspahr.com carltonm@ballardspahr.com -and- / / /	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)

Daniel W. Halston, Esq.
Wilmer Cutler Pickering Hale & Dorr LLP
60 State St.
Boston, MA 02109
Daniel.halston@wilmerhale.com
Attorneys for Defendants MKS Instruments, Inc. and PSI Equipment, Inc.

[X] Via E-service
[ ] Via U.S. Mail (Not registered with CM/ECF Program)

An employee of Fennemore Craig, P.C.

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA (Nevada Bar No. 8599)
311 East Liberty Street
Reno, NV 89501
Telephone: 775/323-1321
775/323-4082 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON
DAVID T. WISSBROECKER
DAVID A. KNOTTS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

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IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

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ALL ACTIONS.	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO AMEND THE ORDER SETTING CIVIL JURY TRIAL

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STATUTES, RULES AND REGULATIONS

I. INTRODUCTION

From its founding to the present day, Nevada has placed paramount importance on trial by jury. Article 1, Section 3 of the Nevada Constitution declares: "[t]he right of trial by Jury shall be secured to all and remain inviolate forever." Nev. Const. art. 1, §3. The Nevada Supreme Court has repeatedly and invariably recognized that this inviolate right to a jury trial applies to tort claims for breaches of fiduciary duty, just like those asserted by Plaintiffs on behalf of the certified stockholder Class in this litigation. For example, the Nevada Supreme Court has affirmed, recognized, or adopted jury verdicts on breach of fiduciary duty claims in the following decisions:

- *Ins. Co. of The W. v. Gibson Tile Co., Inc.*, 122 Nev. 455, 463, 134 P.3d 698, 703 (2006) (jury trial on breach of fiduciary duty claim, "[t]he insurer-insured relationship is fiduciary in nature, and ***a jury's finding of a breach of fiduciary duty may support the finding of bad faith***")[1];
- *Powers v. United Servs. Auto. Ass'n*, 115 Nev. 38, 41, 979 P.2d 1286, 1288 (1999) ("***we state unequivocally that the jury instruction given by the district court on breach of a fiduciary relationship was not error***");
- *Clark v. Lubritz*, 113 Nev. 1089, 1095-98, 944 P.2d 861, 865 (1997) ("In this case, there was sufficient evidence to show that the appellants breached that duty. . . . Therefore, ***this court will not disturb the jury's award for breach of fiduciary duty***.");
- *Broussard v. Hill*, 100 Nev. 325, 326-27, 330-31, 682 P.2d 1376, 1377, 1379 (1984) (agreeing that "***the controversy should properly have been resolved by the jury***" at trial because "***there was sufficient evidence for a reasonable person to conclude that Hill breached his fiduciary duty***");
- *Loomis v. Lange Fin. Corp.*, 109 Nev. 1121, 1124-25, 865 P.2d 1161, 1163 (1993) ("***After a lengthy trial, the jury found . . . against LFC for breach of fiduciary duty, and against Lange, Smiley and Valentine, for breach of fiduciary duty***. The jury assessed actual damages in the amount of $ 18,500.00");
- *Campos v. Hernandez*, 403 P.3d 683, 2017 WL 1532717, at *3 (Nev. Apr. 26, 2017) (Table) ("ORDER the judgments of the district court [which included liability for breach of fiduciary duty claim] AFFIRMED as to Campos and the Moons"); and
- *Brinkerhoff v. Foote*, 387 P.3d 880, 2016 WL 7439357, at *4 (Nev. Dec. 22, 2016) (Table) ("Brinkerhoff argues that Foote's fiduciary duty claim is not supported by substantial evidence because the jury's damage award – $80,000 – is based on a

[1] All citations and footnotes are omitted and emphasis is added unless otherwise noted.

balance Brinkerhoff listed in an email and which Brinkerhoff asserts was rightfully owed to him. We disagree.").

Likewise, as also described below, this Court has repeatedly adjudicated and scheduled jury trials on claims for breaches of fiduciary duty, including the recent *Wynn Resorts, Ltd. v. Okada* breach of fiduciary duty case (which settled during jury selection for $2.6 billion) and multiple merger-related class action claims for breach of fiduciary duty like this case.

This overwhelming authority – which Defendants do not address – is no accident. Under Nevada law, Plaintiffs' claims include a constitutional right to a jury trial because they are analogous both to common law claims that existed when the Nevada Constitution was adopted (*i.e.*, tort claims) ***and*** seek legal relief (*i.e.* money damages). *See Aftercare of Clark Cty. v. Justice of Las Vegas Twp. ex rel. Cty. of Clark*, 120 Nev. 1, 82 P.3d 931 (2004); *Clark*, 113 Nev. at 1095-98.

Given Nevada's heavy weight of binding authority, and its historical analysis test, Defendants' arguments based on the Delaware Court of Chancery (which has no juries at all) are rendered irrelevant. Defendants' remaining arguments using Nevada cases fare no better. In sum, Nevada mandates the right to a jury trial on breach of fiduciary duty claims, Defendants have not established "good cause" to amend the scheduling order, and Defendants' attempt to avoid a jury trial on these well-pleaded, viable claims should be rejected.

II. BACKGROUND

Plaintiffs filed the Second Amended Complaint (the "Complaint") on July 27, 2017, alleging a claim for breach of fiduciary duty against each member of the Newport Board and seeking money damages "on behalf of a proposed Newport stockholder class as a result of the unfair and unlawful Merger." ¶¶15, 103-147.[2]

The Court denied Defendants' Motion to Dismiss the Complaint, finding: "with respect to each Defendant individually, the Complaint sufficiently pleads facts demonstrating that: (i) the business judgment presumption under NRS 78.138(3) is rebutted; (ii) each Defendant's individual act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and (iii) each individual Defendant engaged in a breach of fiduciary duty that involved intentional

[2] All "¶" and "¶¶" references are to the Complaint.

misconduct or fraud." MTD Order at 2. The Court further found "that the Complaint sufficiently alleges that, on March 29, 2016, Defendants caused Newport to file the Definitive Proxy Statement on Schedule 14A (the 'Proxy') with the SEC and distribute it to Newport's stockholders. The Complaint sufficiently pleads facts alleging that the Proxy failed to disclose and/or misrepresented material information to stockholders." *Id.* at 2-3.

On May 1, 2018, the Court entered the "Order Setting Civil Jury Trial, Pre-Trial and Calendar Call" ("Scheduling Order I"). As the title indicates, the Court specifically scheduled Plaintiffs' claims to be tried by a jury, stating that "[t]he above entitled case is set to be ***tried before a jury*** on a five week stack to begin on October 21, 2019 at 10:30 a.m." Scheduling Order I at 1. The parties also stipulated and filed two Business Court Scheduling Order and Trial Setting Orders on April 2, 2018 and November 21, 2018 respectively ("Scheduling Order II" and "Scheduling Order III"). Both stipulated orders explicitly state that Plaintiffs filed a jury demand. *See* Scheduling Order II and III.

Defendants have been in receipt of the Court's order scheduling this case for a jury trial for nearly one year. *See* Scheduling Order I. Defendants twice stipulated to Scheduling Order II and III. While Plaintiffs have been diligently assembling evidence through discovery and preparing for a jury trial, Defendants raised no objection to the long-scheduled jury trial, until now.

III. ARGUMENT

Under its terms, Scheduling Order I "may be amended or modified upon good cause shown." Scheduling Order I. Defendants have not established good cause to amend Scheduling Order I in light of Plaintiffs' constitutional right to have these breach of fiduciary duty claims for money damages tried by jury. *See* Nev. Const. art. 1, §3.

A. Breach of Fiduciary Duty Claims in Nevada Are Tried by Juries

The Nevada Supreme Court has analyzed and upheld numerous jury verdicts on breach of fiduciary duty claims. The Court should not accept Defendants' invitation to simply cast aside this binding precedent and reach a different result here. In *Powers*, for example, the Nevada Supreme Court ***twice*** upheld a jury verdict for compensatory and punitive damages on breach of fiduciary duty claims. *See Powers v. United Services Auto. Ass'n*, 114 Nev. 690, 702-03, 962 P.2d 596, 604

(1998), *opinion modified on denial of reh'g*, 115 Nev. 38, 979 P.2d 1286 (1999). When denying a rehearing, the Court held, "***we state unequivocally that the jury instruction given by the district court on breach of a fiduciary relationship was not error***." 115 Nev. at 41. In that same rehearing denial opinion, the Court went out of its way to make clear that the jury instruction on the breach of fiduciary duty claim was proper, writing:

> The full text of the jury instruction on fiduciary relationship is as follows:
>
> Plaintiff seeks damages for a breach of a fiduciary relationship between plaintiff and defendant. The duty owed by an insurance company to an insured is ***fiduciary in nature***. In order to recover plaintiff must establish by a preponderance of the evidence that a fiduciary relationship existed between plaintiff and defendant and that defendant breached a duty to disclose known facts to plaintiff.
>
> A fiduciary relationship exists when one has the right to expect trust and confidence in the integrity and fidelity of another.

Id. at 41-42 (emphasis in original). The Court again concluded: "It is clear that the jury was properly instructed that an insurer's duty to its policyholder is, as USAA concedes, 'akin' to a fiduciary relationship." *Id.* at 42.

Similar cases from the Nevada Supreme Court include:

- *Gibson Tile Co.*, 122 Nev. at 463 (jury trial on breach of fiduciary duty claim, "[t]he insurer-insured relationship is fiduciary in nature, and a jury's finding of a breach of fiduciary duty may support the finding of bad faith");
- *Lubritz*, 113 Nev. at 1095-98 (affirming a jury verdict of nearly $400,000 in compensatory and punitive damages for the breach of fiduciary duty of disclosure and breach of contract claims, finding: "In this case, there was sufficient evidence to show that the appellants breached that duty. The evidence clearly indicated that the appellants did not disclose the unequal distribution. Moreover, as discussed more fully above, there is sufficient evidence upon which a jury could determine that the appellants desired to conceal the unequal distribution from Lubritz. Therefore, this court will not disturb the jury's award for breach of fiduciary duty.");
- *Broussard*, 100 Nev. at 326-27, 330-31 (agreeing that "the controversy should properly have been resolved by the jury" at trial because "there was sufficient evidence for a reasonable person to conclude that Hill breached his fiduciary duty");
- *Loomis*, 109 Nev. at 1124-25 (After appeal from jury verdict finding, *inter alia*, breach of fiduciary duty against certain of the defendants, the Nevada Supreme Court amended the verdict but did not alter the jury verdict finding breach of fiduciary duty. The Nevada Supreme Court noted, in relevant part: "After a lengthy trial, the jury found . . . against LFC for breach of fiduciary duty, and against Lange, Smiley

and Valentine, for breach of fiduciary duty. The jury assessed actual damages in the amount of $ 18,500.00.");

- *Brinkerhoff*, 387 P.3d 880, 2016 WL 7439357, at *4 (affirming a jury verdict of $80,000 for breach of fiduciary duty of loyalty by a CFO, finding: "Brinkerhoff argues that Foote's fiduciary duty claim is not supported by substantial evidence because the jury's damage award – $80,000 – is based on a balance Brinkerhoff listed in an email and which Brinkerhoff asserts was rightfully owed to him. We disagree. . . . Brinkerhoff owed a fiduciary duty to Foote because he served as the CFO of W.E.T. and because he was a partner in a joint venture with Foote. Additionally, retaining funds left over from the company's sale is a breach of the duty of loyalty because Brinkerhoff gave himself a benefit instead of distributing the benefit between himself and the other shareholder in the company. The jury accepted the evidence that Foote presented and discounted Brinkerhoff's evidence to the contrary."); and

- *Campos*, 403 P.3d 683, 2017 WL 1532717, at *3 (affirming jury verdict for breach of fiduciary duty, finding: "ORDER the judgments of the district court [which included liability for breach of fiduciary duty claim] AFFIRMED as to Campos and the Moons.").

In addition, this Court has repeatedly overseen breach of fiduciary duty claims at a jury trial. The Court's ruling in *Goldberg v Mayfield*, No. A415438, 2002 WL 34682371 (Nev. Dist. Ct. Apr. 24, 2002) (Trial Order) is particularly instructive. There, the Court sat as fact finder on the equitable claims (demand for quiet title) and the jury sat as fact finder on the legal claims. *Id.* ***The legal claims decided by the jury included a claim for breach of fiduciary duty***. *Id.* The Court thus recognized the difference between legal and equitable claims and held that breach of fiduciary duty claims were legal. *Id.* In its final judgment, this Court held, in relevant part: "The above-entitled matter is somewhat unique in that some causes of action in the case were tried by jury, while other causes of action were equitable in nature and were tried by the Court. . . . Trial of this matter began on February 13, 2002. Plaintiffs Sheldon Goldberg's and Barbara Goldberg's cause of action for civil conspiracy and Defendants Gerald Cooney's and Beverly Cooney's counterclaims for breach of fiduciary duty and legal malpractice were to be tried by the jury." *Id.*

Likewise, in the recent *Wynn Resorts, Ltd. v. Okada* case, the Court was in the midst of selecting a jury to hear a months-long trial on multiple claims for breach of fiduciary duty. *See, e.g.*, *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court of Nev.*, 399 P.3d 334 (Nev. 2017) (describing claims for "breach of fiduciary duty, and aiding and abetting breach of fiduciary duty" and

adjudicating scope of the business judgment rule). As the matter neared the April 2018 trial date, defense counsel estimated that the jury trial would last three to four months, and the Plaintiffs estimated one to five months. *See Wynn Resorts, Ltd. v. Okada*, No. A-12-65710-B, Minute Order (Nev. Dist. Ct. Dec. 4, 2017) (attached hereto as Exhibit A). When the case settled for a reported $2.6 billion, jurors were actually being selected and counsel were approving the jury questionnaire. *Wynn Resorts, Ltd. v. Okada*, No. A-12-65710-B, Minute Order (Nev. Dist. Ct. Feb. 2, 2018) (attached hereto as Exhibit B); "Wynn Resorts to Pay $2.6 Billion in Settlement That Removes a Barrier to Steve Wynn Stake Sale," *Wall Street Journal* (Mar. 8, 2018) (attached hereto as Exhibit C).

Similar rulings from this Court include:

- *Cantor G&W (Nevada) Holdings, L.P. v William Hill U.S. Holdco, Inc*., No. 13A681153, 2018 WL 3202574, at *2-*3 (Nev. Dist. Ct. May 15, 2018) – This Court granted a motion for summary judgment for, *inter alia*, breach of fiduciary duty and aiding and abetting breach of fiduciary duty claims based on issue preclusion because the issues had been properly submitted to and decided by a jury in a prior litigation. This Court held, in relevant part: "The jury found that Asher did not breach the Asher/Cantor Partnership Agreements and did not breach any fiduciary duties owed to Plaintiffs. . . . The issues of whether Asher breached the Asher/Cantor Partnership Agreements and alleged fiduciary duties that form the basis for Plaintiffs' claims here were properly submitted to and decided by the jury in the Asher/Cantor Litigation."

- *Rasmussen v. Lopez*, No. CV93-10613, 1999 Nev. Dist. LEXIS 1436, at *16-*17 (Nev. Dist. Ct. Sept. 29, 1999) – This Court denied a motion for judgment notwithstanding a verdict and upheld a jury verdict for money damages for multiple breach of fiduciary duty claims, holding, in relevant part: "As stated above, the jury found that Rasmussen breached his fiduciary duty to Lopez as a business partner, but the jury also found that Lopez breached the buy-out provision of the pre-incorporation agreement as well as breached the covenant of good faith and fair dealing. Therefore, the jury found that both Rasmussen and Lopez acted improperly in their business dealings with each other. . . . In light of this, the jury award is not based on the lost profit of Altair STCs but on the breach of duty in the existing relationship between Lopez and Rasmussen. Accordingly, Defendant/Counter-Plaintiff's judgment notwithstanding the verdict is denied since the evidence was not such that a reasonable person would have necessarily reached a different result."

- *Coastal Int'l, Inc. v Beavers*, No. A567368, 2011 WL 7266524 (Nev. Dist. Ct. Dec. 14, 2011) (Trial Order) – In a final judgment following a jury trial, Judge Gonzalez held: "As to Plaintiff/Counterdefendant Coastal International, Inc.'s Breach of

Fiduciary Duty claim the jury found in favor of Defendant/Counterclaimant Matthew Beavers and against Plaintiff/14 Counterdefendant Coastal International, Inc."

- *FortuNet, Inc. v Playbook Pub., LLC*, No. 11A645734, 2013 WL 8541602, at *2 (Nev. Dist. Ct. Sept. 26, 2013) – In a post-trial judgment concerning claims subject to declaratory relief, Judge Gonzalez noted the following findings by the jury without disturbing them: "The jury found that Coronel did not breach the fiduciary duty failing to exercise any of the following duties: (1) his duty of care; (2) his duty of loyalty; (3) his duty of confidentiality; (4) his duty of fully disclosure; (5) his duty of fairness; OR (6) his duty to act in good faith in his dealings with FortuNet."

- *Schmidt v. Liberator Medical Holdings, Inc.*, a certified class action alleging merger-related breach of fiduciary duty claims against a target-CEO/director, Judge Gonzalez recently issued a Minute Order that included the following entry: "4-22-19 1:30 PM ***Jury Trial***." *Schmidt v. Liberator Medical Holdings, Inc.*, No. A-15-728234-B, Minute Order (Nev. Dist. Ct. Mar. 8, 2019) (attached hereto as Exhibit D).

- *In re Parametric Sound Corporation Shareholders' Litigation*, a certified class action alleging breach of fiduciary duty (and related) claims against a corporate board and its affiliates for merger-related misconduct, Judge Gonzalez again issued a minute order that included the following entry: "Matter SET for ***Jury Trial*** on the stack that begins on November 18, 2019. Trial Setting order will ISSUE." *In re Parametric Sound Corp. S'holders' Litig.*, No. A-13-686890-B, Scheduling Order (Nev. Dist. Ct. Jun. 11, 2008) (attached hereto as Exhibit E).

Defendants ask the Court to ignore this wealth of relevant authority and instead follow *EXX, Inc. v Stabosz*, No. 10A627976, 2014 WL 10251999 (Nev. Dist. Ct. Feb. 10, 2014). Motion at 2. *EXX*, however, is readily distinguishable. Most notably, *EXX* was also an appraisal action, and such actions are required by statute to be tried by the court. *See, e.g.*, NRS 92A.490 (requiring a corporation to "petition the court to determine fair value" in a merger-related appraisal action); *Am. Ethanol, Inc. v. Cordillera Fund, L.P.*, 127 Nev. 147, 154-55, 252 P.3d 663, 667 (2011) ("Final responsibility for determining fair value . . . lies with the court, which must make its own independent value determination."). Nevada's breach of fiduciary duty statute, in contrast, requires findings made by the "trier of fact," *see* NRS 78.138(7), rather than "the court" as in the appraisal statue. *See* NRS 92A.490. In addition, the *EXX* plaintiffs' breach of fiduciary duty claims were "based upon the Delaware common law claim of equitable entire fairness." *EXX*, 2014 WL 10251999, at *1. Following *EXX*, however, Nevada adopted a statutory scheme that places the burden of proof on the stockholder plaintiff for all elements. *See* NRS 78.138(7).

Defendants' reliance on *Cohen* is similarly unsound. Motion at 1-2. To be clear, *Cohen* does ***not*** hold that claims for breach of fiduciary duty are inappropriate for juries. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 11, 15 n.45, 62 P.3d 720 (2003). While the Court in *Cohen* indeed stated that "an action to invalidate a merger is equitable in nature and subject to equitable defenses," *id.*, Defendants ignore that the primary effect of *Cohen* establishes the ability for stockholders to sue for ***money damages outside of appraisal*** on post-close merger claims for breach of fiduciary duty. *See, e.g.*, *id.* at 15 ("Once shareholders prove that the merger was wrongfully accomplished, they may also receive compensatory and punitive damages."). As described below, claims for money damages (above the small claims threshold) are inherently and traditionally a province of the jury. Moreover, nine months after the Nevada Supreme Court issued *Cohen*, the court issued a discovery scheduling order explicitly noting that a jury demand had been filed. *Cohen v. Mirage Resorts, Inc.*, No. A408662, Discovery Scheduling Order (Nev. Dist. Ct. Nov. 5, 2003) (attached hereto as Exhibit F).[3]

B. Plaintiffs Have a Constitutional Right to a Jury Trial on Breach of Fiduciary Duty Claims

The seventeen cases cited above where breach of fiduciary duty claims were heard by juries, or scheduled to be heard by juries, were not all wrongly decided. Nevada's constitutional analysis supports the result in each of those cases. Article 1, Section 3 of the Nevada Constitution guarantees "[t]he right of trial by Jury shall be secured to all and remain inviolate forever." Nev. Const. art. 1, §3. This clause preserves the right to a jury trial "as it was understood when the Nevada Constitution was adopted" in 1864. *Aftercare*, 120 Nev. at 6. Under this historical analysis, courts analyze (i) whether the claims were common law claims when the Nevada constitution was adopted (or analogous to such claims), and (ii) whether the claims seek "legal" (opposed to equitable) relief. *Id.* at 6, 10 (Gibbons, J. dissenting); *City of Monterey v. Del Monte Dunes at Monterey, Ltd*., 526

[3] Defendants' remaining Nevada cases are inapposite. *See Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707 (2007) (no breach of fiduciary duty claim; holding that a contract claim seeking rescission of the agreement was equitable and could be tried by the court); *Close v. Isbell Const. Co.*, 86 Nev. 524, 529, 471 P.2d 257 (1970) (no breach of fiduciary claim; holding that the foreclosure of liens was an equitable matter that did not include a right to a jury trial); *Hoffman v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe*, No. 60119, 2013 WL 7158424, at *7 (Nev. Dec. 16, 2013) (Unpublished and prior to January 1, 2016) (the Court simply described the ***plaintiffs' complaint***, which alleged that the fiduciary/trustee claims asserted therein were equitable).

U.S. 687, 708, 119 S. Ct. 1624, 143 L.Ed.2d 882 (1999) (applying test to determine whether a claim has a right to a jury under the U.S. Constitution). Plaintiffs' claims for breach of fiduciary duty satisfy both requirements.

Tort claims seeking money damages were common law claims when the Nevada Constitution was adopted. *See Aftercare*, 120 Nev. at 9. In *Aftercare*, the plaintiffs brought personal injury tort claims for money damages. *Id.* at 3-4. After applying the historical analysis standard, the Nevada Supreme Court concluded that the tort claims included a constitutional guaranty to a jury trial. *Id*. at 9. Justice (now Chief Justice) Gibbons provided particularly relevant insight in his dissent, stating:

> Under the common law, "tort actions were brought under the writs of trespass and trespass on the case." "Trespass remedied direct, forcible tortious injuries, while the later developed trespass on the case remedied indirect or consequential harms." Tort actions involving a claim for money damages were generally triable to a jury at common law.

Id.[4]; *see also City of Monterey*, 526 U.S. at 729 ("The initial Seventh Amendment question before us, therefore, is whether a tort action seeking money damages was a "suit at common law" for which a jury trial was provided. The answer is obviously yes.").

Claims for breach of fiduciary duty are torts under Nevada law. *Lubritz*, 113 Nev. at 1098. In *Lubritz*, defendants appealed a jury verdict awarding compensatory and punitive damages for a breach of fiduciary duty claim, arguing the claim could not form the predicate tort for punitive damages. *Id.* The Court disagreed, upholding the jury award and finding that the breach of fiduciary duty was "a separate tort upon which punitive damages may be based." *Id.*; *see also Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (holding that "a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship").[5]

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[4] Justice Gibbons ultimately concluded in his dissent that claims where the amount does not exceed $5,000 may be adjudicated without a jury. *See Aftercare*, 120 Nev. at 10. The Nevada Supreme Court subsequently relied on Justice Gibbons' decent to adopt a similar rule regarding small claims cases in *Cheung v. Eighth Judicial Dist. Court of Nev.*, 121 Nev. 867, 873-74, 124 P.3d 550 (2005). This case unquestionably involves an amount in controversy far, far greater than the small claims threshold.

[5] Breach of fiduciary duty claims involve the same basic elements as general tort claims under Nevada law. To prove a claim for breach of fiduciary duty under Nevada law, a party must

Finally, a party seeking money damages, as Plaintiffs do here, is requesting "legal" and not "equitable" relief. Again, Chief Justice Gibbons acknowledged this rule in his dissent in *Aftercare*, stating: "[t]ort actions involving a claim for money damages were generally triable to a jury at common law." *Aftercare*, 120 Nev. at 10 (Gibbons, J. dissent). And this principle has been echoed by courts across the country, including on numerous occasions by the Supreme Court of the United States. *See, e.g.*, *City of Monterey*, 526 U.S. at 710 ("We have recognized the 'general rule' that monetary relief is legal."); *see also CDX Liquidating Trust v. Venrock Assocs*., No. 04 C 7236, 2007 WL 1673403, at *2 (N.D. Ill. June 4, 2007) (claims for, *inter alia*, breach of fiduciary duty and aiding and abetting breaches of fiduciary duty "established a right to a jury trial because '[t]he remedy the Trustee seeks for all of these claims . . . is money damages'"); *DePinto v. Provident Sec. Life Ins. Co*., 323 F.2d 826, 836 (9th Cir. 1963) (stockholder claim for money damages predicated on negligence and breach of fiduciary duty would be cognizable in a suit at common law, and appellants were entitled to a jury trial on such claims). This analysis supports all of the many Nevada cases that send breach of fiduciary duty claims to juries.

C. Defendants' Reliance on Bench Trials in Delaware and California (Regarding Delaware Corporations) Do Not Override Nevada Supreme Court Precedent

Defendants largely ignore the Nevada Supreme Court cases above that repeatedly affirm, recognize, and adopt jury trial verdicts on breach of fiduciary duty claims. Defendants also do not address Nevada's historical analysis standard. Instead, Defendants primarily contend that Plaintiffs do not have a right to a jury trial in Nevada because they would not have a right to a jury trial in Delaware or California. *See* Motion at 2-3. This argument fails for several reasons.

First, this case involves a Nevada corporation being litigated in a Nevada Court under Nevada law. Nevada has its own unique analysis and body of Nevada Supreme Court authority, as described above. There is no reason to search elsewhere for case law.

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demonstrate (1) the existence of a fiduciary duty; (2) a breach of that duty; (3) causation; and (4) damages. *Stalk v. Mushkin*, 125 Nev. 21, 199 P.3d 838 (2009). And to establish tort liability under Nevada law, a party must also demonstrate (1) duty; (2) breach; (3) causation; and (4) damages. *Scott v. Equity Grp., Inc.*, 128 Nev. 933, 381 P.3d 660 (2012).

Second, Delaware, unlike Nevada, never merged its courts of law and equity. Del. Const. Art. VI, §§7, 10. As a result, the Delaware Court of Chancery has retained exclusive jurisdiction over all business disputes of this kind, regardless of the underlying facts or relief sought. *Id.* And the Court of Chancery has no jury trials – every case is decided by the Chancellor or a Vice Chancellor, again, regardless of the cause of action or damages sought. 10 Del. C. §369. It is therefore the result of happenstance (not relevant analysis) that Plaintiffs' claims would be tried by a court in Delaware – ***if*** Newport Corp. were a Delaware corporation.

Third, California courts frequently look to Delaware when holding that breach of fiduciary duty claims do not involve the right to a jury in light of Delaware's equitable entire fairness test. *See Cent. Laborers' Pension Fund v. McAfee, Inc*., 17 Cal. App. 5th 292, 349, 225 Cal. Rptr. 3d 249, 298 (2017) ("*McAfee*") (Delaware corporation); *Interactive Multimedia Artists, Inc. v. Superior Court*, 62 Cal. App. 4th 1546, 1556, 73 Cal. Rptr. 2d 462, 468 (1998) (choice of law provision selecting Delaware law). *Interactive* and *McAfee* both found persuasive the Delaware-centric, equitable burden-shifting doctrine of "entire fairness." *See id.* As described above, Nevada stockholder claims for breach of fiduciary duty involve a different statutory scheme, *see* NRS 78.138(7), and, in any event, this Court does not ***always*** sit in equity like the Delaware Court of Chancery. These Delaware and California cases do nothing to override the multitude of Nevada decisions that affirm, recognize, and adopt jury trial verdicts on breach of fiduciary duty claims.

IV. CONCLUSION

Article 1, Section 3 of the Nevada Constitution declares: "[t]he right of trial by Jury shall be secured to all and remain inviolate forever." Nev. Const. art. 1, §3. The Nevada Supreme Court has thus repeatedly and invariably recognized that this inviolate right to a jury trial applies to tort claims for breaches of fiduciary duty, just like those asserted by Plaintiffs on behalf of the certified stockholder Class in this litigation. This Court has conducted jury trials on breach of fiduciary duty claims as well. Defendants do not address these cases in their Motion. They do not attempt to distinguish them; they do not attempt to argue they were wrongly decided; they do not argue that this case presents any different circumstances; and Defendants cannot contend that all of these cases do not represent good Nevada law. In sum, Defendants have not established "good cause" to amend the

scheduling order and Defendants' attempt to avoid a jury trial on these well-pleaded claims should be rejected. Plaintiffs respectfully request that the Court deny Defendants' Motion.

DATED: April 12, 2019

Respectfully submitted,

THE O'MARA LAW FIRM, P.C.
DAVID C. O'MARA

s/David C. O'Mara
DAVID C. O'MARA

311 East Liberty Street
Reno, NV 89501
Telephone: 775/323-1321
775/323-4082 (fax)

Liaison Counsel

ROBBINS GELLER RUDMAN
& DOWD LLP
RANDALL J. BARON
DAVID T. WISSBROECKER
DAVID A. KNOTTS
655 West Broadway, Suite 1900
San Diego, CA 92101
Telephone: 619/231-1058
619/231-7423 (fax)

Lead Counsel for Plaintiffs

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 by:

_____ Depositing in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, following ordinary business practices

_____ Via Email

__X__ Electronically through the Court's Electronic Filing System

addressed as follows:

FENNEMORE CRAIG, P.C.
Chris H. Byrd, Esq.
cbyrd@fclaw.com
Trista Day
tday@fclaw.com
300 S. Fourth St., Ste. 1400
Las Vegas, NV 89101

GIBSON, DUNN & CRUTCHER, LLP
Meryl L. Young
myoung@gibsondunn.com
Colin B. Davis
cdavis@gibsondunn.com
3161 Michelson Dr.
Irvine, CA 92612

GIBSON, DUNN & CRUTCHER, LLP
Brian M. Lutz, Esq.
BLutz@gibsondunn.com
555 Mission St., Ste. 3000
San Francisco, CA 94105

GIBSON, DUNN & CRUTCHER, LLP
Jason R. Meltzer
jmeltzer@gibsondunn.com
1050 Connecticut Ave, NW
Washington, DC 20036

DATED: April 12, 2019

/s/ Valerie Weis
VALERIE WEIS

INDEX OF EXHIBITS

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C	Wall Street Journal	3
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E	Parametric Scheduling Order	4
F	Cohen Discovery Scheduling Order	3

EXHIBIT A

DISTRICT COURT
CLARK COUNTY, NEVADA

Business Court	**COURT MINUTES**	**December 04, 2017**

A-12-656710-B Wynn Resorts, Limited, Plaintiff(s)
vs.
Kazuo Okada, Defendant(s)

December 04, 2017 **8:00 AM** **All Pending Motions**

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 10C

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

PARTIES PRESENT:

Cassity, Robert J.	Attorney for Kazuo Okada, Defendant
Ferrario, Mark E.	Attorney for Elaine Wynn
Miller, Adam B.	Attorney for the Aruze and Universal Defendants
Peek, Joseph S.	Attorney for Kazuo Okada, Defendant
Spinelli, Debra L.	Attorney for Plaintiffs
Urga, William R.	Attorney for Elaine Wynn
Williams, J. Colby	Attorney for Stephen Wynn

JOURNAL ENTRIES

- APPEARANCES CONTINUED: Attorney Ava Schaeffer for the Plaintiffs, Eric Aldrian, client representative for Wynn Resorts Limited, Attorney Phil Erwin and Attorney Samuel Mirkovich for Stephen Wynn, Attorney Ian McGinn for the Aruze and Universal parties, observing in the gallery.

DEFENDANTS' MOTION TO COMPEL FURTHER NRCP 30(B)(6) TESTIMONY BY WYNN RESORTS, LIMITED ON ORDER SHORTENING TIME: Court inquired if an opposition was filed to this motion. Ms. Spinelli advised she and Mr. Miller met over the weekend and they have agreed to take the motion off calendar; Wynn Resorts has agreed to supplement their interrogatory responses and if it is not sufficient for Mr. Miller a motion will be brought back to the Court. COURT SO ORDERED. Matter OFF CALENDAR.

ELAINE P. WYNN'S MOTION TO MODIFY THE WYNN PARTIES' PROTECTIVE ORDER...DEFENDANTS ARUZE USA INC AND UNIVERSAL ENTERTAINMENT CORP'S JOINDER TO KAZUO OKADA'S LIMITED JOINDER TO ELAINE P WYNN'S MOTION TO MODIFY THE WYNN PARTIES' PROTECTIVE ORDER...LIMITED JOINDER TO ELAINE P. WYNN'S MOITON TO MODIFY THE WYNN PARTIES' PROTECTIVE ORDER: Argument by Mr. Ferrario in support of the motion. Joinder by Mr. Peek. Response by Ms. Spinelli. Following further argument, COURT ORDERED, motion DENIED. However, the meet-and-confer process that deals with a document by document basis may continue. Colloquy between the Court and Mr. Peek regarding de-designation of highly confidential documents and the meet-and-confer process.

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TRIAL SCHEDULING / JURY QUESTIONNAIRES: Mr. Peek anticipated trial lasting 3 to 4 months. Mr. Ferrario advised it will be 1 to 1. 5 months in Elaine Wynn's case alone, 5 months total. Court advised trial will be 5 days per week, and some days will be shorter than others. Court further directed the parties to think of their definition of the start of trial, and whether time limits will be imposed in each party's presentation of their case. Mr. Peek stated that as to the definition of the start of trial it is in the jury questionnaire / jury selection process and that they will submit a brief. Ms. Spinelli noted that she believes the definition is in a stipulation somewhere.

Upon Court's inquiry, Ms. Spinelli stated that they have not yet filed a motion to stay because they had to do responsive briefs for their Nevada Supreme Court hearing today.

Colloquy regarding the stays in this case. Court NOTED there is NOT a stay of the entire case in place, only those particular orders or performance thereof pending the writs that are up at the Nevada Supreme Court.

~

DEFENDANTS MOTION FOR A PARTIAL STAY OF ORDER ON WYNN RESORTS, LIMITED, ALLAN ZEMAN AND RAY R. IRANI'S MOTION TO COMPEL COMPLIANCE WITH THE COURT'S AUGUST 21, 2017 DISCOVERY RULING AND/OR EXPEDITED FURTHER RESPONSES TO THEIR DISCOVERY REQUESTS PENDING THEIR PETITION FOR WRIT OF PROHIBITION OR MANDAMUS ON ORDER SHORTENING TIME: Mr. Miller argued in support of a 2-week stay from today. Ms. Spinelli responded that she would be fine with the standard practice of 10 days. COURT ORDERED, if competing orders are submitted today the Court will work on it, so, 10 days' stay will be GRANTED. Counsel to notify the Court if they need more time.

Mr. Miller further advised they have a separate writ petition related to that one document; the current stay on that expires on Thursday; he and Ms. Spinelli have agreed in the hallway today to

extend it until Monday, and then Defendants will file a motion. Ms. Spinelli concurred.

Court further advised that if the case is not otherwise stayed proposed jury questionnaires need to be submitted to the Court by the first of the year.

With regards to stay on the the business judgment rule order, Court directed counsel for Wynn to do their responses.

~

ELAINE P. WYNN'S MOTION TO REDACT HER MOTION TO MODIFY THE WYNN PARTIES' PROTECTIVE ORDER ON ORDER SHORTENING TIME: COURT ORDERED, motion GRANTED.

MOTION TO REDACT DEFENDANTS' MOTION TO COMPEL FURTHER NRCP 30(B)(60 TESTIMONY BY WYNN RESORTS LIMITED ON ORDER SHORTENING TIME: COURT ORDERED, motion GRANTED.

MOTION TO SEAL EXHIBIT A OF DEFENDANTS' MOTION FOR A PARTIAL STAY OF ORDER ON WYNN RESORTS, LIMITED'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS DEFENDANTS PROVIDED TO THE UNITED STATES GOVERNMENT OR GOVERNMENT AGENCIES PENDING THEIR PETITION FOR WRIT OF PROHIBITION OR MANDAMUS: COURT ORDERED, motion GRANTED.

MOTION TO REDACT OPPOSITION TO ELAINE P WYNN'S MOTION FOR SANCTIONS AGAINST WYNN RESORTS, LIMITED PURSUANT TO NRCP 37 FOR FAILURE TO COMPLY WITH THE COURT'S JULY 12 ORDER TO SEAL EXHIBITS 2, 3, 5-9, 11, AND 12: COURT ORDERED, motion GRANTED.

MOTION TO REDACT LIMITED JOINDER TO ELAINE P. WYNN S MOTION TO MODIFY THE WYNN PARTIES PROTECTIVE ORDER AND TO SEAL CERTAIN EXHIBITS THERETO: COURT ORDERED, motion GRANTED.

MOTION TO REDACT WYNN RESORTS, LIMITED'S OPPOSITION TO ELAINE P. WYNN'S MOTION TO COMPEL WYNN RESORTS, LIMITED TO RESPOND TO REQUESTS FOR PRODUCTION ON ORDER SHORTENING TIME AND EXHIBIT 1 THERETO, AND SEAL EXHIBIT 2 THERETO: COURT ORDERED, motion GRANTED.

EXHIBIT B

DISTRICT COURT
CLARK COUNTY, NEVADA

Business Court	**COURT MINUTES**	**February 02, 2018**

A-12-656710-B Wynn Resorts, Limited, Plaintiff(s)
vs.
Kazuo Okada, Defendant(s)

February 02, 2018 **3:00 AM** **All Pending Motions**

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** Chambers

COURT CLERK: Dulce Romea

PARTIES PRESENT: None. Minute order only – no hearing held.

JOURNAL ENTRIES

- STATUS CHECK: TABLE FROM ASST. COURT ADMINISTRATOR / JURY COMMISSIONER OF STATUTORILY QUALIFIED POTENTIAL JURORS...STATUS CHECK: SEND JURY QUESTIONNAIRE TO COUNSEL: Jury questionnaire provided by email to counsel for final review. See conference call minute order of today's date.

WYNN RESORTS LIMITED MOTION FOR ORDER OVERRULING ELAINE P WYNN'S PRIVILEGE DESIGNATIONS ON LOGS OF PRIVILEGED DOCUMENTS FROM SPECIAL MASTER REVIEW ON ORDER SHORTENING TIME: The Court having reviewed the Motion to Overrule Elaine Wynn's privilege designation and the related briefing including the supplement submitted by Elaine Wynn in conjunction with Motion and being fully informed, GRANTS the motion IN PART. As with the ruling related to Mr. Poster's documents stored on the Wynn Resorts system, Elaine Wynn waived any protection for use of those documents by Wynn or release of those documents for purposes of discovery in this litigation. All documents which postdate the creation of the preservation image are excluded from this waiver. Counsel for Wynn Resorts is directed to submit a proposed order consistent with the foregoing within ten (10) days and distribute a filed copy to all parties involved in this matter. Such order should set forth a synopsis of the supporting reasons proffered to the Court in briefing. This Decision sets forth the Court's intended disposition on the subject but anticipates further order of the Court to make such disposition effective as an order or judgment.

CLERK'S NOTE: A copy of this minute order was distributed via the E-Service list. / dr 2-5-18

EXHIBIT C

THE WALL STREET JOURNAL.

https://www.wsj.com/articles/wynn-resorts-to-pay-universal-entertainment-to-settle-litigation-1520551385

BUSINESS

Wynn Resorts to Pay $2.6 Billion in Settlement That Removes a Barrier to Steve Wynn Stake Sale

Litigation stems from Wynn Resorts' forcible 2012 redemption of Universal's shares

Steve Wynn, the former CEO of Wynn Resorts, show in May 2017. PHOTO: MIKE BLAKE/REUTERS

By Kate O'Keeffe, Alexandra Berzon and Chris Kirkham

Updated March 8, 2018 10:34 p.m. ET

Steve Wynn resigned last month as the chairman and chief executive of the casino company that bears his name. On Thursday Wynn Resorts Ltd. took a step that could eventually allow him to end his status as the company's largest shareholder, too.

His 12% stake has left him and the company subject to additional scrutiny by regulators in Nevada and Massachusetts, who are investigating allegations that he engaged in sexual misconduct against employees.

But he has been prevented from selling his Wynn Resorts stock by a complex shareholder agreement among him, his ex-wife and a former business partner that dates to 2010.

On Thursday, Wynn Resorts moved to resolve the standoff by agreeing to pay $2.6 billion to settle litigation with Universal Entertainment Corp., a Japanese company that was forced by Wynn in 2012 to give up its 20% stake in the casino giant, according to a statement from Universal's lawyers, Buckley Sandler LLP.

Wynn Resorts has been under increased pressure to resolve the Nevada legal dispute after a Wall Street Journal investigation published in January detailed allegations that Mr. Wynn sexually harassed and assaulted employees.

The stockholder agreement that's been recently preventing Mr. Wynn from selling shares was originally designed to help him maintain control of the company. The agreement prohibited Mr. Wynn, his ex-wife Elaine Wynn or a subsidiary of Universal from selling shares without the permission of the other parties.

Last month, Mr. Wynn radically shifted his strategy in the long-running legal battle by saying that he would no longer seek to prevent Ms. Wynn from selling her shares in the company. Six years ago, Ms. Wynn had joined in the litigation between Mr. Wynn, Universal and Universal's founder and former chairman, Kazuo Okada, in an attempt to remove restrictions on her right to sell her approximate 9% stake in Wynn Resorts.

But Universal and Ms. Wynn sought to block Mr. Wynn's about-face, and the judge in the case denied Mr. Wynn's attempt to invalidate the shareholder agreement.

As part of the settlement, a Universal subsidiary, Aruze USA, won't consider itself a party to the shareholder agreement, Wynn Resorts said in a statement.

It is unclear what Ms. Wynn, who isn't a party to the settlement, will do. The case is still set to go to trial next month, given that some claims remain unresolved.

RELATED WYNN COVERAGE

- Two Wynn Resorts Board Members Will Step Down
- Steve Wynn Will Lose Hundreds of Millions in Severance
- Steve Wynn No Longer Seeking to Block Ex-Wife From Selling Shares

Wynn Resorts in 2012 forcibly redeemed shares owned by Universal, then valued at $2.77 billion, at a 30% discount, and the board voted to remove Mr. Okada as a nonexecutive director. The move came amid a deteriorating relationship between Mr. Wynn and Mr. Okada, then Wynn's largest shareholder. Mr. Okada, who ran a pachinko and slot machine empire, was instrumental in creating Wynn Resorts, initially investing $260 million for a 50% stake in the company.

Wynn said that an internal investigation conducted by a former FBI director had found Mr. Okada to be "unsuitable," based on the company's own regulations. Wynn then filed suit in Nevada court against Universal and Mr. Okada, claiming breach of fiduciary duties and other offenses. The company promised to pay Mr. Okada $1.9 billion in 10 years for his stake, which at that time amounted to 20% of Wynn Resorts and was held by Universal's subsidiary Aruze.

Universal and Mr. Okada, who said that he was ousted for challenging some of Wynn's decisions, filed their own claims against Wynn, disputing the validity of the share redemption.

Mr. Okada, who last year was also ousted from Universal after his own company accused him of fraud, isn't a party to Thursday's settlement, according to people with knowledge of the matter. Mr. Okada has denied the allegations of wrongdoing made by Wynn and Universal.

Mr. Wynn stepped down in February after a Wall Street Journal investigation detailed allegations that would amount to a decadeslong pattern of sexual misconduct. They included an allegation that Mr. Wynn in 2005 paid a $7.5 million settlement to a manicurist who told people at the time that Mr. Wynn forced her to have sex with him. Mr. Wynn has said it was "preposterous" that he would assault a woman; he hasn't responded to other allegations.

In announcing his resignation, Mr. Wynn said he could no longer be effective in an environment in which "a rush to judgment takes precedence over everything else, including the facts."

They included an allegation that Mr. Wynn in 2005 paid a $7.5 million settlement to a manicurist who told people at the time that Mr. Wynn forced her to have sex with him. Mr. Wynn at the time said it was "preposterous" that he would assault a woman; he has not responded to specifics of other allegations. Thursday's settlement includes the $1.9 billion principal amount of the redemption note previously issued to Universal's subsidiary, Aruze USA, interest on the note and additional money to resolve a dispute over the interest, people familiar with the matter said. Wynn will pay the total amount by March 31, the statement from Universal's lawyers said.

Write to Kate O'Keeffe at kathryn.okeeffe@wsj.com, Alexandra Berzon at alexandra.berzon@wsj.com and Chris Kirkham at chris.kirkham@wsj.com

Appeared in the March 9, 2018, print edition as 'Pact to Ease Steve Wynn's Sale of Stake.'

EXHIBIT D

A-15-728234-B

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Business Court Matters **COURT MINUTES** **March 08, 2019**

A-15-728234-B Dan Schmidt, Plaintiff(s)
vs.
C . R. Bard Inc, Defendant(s)

March 08, 2019 **3:00 AM** **All Pending Motions**

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** Chambers

COURT CLERK: Dulce Romea

PARTIES PRESENT: None. Minute order only - no hearing held.

JOURNAL ENTRIES

- MOTION TO FILE PLAINTIFFS' OPPOSITION TO DEFENDANT MARK A. LIBRATORE'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF BRIAN T. FOLEY UNDER SEAL...MOTION TO FILE PLAINTIFFS' OPPOSITION TO DEFENDANT MARK LIBRATORE'S MOTION FOR SUMMARY JUDGMENT AND DOCUMENTS FILED THEREWITH UNDER SEAL

Court noted the motions to file under seal do not appear narrowly tailored to protect confidential or commercially sensitive but appear overbroad and are CONTINUED for 2 weeks (March 22, 2019). If any party wishes a document subject to this order to be considered for redaction, supplemental proposed redactions must be provided by March 19, 2019.

3-18-19 9:00 AM DEFENDANT MARK LIBRATORE'S MOTION TO EXCEED PAGE LIMIT FOR MOTION FOR SUMMARY JUDGMENT...
...DEFENDANT MARK LIBRATORE'S MOTION FOR SUMMARY JUDGMENT...
...DEFENDANT MARK LIBRATORE'S MOTION TO SEAL AND REDACT PORTIONS OF HIS MOTION IN LIMINE TO EXCLUDE TESTIMONY OF BRIAN FOLEY AND EXHIBIT A THERETO...
...STATUS CHECK

3-22-19 CHAMBERS MOTION TO FILE PLAINTIFFS' OPPOSITION TO DEFENDANT MARK A. LIBRATORE'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF BRIAN T. FOLEY UNDER SEAL...MOTION TO FILE PLAINTIFFS' OPPOSITION TO DEFENDANT MARK LIBRATORE'S MOTION FOR SUMMARY JUDGMENT AND DOCUMENTS FILED THEREWITH UNDER SEAL

3-28-19 9:30 AM PRE TRIAL CONFERENCE

4-1-19 9:00 AM DEFENDANT MARK LIBRATORE'S UNOPPOSED MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE REGARDING INSURANCE COVERAGE...PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE EVIDENCE REGARDING BARD/LIBERATOR'S POST ACQUISITION FINANCIAL PERFORMANCE...DEFENDANT MARK LIBRATORE'S MOTION IN LIMINE TO EXCLUDE TESTIMONY OF BRIAN T. FOLEY

4-16-19 9:30 AM CALENDAR CALL

4-22-19 1:30 PM JURY TRIAL

CLERK'S NOTE: A copy of this minute order was distributed via the E-Service List. / dr 3-11-19

EXHIBIT E

DISTRICT COURT
CLARK COUNTY, NEVADA

In Re: PARAMETRIC SOUND CORPORATION SHAREHOLDERS' LITIGATION,	**Case No.** 13 A 686890 **Consolidated with:** 13 A 687232 13 A 687354 13 A 687665 13 A 688374 16 A 741073 **Dept. No.** XI

1st AMENDED BUSINESS COURT SCHEDULING ORDER AND ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL AND CALENDAR CALL

This BUSINESS COURT SCHEDULING ORDER AND TRIAL SETTING ORDER is entered following the Supplemental Rule 16 Conference conducted on June 11, 2018. This Order may be amended or modified by the Court upon good cause shown.

IT IS HEREBY ORDERED that the parties will comply with the following deadlines:

Expert Disclosures are Due	**03/22/19**
Rebuttal Expert Disclosures are Due	**05/24/19**
Discovery Cut-Off	**08/23/19**
Dispositive Motions and Motions in Limine to be filed by (***Omnibus Motions in Limine are not allowed***)	**09/27/19**

IT IS HEREBY ORDERED THAT:

A. The above entitled case is set to be tried to a Jury on a **Five week stack** to begin,

November 18, 2019 at 1:30 p.m.

B. A calendar call will be held on **November 12, 2019 at 9:30 a.m.**

Parties must bring to Calendar Call the following:

(1) Typed exhibit lists;

(2) List of depositions;
(3) List of equipment needed for trial, including audiovisual equipment;[1] and
(4) Courtesy copies of any legal briefs on trial issues.

The Final Pretrial Conference will be set at the time of the Calendar Call.

C. A Pre-Trial Conference with the designated attorney and/or parties in proper person will be held on **October 24, 2019 at 9:30 a.m.**

D. Parties are to appear on **August 26, 2019 at 9:00 a.m.** for a Status Check on the matter.

E. The Pre-Trial Memorandum must be filed no later than **October 18, 2019**, with a courtesy copy delivered to Department XI. All parties, (Attorneys and parties in proper person) **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67, 2.68 and 2.69. Counsel should include the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

F. All motions in limine (***Omnibus Motions in Limine are not allowed***), must be in writing and filed no later than **September 27, 2019. Orders shortening time will not be signed except in extreme emergencies**.

G. All original depositions anticipated to be used in any manner during the trial must be delivered to the clerk prior to the final Pre-Trial Conference. If deposition testimony is anticipated to be used in lieu of live testimony, a designation (by page/line citation) of the portions of the testimony to be offered must be filed and served by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference. Any objections or counterdesignations (by

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[1] If counsel anticipate the need for audio visual equipment during the trial, a request must be submitted to the District Courts AV department following the calendar call. You can reach the AV Dept at 671-3205 or via E-Mail at CourtHelpDesk@ClarkCountyCourts.us

page/line citation) of testimony must be filed and served by facsimile or hand, one (1) judicial day prior to the final Pre-Trial Conference commencement. Counsel shall advise the clerk prior to publication.

H. In accordance with EDCR 2.67, counsel shall meet, review, and discuss exhibits. All exhibits must comply with EDCR 2.27. Two (2) sets must be three hole punched placed in three ring binders along with the exhibit list. The sets must be delivered to the clerk prior to the final Pre-Trial Conference. Any demonstrative exhibits including exemplars anticipated to be used must be disclosed prior to the calendar call. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to individual proposed exhibits. Unless otherwise agreed to by the parties, demonstrative exhibits are marked for identification but not admitted into evidence.

I. In accordance with EDCR 2.67, counsel shall meet, review, and discuss items to be included in the Jury Notebook. Pursuant to EDCR 2.68, at the final Pre-Trial Conference, counsel shall be prepared to stipulate or make specific objections to items to be included in the Jury Notebook.

J. In accordance with EDCR 2.67, counsel shall meet and discuss pre-instructions to the jury, jury instructions, special interrogatories, if requested, and verdict forms. Each side shall provide the Court, at the final Pre-Trial Conference, an agreed set of jury instructions and proposed form of verdict along with any additional proposed jury instructions with an electronic copy in Word format.

K. In accordance with EDCR 7.70, counsel shall file and serve by facsimile or hand, two (2) judicial days prior to the final Pre-Trial Conference voir dire proposed to be conducted pursuant to conducted pursuant to EDCR 2.68.

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel is required to advise the Court immediately when the case settles or is otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy should be given to Chambers.

DATED this 13th day of July, 2018.

ELIZABETH GONZALEZ, DISTRICT JUDGE

Certificate of Service

I hereby certify that on or about the date filed, this Order was served through Odyssey File & Serve to the parties identified on the e-service list.

Dan Kutinac

EXHIBIT F

ORIGINAL

FILED
Nov 5 9 03 AM '03
Shirley B. Parraguirre
CLERK

DSO

DISTRICT COURT

CLARK COUNTY, NEVADA

Harvey Cohen, individually,

Plaintiff,

v.

MIRAGE RESORTS, INCORPORATED, a Nevada Corporation, MIRAGE ACQUISITION SUB, INC., a Nevada Corporation, JEFFREY PAUL JACOBS, an individual, LOUIS SPOSATO, an individual, JAMES SCIBELLI, an individual, FORREST WOODWARD, II, an individual, AVIS P. JANSEN, an individual, JACOBS ENTERTAINMENT NEVADA, INC., a Nevada Corporation, DIVERSIFIED OPPORTUNITIES GROUP, LTD., an Ohio limited liability company,

Defendants.

CASE NO. A408662
DEPT NO. XV

DISCOVERY SCHEDULING ORDER

NATURE OF ACTION: Breach of fiduciary duty

DATE OF FILING JOINT CASE CONFERENCE REPORT: 10/29/03 - approved

TIME REQUIRED FOR TRIAL: 5-7 days JURY DEMAND FILED: Yes

ATTORNEY FOR PLAINTIFFS: Jennifer C. Popick, Esq., Harrison, Kemp & Jones and Michael T. Fantini, Esq., Berger & Montague (PA co-counsel)

ATTORNEY FOR DEFENDANTS: Todd L. Bice, Esq., Schreck Brignone

. . .

RECEIVED
NOV 05 2003
COUNTY CLERK

DISCOVERY COMMISSIONER
EIGHTH JUDICIAL DISTRICT COURT

Counsel representing all parties have been heard and after consideration by the Discovery Commissioner,

IT IS HEREBY ORDERED all parties shall be entitled, as a matter of right, to complete discovery proceedings at least up to and including April 30, 2004, or 45 days before the date set for the trial of the case, whichever is later. However, the last day to supplement your witness list, including expert and rebuttal witnesses, shall be 60 days prior to trial, unless otherwise ordered by the trial court or Discovery Commissioner.

Trial of this matter shall not begin prior to June 14, 2004. Within 60 days from the date of this Scheduling Order, the Court shall notify attorneys for the parties as to the date of trial.

Unless otherwise ordered, all discovery disputes (except disputes presented at a pre-trial conference or at trial) must first be heard by the Discovery Commissioner.

This schedule shall not be modified except by leave of the Judge or Discovery Commissioner upon a showing of good cause.

Motions to continue the trial or for preferential trial setting shall be heard only by the Judge.

Dated this 5th day of November, 2003.

DISCOVERY COMMISSIONER

DISCOVERY COMMISSIONER
EIGHTH JUDICIAL DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I placed a copy of the foregoing DISCOVERY SCHEDULING ORDER in the folders(s) in the Clerk's office and/or mailed as follows:

Jennifer C. Popick, Esq.
Todd L. Bice, Esq.

Brandi J. Wendel

COMMISSIONER DESIGNEE

RIS
FENNEMORE CRAIG, P.C.
Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
E-mail: cbyrd@fclaw.com
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young, Esq. (Admitted *Pro Hac Vice*)
Colin B. Davis, Esq. (Admitted *Pro Hac Vice*)
Katie M. Magallanes, Esq. (Pro Hac Pending)
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: (949) 451-3800
E-mail: myoung@gibsondunn.com
cdavis@gibsondunn.com
kmagallanes@gibsondunn.com
-and-
Brian M. Lutz, Esq. (Admitted *Pro Hac Vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
E-mail: blutz@gibsondunn.com

Attorneys for Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone

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)
Dept. No.: 27

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO AMEND THE ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL AND CALENDAR CALL

Date of Hearing: May 1, 2019

Time of Hearing: 10:30 A.M.

///

///

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I. INTRODUCTION

Plaintiffs do not dispute the underlying reasons why a bench trial is appropriate in this case: *first*, breach of fiduciary duty claims challenging corporate directors' approval of a merger are equitable in nature; and *second*, where the only claims in a case are equitable, and defendants do not consent to a jury trial, the case must be tried to the Court and not a jury. These premises are well established by Nevada Supreme Court precedent and the Nevada Rules of Civil Procedure.

Plaintiffs cannot escape this binding law, so they rely on the inconsequential fact that, under different circumstances, some Nevada courts have tried some fiduciary duty claims to a jury. That is not in dispute, but it also is not dispositive. In a case *unlike this one*, where there are both legal and equitable claims, a court may send both types of claims to a jury. And where, *unlike here*, the parties consent to a jury trial, even breach of fiduciary duty claims can be tried to a jury—as was the case in each breach of fiduciary duty case Plaintiffs cite.

The simple fact is that Plaintiffs cannot cite a case—because none exists—where a Nevada court held a jury trial in a case with only fiduciary duty claims over a party's objection. And importantly, the directly on-point precedent demonstrates that this case must be tried to the Court, and not a jury. *See Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 11, 15 n.45, 62 P.3d 720, 727, 729 n.45 (2003) (breach of fiduciary duty claims arising out of merger are equitable, not legal, claims); *EXX, Inc. v. Stabosz*, No. A-10-627976-B, 2013 WL 6431989, at *1 (Nev. Dist. Ct. July 11, 2013) (granting motion to strike the jury demand because claims for breach of fiduciary duty arising out of a merger were equitable in nature and therefore needed to be tried by the court). Thus, because "there is no right to a jury trial" on Plaintiffs' equitable breach of fiduciary duty claims, Nev. R. Civ. P. 39(a)(2), the case should "be tried by the court." Nev. R. Civ. P. 39(b).

This Court should follow binding Nevada precedent and procedure, and confirm that this case—which indisputably involves only equitable claims for breach of fiduciary duty—must be tried to the Court.

II. ARGUMENT

A. Plaintiffs' Claims Are Equitable And Should Be Tried By The Court.

Plaintiffs claim that, in pursuing and executing a merger, each defendant breached his fiduciary duties. (SAC ¶¶ 103-47.) These claims are indisputably equitable in nature. (Mot. 1-3.) Indeed, the Nevada Supreme Court has held that former shareholders' claims for "breach of fiduciary duty" in an "action [challenging] a merger" are "equitable in nature." *Cohen*, 119 Nev. at 11, 15 n.45, 62 P.3d at 727, 729 n.45. Accordingly, Plaintiffs "must assert and prove *in an equitable action* that the merger was improper." *Id.* at 17, 62 P.3d at 731 (emphasis added); *accord, e.g.*, *EXX*, 2013 WL 6431989, at *1 ("Plaintiffs' claims" for breach of fiduciary duty in connection with a merger "are[ ]equitable in nature"). This is a specific application of the general rule that claims regarding "trust administration and alleged breaches of fiduciary duty by [the] trustees" are "equitable claims." *Hoffman v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe*, No. 60119, 2013 WL 7158424, at *1 (Nev. Dec. 16, 2013).

Plaintiffs have little to say about this binding precedent. They note merely that *Cohen* also held that shareholders can sue for money damages for fiduciary duty claims arising out of a merger. (Opp. 8.) That is beside the point. Citing analogous authority from Delaware, *Cohen* held that a claim for damages arising out of a breach of fiduciary duty still must be asserted **in an equitable action**, meaning an action in which the plaintiff has no right to a jury trial:

> Former shareholders, however, cannot simply seek more money for their stock. They must assert and prove in an equitable action that the merger was improper. If this is proven, then they are entitled to any monetary damages they are able to prove were proximately caused by the improper merger.

Cohen, 119 Nev. at 17, 62 P.3d at 731 (citation omitted). In other words, the form of relief sought (including damages) does not matter if the **claim** is equitable—a principle Plaintiffs do not deny. Whether a jury or a court decides a case "depends upon the nature of the litigation, either as an action at law or as a suit in equity. **It is elemental that in a suit in equity the judgment or decree must be based upon findings of the court rather than a jury verdict.**" *Musgrave v. Casey*, 68 Nev. 471, 474, 235 P.2d 729, 731 (1951) (emphasis added). Accordingly, *Cohen* held that breach of fiduciary duty claims in connection with a merger were equitable, even though plaintiffs may obtain "monetary

damages" if they prevail. 119 Nev. at 11, 17, 62 P.3d at 727, 731. And *EXX* held that such claims must be tried by the court, not by a jury, even though plaintiffs there sought money damages. *EXX*, 2013 WL 6431989, at *1; Mot. to Strike Jury Demand at 24, *EXX, Inc. v Stabosz*, No. A-10-627976-B (Nev. Dis. Ct. May 22, 2013), *available at* 2013 WL 6631519 ("EXX Mot."). Courts in Delaware and California do the same. (Mot. 2-3.)

Plaintiffs also fail to distinguish *EXX*. They say that plaintiffs in *EXX* "also" sought an appraisal, which requires action by the court, in addition to seeking damages for breach of fiduciary duty. (Opp. 7.) Plaintiffs miss the point. The court was required to hold a bench trial in *EXX* because, just like here, *every* claim in that case was equitable—including the breach of fiduciary duty claims. 2013 WL 6431989, at *1. The key argument by the *EXX* defendants in their motion to strike the jury demand was that "Plaintiffs' *non-appraisal* claims" for "breach of fiduciary duty … arising from the merger are equitable in nature, and thus are not subject to a trial by jury as a matter of law." EXX Mot. at 24 & n.19 (emphasis added). That is the precise reasoning adopted by the *EXX* court: "Defendants' Motion to Strike Jury Demand is GRANTED, as Plaintiffs' claims are equitable in nature, and therefore must be tried to the Court." *EXX*, 2013 WL 6431989, at *1.

Nor do Plaintiffs deny that the law is the same in other states, including Delaware and California. (Mot. 2-3; Opp. 10-11.) Instead, they note that "Delaware, unlike Nevada, never merged its courts of law and equity." (Opp. 11.) Again, this is beside the point, as the Nevada Supreme Court concluded in *Cohen*. 119 Nev. at 15 n.45, 62 P.3d at 729 n.45 (holding it irrelevant that "Nevada, unlike Delaware, . . . do[es] not maintain separate courts of law and equity"). Indeed, in both Delaware and Nevada, the question of whether an action is legal or equitable has important consequences for determining how the case is tried. In Delaware, it determines which court hears the case—the Court of Chancery, without a jury, or the Superior Court, with a jury. *See, e.g.*, *Damage Recovery Sys., Inc. v. Tucker*, No. Civ.02-1647-SLR, 2005 WL 388597, at *2 & n.3 (D. Del. Feb. 2, 2005) (collecting decisions holding that the Court of Chancery has jurisdiction over breach of fiduciary duty claims, even where monetary relief is sought, because these claims are equitable and therefore not tried to a jury). And in Nevada (as in California), whether a case is equitable or legal determines whether the court will try the case (equitable) or send it to a jury (legal). All three states use a historical approach to determine

whether a claim is legal or equitable. *See Interactive Multimedia Artists, Inc. v. Superior Court*, 62 Cal. App. 4th 1546, 1551 (1998). And Plaintiffs do not deny that Nevada courts frequently look to Delaware procedural law, in spite of its different court system—as the Supreme Court did in *Cohen*. (Mot. 2 & n.1.)[1]

Rather than addressing the on-point precedent, Plaintiffs cite cases stating that "[t]ort actions involving a claim for money damages were *generally* triable to a jury at common law," and that fiduciary duty is a tort (rather than a contract claim). (Opp. 9 (quoting *Aftercare of Clark Cty. v. Justice of Las Vegas Twp. ex rel. Cty. of Clark*, 120 Nev. 1, 10, 82 P.3d 931, 936-37 (2004) (Gibbons, J., dissenting) (emphasis added)).) *Aftercare* involved tort claims arising out of an automobile accident. 120 Nev. at 3, 82 P.3d at 932. But even though common tort claims—such as negligence, products liability, fraud, trespass, and the like—are "generally" legal claims triable by jury, the claims Plaintiffs assert here—for breach of fiduciary duty—are not. *E.g.*, *EXX*, 2013 WL 6431989, at *1. Because Article 1, Section 3 of the Constitution "does not *extend* the right to a jury trial, but merely *preserves* the right to trial by jury as it existed at common law," *Aftercare*, 120 Nev. at 10, 82 P.3d at 936 (Gibbons, J. dissenting) (emphasis in original), there is no right to a jury in this purely equitable case. *E.g.*, *Cohen*, 119 Nev. at 15 n.45, 17, 62 P.3d at 729 n.45, 731; *EXX*, 2013 WL 6431989, at *1.

Plaintiffs cite no authority contrary to *Cohen*'s holding that a shareholder breach of fiduciary duty claim is equitable. Plaintiffs note that, in *Goldberg v Mayfield*, No. A415438, 2002 WL 34682371 (Nev. Dist. Ct. Apr. 24, 2002), the court held a bifurcated trial. (Opp. 5.) The *Goldberg* court first submitted a bevy of claims, including Defendants' "counterclaims for breach of fiduciary duty and legal malpractice," to a jury. 2002 WL 34682371. Then, after the jury delivered its verdict, the court addressed "the equitable issues before the Court." *Id.* No one objected to this procedure. And critically, the Court did not hold that fiduciary duty claims are legal in nature—a premise that the Supreme Court expressly refuted the following year in *Cohen*. It merely held a jury trial by consent on certain issues

[1] Contrary to Plaintiffs' argument (Opp. 11), the "entire fairness" standard that Delaware applies to fiduciary duty claims under certain circumstances does not determine whether a claim is equitable or legal and was not the basis for the California courts' holdings that a bench trial was appropriate in *Interactive*, 62 Cal. App. 4th at 1553-55, and *Cent. Laborers' Pension Fund v. McAfee, Inc.*, 17 Cal. App. 5th 292, 350 (2017). Indeed, *McAfee* **rejected** the argument that the "entire fairness" standard applied in that case, *id.* at 320-32, but it still held that fiduciary duty claims are "equitable in nature" and therefore must "be tried by the court," *id.* at 350.

relating to legal malpractice claims—a different situation than a shareholders' suit for breach of fiduciary duty relating to a merger, the exact scenario at issue here and addressed in *Cohen*.

B. Because Each Claim Is Equitable And Defendants Do Not Consent To A Jury Trial, The Case Should Be Tried By The Court.

Because Plaintiffs' claims are all equitable and Defendants do not consent to trial by jury, a bench trial is required. (Mot. 1-3.) Plaintiffs' only response is to cite cases including breach of fiduciary duty claims where courts have held jury trials. (Opp. 1-7.) Critically, however, there is no indication, in **any** of the cases Plaintiffs rely on, that any party requested a bench trial, or objected to a jury trial. Nor do any of these cases suggest that the only claims asserted were equitable claims for breach of fiduciary duty related to a merger—unlike *Cohen*, *EXX*, and this case. To the contrary, most of the decisions Plaintiffs cite affirmatively state that other claims (like fraud, defamation, contract-related torts, conversion, and insurance-related claims) were asserted, too. Where, *unlike here*, there are both legal and equitable claims, the case is not a pure "suit in equity", *Musgrave*, 68 Nev. at 474, 235 P.2d at 731, and the court can hold a jury trial, Nev. R. Civ. P. 39(b). More critically, **none** of the cases Plaintiffs cite, unlike *EXX* and others Defendants cited, adjudicated a motion to hold a bench trial; the parties therefore consented to a jury trial. Of course, "*with the parties' consent*," the court may "try any issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right." Nev. R. Civ. P. 39(c)(2) (emphasis added). By contrast, here—just like in *EXX*—Defendants object to a jury trial, and have moved for a bench trial. This fact alone distinguishes Plaintiffs' cases.

Finally, Plaintiffs assert that they "have been diligently assembling evidence through discovery and preparing for a jury trial." (Opp. 3.) Plaintiffs do not explain, and it is difficult to understand, why their trial preparation efforts to date—for a trial more than eight months away—would have to be scrapped when the case is tried to the Court, rather than a jury. Regardless, Plaintiffs' trial preparation does not transform their equitable claims to legal claims. They simply have no right under Nevada law to try their equitable case to a jury.

III. CONCLUSION

For the foregoing reasons, and those in the Motion, Defendants respectfully request that this Court amend its Order Setting Civil Jury Trial, Pre-Trial and Calendar Call to specify that this case will be tried before the Court, and not a jury.

Dated this 22nd day of April, 2019.

FENNEMORE CRAIG, P.C.

/s/Christopher H. Byrd, Esq.

Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
E-mail:cbyrd@fclaw.com
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young, Esq. (Admitted *Pro Hac Vice*)
Colin B. Davis, Esq. (Admitted *Pro Hac Vice*)
Katie M. Magallanes, Esq. (Pro Hac Vice Pending)
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: (949) 451-3800
E-mail:myoung@gibsondunn.com
cdavis@gibsondunn.com
kmagallanes@gibsondunn.com
-and-
Brian M. Lutz, Esq. (Admitted *Pro Hac Vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
E-mail:blutz@gibsondunn.com
Attorneys for Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone

CERTIFICATE OF SERVICE

I hereby certify that a copy of the following: **DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO AMEND THE ORDER SETTING CIVIL JURY TRIAL, PRE-TRIAL AND CALENDAR CALL** 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 22nd day of April, 2019 as follows:

David C. O'Mara, Esq.
The O'Mara Law Firm, P.C.
316 E. Bridger Avenue, 2nd Floor
Las Vegas, Nevada 89101
725-529-4042; FAX 775-323-4082
david@omaralaw.net
bsnyder@omaralaw.net
val@omaralaw.net

[X] Via E-service
[ ] Via U.S. Mail (Not registered with CM/ECF Program)

-and-

David T. Wissbroecker, Esq.
Edward M. Gergosian, Esq.
David A. Knotts, Esq.
Randall J. Baron, Esq.
Robbins Geller Rudman & Dowd LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
619-231-1058; FAX 619-231-7423
DWissbroecker@rgrdlaw.com
EGergosian@rgrdlaw.com
dknotts@rgrdlaw.com
randyb@rgrdlaw.com
tlacomb@rgrdlaw.com
jaimem@rgrdlaw.com

[X] Via E-service
[ ] Via U.S. Mail (Not registered with CM/ECF Program)

-and-

Frank J. Johnson, Esq.
Johnson & Weaver, LLP
600 W. Broadway Suite 1540
San Diego, CA 92101
619-230-0063; FAX 619-255-1856
frankj@johnsonandweaver.com

[X] Via E-service
[ ] Via U.S. Mail (Not registered with CM/ECF Program)

-and-

W. Scott Holleman, Esq.
Johnson & Weaver, LLP
99 Madison Avenue 5th Floor
New York, NY 10016
212-802-1486; FAX 212-602-1592
scotth@johnsonandweaver.com
Attorneys for Plaintiffs

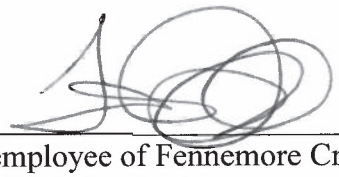
[X] Via E-service
[ ] Via U.S. Mail (Not registered with CM/ECF Program)

///

John P. Aldrich, Esq. Aldrich Law Firm, Ltd. 1601 S. Rainbow Blvd. Suite 160 Las Vegas, NV 89146 jaldrich@johnaldrichlawfirm.com traci@johnaldrichlawfirm.com -and- Shane T. Rowley, Esq. Levi & Korsinsky LLP 30 Broad Street, 24th Floor New York, NY 10004 srowley@zlk.com *Attorneys for Plaintiff, Dixon Chung*	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program) [X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
Meryl L. Young, Esq. Colin B. Davis, Esq. Katie Magallanes, Esq. Gibson, Dunn & Crutcher, LLP 3161 Michelson Drive Irvine, CA 92612-4412 MYoung@gibsondunn.com CDavis@gibsondunn.com kmagallanes@gibsondunn.com kbarry@gibsondunn.com bakin@gibsondunn.com pmclean@gibsondunn.com -and- Brian M. Lutz, Esq. Gibson, Dunn & Crutcher, LLP 555 Mission Street, Suite 3000 San Francisco, CA 94105-0921 BLutz@gibsondunn.com *Counsel for Defendants Newport Corporation, Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin and Peter J. Simone*	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
Abran E. Vigil, Esq. Ballard Spahr LLP 100 N. City Parkway, Suite 1750 Las Vegas, NV 89106 702-471-7000; FAX: 702-471-7070 vigila@ballardspahr.com lvdocket@ballardspahr.com GallM@ballardspahr.com carltonm@ballardspahr.com -and- / / /	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)

Daniel W. Halston, Esq.
Wilmer Cutler Pickering Hale & Dorr LLP
60 State St.
Boston, MA 02109
Daniel.halston@wilmerhale.com
Attorneys for Defendants MKS Instruments, Inc. and PSI Equipment, Inc.

[X] Via E-service
[ ] Via U.S. Mail (Not registered with CM/ECF Program)



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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

DIXON CHUNG, Plaintiff(s), vs. NEWPORT CORP., Defendant(s).	CASE NO: A-16-733154-B DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

WEDNESDAY, MAY 01, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS

APPEARANCES:

For the Plaintiff(s): DAVID A. KNOTTS, ESQ.
DAVID C. O'MARA, ESQ.
TIMOTHY Z. LaCOMB, ESQ.

For the Defendant(s): BRIAN M. LUTZ, ESQ.
BRANDI PLANET, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

LAS VEGAS, NEVADA, WEDNESDAY, MAY 01, 2019

[Proceeding commenced at 10:44 a.m.]

THE COURT: All right, guys. Chung versus Newport. Is everyone here?

All right. Let's -- as soon as everybody is set up, we'll take appearances from your right to left. I'm starting to remember everybody's names. I think that's a good sign. Or I hope so. Or a bad sign. I don't know.

MR. O'MARA: Good morning, Your Honor. David O'Mara on behalf of the plaintiffs.

MR. LaCOMB: Good morning, Your Honor. Tim LaComb on behalf of the plaintiffs.

MR. KNOTTS: Good morning, Your Honor. David Knotts on behalf of plaintiffs as well.

MR. LUTZ: Good morning, Your Honor. Brian Lutz, for Gibson Dunn, on behalf of the defendants.

THE COURT: Okay.

MS. PLANET: Good morning, Your Honor. Brandi Planet, also on behalf of defendants.

THE COURT: Thank you, all.

All right. So Mr. Lutz, it's your Motion to Amend the Order Setting Jury Trial, Pretrial, and Calendar Call. So please proceed.

MR. LUTZ: Thanks. You've seen our motion.

This is -- we believe the Court should amend the order

setting the trial in this case to provide for a bench trial under binding Nevada Supreme Court precedent. The plaintiffs' breach of fiduciary duty claims in this case are equitable in nature.

Also, under binding Nevada Supreme Court precedent, equitable claims are tried to a court and not a jury.

This is not a close call. No case in Nevada has held to the contrary. And the on-point authority that we've offered to the court from Delaware and California and other jurisdictions is exactly consistent with that authority as well.

So under Rule 39 of the Nevada Rules of Civil Procedure, the scheduling order in this case should be amended because plaintiffs have, quote, no right to a jury trial. That's Rule 39(a)2, and, quote, a jury trial is not properly demanded, unquote. That's Rule 39(b).

THE COURT: You know, this usually comes up in the form of a Motion to Strike a Jury Demand or a Motion to Amend an Order.

MR. LUTZ: I'm -- was that a question of how it comes up.

THE COURT: So for some reason -- it usually comes up with a Motion to Strike a Jury Demand --

MR. LUTZ: Yeah. I mean, we --

THE COURT: -- or a Motion to Amend.

MR. LUTZ: It is a Motion to -- I mean, it is effectively a Motion to Amend the Scheduling Order.

THE COURT: It's kind of untimely. So will you address that for me?

MR. LUTZ: The timeliness?

THE COURT: Yeah.

MR. LUTZ: Oh, I mean, I don't think it matters whether it's filed as a Motion to Strike. I mean, we could turn around tomorrow and file a Motion to Strike. We thought the most efficient way to proceed was just to say, here's a scheduling order. Good cause is --

THE COURT: Well, I -- no, I intend to proceed today. I intend to proceed today.

MR. LUTZ: Yeah.

THE COURT: I just wonder why it came up so late.

MR. LUTZ: You know, we went back and forth on how to style the motion.

The order -- the scheduling order in this case says it could be amended for good cause shown. So we thought that that was the most efficient way of doing it. I mean, whether we -- I don't think it matters whether you style it as a Motion to Strike a Jury Trial, as is the case in the EXX case that we've cited; or whether you do it as a Motion to Amend. We thought, given that the scheduling order specifically said you can amend it for good cause shown, that was the most efficient way to do it. But again, I don't think it matters one way or the other.

And on the timeliness, I mean, if this is a question of preparing for a jury trial, I mean, the trial is not until 8 or 9 months away.

THE COURT: Right.

MR. LUTZ: I don't think that there's any -- certainly no prejudice shown given the amount of time that's ready to -- before the trial is even on the stack to begin with.

I know Your Honor knows what this case is about. But this is the case arising out of the sale of Newport to MKS. Directors are alleged in this case, you know, ran a sales process exhaustive search; many bidders; ultimately agreed to sell the company --

THE COURT: Right.

MR. LUTZ: -- in a 51 percent premium transaction. The shareholders overwhelmingly approved the transaction.

The plaintiffs here filed a lawsuit claiming that the directors of Newport breached their fiduciary duties in connection with the sales process. They are seeking money damages for those breaches. They assert the identical breach of fiduciary duty claim against each of the six directors of Newport. Those are the only claims in this case, breach of fiduciary duty. There's no other claims.

Now, there's no dispute that breach of fiduciary duty claims arising out of a merger are equitable in nature, not legal. We're all familiar, from the various times we've been before you, with the Cohen case, which is the definitive case in the Nevada Supreme Court 2003. The Supreme Court in Cohen said explicitly that the claims' plaintiffs are here -- breach of fiduciary duty claim arising out of a merger seeking money damages are equitable in nature, not legal.

The relevant quote is, quote: Former shareholders cannot

simply seek more money for their stock. They must assert and prove in an equitable action that the merger was improper. If this is proven, then they are entitled to any monetary damages they are able to prove were proximately caused by the improper merger. It's a direct quote from the Supreme Court in Cohen.

Cohen, it should be noted, relies expressly on Delaware law in -- when making that assertion. Delaware law, of course, is exactly consistent with that assertion in Cohen. And we've cited other cases in Delaware. We cited California cases that are exactly on point. Breach of fiduciary duty cases claims are equitable in nature.

Nevada law also is clear that equitable claims are tried to the bench, not a jury. There's no right to a jury trial -- and that's critical here -- right to a jury trial for an equitable claim. Nevada Supreme Court again has said this explicitly over and over again. In the Musgrave's case that we've cited to Your Honor, the Court noted that whether a jury or court decides a case, quote, depends on the nature of the litigation, either as an action at law, or as a suit in equity. It is elemental, the Court said, that in a suit in equity, the judgment or decree must be based on findings of the court, rather than rulings of -- I'm sorry -- rather than a jury verdict.

The Supreme Court in Awada [phonetic] later said exactly the same thing, quote: The right to a trial by jury does not extend to equitable matters.

The court in Hoffman said the same thing. This is not a --

an ambiguous issue of law.

And as I noted, we cited the EXX case to Your Honor. It's a district court case. And we cited it because it's on all fours with this action. EXX was a merger case. The plaintiffs sought monetary damages for alleged breaches of fiduciary duties by directors arising out of a merger. Defendants have filed a motion to strike, as we just said, the jury demand. The Court concluded that the claims were equitable and could be tried to the bench.

Now, my colleagues here say, Well, there is also an appraisal claim in that action. That is beside the point.

If you actually read the Court's order, the Court notes that all of the claims in the action are equitable and, therefore, would be tried to the bench and not a jury. It's on all fours with this case.

So we're not splitting hairs. We're not pitching some novel legal theory. This is black letter, Nevada Supreme Court binding precedent law, that this is an equitable claim. Equitable claims are tried to the bench and not a jury. And critically, there is no right to a jury trial for the claims that are asserted here.

So the plaintiffs don't have a credible response, in our view, to this binding Nevada Supreme Court precedent. They don't cite a case holding that breach of fiduciary duty claims are legal rather than equitable. They can't, because the Nevada Supreme Court says exactly the opposite. They don't cite a case that says that equitable claims should be tried to a jury or there's a right to a jury trial for an equitable claim, because Nevada Supreme Court binding

precedent says exactly the opposite.

So what do they do? They say, Well, fiduciary duty claims are tort claims; and tort claims for money damages generally are triable to a jury at common law. That's one of their arguments.

But, of course, many common law tort claims -- negligence, products liability, trespass -- are legal, not equitable claims. And yes, those are -- those should be tried to a jury.

But the Nevada Supreme Court has said that the very claim that's at issue here, breach of fiduciary duty, is equitable. It doesn't matter that general, nondifferent tort claims are legal in nature and should be tried to a jury.

And as we already discussed, you know, not only is Nevada directly on point and has binding Supreme Court precedent on that very issue, Delaware cases say exactly the same thing, as does California.

And in Cohen and EXX and many other cases, the -- as we made clear, just because a defendant seeks money damages doesn't suddenly turn the claim into a jury trial claim.

The question is what is the claim itself? And Musgrave says this directly, again, binding Nevada Supreme Court precedent. The question is, Is the claim equitable? Or is the claim legal? Here, indisputably, the claim is equitable.

The other argument that the plaintiffs make is they cite cases that were either tried to a jury or scheduled for a jury trial. These cases are beside the point. None of them involved a

contested motion over whether the case was -- should be tried to the bench or to a jury.

In other words these -- in these cases, the parties either consented to, or did not oppose more likely, a request for a jury trial. But one of the ones that they cite, you know, in Exhibit F, is a two-page scheduling order from Cohen which merely notes that the plaintiffs in that case had demanded a jury trial. As if that is somehow precedential. Of course, it's not precedential. Anyone at any time can consent to a jury trial or not oppose a jury trial, Rule 39(c)2 says exactly that.

The question here is whether the plaintiffs have a right to a jury trial. On their equitable breach of fiduciary duty claim, the binding Supreme Court precedent in this state says very directly that the plaintiffs do not have that right. The Court should follow this precedent and require that the Court -- that the case be tried to the bench rather than the jury.

Thank you.

THE COURT: Thank you.

And the opposition, please.

MR. KNOTTS: Good morning, again, Your Honor.

May it please the Court, this is a certified class action involving claims for breach of fiduciary duty, and as Mr. Lutz said, we are seeking money damages.

This merger has closed. We have no claim for an injunction or other equitable remedies that plaintiffs seek pre-merger

in a breach of fiduciary duty case.

We cited over 17 breach of fiduciary duty cases in this state that involve a jury trial.

THE COURT: But in any of them was there an effort made to strike the jury demand? It seemed to me that they were all by consent.

MR. KNOTTS: There was. And I think --

THE COURT: And I'm aware of some of them, because we all are on the same floor.

MR. KNOTTS: Right. A couple of the cases, I thought got pretty close. And there was a motion in Loomis versus Lange Financial, Nevada Supreme Court, 1993. And in that case, you had -- the sellers' real estate transaction filed a breach of fiduciary duty claim against their broker, and that case reached a jury verdict.

And the Court noted that after a lengthy trial, the jury found against the defendants for breach of fiduciary duty, and the jury assessed actual damages in the amount of $18,500. The broker objected to the jury verdict.

And then the Court actually reversed the jury trial on the question of the liquidated damages provision in a contract, because apparently that issue is traditionally one for a court sitting in equity.

And after that analysis, the Nevada Supreme Court left undisturbed the jury verdict on the breach of the fiduciary duty claim. And that's a case where the Court very briefly discussed the notion that the liquidated damages provisions were traditionally for

courts sitting in equity.

And I will state, though, that the Court didn't then go on and say, Okay. But all of these other claims, breach of fiduciary duty, were properly sent to the jury, you know, because X, Y, and Z, and they involved tort. It didn't have that additional analysis on the breach of fiduciary duty claims, but it didn't disturb the jury verdict on those issues. So that's one court that gets close to it.

There's also the Goldberg case, where -- in this court, where the Court actually bifurcated the trial for claims that were for the court in equity. I think there were claims for injunctions and mechanic's liens and things like that, and then specifically held that the breach of the fiduciary duty claims were in front of a jury. So it actually bifurcated that -- the trial in that regard.

So -- and I'll get into some of those cases more in a little bit. But, you know, I wanted to explain the actual test and the standard that the Court applies when resolving that issue. Because defendants take a word from Cohen, call it binding precedent, and essentially base their entire arguments on that case, without actually looking at the test that the Court should apply to it, which is the historical analysis test. And I think when the Court applies that test, the standard that applies here, it conclusively resolves in favor of a jury trial in this case.

And that's because there are two principle reasons. These are tort claims, like counsel mentioned. The Nevada Supreme Court has also -- if you want to call it binding precedent -- has also held in

binding precedent that breaches of fiduciary duty claims are tort claims. At common law and today, tort claims unquestionably involve the right to a jury. And I'll get into that case in a little more detail.

Two, these are claims for money damages. Again, at common law and today, claims for money damages involve the right to a jury. Defendants don't address that money damages' point.

And in contrast, the equitable notion, which comes entirely from Cohen v. Mirage, which I'll also get into, the Court's sitting in equity where equitable cases refers to injunctions, specific performance, rescission, enforcing mechanic's liens, things like that, that we just don't have in this case, because it is a post-merger claim.

And defendants say that, you know, the notion that this is seeking equitable claims isn't in dispute. It absolutely is. We aren't seeking equitable relief here. We are seeking money damages. But that --

THE COURT: But your only two causes of action are fiduciary duty and aiding and abetting.

MR. KNOTTS: We don't have an aiding and abetting claim, Your Honor. It's just breach of fiduciary duty against the six defendants.

THE COURT: I have the first amended complaint up. Am I looking at the wrong document?

MR. KNOTTS: The first one we had some aiding and

abetting claims, but those were dismissed.

THE COURT: Oh, okay.

MR. KNOTTS: So those were dismissed.

THE COURT: This goes back to 2016, so --

MR. KNOTTS: Yeah. It's now just breach of fiduciary duty.

THE COURT: Okay.

MR. KNOTTS: And the notion that breach of fiduciary duty is a tort claim, Clark versus Lubritz, Nevada Supreme Court case from 1997, is instructive on this issue. And the issue in that case was whether a jury --

THE COURT: I was with that law firm during that case.

MR. KNOTTS: Oh, yes.

THE COURT: So I am --

MR. KNOTTS: So, as Your Honor may recall, the issue is whether a jury could award punitive damages on a breach of fiduciary duty claim. And the decision came down to whether a breach of fiduciary duty case was a tort. And the Court said yes. Breach of fiduciary duty is a tort, and punitive damages are proper. And I'll also note that the Court generally can't award punitive damages. That belongs for the jury.

So where a breach of fiduciary duty is, in fact, a tort -- and at common law, tort claims are for juries, this case is properly sent to the jury, and plaintiffs have a right that the case be sent to the jury.

And Mr. Lutz said, Well, you know, that proposition only involves tort claims like negligence or fraud. And I think Clark v.

Lubritz specifically contradicts defendant's argument in that regard, and -- but negligence and fraud and things like that is precisely the conduct that supports a breach of fiduciary duty claim in Nevada. Under the statute, we are required to prove fraud. And Clark v. Lubritz noted that the elements are the same that made that point clear.

So I think that the fact that these are tort claims, under binding Nevada Supreme Court precedent, they are then properly tried by a jury, which meets the historical analysis test that the Court is to apply in and of itself.

And then turning to the money damages point. Again, I think it's clear, defendants don't dispute that claims involving money damages are properly claims for the jury.

This complaint seeks compensatory damages for breaches of fiduciary duty based on fraud or misconduct -- fraud and/or intentional misconduct.

Again, this is not a suit in equity because it doesn't seek an injunction or rescission or traditional equitable remedies.

And that brings me to the defendants' arguments that these claims are equitable based on Cohen v. Mirage. And that's the primary source for defendants' argument that Mr. Lutz keeps calling binding precedent.

I mean, I think it's hard to have binding precedent on the big picture issue, on a case that never actually addresses the issue that the Court should apply, and that's whether these claims involve

the right to a jury trial. I think, at best for the defendants, Cohen v. Mirage involves inconsistent language.

Just as an aside, we had an argument a year or two ago in the Nevada Supreme Court on the Parametric case, and it was all about interpreting Cohen v. Mirage. And one of the justices was, you know, saying something about the decision kind of waxes and wanes, was the phrase that he used.

THE COURT: Well, it waxes and wanes more on the derivative issue than it does on this issue.

MR. KNOTTS: Exactly. But it does on this issue also, because I think, at best for defendants, Cohen has inconsistent language, but those inconsistencies here, I think, break in our favor.

The entire point of the decision is that in addition to appraisal, which is tried by the court, it holds, quote, stockholders may attempt to hold individuals liable for monetary damages under theories of breach of fiduciary duty or loyalty, and the Court made that holding about five or six times.

In one of those instances, the Court used the word equitable before that -- in an action -- equitable action, defendants have to show that the merger was improper. And that language, in the one instance that that's used when the Court's talking about money damages, comes from a discussion where the Court is talking about whether the defensive acquiescence applies and whether the so-called equitable defense of acquiescence can apply.

And an equitable -- so-called equitable defenses like

waiver, estoppel, acquiescence can apply in every case, regardless of whether it's decided by a jury or decided by the Court. And in that equitable language -- that equitable sentence, the very next sentence after that, the Court again emphasizes that money damages are available.

And the Court never actually addressed the issue. It never actually said, You know, money damages are available, but plaintiffs don't get a right to the jury, so, you know, don't even try; or money damages are available in a matter to be tried by the Court.

It uses that equitable language. It's citing UOP versus Weinberger, which is a Delaware case that distinguishes between breach of fiduciary duty action in that case and appraisal -- all cases -- all business disputes in Delaware are heard by a court, regardless of the nature of those claims.

So I think three factors ultimately support our view of Cohen and how it overrides the use of the word equitable that the Court mentioned in passing indicta.

Again, the Court in Cohen found that money damages are available here. That's a jury claim.

Two, the Court found that punitive damages are available on a breach of fiduciary duty claim after a merger. Again, that's traditionally for the jury.

And three, after the decision was issued, the Court scheduled a jury trial. It didn't say, Hold on. These are equitable claims for the court --

THE COURT: I don't make that call unless it's raised to me.

MR. KNOTTS: So in any event, the plaintiffs filed the jury demand. It was noted in the order.

Because again, Cohen didn't clearly address that stockholders don't have a right to a jury on breach of fiduciary duty claims. It, in fact, held that money damages are available.

The only other source -- Nevada source of defendants' argument about breach of fiduciary duty claims is the excess. And we can't tell much from the one sentence order on the jury issue.

But when I look at the more substantive opinion at trial, the -- it was clear the Court was addressing two claims -- an appraisal claim and what the court referred to as a counterclaim based on the Delaware common law claim of equitable entire fairness. The Court considered that -- that claim as worthy. And to be fair, it wasn't Nevada corporation, but that's how the court described the claim, Delaware common law claim of equitable entire fairness.

It is clear that, in Nevada, equitable entire fairness cause of action does not exist in Nevada. That's under NRS 78.1387. I wish that it did. It would -- these cases would be easier. Under equitable entire fairness, the burden starts with the defendants and shifts around.

But the statute, again, 78.1387 makes clear that plaintiffs have the burden of proof, and the entire fairness doesn't apply. And to the extent that it did earlier, it doesn't apply anymore in Nevada.

So given that the Court in EXX was focused on appraisal and what it called the Delaware common law claim of equitable entire fairness, I think EXX is distinguishable on that ground.

And I do think that that also distinguishes Delaware -- defendants' reliance on cases from Delaware and California. The California cases involve Delaware corporations. And they specifically -- when making the jury determination, they specifically looked to the entire fairness doctrine. It's explicitly mentioned in McAfee [phonetic], and it's mentioned in Interactive. And again, that's a Delaware cause of action. And Delaware, like I said, just doesn't have juries. So all business disputes are heard by a judge, and that's sort of a historical quirk, but they never merged their courts of law and equity.

So unlike Nevada -- and then again, that's unlike Nevada where breaches of fiduciary duty claims are repeatedly tried by juries again and again. And I think the reason why that is -- you know, and it isn't necessarily based on stipulation or otherwise.

It's because ultimately, under the historical analysis test, the breaches of fiduciary duty claims are torts, and also in this case we seek monetary damages, and both such claims are properly for the jury.

The one word in Cohen, calling breaches of fiduciary duty claims equitable, does not change the historical analysis and does not impact all of the cases that have repeatedly held breach of fiduciary duty claims in front of jury trials in this state.

So we respectfully request that the Court deny defendant's motion and retain the jury trial schedules.

THE COURT: Thank you. And the reply, please.

MR. LUTZ: Just very briefly.

You asked Mr. Knotts the right question, which is whether any of those 17 cases involved a contested motion? The answer is no. I mean, he told you something about Loomis in a post-trial decision. The answer to that question is no.

The question -- I felt like the last substantive argument we had before [indiscernible] on class certification, I spent half the time trying to tell you why Golden Coin, the Nevada Supreme Court decision, didn't control the outcome. You disagreed with me.

I feel like we're having the same situation here where Mr. Knotts is trying to tell you that the plain language of Cohen shouldn't apply, and there's a bunch of reasons why you can read that language out of the decision.

The simple fact is, Cohen made clear and said specifically that breach of fiduciary duty claims are equitable, citing to Delaware case law that says exactly the same thing. This isn't a blip. This isn't some mistake. This isn't some esoteric thing. This is what Cohen specifically said.

The point about Delaware and some relic, and they have a different court for equitable claims --

THE COURT: Mm-hmm. They have a different statutory scheme.

MR. LUTZ: They do. But the point is, breach of fiduciary duty claims have to be brought in the Court of Chancery. Why? It's a court of equity. That's -- breach of fiduciary duty claims are equitable claims under Delaware law, under California law, under Nevada law, under the law of various states.

The California cases we cited, they did involve Delaware corporations. The cases did not apply Delaware law. They very specifically said, We are not applying Delaware law, even though Delaware law makes clear that breach of fiduciary duty claims are equitable and have to be tried to the bench. We are applying California law and going through the very specific analysis and saying we agree. And that is exactly the same case in California.

A very detailed discussion in both of the key California cases that we cited, that notwithstanding the fact that there were money damages sought, that those were equitable claims, because the nature of the claim is equitable, notwithstanding the money damages claim form of relief sought, those -- still, there was no right to a jury trial. Those are equitable claims that were tried to the bench.

You know, so I -- you've heard my arguments before. I'm not going to repeat myself. But those are my key points. Thank you.

THE COURT: Thank you, both.

This is the Defendant's Motion to Amend the Order Setting Jury Trial, which I'm going to take as a Motion to Strike the Jury. And even though I realize that in most cases the right to trial by jury

is granted by our Nevada constitution, I find that there's an exception here. I'm going to grant the motion.

The two cases that I considered the most are Clark versus Lubritz, 1997, which is distinguishable because it was the breach of contract with a punitive damages claim, which was in addition to the fiduciary duty.

And the only thing I can really go on is Cohen versus Mirage, which comes up only six years later in 2003, which does say that an action for breach of fiduciary duty has traditionally been equitable in nature. There being no other causes of action that are still alive or ever pled that are unrelated to fiduciary duty, I do believe that the Motion to Strike is appropriate.

So for those reasons, I'm granting the motion.

Mr. Lutz to prepare the order. Mr. Knotts to approve the form of that before it's submitted. You may include findings of fact and conclusions of law, if you wish, or just do a simple form of order. However you wish to proceed.

MR. LUTZ: Okay. Thank you.

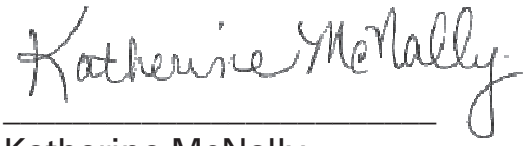
THE COURT: Any other questions while you're here?

MR. KNOTTS: None.

[Proceeding concluded at 11:13 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Katherine McNally
Independent Transcriber CERT**D-323

ORDR
FENNEMORE CRAIG, P.C.
Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
E-mail: cbyrd@fclaw.com
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young, Esq. (Admitted *Pro Hac Vice*)
Colin B. Davis, Esq. (Admitted *Pro Hac Vice*)
Katie M. Magallanes, Esq. (Admitted *Pro Hac Vice*)
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: (949) 451-3800
E-mail: myoung@gibsondunn.com
cdavis@gibsondunn.com
kmagallanes@gibsondunn.com
-and-
Brian M. Lutz, Esq. (Admitted *Pro Hac Vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
E-mail: blutz@gibsondunn.com
Attorneys for Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone

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:

FENNEMORE CRAIG, P.C.

Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young, Esq. (Admitted *Pro Hac Vice*)
Colin B. Davis, Esq. (Admitted *Pro Hac Vice*)
Katie M. Magallanes, Esq. (Admitted *Pro Hac Vice*)
3161 Michelson Drive
-and-
Brian M. Lutz, Esq. (Admitted *Pro Hac Vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Attorneys for Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone

Approved as to form by:

THE O'MARA LAW FIRM, P.C.

/s David C. O'Mara

David C. O'Mara, Esq. (NV Bar No. 8599)
316 E. Bridger Avenue, 2nd Floor
Las Vegas, Nevada 89101
-and-
David T. Wissbroecker, Esq.
David A. Knotts, Esq.
Randall J. Baron, Esq.
Robbins Geller Rudman & Dowd LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Counsel for Plaintiffs

NEOJ
FENNEMORE CRAIG, P.C.
Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
E-mail: cbyrd@fclaw.com
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young, Esq. (Admitted *Pro Hac Vice*)
Colin B. Davis, Esq. (Admitted *Pro Hac Vice*)
Katie M. Magallanes, Esq. (Admitted *Pro Hac Vice*)
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: (949) 451-3800
E-mail: myoung@gibsondunn.com
cdavis@gibsondunn.com
kmagallanes@gibsondunn.com
-and-
Brian M. Lutz, Esq. (Admitted *Pro Hac Vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
E-mail: blutz@gibsondunn.com

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

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.

FENNEMORE CRAIG, P.C.

/s/Christopher H. Byrd, Esq.

Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
E-mail:cbyrd@fclaw.com
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young, Esq. (Admitted *Pro Hac Vice*)
Colin B. Davis, Esq. (Admitted *Pro Hac Vice*)
Katie M. Magallanes, Esq. (Admitted *Pro Hac Vice*)
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: (949) 451-3800
E-mail:myoung@gibsondunn.com
cdavis@gibsondunn.com
kmagallanes@gibsondunn.com
-and-
Brian M. Lutz, Esq. (Admitted *Pro Hac Vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
E-mail:blutz@gibsondunn.com
Attorneys for Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone

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:

David C. O'Mara, Esq. The O'Mara Law Firm, P.C. 316 E. Bridger Avenue, 2nd Floor Las Vegas, Nevada 89101 725-529-4042; FAX 775-323-4082 david@omaralaw.net bsnyder@omaralaw.net val@omaralaw.net	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- David T. Wissbroecker, Esq. Edward M. Gergosian, Esq. David A. Knotts, Esq. Randall J. Baron, Esq. Robbins Geller Rudman & Dowd LLP 655 West Broadway, Suite 1900 San Diego, CA 92101 619-231-1058; FAX 619-231-7423 DWissbroecker@rgrdlaw.com EGergosian@rgrdlaw.com dknotts@rgrdlaw.com randyb@rgrdlaw.com tlacomb@rgrdlaw.com jaimem@rgrdlaw.com	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- Frank J. Johnson, Esq. Johnson & Weaver, LLP 600 W. Broadway Suite 1540 San Diego, CA 92101 619-230-0063; FAX 619-255-1856 frankj@johnsonandweaver.com	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
-and- W. Scott Holleman, Esq. Johnson & Weaver, LLP 99 Madison Avenue 5th Floor New York, NY 10016 212-802-1486; FAX 212-602-1592 scotth@johnsonandweaver.com *Attorneys for Plaintiffs*	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)

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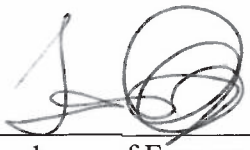
John P. Aldrich, Esq. Aldrich Law Firm, Ltd. 1601 S. Rainbow Blvd. Suite 160 Las Vegas, NV 89146 jaldrich@johnaldrichlawfirm.com traci@johnaldrichlawfirm.com -and- Shane T. Rowley, Esq. Levi & Korsinsky LLP 30 Broad Street, 24th Floor New York, NY 10004 srowley@zlk.com *Attorneys for Plaintiff, Dixon Chung*	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program) [X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
Meryl L. Young, Esq. Colin B. Davis, Esq. Katie Magallanes, Esq. Gibson, Dunn & Crutcher, LLP 3161 Michelson Drive Irvine, CA 92612-4412 MYoung@gibsondunn.com CDavis@gibsondunn.com kmagallanes@gibsondunn.com kbarry@gibsondunn.com bakin@gibsondunn.com pmclean@gibsondunn.com -and- Brian M. Lutz, Esq. Gibson, Dunn & Crutcher, LLP 555 Mission Street, Suite 3000 San Francisco, CA 94105-0921 BLutz@gibsondunn.com *Counsel for Defendants Newport Corporation, Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin and Peter J. Simone*	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)
Abran E. Vigil, Esq. Ballard Spahr LLP 100 N. City Parkway, Suite 1750 Las Vegas, NV 89106 702-471-7000; FAX: 702-471-7070 vigila@ballardspahr.com lvdocket@ballardspahr.com GallM@ballardspahr.com carltonm@ballardspahr.com -and- / / /	[X] Via E-service [ ] Via U.S. Mail (Not registered with CM/ECF Program)

Daniel W. Halston, Esq.
Wilmer Cutler Pickering Hale & Dorr LLP
60 State St.
Boston, MA 02109
Daniel.halston@wilmerhale.com
Attorneys for Defendants MKS Instruments, Inc. and PSI Equipment, Inc.

[X] Via E-service
[ ] Via U.S. Mail (Not registered with CM/ECF Program)



An employee of Fennemore Craig, P.C.

ORDR
FENNEMORE CRAIG, P.C.
Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
E-mail: cbyrd@fclaw.com
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young, Esq. (Admitted *Pro Hac Vice*)
Colin B. Davis, Esq. (Admitted *Pro Hac Vice*)
Katie M. Magallanes, Esq. (Admitted *Pro Hac Vice*)
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: (949) 451-3800
E-mail: myoung@gibsondunn.com
cdavis@gibsondunn.com
kmagallanes@gibsondunn.com
-and-
Brian M. Lutz, Esq. (Admitted *Pro Hac Vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: (415) 393-8200
E-mail: blutz@gibsondunn.com
Attorneys for Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone

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:

FENNEMORE CRAIG, P.C.

Christopher H. Byrd, Esq. (NV Bar No. 1633)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
-and-
GIBSON, DUNN & CRUTCHER LLP
Meryl L. Young, Esq. (Admitted *Pro Hac Vice*)
Colin B. Davis, Esq. (Admitted *Pro Hac Vice*)
Katie M. Magallanes, Esq. (Admitted *Pro Hac Vice*)
3161 Michelson Drive
-and-
Brian M. Lutz, Esq. (Admitted *Pro Hac Vice*)
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Attorneys for Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone

Approved as to form by:

THE O'MARA LAW FIRM, P.C.

/s David C. O'Mara
David C. O'Mara, Esq. (NV Bar No. 8599)
316 E. Bridger Avenue, 2nd Floor
Las Vegas, Nevada 89101
-and-
David T. Wissbroecker, Esq.
David A. Knotts, Esq.
Randall J. Baron, Esq.
Robbins Geller Rudman & Dowd LLP
655 West Broadway, Suite 1900
San Diego, CA 92101
Counsel for Plaintiffs

DECL

ADAM K. BULT, ESQ., Nevada Bar No. 9332
abult@bhfs.com
MAXIMILIEN FETAZ, Nevada Bar No. 12737
mfetaz@bhfs.com
BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
Telephone: 702.382.2101
Facsimile: 702.382.8135

MERYL L. YOUNG, ESQ. (*pro hac vice*)
myoung@gibsondunn.com
COLIN B. DAVIS, ESQ. (*pro hac vice*)
cdavis@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: 949.451.3800

BRIAN M. LUTZ, ESQ. (*pro hac vice*)
blutz@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street, Suite 3000
San Francisco, CA 94105-0921
Telephone: 415.393.8200

Attorneys for Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone

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 **DECLARATION OF BRIAN M LUTZ, ESQ. IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I, BRIAN M. LUTZ, ESQ., declare and state as follows:

1. I am an attorney duly licensed by the State Bars of California and New York and am admitted to practice *pro hac vice* before this Court. I am a partner in the law firm of Gibson, Dunn & Crutcher LLP, and I represent Defendants Robert J. Phillippy, Kenneth F. Potashner, Christopher Cox, Siddhartha C. Kadia, Oleg Khaykin, and Peter J. Simone in the above-captioned case. I submit this declaration in support of Defendants' Motion for Summary Judgment. I have personal knowledge of the facts stated in this Declaration and, if called upon, could and would testify competently thereto.

2. The exhibits referenced below are included in the Appendix of Exhibits in Support of Defendants' Motion for Summary Judgment (the "Appendix").

3. Included in the Appendix as **Exhibit 1** is a true and correct copy of relevant excerpts from the deposition transcript of David Allen, taken on March 14, 2019.

4. Included in the Appendix as **Exhibit 2** is a true and correct copy of relevant excerpts from the deposition transcript of Charles Cargile, taken on April 30, 2019.

5. Included in the Appendix as **Exhibit 3** is a true and correct copy of relevant excerpts from the deposition transcript of Jeffrey Coyne, taken on May 3, 2019.

6. Included in the Appendix as **Exhibit 4** is a true and correct copy of relevant excerpts from the deposition transcript of Christopher Cox, taken on April 9, 2019.

7. Included in the Appendix as **Exhibit 5** is a true and correct copy of relevant excerpts from the deposition transcript of Brian Foley, taken on July 15, 2019.

8. Included in the Appendix as **Exhibit 6** is a true and correct copy of relevant excerpts from the deposition transcript of John F. Ippolito, taken on April 11, 2019.

9. Included in the Appendix as **Exhibit 7** is a true and correct copy of relevant excerpts from the deposition transcript of Siddhartha Kadia, Ph.D., taken on February 27, 2019.

10. Included in the Appendix as **Exhibit 8** is a true and correct copy of relevant excerpts from the deposition transcript of Oleg Khaykin, taken on February 15, 2019.

11. Included in the Appendix as **Exhibit 9** is a true and correct copy of relevant excerpts of the deposition transcript of David Lubeck, taken on March 8, 2019.

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

12. Included in the Appendix as **Exhibit 10** is a true and correct copy of relevant excerpts from the deposition transcript of Jeffrey Parker, taken on May 29, 2019.

13. Included in the Appendix as **Exhibit 11** is a true and correct copy of relevant excerpts from the deposition transcript of Robert Phillippy (Volume I), taken on August 4, 2016.

14. Included in the Appendix as **Exhibit 12** is a true and correct copy of relevant excerpts from the deposition transcript of Robert Phillippy (Volume II), taken on April 3, 2019.

15. Included in the Appendix as **Exhibit 13** is a true and correct copy of relevant excerpts from the deposition transcript of Kenneth Potashner (Volume I), taken on July 1, 2016.

16. Included in the Appendix as **Exhibit 14** is a true and correct copy of relevant excerpts from the deposition transcript of Kenneth Potashner (Volume II), taken on April 18, 2019.

17. Included in the Appendix as **Exhibit 15** is a true and correct copy of relevant excerpts from the deposition transcript of Maria Ross, taken on April 26, 2019.

18. Included in the Appendix as **Exhibit 16** is a true and correct copy of relevant excerpts from the deposition transcript of Peter Simone, taken on March 20, 2019.

19. Included in the Appendix as **Exhibit 17** is a true and correct copy of relevant excerpts from the deposition transcript of Dennis Werth, taken on April 5, 2019.

20. Included in the Appendix as **Exhibit 18** is a true and correct copy of Newport Corporation's Definitive Proxy Statement on Schedule 14A, filed with the U.S. Securities and Exchange Commission ("SEC") on March 29, 2016.

21. Included in the Appendix as **Exhibit 19** is a true and correct copy of Newport Corporation's Current Report on Form 8-K, filed with the SEC on April 15, 2016.

22. Included in the Appendix as **Exhibit 20** is a true and correct copy of Exhibit 99.1 to Newport Corporation's Current Report on Form 8-K, filed with the SEC on April 29, 2016.

23. Included in the Appendix as **Exhibit 21** is a true and correct copy of Newport Corporation's Current Report on Form 8-K, filed with the SEC on April 29, 2016.

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

24. Included in the Appendix as **Exhibit 22** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated August 17, 2015, produced in this litigation bearing the Bates numbers NEWP000001–07.

25. Included in the Appendix as **Exhibit 23** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Newport Corporation, dated October 8, 2015, produced in this litigation bearing the Bates numbers NEWP000008–11, which was marked and authenticated as Exhibit 8 at the April 9, 2019 deposition of Christopher Cox, as reflected on pages 56–57 of the deposition transcript.

26. Included in the Appendix as **Exhibit 24** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated October 15, 2015, produced in this litigation bearing the Bates numbers NEWP000012–14.

27. Included in the Appendix as **Exhibit 25** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated October 23, 2015, produced in this litigation bearing the Bates numbers NEWP000015–17, which was marked and authenticated as Exhibit 4 at the May 3, 2019 deposition of Jeffrey Coyne, as reflected on pages 18–19 of the deposition transcript.

28. Included in the Appendix as **Exhibit 26** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated October 28, 2015, produced in this litigation bearing the Bates numbers NEWP000018–20, which was marked and authenticated as Exhibit 2 at the April 9, 2019 deposition of Christopher Cox, as reflected on pages 29–30 of the deposition transcript.

29. Included in the Appendix as **Exhibit 27** is a true and correct copy of the Minutes of a Special Meeting of the Independent Committee of the Board of Directors of Newport Corporation, dated October 30, 2015, produced in this litigation bearing the Bates numbers NEWP000021–22.

30. Included in the Appendix as **Exhibit 28** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Newport Corporation, dated November 9, 2015, produced in this litigation bearing the Bates numbers NEWP000023–25.

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31. Included in the Appendix as **Exhibit 29** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Newport Corporation, dated November 12, 2015, produced in this litigation bearing the Bates numbers NEWP000026–28, which was marked and authenticated as Exhibit 11 at the February 27, 2019 deposition of Siddhartha Kadia, Ph.D., as reflected on pages 140–41 of the deposition transcript.

32. Included in the Appendix as **Exhibit 30** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated November 25, 2015, produced in this litigation bearing the Bates numbers NEWP000029–31.

33. Included in the Appendix as **Exhibit 31** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Newport Corporation, dated December 28, 2015, produced in this litigation bearing the Bates numbers NEWP000032–36.

34. Included in the Appendix as **Exhibit 32** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated January 18, 2016, produced in this litigation bearing the Bates numbers NEW000037–40.

35. Included in the Appendix as **Exhibit 33** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated February 11, 2016, produced in this litigation bearing the Bates numbers NEWP000041–43.

36. Included in the Appendix as **Exhibit 34** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Newport Corporation, dated February 19, 2016, produced in this litigation bearing the Bates numbers NEWP021997–98, which was marked and authenticated at the February 15, 2019 deposition of Oleg Khaykin, as reflected on pages 107–08 of the deposition transcript.

37. Included in the Appendix as **Exhibit 35** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated February 21, 2016, produced in this litigation bearing the Bates numbers NEWP021999–2001.

38. Included in the Appendix as **Exhibit 36** is a true and correct copy of the Minutes of a Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated February 22, 2016, produced in this litigation bearing the Bates numbers NEWP022002–09.

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39. Included in the Appendix as **Exhibit 37** is a true and correct copy of the Minutes of a Special Meeting of the Independent Committee of the Board of Directors of Newport Corporation, dated February 22, 2016, produced in this litigation bearing the Bates numbers NEWP022010–11.

40. Included in the Appendix as **Exhibit 38** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated October 15, 2015, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP073308–73328, which was marked and authenticated as Exhibit 3 at the March 8, 2019 deposition of David Lubeck, as reflected on pages 48–49 of the deposition transcript.

41. Included in the Appendix as **Exhibit 39** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated October 23, 2015, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP027551–27580, which was marked and authenticated as Exhibit 7 at the March 8, 2019 deposition of David Lubeck, as reflected on pages 58–59 of the deposition transcript.

42. Included in the Appendix as **Exhibit 40** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated October 28, 2015, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP088047–72.

43. Included in the Appendix as **Exhibit 41** is a true and correct copy of a page from J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated October 28, 2015, and entitled "Transaction pricing matrix – premiums and multiples," bearing the Bates number NEWP000147.

44. Included in the Appendix as **Exhibit 42** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated November 9, 2015, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP012422–28.

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45. Included in the Appendix as **Exhibit 43** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated November 12, 2015, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP020915–28, which was marked and authenticated as Exhibit 27 at the March 8, 2019 deposition of David Lubeck, as reflected on page 157–58 of the deposition transcript.

46. Included in the Appendix as **Exhibit 44** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated December 28, 2015, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP001917–31, which was marked and authenticated as a part of Exhibit 13 at the August 4, 2016 deposition of Robert Phillippy (Volume I), as reflected on pages 157–58 of the deposition transcript.

47. Included in the Appendix as **Exhibit 45** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated January 18, 2016, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP001967–86, which was marked and authenticated as Exhibit 8 at the July 1, 2016 deposition of Kenneth F. Potashner, as reflected on pages 120–21 of the deposition transcript.

48. Included in the Appendix as **Exhibit 46** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated February 11, 2016, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP013127–39.

49. Included in the Appendix as **Exhibit 47** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated February 21, 2016, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP028582–95, which was marked and authenticated as part of Exhibit 18 at the March 8, 2019 deposition of David Lubeck, as reflected on pages 114–15 of the deposition transcript.

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50. Included in the Appendix as **Exhibit 48** is a true and correct copy of J.P. Morgan's presentation for the Special Telephonic Meeting of the Board of Directors of Newport Corporation, dated February 22, 2016, and entitled "Board Discussion Materials," produced in this litigation bearing the Bates numbers NEWP034295–308, which was marked and authenticated as a part of Exhibit 13 at the February 27, 2019 deposition of Siddhartha Kadia, Ph.D., as reflected on pages 176–77 of the deposition transcript.

51. Included in the Appendix as **Exhibit 49** is a true and correct copy of an email from Robert Phillippy to David Lubeck, dated February 9, 2016, regarding "Nepal: Colombia," produced in this litigation bearing the Bates numbers NEWP011840–42.

52. Included in the Appendix as **Exhibit 50** is a true and correct copy of written correspondence from Jeffrey Coyne to John F. Ippolito, dated December 4, 2015, produced in this litigation bearing the Bates numbers NEWP021975–83.

53. Included in the Appendix as **Exhibit 51** is a true and correct copy of written correspondence from Gerald G. Colella to Robert J. Phillippy, dated December 23, 2015, produced in this litigation bearing the Bates numbers NEWP001938–39, which was marked and authenticated as a part of Exhibit 7 at the July 1, 2016 deposition of Kenneth Potashner (Volume I), as reflected on pages 105–06 of the deposition transcript.

54. Included in the Appendix as **Exhibit 52** is a true and correct copy of written correspondence from Gerald G. Collela to Robert J. Phillippy, dated January 15, 2016, produced in this litigation bearing the Bates numbers NEWP001987–88, which was marked and authenticated as a part of Exhibit 8 at the July 1, 2016 deposition of Kenneth Potashner (Volume I), as reflected on pages 120–21 of the deposition transcript.

55. Included in the Appendix as **Exhibit 53** is a true and correct copy of an email from Jeffrey Coyne to Dave Allen, Jeff Parker, Dennis Werth, Wilson Lin, Willem Meintjes, and Maria Ross, copying Robert Phillippy, Chares Cargile, David Lubeck, and Ilene Chau, dated January 29, 2016, regarding "Project Photon Meeting Schedule," attaching "Project Photon Meeting Schedule—January 28; January 31—February 2 2015 (Masterv2).docx," produced in this litigation bearing the Bates numbers NEWP0112000–04.

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56. Included in the Appendix as **Exhibit 54** is a true and correct copy of an email from Robert Phillippy, dated January 25, 2016, regarding "Molecule Notes – Start 1/25/16," produced in this litigation bearing the Bates numbers NEWP021399–407, which was marked and authenticated as Exhibit 11 at the August 4, 2016 deposition of Robert Phillippy (Volume I), as reflected on pages 123–24 of the deposition transcript.

57. Included in the Appendix as **Exhibit 55** is a true and correct copy of written correspondence from Gerald G. Colella to Kenneth Potashner and Robert J. Phillippy, dated February 10, 2016, produced in this litigation bearing the Bates numbers NEWP000048–49.

58. Included in the Appendix as **Exhibit 56** is a true and correct copy of written correspondence from J.P. Morgan to Newport Corporation's Board of Directors expressing a professional opinion as to the fairness of the merger between Newport Corporation and MKS Instruments, Inc., dated February 22, 2016, produced in this litigation bearing the Bates numbers NEWP107285–87.

59. Included in the Appendix as **Exhibit 57** is a true and correct copy of a press release from MKS Instruments, Inc., dated February 23, 2016, entitled "MKS Instruments Announces Agreement to Acquire Newport Corporation," produced in this litigation bearing the Bates numbers NEWP008448–53.

60. Included in the Appendix as **Exhibit 58** is a true and correct copy of Institutional Shareholder Services Inc.'s Proxy Analysis & Benchmark Policy Voting Recommendations, dated April 12, 2016, produced in this litigation bearing the Bates numbers NEWP106088–96.

61. Included in the Appendix as **Exhibit 59** is a true and correct copy of Glass Lewis & Co.'s Proxy Paper recommendation, dated April 11, 2016, produced in this litigation bearing the Bates numbers NEWP096659–68.

62. Included in the Appendix as **Exhibit 60** is a true and correct copy of Egan-Jones Ratings Company's recommendation, produced in this litigation bearing the Bates numbers NEWP105551–66.

63. Included in the Appendix as **Exhibit 61** is a true and correct copy of an email from Charles Cargile to David Lubeck and Ilene Chau, copying Robert Phillippy and Jeffrey Coyne,

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dated October 20, 2015, regarding "Summary Newport 2012 to 2020 Oc-2015 10-19-15," attaching "Summary Newport 2012 to 2020 Oct-2015 10-19-15.xlsx," produced in this litigation bearing the Bates numbers NEWP002205–06.

64. Included in the Appendix as **Exhibit 62** is a true and correct copy of an email from Maria Ross to Charles Cargile, dated November 5, 2015, regarding "Newport Model 2012 to 2020 as of Nov 2015_(11-05-15).xlsx," attaching "Summary of Newport 2012 to 2020 Nov-2015_11-5-15.xlsx," produced in this litigation bearing the Bates numbers NEWP051251 and NEWP051253.

65. Included in the Appendix as **Exhibit 63** is a true and correct copy of an email from Charles Cargile to Robert Phillippy, David Lubeck, and Jeffrey Coyne, copying Maria Ross and Willem Meintjes, dated January 11, 2016, regarding "Copy of Organic revenue growth template including FX impact.xlsx," attaching, "Copy of Organic revenue growth template including FX impact," produced in this litigation bearing the Bates numbers NEWP016369–70, which was marked and authenticated as Exhibit at the May 7, 2019 deposition of Willem Meintjes, as reflected on pages 15–17 of the deposition transcript.

66. Included in the Appendix as **Exhibit 64** is a true and correct copy of Newport Corporation's Annual Report on Form 10-K for the fiscal year ended December 29, 2012, filed with the SEC on March 14, 2013.

67. Included in the Appendix as **Exhibit 65** is a true and correct copy of an email from Robert Phillippy to Charles Cargile, Jeffrey Coyne, Dave Allen, Wilson Lin, Jeff Parker, Dennis Werth, Maria Ross, Willem Meintjes, and Yitzhak Raif, dated November 30, 2015, regarding "Strategic Plan Reviews—Kickoff Session Presentation," attaching "Strategic Plan Reviews – Intro Presentation 11-30-15e.pptx," produced in this litigation bearing the Bates numbers NEWP035193–214, which was marked and authenticated as Exhibit 4 at the March 14, 2019 deposition of David Allen, as reflected on pages 61–62 of the deposition transcript.

68. Included in the Appendix as **Exhibit 66** is a true and correct copy of a presentation entitled "Newport Optics Group Strategic Plan," dated November 30, 2015, produced in this litigation bearing the Bates numbers NEWP077307–469, which was marked and authenticated as

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a part of Exhibit 4 at the May 29, 2019 deposition of Jeffrey Parker, as reflected on pages 45–46 of the deposition transcript.

69. Included in the Appendix as **Exhibit 67** is a true and correct copy of a presentation entitled "Laser Group Strategic Plan," dated December 1, 2015, produced in this litigation bearing the Bates numbers NEWP095078–126, which was marked and authenticated as a part of Exhibit 5 at the March 14, 2019 deposition of David Allen, as reflected on pages 74–75 of the deposition transcript.

70. Included in the Appendix as **Exhibit 68** is a true and correct copy of a presentation entitled "Photonics Group Strategic Plan," dated December 2, 2015, produced in this litigation bearing the Bates numbers NEWP115767–907, which was marked and authenticated as a part of Exhibit 9 at the April 5, 2019 deposition of Dennis Werth, as reflected on page 98 of the deposition transcript.

71. Included in the Appendix as **Exhibit 69** is a true and correct copy of an email from Jeffrey Coyne to John Ippolito, copying Jerry Colella, Seth Bagshaw, Eric Snyder, Robert Phillippy, and Charles Cargile, dated December 8, 2015, regarding "Project Fusion NDA – MKS (12-4-2015)," produced in this litigation bearing the Bates numbers NEWP004015–23, which was marked and authenticated as Exhibit 12 at the May 3, 2019 deposition of Jeffrey Coyne, as reflected on pages 54–55 of the deposition transcript.

72. Included in the Appendix as **Exhibit 70** is a true and correct copy of Newport Corporation's Amendment No. 1 on Form 10-K/A, amending Newport Corporation's Annual Report on Form 10-K for the fiscal year ended January 2, 2016, filed with the SEC on March 24, 2016.

73. Included in the Appendix as **Exhibit 71** is a true and correct copy of MKS Instruments, Inc.'s Definitive Proxy Statement on Schedule 14A, filed with SEC on March 24, 2017.

74. Included in the Appendix as **Exhibit 72** is a true and correct copy of MKS Instruments, Inc.'s Definitive Proxy Statement on Schedule 14A, filed with SEC on March 28, 2018.

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75. Included in the Appendix as **Exhibit 73** is a true and correct copy of an email from Robert Phillippy to Christopher Cox, Siddhartha Kadia, Oleg Khaykin, Kenneth Potashner, and Pete Simone, copying Charles Cargile and Jeffrey Coyne, dated January 23, 2016, regarding "CONFIDENTIAL – Transformational M&A Update," attaching "Molecule Investor Presentation Dec-2015.pdf," produced in this litigation bearing the Bates numbers NEWP002218–41.

76. Included in the Appendix as **Exhibit 74** is a true and correct copy of a draft email from Robert Phillippy, dated December 8, 2015, regarding "Fusion – Proton CEO Call Notes," bearing the Bates number NEWP009116, which was marked and authenticated as Exhibit 8 at the August 4, 2016 deposition of Robert Phillippy (Volume I), as reflected on pages 105–06 of the deposition transcript.

77. Included in the Appendix as **Exhibit 75** is a true and correct copy of a letter from Jeffrey Coyne to William D. Eginton, dated November 6, 2015, produced in this litigation bearing the Bates numbers NEWP021955–63.

78. Included in the Appendix as **Exhibit 76** is a true and correct copy of written correspondence from Jeffrey Coyne to David Nislick, dated November 5, 2015, produced in this litigation bearing the Bates numbers NEWP021964–74.

79. Included in the Appendix as **Exhibit 77** is a true and correct copy of an email from Charles Cargile to Robert Phillippy and Jeffrey Coyne, dated December 8, 2015, regarding "Project Fusion NDA – MKS (12-4-2015)," produced in this litigation bearing the Bates numbers NEWP033005–13.

80. Included in the Appendix as **Exhibit 78** is a true and correct copy of a presentation entitled, "Newport Optics Group Overview," dated January 31 2016, produced in this litigation bearing the Bates numbers NEWP003154–77, which was marked and authenticated as a part of Exhibit 7 at the May 29, 2019 deposition of Jeffrey Parker, as reflected on pages 70–71 of the deposition transcript.

81. Included in the Appendix as **Exhibit 79** is a true and correct copy of a presentation entitled, "Spectra-Physics Lasers Group Overview," dated January 2016, produced in this litigation bearing the Bates numbers NEWP111791–818, which was marked and authenticated as

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a part of Exhibit 6 at the March 14, 2019 deposition of David Allen, as reflected on pages 103–04 of the deposition transcript.

82. Included in the Appendix as **Exhibit 80** is a true and correct copy of a presentation entitled, "Newport Photonics Group Overview," dated January 31 2016, produced in this litigation bearing the Bates numbers NEWP002055–79, which was marked and authenticated as a part of Exhibit 13 at the April 5, 2019 deposition of Dennis Werth, as reflected on pages 140–41 of the deposition transcript.

83. Included in the Appendix as **Exhibit 81** is a true and correct copy of Newport's Business Development Update presentation for the Board of Directors Telephonic Meeting, dated December 28, 2015, produced in this litigation bearing the Bates numbers NEWP001891–916, which was marked and authenticated as a part of Exhibit 13 at the August 4, 2016 deposition of Robert Phillippy (Volume I), as reflected on pages 157–58 of the deposition transcript.

84. Included in the Appendix as **Exhibit 82** is a true and correct copy an email from Sumeet Mehra to Michael Murray, copying Brendan Butler and Spencer Jaffe, dated February 6, 2016, produced in this litigation bearing the Bates numbers LAZARD00001167–168. I understand that, after MKS's financial advisor produced this document in response to Plaintiffs' subpoena, Plaintiffs' counsel suggested that the financial advisor "claw back" the document, despite that it is relevant and not privileged.

85. Included in the Appendix as **Exhibit 83** is a true and correct copy a draft email from Robert Phillippy, dated January 16, 2016, regarding "Fusion Notes – Start 01/16/16," produced in this litigation bearing the Bates numbers NEWP011224–27.

86. Included in the Appendix at **Exhibit 84** is a true and correct copy of an email from Michael Murray to Kathleen Burke, copying John Ippolito, dated January 26, 2016, regarding "Project Photon," produced in this litigation bearing the Bates numbers MKS00003853–57.

87. Included in the Appendix as **Exhibit 85** is a true and correct copy an email from Robert Phillippy to Kenneth Potashner, dated February 6, 2016, regarding "update," produced in this litigation bearing the Bates numbers NEWP061804–07.

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88. Included in the Appendix as **Exhibit 86** is a true and correct copy of an email from Robert Phillippy to Kenneth Potashner, copying Jeffrey Coyne, dated September 12, 2015, regarding "Geneva—Banker Discussion Document," attaching "Geneva Proposal (9.10.15)b-clean," produced in this litigation bearing the Bates numbers NEWP018803–04, which was marked and authenticated as Exhibit 2 at the August 4, 2016 deposition of Robert Phillippy (Volume I), as reflected on pages 40–41 of the deposition transcript.

89. Included in the Appendix as **Exhibit 87** is a true and correct copy of an email from Robert Phillippy to Michael Mertin, copying Jeffrey Coyne, dated February 11, 2016, regarding "Our Planned Meeting at Photonics West–Schedule Conflict," produced in this litigation bearing the Bates number NEWP011702.

90. Included in the Appendix as **Exhibit 88** is a true and correct copy of a Newport Corporation Discussion Materials presentation, dated June 11, 2015, produced in this litigation bearing the Bates numbers NEWP025882–95.

91. Included in the Appendix as **Exhibit 89** is a true and correct copy of a transcript of the June 17, 2019 hearing in *Guzman v. Johnson*, Case No. A-18-783643 (Nev. Dist. Ct., Hr'g June 17, 2019).

92. Included in the Appendix as **Exhibit 90** is a true and correct copy of a Notice of Entry of Order Granting Motion to Dismiss in *Guzman v. Johnson*, Case No. A-18-783643 (Nev. Dist. Ct. July 24, 2019).

93. Included in the Appendix as **Exhibit 91** is a true and correct copy of relevant excerpts from the deposition transcript of Willem Meintjes, taken on May 7, 2019.

I declare under penalty of perjury under the law of Nevada that the foregoing is true and correct. Executed this 23rd day of August, 2019, in San Francisco, California.

Brian M. Lutz, Esq.

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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 **DECLARATION OF BRIAN M. LUTZ, ESQ. IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** to be submitted electronically to all parties currently on the electronic service list on August 23, 2019.

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

BROWNSTEIN HYATT FARBER SCHRECK, LLP
100 North City Parkway, Suite 1600
Las Vegas, NV 89106-4614
702.382.2101

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DISTRICT COURT

CLARK COUNTY, NEVADA

DIXON CHUNG, Plaintiff(s), vs. NEWPORT CORP., Defendant(s).	CASE NO: A-16-733154-B DEPT. XXVII

BEFORE THE HONORABLE NANCY ALLF, DISTRICT COURT JUDGE

THURSDAY, OCTOBER 10, 2019

RECORDER'S TRANSCRIPT OF PROCEEDINGS
RE: MOTIONS

APPEARANCES:

For the Plaintiff(s): DAVID A. KNOTTS, ESQ.
DAVID C. O'MARA, ESQ.

For the Defendant(s): BRIAN M. LUTZ, ESQ.
COLIN DAVIS, ESQ.
MAXIMILLEN FETAZ, ESQ.

RECORDED BY: BRYNN WHITE, COURT RECORDER

LAS VEGAS, NEVADA, THURSDAY, OCTOBER 10, 2019

[Proceeding commenced at 11:24 a.m.]

THE COURT: And as soon as everyone is set up, we'll take appearances from right to left.

And I probably should have had you guys argue first. The lawyers would have loved to hear your argument, I'm sure. So thank you for your patience this morning.

Appearances, please.

MR. O'MARA: Good morning, Your Honor. David O'Mara, on behalf of the plaintiffs.

MR. KNOTTS: Good morning, Your Honor. David Knotts, on behalf of the plaintiffs.

THE COURT: Thank you.

MR. LUTZ: Good morning. Brian Lutz, for Gibson Dunn, on behalf of the defendants.

THE COURT: Thank you.

MR. DAVIS: Good morning, Your Honor. Colin Davis, from Gibson Dunn, on behalf of the defendants.

THE COURT: Thank you.

MR. FETAZ: Good morning, Your Honor. Maximillen Fetaz, on behalf of the defendants.

THE COURT: Thank you, all.

All right. So this was the Plaintiff's Motion for Leave to Amend the Second Amended Complaint. And we also have some

Motions to Seal.

Let me address those Motions to Seal right away.

The Motion to Seal for today will be granted. No argument is necessary.

The Motions to Seal set for -- let me see if I can read this -- 11/6 and 11/21 will be granted and those hearings will be vacated. Okay?

Good. Now, I think I'm ready to hear your motion.

MR. KNOTTS: Thank you, Your Honor. May it please the Court, we are here on Plaintiff's Motion for Leave to Amend to File a Proposed Third-Amended Complaint.

And I want to start with the case schedule, a little bit of background on the amended pleading.

The case schedule, as modified by the parties, called for fact discovery, and then expert discovery closed on August 2nd, 2019. And then amended complaints --

THE COURT: And the discovery cutoff was March 15th, then continued to May 10th of this year.

MR. KNOTTS: Yes, yes. And then the deadline for amended complaints, any amended complaint incorporating additional evidence obtained in discovery was August 9th of 2019. And then Motions for Summary Judgment were due after that.

We hit the deadline for filing this amended complaint. We filed the complaint on August 9th, 2019. And the defendants concede that the schedule was, in fact, adjusted to August 9th of

2019.

Just some background on the amended complaint. It's 123 pages long, contains 500 footnote citations to the record. Yes, it has all of that. But I don't think it has quite the transformative effect on this case that the defendants contend.

Earlier in the second amended complaint, we had six causes of action against the six individual defendants for breach of fiduciary duty arising out of this merger. Those six causes of action have not changed. It's the same causes of action, the same statutory claim against the defendants.

The earlier Second Amended Complaint contains 17 enumerated instances, in total, of fraud and misconduct supporting those six causes of action.

The Third Amended Complaint has four more against the existing defendants. So now we're up to 21 enumerated instances of fraud and intentional misconduct.

But again, it all relates to the same claims for breach of fiduciary duty with respect to the same merger.

We've added a seventh cause of action against the CFO of Newport in connection with conduct related to the merger.

THE COURT: Or rather you're seeking to add?

MR. KNOTTS: Pardon me?

THE COURT: You're seeking to add?

MR. KNOTTS: We are seeking to add --

THE COURT: All right.

MR. KNOTTS: -- a seventh claim. So the Third Amended Complaint contains that claim, but we are seeking to add that claim against the CFO. Again, it relates to the same merger. It actually involves very similar misconduct to an existing defendant, Mr. Phillippy.

And finally we clarify the request for damages to run consistent with our prior -- or we're seeking to clarify with our previous expert disclosures, which, again, timely and on schedule disclosed the specific rescissory damages calculation.

So getting back to -- or starting with the statute. As the Court is well aware, the Court should freely give leave where justice so requires. And just with about every rule, of course, there are exceptions. And defendants contend that a few of those exceptions apply here -- undue delay, prejudice, and futility.

Before getting into those, though, I think it's important to note one of the exceptions bad faith isn't contested here. Defendants make no arguments in their briefs that there's any element of bad faith with this proposed amended pleading.

And we've all read cases where parties intentionally sandbag someone with claims during trial, at summary judgment, just to sort of throw a wrench into things and avoid dismissal. But we don't have any allegations like that here. There's no -- defendants aren't contesting bad faith.

So that brings us to the purported delay. And we were a little surprised when the oppositions came in, and there was an

argument about delay in light of the fact that we hit the schedule.

Defendants essentially asked the Court to find that we have a timely filed, but untimely amended pleading. A timely, untimely amended pleading. And again, as I stated, that's because we filed the complaint on schedule. We all agreed. The defendants agreed. The defendants proposed this date, that the deadline for amended pleadings was August 9th, and we hit that deadline.

Defendant's opposition cited 46 cases -- 46 cases from 15 different courts across the country. And we checked all of those cases and found that not one of those denied a Motion for Leave to Amend on timeliness or prejudice grounds when it was filed on a court order or agreed upon schedule, not one.

And look, there are very good attorneys on the other side in this case. I have a lot of respect for them.

THE COURT: There are very good attorneys on both sides. You guys are as good as I've ever seen on both sides.

MR. KNOTTS: Well, I could agree with that on the defense side, Your Honor.

And so I have no doubt that if such a case existed, they would have found it. But I think it says a lot, the defendants can't find a single case that supports this timely, but still untimely argument.

But a host of cases go the other way, and they say things like filing an amended complaint on the deadline is strong evidence of timeliness. Another case said that filing on time under schedule

precludes a finding of undue delay. And I think that may -- authority makes sense, especially on the facts of this case.

So the schedule structure -- from this outset or the first schedule in this case, a process has been set up. Fact discovery, then expert discovery, and then the amended complaint deadline, and then Motions for Summary Judgment. And that makes sense. We set it up that way for a reason. It allows us to incorporate all of the evidence from fact and expert discovery, and then get an amended pleading out there before Motions for Summary Judgment. And in this case, five months before trial.

Because otherwise, we just file seriatim complaints every time we learn something new, so it makes sense in our view, and that's why we set up a schedule that way, to have one amended complaint deadline after discovery.

And essentially there's two deadlines in this case that we're cognizant of. There's the statute of limitations and the amended complaint deadline. And as we'll get into with respect to Mr. Cargile on statute of limitations, we believe we've hit both of those.

You know, again, we -- you know, the amended complaint is significant. We had to wade through a lot of evidence, a lot of depositions, a lot of deposition testimony, a lot of documents to get it done. And we got it on file. We hit the deadline. We worked hard to hit that deadline. And we are proud of the amended pleading, and we are proud of the fact that we hit the deadline.

And I think it's also important that defendants make no argument of futility on the substantive claims, the underlying claims. They, of course, argue statute of limitations. But they don't argue that the claims aren't sufficient, that they don't plead a substantive claim for relief. So I think that speaks to the strength of the amended pleading, that we didn't file it prematurely before we had the evidence, that we filed it at the right time.

And on the subject of prejudice, defendants argue about prejudice -- I think that denying the Motion for Leave to Amend when we hit to the schedule that's been in existence in this case would work for more prejudice to the class at trial to cutoff claims that the defendants don't even argue aren't viable at the pleading stage. You know, when, on the other hand, defendants just have unspecified cries of -- and complaints of additional discovery. But an amendment here, when we hit the schedule, would work real prejudice or denying the amend would work real prejudice to the class.

So again, I think we had a timely amended pleading under the case schedule. And a finding of untimeliness would be simply incompatible with the fact that we hit the schedule.

So I want to move to the specific issue of rescissory damages, and then the claim against Mr. Cargile.

So rescissory damages, that is in addition to the prayer for relief. It is based on the underlying claims for breach of fiduciary duty. It is not a new cause of action. It is not a new claim. It is just a

measure of damages -- an additional measure of damages for the underlying breaches. And we already disclosed the specific calculations behind that rescissory damages measure back in June.

Defendants don't specifically argue futility on rescissory damages. They make a few arguments saying that rescissory damages isn't allowed in Nevada. I think we responded to that. But they don't actually make a futility argument. It's purely an argument based on undue delay and prejudice with respect to the rescissory damages measure. And I think defendants essentially combined those two, so I'll sort of walk through the timeline.

Under the adjusted schedule from the parties, we were to disclose expert calculations of damages under NRCP 161.2(d) in early July of 2019, about what, four months ago. We did that.

Our expert's opening report, served on June 4th, 2019. We served an expert report from a CPA, an evaluation professional, Mr. Quintero, that included over 7 pages and multiple exhibits explaining in significant detail the rescissory damages issues and the specific rescissory damage calculation. And under the schedule, defendants had, and we did too, rebuttal reports. And defendants responded to the rescissory damage calculation.

Defendants submitted a rebuttal report on June 28th, 2019, that contained over 7 pages of critique on this very rescissory damages issue. That's actually -- and defendant's expert rebuttal report is literally entitled, Critique of the Quintero Rescissory Damages Opinion. And we included that as an attachment to our

brief.

So the notion in our -- in defendant's briefs that we never disclosed the rescissory damages calculation until August, until the proposed amended complaint, just is not correct. We disclosed it back in June, four months ago, under the expert disclosure schedule, and seven months before trial in this case. I think, for that additional reason, the rescissory damages request is timely as well.

And moving to the prejudice, I think defendant's prejudice argument appears to relate, primarily, if not completely, to the rescissory damages issue. And essentially defendant's complain about additional discovery, but they don't say what it is. And I really think the proof is in the pudding on this one. So let's look and see what the defendants have actually done on this issue.

And I think that's important because, you know, complaints and cries about additional discovery is an argument that every defendant can make in response to an amendment, every time. And I think as the cases say, it's up to the defendant. The burden is on the defendant to specify exactly what it is that they need, you know, from whom, how long is this discovery going to take? We just don't know.

I think one issue is illuminating on this. As I said, we disclosed rescissory damages back in June, June 4th -- all the calculations, all of our facts. Defendants knew about that. They knew it was a live issue in the case, again, seven months before trial.

And here we are in October, four months and defendants

haven't done anything to request any additional discovery. They haven't reached out and said, Hey, we have this additional party that we want to subpoena. Can we do this? You know, we have these additional document requests.

We've heard absolutely nothing on the subject -- no subpoenas, no e-mails, nothing. And I think if defendants were truly concerned about the, timing of discovery, and again, that's the sole basis for this prejudice argument, they could have asked us or they could have proposed a subpoena to MKS or whoever it is that they're intending to subpoena: Will you give us leave for fact discovery? We just have this discovery request. There's nothing like that.

So instead, here we are in November *[sic]*, arguing about additional discovery that they purportedly need to conduct, but they haven't identified what it is.

We can also look to defendant's past activity on discovery during the fact discovery period. And we've highlighted some facts in our brief, but I think they're worth emphasizing. And I'll walk through a couple of the arguments defendants make compared with what they've actually done.

The introduction of defendant's brief says, quote, Third party subpoenas would need to be issued, end quote -- if this amendment's allowed. Defendants have issued no third-party subpoenas for the duration of this case, zero. And they don't identify who these third parties are.

Defendants say, more documents would need to be reviewed and produced. Again, defendants haven't obtained any documents from any third parties, so more documents from where. We don't know.

Defendants say more third parties would need to be deposed. Again, they haven't noticed any third-party depositions throughout the entirety of this case. And we don't know who they are.

Defendants say new expert reports would be required. And I just don't understand this one. As I said, plaintiffs submitted a detailed expert report on the rescissory damages issue. Defendants submitted a detailed response to the rescissory damages issue. Defendants then deposed our expert and asked him a whole host of very good questions about the rescissory damages issue. So we just don't know what additional expert reports would be required when the experts have already addressed the issue.

So I think as far as we can tell, defendants are really just crying wolf on this additional discovery issue. They're making an argument, again, that every defendant can make without providing any specification whatsoever. So again, I think it's important to look to the actual facts in the timeline. And we really don't think that supports any real or unique argument of prejudice here.

So moving to the new claim, or the new requested claim, regarding Mr. Cargile. Two arguments made by defendants -- futility and again undue delay. And again, I think I'll come back to this.

But defendants -- and they've represented Mr. Cargile in this case, or at least their counsel has -- make no argument of futility as to the substantive, the underlying -- the underlying substantive claims against Mr. Cargile. There's no argument that the complaint doesn't sufficiently plead a breach of fiduciary duty against Mr. Cargile involving intentional misconduct or fraud. And obviously they'll make whatever factual arguments they want to make later at summary judgment or trial. But at least at the pleading stage, they make no argument on those grounds.

And I think delay and futility somewhat dovetail with each other with respect to Mr. Cargile. The statute of limitations is the ultimate statutory measure of delay, and they do involve similar facts.

So on futility, Nevada courts, including the Nutter case, Court of Appeals case, has made it clear that the standard for futility on a motion for relief to amend is essentially the same as the standard on a Motion to Dismiss. It's a very plaintiff friendly and permissive standard.

THE COURT: Actually, well, not exactly, but okay.

MR. KNOTTS: Not exactly that it's plaintiff friendly permissive? Or that it's the same standard?

THE COURT: I think that a Motion for Leave to Amend is probably more freely granted. A Motion to Dismiss, a little different.

MR. KNOTTS: Well, then I won't -- then I won't disagree with that point.

THE COURT: Well, although, I have to tell you, Mr. Knotts, I don't know why this case isn't ready for trial. You guys have been litigating for three and a half years.

MR. KNOTTS: We're ready for trial.

THE COURT: And aren't you capable of obtaining complete relief in the event you prevail at the time of trial? I'm really troubled --

MR. KNOTTS: Not on the Second Amended Complaint, Your Honor.

THE COURT: I'm really --

MR. KNOTTS: I mean --

THE COURT: I'm really troubled by adding new parties and new causes of action now.

MR. KNOTTS: All right. So -- now, is that on a futility basis or the time limits?

THE COURT: Time -- time wise. You know, we have a policy of time to trial, 24 months in the business court. The case is three and a half years old.

MR. KNOTTS: So the schedule called for an amended -- for any amended complaint incorporating additional evidence obtained during discovery. And that's what we've done. Otherwise, there's --

THE COURT: I don't think you have lacked compliance. I don't think you've lacked diligence. I just think that these issues should have been brought to me ahead of time.

MR. KNOTTS: Let me explain --

THE COURT: Because how would this affect your trial date? And I know there's a summary judgment motion, and I can't work far enough ahead to tell you how that will come out. And I won't know until I listen to your arguments anyway.

MR. KNOTTS: I don't think that it does, Your Honor, because Mr. Cargile, who is represented by the same counsel, isn't making a substantive argument on the underlying claims for purposes of a Motion to Dismiss, because they made the futility argument. If we get past that, then we're past the pleading stage, essentially.

Mr. Cargile can, of course, file the Motion for Summary Judgment. We still have plenty of time to do that. We have a case pending in front of Judge Gonzalez right now.

THE COURT: This is October. You're set for trial on the January 27th stack.

MR. KNOTTS: Right. Your Honor, we have a case pending in front of Judge Gonzalez right now where motions for summary judgment -- and this is the schedule long set -- were due less than a month before trial. And we are proceeding under that schedule. In fact, we are in our opposition, two-week opposition period for Motions for Summary Judgment right now.

This case has from now till trial a relatively leisurely pace between now and trial. So if there's additional Motions for Summary Judgment, we can get it done.

But then with regard to additional discovery, defendants don't just say what it is.

And let me explain why we filed the amendment against Mr. Cargile when we did. You know, as the Court -- as the Court is aware, we filed a Motion to Compel earlier regarding text messages. Defendant said that no substantive text messages existed. The Court correctly granted the Motion to Compel.

This was at the end of 2018, early 2019. Lo and behold, after the defendant said they didn't have any substantive text messages, the defendants produced 250 text messages about this merger, very substantive text messages. We didn't get those until February and March of 2019. And in those text messages contained evidence that Mr. Cargile was using the merger for personal benefit. He was making requests for additional compensation.

So we received the text messages. And that certainly, at that point in time, caused us to look at Mr. Cargile a little bit differently. But we had -- we still needed discovery to figure out what they actually meant.

I have no doubt that if we had immediately filed an amended complaint as soon as we got in the text messages, defendants would have moved to dismiss. And they would have argued that, you know, they weren't clear, it's -- we haven't clearly pled fraud. It's not clear what was going on.

So we saw the amended complaint deadline. We wanted to ask questions about those text messages at deposition to find out

what was really going on.

We deposed Mr. Phillippy in April of 2019. And he really laid out Mr. Cargile at his deposition.

We deposed defendant Cox, I think, later at the very end of April. And Mr. Cox also really excoriated Mr. Cargile. Mr. Cox -- and now we're at the end of April -- Mr. Cox said that a merger, a big M and A transaction like this offered some people the opportunity to see that they personally were taken care of, and that included what Mr. Cargile was doing. So we were able to get more explanation on some of the evidence then.

And then on May 7th -- so now we're all the way up to May, figuring things out, finding new things about Mr. Cargile. On May 7th, Willam Menchez [phonetic], the controller of Newport who is not a defendant, but who was prepared and represented by defense counsel at deposition, blamed Mr. Cargile for the instruction regarding the Strategic Planned Projection submitted to JP Morgan.

But at that point in time, we had a document from JP Morgan, and it said, with regard to the Strategic Plan Projections, which are a significant set of projections that we alleged that weren't disclosed to the board, weren't disclosed to the stockholders -- it was a document that had those Strategic Planned Projections internally at JP Morgan. And they said, Willam -- or no, they said, Do not use, dash, Willam. What does that mean? So we asked Mr. Cargile -- or I'm sorry -- we asked Mr. Menchez -- we asked Willam, May 7th, of just this year, Did you instruct them to do that? What does that

mean?

And he said, I don't know. I don't remember. I don't remember. But I wouldn't have been acting on my own accord. It would have been Mr. Cargile that told me what to do.

So this is a witness that is prepared by defense counsel in a series of witnesses that at the very end of discovery -- very end of fact discovery started blaming Mr. Cargile.

So we incorporated all of that evidence into a very detailed amendment pleading. And we filed what, three months later, as of the amended pleading deadline. So the -- our ability -- we simply didn't have the ability to file the complaint earlier.

And all of this really started with the production of text messages that defendants stood here and represented to the Court did not exist.

And again, I think an approach that defendants are proposing would just invite seriatim amendment. So we filed as soon as we get the text messages. And then we get testimony against [indiscernible]. The defendants move to dismiss. And then we get testimony. And then we filed another amendment. And then we get the testimony on the strategic plan blaming Mr. Cargile. And then we get another amendment.

So I think if an amendment is denied here, it allows the defendants to, A, withhold relevant evidence from the Court regarding not only their own conduct, but Mr. Cargile; and then at the end of fact discovery blame someone else and then go to trial

where defendants are still blaming that person and he's not here.

So we wanted to file the right pleading, on schedule, with the right defendants. And again, based on our experience, you know, in other cases in this Court, I think we still have a very sufficient amount of runway to get there.

And you know, again, the rescissory damage -- again, we're just talking about seriatim amendments. We disclosed it to the defendants. We saw that there was an amended complaint deadline coming up. And so we filed the rescissory damages, just again, an amendment to the prayer for relief on the deadline.

Defendants have had more than enough notice on the rescissory damages issue. We've submitted expert reports on the matter. It involves -- so it's a different measure of damages, based on opposed closed performance of Newport, but it's still based on the same underlying breaches of fiduciary duty in connection with the merger.

You know, we're not changing this to a derivative claim about some other transaction or some other deal. It's all related to the same merger.

So does Your Honor have any more questions about sort of the times of when we started learning things?

THE COURT: I don't. No. I had -- I read everything. And I did interrupt you, and so I'll be polite and not say you took 35 minutes. So no.

It -- you'll have a chance to argue in reply. But we've been